

Pathways to a Peaceful Korean Peninsula:

Denuclearization, Reconciliation and Cooperation

Edited by
Kyung-ok Do, Jeong-Ho Roh, and Henri Féron



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The analyses, comments and opinions expressed in this book are those of the authors and do not necessarily represent the views of the Korea Institute for National Unification.

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PREFACE

In the present volume, we analyze the dramatic escalation of tensions that accompanied the North Korean nuclear tests of January and September 2016 and that now threatens to trigger a new war on the Korean peninsula. We discuss the driving forces of the Korean nuclear crisis, review the soundness of current policies to solve it, and propose alternative approaches towards achieving durable peace and reconciliation. This volume represents the fourth installment in a five-year joint project between the Korea Institute for National Unification (KINU) and the Center for Korean Legal Studies (CKLS) at Columbia Law School in New York. The project aims to provide an ongoing legal and policy forum for advancing the causes of peace and reunification on the Korean Peninsula. In previous years, it broadly addressed foundational and contextual issues such as the roots and legal consequences of the Korean division, the implications of the geopolitical tensions pervading the peninsula, and the interaction of the North with global governance institutions and the global economy. The rapidity of the escalation in 2016, however, brought us to focus in this volume a much more targeted and concrete manner on appropriate policy responses.

Hostilities rose to such levels in 2016 that UN Secretary General Ban Ki-moon lamented that he had “never... seen such kind of heightened tensions on the Korean Peninsula.” The escalation is certainly unprecedented when measured by the frequency of North Korean nuclear and ballistic missile tests, the growth of the South Korean military budget, and the severity of sanctions against the North. Unsurprisingly, there are contradictory narratives about the responsibility for this situation. One end of the spectrum puts it squarely on North Korea (the Democratic People’s Republic of

Korea, or DPRK). In this view, it is the DPRK that triggered the crisis by conducting a string of illegal nuclear and missile tests that threatened the national security of its neighbors and ultimately forced them to respond by shows of strength and sanctions. The other end of the spectrum suggests that the United States and South Korea (the Republic of Korea, or ROK) provoked the crisis by continuously dismissing the DPRK's peace advances and by threatening its national security to the point where it felt compelled to develop a nuclear deterrent. Of course, there may be myriad more nuanced narratives between these black-and-white representations. In the end, though, what matters from a policy perspective is not so much the question of responsibility as that of efficiency in promoting national interests. Accordingly, the question at the heart of this volume is to identify what sort of crisis response would best further the interests of the ROK and the United States.

It goes without saying that both countries would be more secure if the North Korean nuclear program did not exist. What remains subject to debate is whether the ROK and the US are really made safer by pressuring the DPRK with sanctions and diplomatic isolation until it denuclearizes or collapses. This coercive approach lowers the national security risk only if it succeeds in wresting the DPRK into submission; in all other cases it actually pours oil on the fire of an already tense stand-off, raising the risk of war. Whether this approach serves ROK and US interests depends on the likelihood of a North Korean submission or collapse. In the 1990s, collapse appeared imminent indeed. The North reeled under a political crisis caused by the death of its leader, Kim Il-sung, a security crisis caused by the collapse of its Soviet ally, and an economic crisis caused by the crumbling of most of its socialist trade partners. Time seemed to run against the DPRK. Today, however, the picture is much less clear-cut. Is the North Korean economy stagnating, as estimated by the ROK's Bank of Korea, or is it growing rapidly, as suggested by Chinese reports on trade with the North? Do repeated purges of high-level officials mean that North Korean leader Kim Jong-un has trouble asserting his authority, or that, on the contrary, he has successfully eliminated all his potential rivals? Do the dwindling num-

bers of refugees mean that the government is engaging in a last-ditch crackdown on dissent or that economic recovery has made life more bearable for average people in the North? The opacity and secrecy of the North Korean state make it difficult to determine how fragile or solid the country really is. There is one game-changing aspect we are relatively certain about, though: the DPRK has now developed nuclear bombs of roughly the same strength as those dropped on Hiroshima and Nagasaki, and it has enough fissile material to develop dozens of those bombs through 2020. In effect, for every year that coercion fails to achieve a North Korean submission or collapse, there will be more bombs and an accordingly greater threat to ROK and US national security. Time cannot simply be assumed to run against the DPRK anymore.

In light of the stark differences between the circumstances at the end of the Cold War and those that prevail today, we propose in the present volume to carry out a general review of the situation and of the policy options available. We chart here a road map toward a peaceful Korean Peninsula through a three-pronged analysis of the Korean question, covering past, present, and future. In the first part, we look back at the path followed up to this day, asking in particular why peace has eluded us for decades, what various carrot-and-stick approaches have achieved in a quarter century of nuclear standoff, and whether policy objectives have or have not followed the changing circumstances on the ground. Answering these questions gives us a clear idea of where we came from, so that we may better appreciate the direction we now need to take. We then follow up in a second part by discussing where the confrontational path we are on is leading us, what the “end game” would look like, how North Koreans are faring from a humanitarian perspective, and whether harsher sanctions could end up violating the limits set by international law. The conclusions we draw from these inquiries then allow us to better compare the current coercive path with potential cooperative alternatives. We accordingly address, in the third and final part of our inquiry, how ripe the conditions are for an economic rapprochement and how a reunification could fit into a plan to end tensions on the Korean Peninsula. A more detailed description of each chapter now follows.

The first part of this volume is entitled “Reflecting on Seventy Years of Diplomacy.” It sets the foundation by reviewing the reasons for unending conflict in Korea, the various diplomatic means used up to now in pursuit of denuclearization, and the evolution of policy objectives regarding the North. The fundamental paradox of the “Korean Question” is that the Peninsula has remained divided for seventy years despite both Koreas, the United States and China claiming for decades to wish for its reunification. It is therefore necessary, in order to achieve peace, to identify the geopolitical tensions that have perpetuated the forcible division of Korea. Similarly, we need to discuss why a quarter century of denuclearization efforts have failed to prevent the development of North Korean nuclear arsenal. Both cooperative and coercive approaches have now been tried, with ample time to show effects, and so it is appropriate to draw a verdict regarding their respective potency. Finally, it is also necessary to evaluate to what extent objectives that were valid or realistic twenty-five years ago may have been affected by the changing conditions on the ground. Although the passage of time has not fundamentally altered the basic interests of the involved countries, it has shifted their respective bargaining power. As suggested above, we cannot simply assume anymore that time is running against the DPRK.

In the first chapter, entitled “The Legal Framework of Diplomacy Under the San Francisco System: Korea and Formation of a New Legal Order,” Jeong-Ho Roh sheds light on legal and historical factors that have made it particularly difficult to achieve peace in Korea. He points out that the way wars are ended often becomes the catalyst for future conflict, and argues that the treatment of Korea after the end of the Second World War, more as a part of defeated Japan than as a sovereign liberated country, ultimately sowed the seeds of Korean division and its ensuing complications. Roh argues that the uncertain legal status of Korea upon its initial division in 1945 and the uncertainties surrounding the outcome of the Korean War were major factors for the exclusion of Korea from negotiations for the San Francisco Treaty of 1952, which marked the formal and legal end of World War II for Japan. Roh shows through an analysis

that goes back to Japan's rise and the Treaty of Portsmouth that conflict on the Korean Peninsula has always been inextricably linked to the secondary treatment of Korean sovereignty in dealings between great powers. The so-called "San Francisco System," he argues, is not much different in this respect; it translated into an American vision of post-war order that focused on making Japan the cornerstone of US policy in East Asia. He argues that the Korean question is an integral part of this system and not a separate matter, as the San Francisco System and the division of Korea are intricately intertwined. Roh concludes with the observation that relations between the major actors in the region have changed considerably since 1945 and that attempts to accomplish a peace regime will need to take into account the current balance of power. The starting point, he argues, must be through a reevaluation and reassessment of the effects of the San Francisco System on the continued division of the two Koreas.

After this foundational analysis of the question of peace in Korea, we turn to a more practical one on denuclearization in the second chapter, "What Have Twenty-Five Years of Nuclear Diplomacy Achieved?" Author Leon Sigal reviews the respective achievements of negotiations and sanctions in resolving the Korean nuclear crisis. On the basis of a detailed examination of the diplomacy surrounding the US-DPRK Agreed Framework of 1994, the Six-Party Joint Statement of 2005, and the so-called "Leap Day" deal, Sigal argues that the record of negotiations, though mixed, has remained overall far superior to that of sanctions and pressure without negotiations. Diplomacy, he says, kept the North Korean nuclear program in check for a decade during the 1990s. Sigal points out that at the beginning of the Bush presidency, the DPRK had stopped testing longer-range missiles, had less than a bomb's worth of plutonium, and was verifiably not making more. Yet the Bush administration's belief that the DPRK could be pressured into submission or collapse, he says, led to a string of broken promises and financial sanctions against the country. Six years later the DPRK had seven to nine bombs' worth of plutonium, had resumed longer-range test-launches, and felt free to test nuclear weapons. Upon what Sigal sees as the failure of pressure followed two years of diplomatic give-and-take in 2007 and

2008, which he credits with once more stopping the DPRK's production of fissile material as well as its nuclear and missile testing. With the arrival in 2008 of the Lee Myung-bak government at the helm of the ROK, however, Washington once again started pressuring Pyongyang. This, in Sigal's view, predictably led to the collapse of talks and the resumption of the North Korean nuclear program. He concedes that diplomacy failed in the case of the Leap Day deal in 2012, when the DPRK unilaterally pulled the plug, even though it had every reason to believe that the Obama administration was negotiating in earnest. Nevertheless, Sigal concludes that the record of negotiations and pressure remains clearly in favor of the former, and that pressure without negotiations remains a certain recipe for failure. He sees little chance of success in an approach that consists of coercing Pyongyang into submission by burying it in sanctions without engaging with core North Korean security concerns, such as the US-ROK joint military exercises. US and ROK interests will only be harmed, he warns, by the DPRK's unfettered weapons development in the meantime.

Following Sigal's inquiry into the diplomatic means employed to deal with the Korean nuclear crisis, Joel Wit discusses in Chapter 3 how changing circumstances on the Korean peninsula have affected objectives. He focuses on a US perspective, and hence his analysis is entitled "The Future of US Policy toward North Korea and the Role of South Korea." Wit notes that North Korean weapons development is progressing much faster than anticipated. The DPRK's nuclear stockpile, he says, is expected to grow from an estimated baseline of ten to sixteen nuclear weapons in 2015 to anywhere from fifty to a hundred by 2020. The country could have hydrogen bombs, submarine-launched ballistic missiles (SLBMs), and road-mobile intercontinental ballistic missiles (ICBMs) ready by 2020 or sooner, depending on the rate of tests. These developments, he says, pose a significant threat to US national security, not only because North Korean nuclear weapons could strike US troops and the US mainland, but also because they could provoke US allies in the region into a potentially nuclear arms race, undermining the stability of alliances and US interests in nonproliferation. Wit strongly

insists that Beijing cannot be counted upon to solve the problem for Washington, given the fundamentally different interests of the United States and the PRC in the region. He calls for a US-led initiative that does not just rely on sanctions but also on principled diplomacy with Pyongyang. Wit believes the United States should not abandon its ultimate goal of denuclearizing the DPRK, but it should be open to initially discussing only a freeze, if only to stall the rapid North Korean progress in weapons development.

After looking back upon the path taken until now, we turn to assessing where our steps are leading us today. In the second part of this volume, “Assessing the Current Spiral of Escalation,” we consider the confrontational approach adopted by the United States and the ROK against the DPRK—where it is leading us, how severe the North Korean humanitarian situation is as a result, and what limits international law puts on the use of sanctions. As we noted above, coercion serves ROK and US national security interests to the extent that it succeeds in achieving a North Korean submission or collapse. If it fails to do so, it may actually harm those security interests by gratuitously raising military tensions and allowing the growth of the North Korean nuclear arsenal. Therefore, in order to evaluate the worth of the confrontational approach, what really matters is the “end game” question: where all parties are left standing if the confrontational logic is followed to the end without any party budging from its position. Another question that deserves consideration is the severity of the North Korean humanitarian situation, for two reasons. First, it serves as an indicator of how much the pressure of sanctions is felt in the DPRK, and hence it suggests how likely or unlikely the coercive approach is to change North Korean policies on nuclear weapons. Second, it helps us determine the human cost of sanctions. The first to suffer from the sanctions are ordinary North Koreans without obvious means to affect their government’s nuclear armament policies, given the DPRK’s dictatorial political system. This poses an ethical dilemma: are innocent people being subjected to economic violence for naught? In this context it will be useful to determine to what extent international law regulates the severity of sanctions.

In Chapter 4, entitled “The Endgame Question: Where Is Escalation Leading Us, and Is It Worth It?,” Alexandre Mansourov discusses what is at stake in the current spiral of escalation. He notes that there is no sign that North Korean nuclear and missile tests are slowing under sanctions. On the contrary, Pyongyang openly mocks attempts to pressure it into submission and continues its weapons development at great speed. Mansourov warns that the growth of North Korean nuclear capabilities may eventually change its strategic calculus to the point that it would be tempted to make the first move and open military confrontation with the South. In his eyes, the factors that would drive this new strategic calculus are: (1) the increasing obsolescence of North Korean conventional forces, (2) the growing fear of being attacked like Serbia, Iraq, or Libya, and (3) Pyongyang’s misguided but self-confident belief that its new nuclear capabilities would open a window of opportunity to achieve its strategic objectives on acceptable terms. Mansourov notably points out in this context the increasing references in the DPRK to the “spirit of offense” (*konggyeok jeongsin*) as a key concept in North Korean military doctrine. Accordingly, while prospects for negotiations appear remote, he warns that escalation may lead us into a “game of chicken” with potentially catastrophic consequences. It increasingly seems like nothing short of regime change could coerce the DPRK into abandoning its nuclear weapons, he says, and given Pyongyang’s hubris, this path has a high risk of provoking nuclear war on the Korean Peninsula. The hope that the DPRK would crumble like a house of cards if only something happened to Kim Jong-un, for instance through a well-placed missile, is in Mansourov’s view misplaced. He argues that the DPRK is relatively resilient to such shocks, given a highly atomized, disconnected, and compartmentalized governance structure that is used to running on autopilot for extended periods of time. In the event of Kim’s disappearance, Mansourov says, a troika of senior leaders representing the central party apparatus, the state, and the military would take on interim leadership responsibilities, and the dilution of power would prevent any force from challenging the troika’s authority or dominating its decision-making on its own. In

the end then, Mansourov warns us that trying to coerce the DPRK into submission is a risky path that increasingly threatens to lead us into the worst-case scenario of nuclear war.

Following this exposition of the likely endgame scenario to coercion, we turn to Chapter 5 and Hazel Smith's evaluation of the humanitarian situation in the DPRK ("Sanctions and North Korea: The Absence of a Humanitarian Emergency and the Crisis of Development"). As suggested above, this question matters to determine how likely the DPRK is to submit to sanctions, and how ethical it is to maintain them, given their impact on average North Koreans. In Smith's analysis there is no humanitarian emergency in the sense in which international agencies use the term. According to Smith, indicators of humanitarian conditions—such as child and infant mortality, malnutrition and disease incidence—show that the North Korean population is not any worse off than populations living in countries of the same income category that do not suffer from sanctions. Smith demonstrates that in some cases humanitarian conditions continued to improve after 2006, despite the start of UN sanctions against the DPRK. Sanctions do have an impact in terms of development, though, insofar as they deter foreign investment in the DPRK. By reference to component variables of the Human Development Index, namely life expectancy, literacy, and GDP per capita, Smith finds evidence that the DPRK is struggling to develop economically. While the DPRK has had virtually 100 percent literacy since the 1960s, the North Korean life expectancy of seventy has remained lower than the East Asian average of seventy-five (though it is certainly better than countries in the DPRK's income category). And while GDP per capita estimates by the ROK's Bank of Korea show that the DPRK has overcome the economic freefall of the 1990s, levels of economic activity remain comparatively low. Ultimately, Smith's analysis makes clear that sanctions are not currently causing a humanitarian crisis in the DPRK, but they do have a human cost insofar as they inhibit the country's economic development and hence the improvement of the North Korean population's well-being.

Smith's evaluation of the human cost of coercion leads into Kyung-ok Do's discussion of their legality in Chapter 6, "Sanctions against North Korea: An Analysis from an International Human Rights Law Perspective." Sanctions are by their very nature designed to cause harm, and they therefore pose a human rights dilemma. Generally speaking, Do notes that comprehensive sanctions, whether imposed by the UN Security Council (UNSC) or by individual states, have been accused of having a negative impact on economic and social rights, notably the rights to food, health, and an adequate standard of living. The primary victims tend to be the most vulnerable segments of a targeted population: children, women, the infirm, the elderly, and the poor. Yet some argue that a key difficulty with raising human rights objections against sanctions is that international human rights treaties are generally concerned with the relationship between a state and individuals within its territory. In this regard, Do suggests that the International Covenant on Economic, Social, and Cultural Rights (ICESCR) may bind member states to respect the rights of the populations of other member states on the basis of the Covenant's "international assistance and cooperation" clause. The ability of an ICESCR member state to inflict sanctions upon another would therefore be limited by the former's extraterritorial ICESCR obligations. Yet would those obligations also limit the ability of the UNSC to inflict comprehensive sanctions upon a targeted country? While the UN itself is not a party to the ICESCR, says Do, the UNSC may still be bound to respect the human rights of populations it targets for sanctions, owing to its obligation to respect the "purpose and principles of the United Nations," which include human rights, as well as relevant *jus cogens*. In relation to sanctions against North Korea, Do expresses concern that recent sanctions measures, particularly measures taken by individual states, are highly suggestive of comprehensive sanctions. She accordingly warns that such sanctions measures may detract from North Koreans' enjoyment of human rights, and hence calls for a proper balancing of objectives, severity, and human impact.

After considering the coercive path we are on today, we discuss cooperative alternatives that could be taken in the future. While the logic of coercion is that US and ROK interests are best served by threatening DPRK interests, that of cooperation is that the United States and ROK would be better served by accommodating them. Both the United States and ROK have determined that aggressively pursuing the nuclear disarmament of the DPRK serves their interests, and indeed the successful removal of North Korean nuclear capabilities would strengthen US and ROK national security. Yet as suggested above, their national security is only weakened if the coercive strategy serves only to raise military tensions and accelerate the North Korean nuclear program and not to effect the submission or collapse of the DPRK. The key question then is as follows: At what point does the chance that coercive strategies will stop the North Korean nuclear program become so low that it becomes more reasonable to limit the damage by engaging North Korean demands? Pyongyang has notably proposed to freeze its nuclear program in exchange for a suspension of US-ROK joint military exercises. It's a possible starting point for negotiations, and indeed the exercises could be resumed if Pyongyang does not hold to its part of the bargain. In effect, Pyongyang is demanding recognition and accommodation of its own national security interests in exchange for abandoning its main deterrent against the much stronger conventional forces of the United States and the ROK.

If at some point Washington and Seoul do determine that it is more in their respective long-term interests to cooperate with Pyongyang than to continue trying to coerce it, a key issue will be to find a trust-building vehicle that is stable enough not to tip over at the first change of political winds. This is the subject of the third part of this volume, "Proposing a De-escalation." Economic rapprochement remains a solution of choice, because it creates win-win dynamics with a much more continuous and comprehensive momentum than initiatives based purely on the political goodwill of both sides. Of course, economic structures are not immune to politicization, as the case of the Kaesong Industrial Complex shows. What should be clear though is that economically isolating the DPRK by sanctions reduces

its stakes in the international order and thus its incentives to consider the interests of other countries. A successful economic integration in the regional and global economy would exert a strong pull in the right direction. The success of the European Union in ensuring decades of peace in Europe is just the most famous example of the pacifying effects of economic integration. Of course, economic cooperation cannot happen in a vacuum, and so there will need to be a clear understanding of how willing the DPRK is to open up economically, and how the cooperation can be structured to fit ROK and US interests. Negotiators will also need to be attentive to how economic cooperation would fit into long-term plans for reunification, as the model of reunification that the two Koreas ultimately aim for will affect the form of economic cooperation that is desirable between them.

Rüdiger Frank probes the willingness of Pyongyang to voluntarily open up and liberalize its economy in Chapter 7, “Internal Conditions for Rapprochement: What Kind of Economic Opening Is Feasible?” Drawing on lessons from Eastern Europe, China, and Vietnam, Frank identifies the ideological and practical considerations that would guide the economic liberalization attempts of a socialist government such as that of the DPRK. Pyongyang, he finds, will be mindful of the collapse of Soviet and Eastern European countries and will therefore want a gradual transformation that does not threaten its political stability. Yet to be economically efficient, says Frank, Pyongyang’s reform objectives should be to move away from the bureaucratic sluggishness of a purely planned economy through the introduction of a form of decentralization and an alternative incentive system. In this context, he explains, Pyongyang’s instrument of predilection will be special economic zones, as they provide safe laboratories to experiment with reforms before they are extended to the rest of the country. In a general sense, however, Pyongyang will likely aim for a hybrid system between a planned and a market economy, mainly by setting more modest production quotas and allowing production units to operate autonomously once that quota has been met. Frank then analyzes the reforms that Pyongyang has attempted in that direction, and finds that under Kim Jong-un there have been experiments and cautious, limited changes, but no full-fledged eco-

conomic reform. Reforms up to now have been undertaken more in the spirit of perfecting the socialist planned economy than with the idea of effecting something equivalent to the PRC's "reform and opening" or Vietnam's "doi moi" movements. While Frank notes that it is not entirely clear whether Pyongyang needs more time or whether this is as far as it will go, he suggests that Pyongyang eventually will be driven to more reform by sheer economic necessity and by the growth of a middle class. Ultimately, then, he recommends actively supporting the forces of change in the DPRK by engaging economically with the country, for instance through its special economic zones.

Following this inquiry into the North Korean perspective on economic liberalization and opening up, Chang-seok Yang examines the potential of economic rapprochement from a ROK and US perspective. This is the subject of Chapter 8, entitled "External Conditions for Rapprochement: What Avenues and Opportunities Would a North Korean Opening-Up Present for the United States and Korea?" Yang underlines that economic rapprochement could pacify the DPRK and thereby serve US and ROK interests. He argues that economic rapprochement encourages reformist elements in the DPRK, while military confrontation strengthens conservative ones. The light-water reactor (LWR) project pursued under the US-DPRK Agreed Framework of 1994, Yang notes, offered Washington opportunities to engage at all levels of state affairs with Pyongyang, thereby creating important cracks in the latter's isolationism. Later, the Kaesong Industrial Complex (KIC) provided the ROK with a bastion of influence in the DPRK, offering for instance a space where North Korean officials and workers could come into contact with Southerners in a manner unadulterated by propaganda. Overall, Yang suggests that the breakdown of trust has precluded many opportunities for additional rapprochement, and as a result the situation has deteriorated more than it needed to. Today, in his eyes, coercion on its own will not work due to the PRC's noncooperation with the sanctions regime, so engagement remains indispensable for safeguarding ROK and US interests. He therefore recommends, beyond sanctions, an economic rapprochement to encourage market forces as agents of change in the DPRK.

The smaller details of an engagement plan with the DPRK ultimately depend on the big picture of what is aimed for on the Korean Peninsula. In other words, there cannot be an effective process of reconciliation without clarity and consensus on the form and substance that a Korean reunification would eventually take. Two key issues arise in this respect. The first concerns the legal “engineering” of reunification, that is to say, the way in which international law structures the process of state merger or incorporation. Would a united Korea inherit all the treaties, assets, debts, and international legal responsibilities of both the DPRK and ROK, or are these gray areas? The second issue concerns the “design” of reunification—in other words, the constitutional form and geopolitical position that a united Korea would take. Engagement, to be successful, must aim for a form of reunification that is acceptable to both Koreas, and at least tolerated by the great powers involved on the Korean Peninsula.

In Chapter 9, “State Succession in the Context of Korean Unification,” Ye Joon Rim first addresses the international legal issues that would arise from either the merger of the two Koreas into a new state or the incorporation of one Korea into the other. Despite the Koreas not referring to each other as distinct states, Rim argues that their unification would still be governed by international law, given that each Korea is recognized by the international community as having its own distinct legal personality. Rim then notes that state succession is a particularly contentious area of international law, with few established rules even for specific topics such as the succession of treaties, property, debts, and state responsibility. The most authoritative references available are the 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1983 Vienna Convention on State Succession in Respect of State Property, Archives, and Debts, but even these conventions lack general applicability due to their low rates of ratification. The 1978 Convention basically provides for a continuity rule whereby successor states remain bound by most of the predecessor states’ treaties. The 1983 Convention similarly provides for continuity, providing that the property and debts of predecessor states pass to the successor

state, whether in case of merger or incorporation. As for whether a successor state also inherits the responsibility for internationally wrongful acts committed by a predecessor state against a third state, although it has not been codified yet, the draft conclusion drawn by the Institut de Droit International provides that there be succession of state responsibility in the case of unification of states. Nevertheless, given the inconsistency of precedents in these fields and hence the lack of established customary rules, Rim calls for resolving as many of these questions as possible in the run-up to Korean unification through an ad hoc inter-Korean treaty, as was done in the German case.

Following this review of the rules of state succession applicable to Korean reunification, Henri Féron addresses the geopolitical positioning and constitutional design of a united Korea in Chapter 10, "Proposing a Model of Reunification to Solve the Korean Nuclear Crisis." Féron argues that the balance-of-power dynamic underlying the Korean division makes it impossible to solve the nuclear crisis by a confrontational approach that threatens the DPRK with collapse. In his view, Beijing will simply not allow a North Korean collapse insofar as it could tilt the balance of power in Korea against Chinese interests. Accordingly, says Féron, the best hope for solving the nuclear crisis and ensure peace on the Korean Peninsula is to reunify the two Koreas as a nonaligned country. He argues that failure to do so would not only leave the DPRK free to further expand its nuclear arsenal, but would also make Korea a likely battleground for rising Sino-American rivalry. Féron explores the different models of nonalignment the Koreas could pursue, from a simple promise not to side with either power against the other to a full-fledged permanent neutrality like Switzerland or Austria, and also discusses the proper instrument on which to affix it and the appropriate level of militarization for a nonaligned Korea. After that examination of the geopolitical aspect of reunification, he discusses how to make reunification work on the domestic level. He notes that ideological demands have always tended to stall reunification talks, and so argues that it is necessary to hold onto a principle of ideological neutrality for these talks to succeed. Féron then reviews the implications

that prioritizing national unity over ideology would have for the distribution of power, the economy and human rights, concluding that the benefits would far outweigh the costs.

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PART I

Reflecting on Seventy Years of Diplomacy

CHAPTER 1

The Legal Framework of Diplomacy Under the San Francisco System: Korea and the Formation of a New Legal Order

Jeong-Ho Roh

Introduction

On August 15, 1945, celebrations broke out in Korea over the news of Japan's surrender to the Allied Powers. Koreans eagerly anticipated their immediate liberation from 35 years of Japanese colonial rule and the restoration of Korea as a fully independent and sovereign nation, as per the 1943 Cairo Declaration under which Korea would "in due course" become "free and independent," and Japan would be expelled from territories "which she has taken by violence and greed."¹ Meanwhile, Japan faced the uncertain future of a defeated nation upon the Emperor's announcement of unconditional surrender on August 15, 1945, and signing of the *Instrument of Surrender* on September 2, 1945, aboard the USS *Missouri* in Tokyo Bay. Yet Japan soon found security as the core instrument of US policy to counter the threat of communist expansion in the East Asia. Conversely, Korean hopes were dashed when the Cairo Declaration's promise of independence failed to materialize in the manner Koreans had long anticipated. Instead, Korea's tumultuous relations with outside powers, which began with signing the *Treaty of Gang-*

1 See Cairo Declaration, November 26, 1943.

hwa Island with Japan in 1876, dragged on as the nation divided in half.

The study of how and why wars start is important. It provides an understanding of historic, political or economic factors that may prompt nations to resort to force as a means of safeguarding sovereignty or preserving other vital national interests. It also helps to identify the geopolitical interests that may contribute to certain nations' behaviors. The study of wars' endings is equally, if not more, important, particularly from a legal viewpoint. How one war officially ends often provides valuable clues as to why the next one begins. A formal end to war or conflict requires a specific legal act among the belligerent parties, generally by means of a legal instrument binding them to the new political arrangements expressed in most instances in a multilateral or bilateral peace treaty. Such a legal instrument signifies not only the formal end to war among the signatories but more importantly signals new political and legal relationships among the parties affected by the conflict. Although significant impact to Korea's legal rights and disposition concerning vital interests was at stake, Korea was neither involved in the negotiation process nor a signatory to the legal instrument that ended World War II. Korea's interests had also taken second place to the interests of the other parties to the conflict in the endings of the Sino-Japanese War of 1894, the Russo-Japanese War of 1904, World War II and the Korean War. Korea did not sign the legal instruments that ended these four major conflicts. Yet, each legal instrument had significant implications for Korea and its standing in the international community. To the extent that rights and interests of third parties are affected, an inquiry into the legal ramifications of exclusion from such treaties provides a foothold for understanding the geopolitical circumstances that influence the behavior of nations.

The discord between geopolitical interests and international law has had particularly significant consequences for Korea, especially during the period from 1945 to 1952, which marked the end of the military conflict in the Pacific and the signing of the San Francisco Treaty which formally and legally ended World War II for Japan. The "San Francisco System" created a new order that has been central to US policy, one that coincided with the need for Japan's recon-

struction as a bulwark against the spread of communism in East Asia. Korea's uncertain legal status upon its division was resolved by the institutionalization of two distinct states owing in large part to US national interests. Thus, geopolitical circumstances marginalized a "liberated" Korea and rewarded a defeated Japan.

The San Francisco System is a product of a greater compromise that sacrificed Korean independence and self-governance for the protection of US interests against the spread of communism. This move resembles the 1905 *Treaty of Portsmouth*, which benefited the mutual interests of the United States and Japan and made Korea an unwitting pawn in the geopolitical scheme.

The Treaty of Portsmouth as a Prelude to World War II and the San Francisco System

The Russo-Japanese war came to an end in September 1905 through the *Treaty of Portsmouth*. A distinctive feature of this war is that the entire military conflict took place beyond the borders of the two warring nations, Russia and Japan, and was fought instead in China and Korea. But an even more distinctive aspect of the war was the manner in which it ended: by a treaty signed by the two belligerent powers, brokered by US President Theodore Roosevelt in a small, remote naval yard located in Portsmouth, New Hampshire. Central to Roosevelt's involvement was the US desire to preserve its interests in Asia in the face of growing Japanese power, as evidenced by Japan's overwhelming victory over Russia.² This outcome came as a shock to many nations around the world which had assumed that a recently modernized Japan that had just shed its feudal system was no match for the immense power of Russia. Roosevelt aimed to realign the interests of the region's established powers with those of the strong nation that had newly emerged as a possible counterbalance to western hegemony in the area.³ In order to do so, he needed some assur-

2 Charles Neu, "Theodore Roosevelt and American Involvement in the Far East, 1901-1909," *Pacific Historical Review* 35, no. 4 (1966): 434.

3 See generally, Eugen Trani and Donald Davis, "Roosevelt and the U.S. Role: Perception Makes Policy," in *The Treaty of Portsmouth and Its Legacies*, ed. Steven Ericson et al. (Hanover: Dartmouth College Press, 2008), 62-74.

ances that the peace he brokered with Russia for Japan would also serve the US long term interests in Asia. If assuring Japan of its supremacy in its sphere of interest in Asia was a price to be paid, Korea appeared to be worth it.

Japan's interests in the region and its rise to imperial power, which eventually led to the war with Russia, began with its incorporation into the treaty port system during the mid-1800s. This system kick-started the competition for access to trade with China on advantageous terms with the Western powers, most notably Britain. In particular, control over resource-rich Manchuria and control over Korea led to an intense rivalry with Russia that eventually helped to spark the Russo-Japanese War. In its early years the treaty port system relegated Japan and China to "semi-colonial" status in relation to the western powers.⁴ The imbalance created by the "unequal" treaties gave rise to Japan's need to assert its own sphere of influence in order to protect its economic and political interests in the region. Japan had already won influence in Korea in the Sino-Japanese War. Signed in 1895, the *Treaty of Shimonoseki* unambiguously articulated the end of traditional Sino-Korean relations: "China recognizes definitively the full and complete independence and autonomy of Corea, and, in consequence, the payment of tribute and performance of ceremonies and formalities by Corea to China... shall wholly cease in the future."⁵ By this treaty Japan had succeeded in exerting its superior influence to China over Korea. Whether Japan considered Korea to be an equal sovereign nation and would relinquish imperial aspirations over its war prize remained to be seen.⁶ To put the rise of Japan's power in perspective, it is important to note that during this period imperialism was not considered illegal under international law.⁷ Conquest

4 W. G. Beasley, *Japanese Imperialism 1894-1945* (New York: Oxford University Press, 1987), 6.

5 *Treaty of Peace Between China and Japan*, signed at Shimonoseki, April 17, 1895, reproduced in William Woodville Rockhill, *Treaties and Conventions with or concerning China and Korea, 1894-1904: together with various state papers and documents affecting foreign interests* (Washington: Government Printing Office, 1904), 14.

6 Andre Schmid, *Korea Between Empires: 1895-1919* (New York: Columbia University Press, 2002), 27.

7 Alexis Dudden, *Japan's Colonization of Korea: Discourse and Power* (Honolulu: University of Hawai'i Press, 2005), 7-8.

and the acquisition of territory through military action had been accepted as a *de facto* international legal norm.⁸

The Russo-Japanese War that ended with victory for Japan signaled a turning point for both countries. Russia became embroiled in the Revolution of 1905 and through its defeat became subordinate to a new Japan which asserted its position as the dominant power in East Asia. The end of the war and the signing of the Portsmouth Treaty also signaled a new era in which Japan and the United States would compete for influence in the East Asia. The war had depleted both Russian and Japanese resources and an end to the conflict had become essential for stability in both countries. The Japanese request for the United States to mediate a settlement was a first step toward realignment of the balance of power in the region. This realignment would have significant impact on Korea in particular, with decline of Russian influence and the emergence of Japan as the dominant power in the region and Japan's enhanced international prestige among the world powers.⁹ Under the terms of the treaty, Russia, like China before it, was compelled to recognize Korea's independence and to acknowledge that Japan possessed "paramount political, military, and economic interests" in Korea and that Russia would not "obstruct nor interfere with measures for guidance, protection and control which the Imperial Government of Japan may find necessary to take in Korea." The United States had earlier entered into a secret understanding with Japan known as the "Taft-Katsura Agreement" in which the United States also recognized Japan's domination over Korea in exchange for Japan's recognizing the United States' dominant interests in the Philippines.

The recognition of the independence of Korea that had been included as a standard clause in both the *Treaty of Shimonoseki* and the *Treaty of Portsmouth* turned out to be legally insignificant. With China and Russia unable to counter Japan's power, and with an understanding reached with the United States, Japan asserted its unchallenged control over Korea, which had declared its neutrality

8 Jon Van Dyke, "Reconciliation between Korea and Japan," *Chinese Journal of International Law* 5, no. 1 (2006): 217.

9 Sidney L. Pash, *The Currents of War: A New History of American-Japanese Relations, 1899-1941* (Lexington: The University Press of Kentucky, 2014), 327.

during the Russo-Japanese War. On November 17, 1905, Japan assumed full control over the foreign affairs powers of Korea, effectively removing Korea from the community of nations. President Theodore Roosevelt thereafter declared that Japan's suzerainty over Korea and takeover of Korean foreign relations "was a logical result of the present war and would directly contribute to permanent peace in the East."¹⁰ Japan's formal annexation and colonization of Korea on August 22, 1910, merely completed the task of erasing Korea as an independent nation under international law. The end to the Russo-Japanese War had laid the foundation for Japanese dominance in the region and would eventually give rise to further Japanese aggression resulting in World War II.

Korea under the Legal Order Created by the San Francisco System

Japan's defeat in World War II ended its eminence as an imperial power. World War II formally ended with the *Treaty of Peace with Japan* which was signed on September 8, 1951 in San Francisco, more than 6 years after Japan's unconditional surrender (hence commonly referred to as the *San Francisco Treaty*). The treaty was signed by 48 allied nations identified as "belligerent" nations during the war. On the same day, the United States and Japan entered into the *Security Treaty Between the United States and Japan* which granted the United States the right to "maintain certain of its armed forces in and about Japan" for the purpose of providing for the defense of Japan until such time that arrangements can be made "as will satisfactorily provide for the maintenance by the United Nations or otherwise of international peace and security in the Japan Area."¹¹ The preamble to the treaty recognized Japan's inherent right under Article 51 of the United Nations Charter for individual and collective self-defense but also recognized that "Japan will not have the effec-

10 Seokwoo Lee, "Korea and Japan: The Dokdo/Takeshima problem," in *The San Francisco System and Its Legacies: Continuation, transformation, and historical reconciliation in the Asia-Pacific*, ed. Kimie Hara (New York: Routledge, 2015), 27.

11 Article IV of the *Security Treaty Between the United States and Japan* signed September 8, 1951.

tive means to exercise its inherent right of self-defense because it has been disarmed.” Both treaties came into effect on April 28, 1952, marking the legal ending of World War II and restoring Japan’s independence as a fully sovereign nation.

The term “San Francisco System” refers to the legal and political order created by the simultaneous entry into force of the two treaties.¹² The San Francisco System was born during the Korean War, which had begun on June 25, 1950, and intensified with a massive intervention by the Chinese Volunteer Army on November 25, 1950, a few months after the celebrated Inchon landing by General Douglas MacArthur on September 15, 1950.¹³ What had begun as a surprise attack on South Korea by North Korea to forcibly unify a divided peninsula had deepened into an all-out conflict on an international scale with involvement by the United Nations, the United States, China and the two Koreas. Faced with an uncertain outcome in the conflict on the Korean Peninsula and fueled by fear that communism would spread in the region should Korea fall, US policy toward East Asia naturally shifted in the direction of enhancing relations with Japan as the cornerstone of ensuring stability in Asia.¹⁴ The 1951 Security Treaty between the United States and Japan, assuring the security of Japan against the expansion of communism, was the keystone for the San Francisco System. Japan had taken on a new significance for the United States as a counter to the Cold War crisis that had emerged on the Korean Peninsula, making it urgent to put a legal end to World War II with minimal retributive measures against Japan.¹⁵

12 John W. Dower, “The San Francisco System: Past, Present, Future in U.S.-Japan-China Relations,” *The Asia-Pacific Journal* 12, no. 8 (2014): 2-3.

13 For a detailed account of the Korean War, see generally, William Stueck, *Rethinking the Korean War: A New Diplomatic and Strategic History* (Princeton: Princeton University Press, 2002); Robert Barnes, *The US, the UN and the Korean War: Communism in the Far East and the American Struggle for Hegemony in the Cold War* (New York: I.B. Tauris, 2014).

14 Dong-Choon Kim, “The San Francisco Peace Treaty and ‘Korea,’” in *The San Francisco System and Its Legacies: Continuation, transformation, and historical reconciliation in the Asia-Pacific*, ed. Kimie Hara (New York: Routledge, 2015), 99-101.

15 *Ibid.*, 100.

Korean Exclusion from the San Francisco Treaty

One of the most troubling aspects of the *San Francisco Treaty* was the decision not to include Korea in the treaty-negotiation conferences, which proved to have grave consequences for Korea. What are the legal ramifications of Korea's exclusion from the peace conference and treaty signing to those areas that directly affect Korean rights? By analogy, the *Treaty of Shimonoseki*, the *Treaty of Portsmouth*, or even the *Korean Armistice Agreement*, which was a military agreement and not a political one, all suggest that documents unsigned by Korea that directly affect its interests should not be binding on Korea. On the other hand, a purely legalistic approach to this question ignores the realities of national interests and geopolitical considerations that need to be considered in conjunction with the legal framework. The San Francisco Treaty in this regard highlights the discord between law and politics and makes it difficult to analyze and put into perspective the ramifications of a legal act that has governed the relationship of the former belligerents, in particular those not party to the treaty system.

Korean participation in the peace conference hinged on the legal question of whether Korea, as a colony of Japan since 1910, was a belligerent party against Japan in World War II. Japan maintained that as a matter of legal definition, a colony could not have been at war.¹⁶ However, Britain raised objections that proved to be dispositive in ending the debate and highlighted a larger, more fundamental issue that put into context the problem of Korea's legal status during this period. The UK argued that including South Korea and excluding North Korea and the PRC, which it recognized as the government of China, could permit the USSR to demand changes in the conference voting procedures.¹⁷ Whereas the Cairo Declaration had recognized the "enslavement" of Korea by Japan and had declared that Korea would become free and independent upon the defeat of Japan in World War II, the decision to exclude Korea from the San Francisco peace process started a policy shift in the treatment of Korea's

16 Kimie Hara, *Cold War Frontiers in the Asia Pacific: Divided territories in the San Francisco System* (New York: Routledge, 2007), 46.

17 *Ibid.*, 46. Kim, "The San Francisco Peace Treaty and 'Korea,'" 99.

status. Exclusion also underscored the practical problems posed by the division of Korea and the creation of two separate states in 1948, both laying claims to represent the entire “Korea,” and UN recognition of only the Republic of Korea as the legitimate government.

Article 2(a) in the San Francisco Treaty attempts to legally resolve Japan’s past relations with Korea by stating simply that “Japan recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet.” This provision had been the subject of much deliberation and had undergone several revisions during the course of negotiations but ultimately left “unresolved” the issue surrounding rightful territorial claim to Dokdo/Takeshima by omitting reference to the contested islands altogether in the final version. Of equal significance is the reference to Korea in the treaty as a single entity rather than South Korea and North Korea. This omission belies the struggle of the United States and the drafters of the treaty to balance the need for legal clarity against the temptation to politically characterize Korea as a divided nation. This balancing act was exacerbated by uncertainty about the final disposition of the Korean War, which continued during the signing of the San Francisco Treaty. The omission of Dokdo and the ambiguous reference to a single Korea in the San Francisco Treaty, while seemingly unrelated, stemmed from the same question: to what extent did the uncertainty surrounding the “temporary” division of Korea and the outcome of the Korean War adversely influence Korea’s rights?

*Legal Ambiguity regarding Korea due to
Division and Occupation*

The 1943 Cairo Declaration established the legal foundation for support of the principle agreed upon by the leaders of the United States, Great Britain and China for a free and independent Korea upon the defeat of Japan and conclusion of World War II. This principle was based on an understanding that Korean independence and sovereignty would be “restored” to the state that existed prior to the annexation by Japan in 1910. While adhering to the principle established by the Cairo declaration, the United States, Great Britain and

Russia debated the timing of Korean independence. On the sidelines of the Yalta Conference in February 1945 discussing creation of a new post war order, Churchill, Roosevelt and Stalin had deliberated on trusteeship as a temporary mechanism through which independence would be restored to Korea. Roosevelt and Stalin had previously discussed trusteeship over Korea during the Tehran Conference in 1943. What emerged from the Yalta Conference was a recognition that cooperation would be key among the three powers in order to create stability after the war but also an acknowledgment that their respective national interests differed.¹⁸ One of the major factors in the United States pursuit of trusteeship in Korea was a recognition that no one country should gain exclusive domination of Korea. Although Korea in 1945 was of little importance to the United States, its strategic importance to the Soviets for the warm water ports and proximity to China and Japan was clear.¹⁹ Even as early as 1943 the US State Department expressed its concerns regarding Soviet interests in Korea, warning that a “Soviet occupation of Korea would create an entirely new strategic situation in the Far East, and its repercussions with China and Japan might be far reaching.”²⁰ The end of the military conflict in Asia brought these concerns together on the Korean Peninsula. A sequence of events, starting with the ill-conceived US plan for a temporary division of Korea to achieve the most effective surrender of Japanese troops on the Peninsula, culminated in the creation of two separate Koreas.

For Korea, the end of World War II signified liberation from Japanese colonial rule but not full independence as stipulated under the Cairo Declaration. Instead, on the eve of Japan’s surrender, the State-War-Navy Coordinating Committee divided Korea at the 38th parallel, with Soviets occupying the north and American troops the south. The memorandum issued by the Joint Chiefs of Staff under

18 Hara, *Cold War Frontiers*, 17.

19 Bok-ryong Shin, “The Decision Process of the Trusteeship in Korea, 1945-1946: Focusing on the Change of U.S. Ideas,” *Pacific Focus* XIX, no. 1 (2004): 181-183.

20 William Stueck, *The Korean War: an International History* (Princeton: Princeton University Press, 1995), 17, quoting “Possible Soviet Attitudes Toward Far Eastern Questions.”

the title “Instruments for the surrender of Japan,” notes that this line “has been selected in Korea since this gives the US forces the port and communications area of Keijo and a sufficient portion of Korea so that parts of it might be apportioned to the Chinese and the British in case some sort of quadripartite administration eventuates.”²¹ Concerns that the division might trigger a broader race for influence on the Korean Peninsula had already begun to surface. The Allied Powers hastily incorporated the military occupation south of the 38th parallel in Korea into *General Order No. 1*, which would serve as the main source of legal authority for governing the military occupation of Japan. The decision to divide Korea was consistent with the thinking at the time that Korea would not be ready for immediate independence and that the United States would need to “participate in both the military government and the interim administration of Korea.”²² For purposes of governing a post-war Japan, Korea had been divided in half and authority for its governance given to the Supreme Commander Allied Powers (SCAP), General MacArthur. By placing Korea within the same jurisdictional authority as Japan, the Allied Powers acknowledged that Korea was not high on their list of policy objectives but ancillary to the primary foreign policy of reconstructing Japan and ensuring its defense.²³ Much of the initial confusion regarding how to treat Korea stemmed not only from the perception that Japan was more important to the United States but also from general ignorance about Korea, with which the United States had had no official relationship since 1905. It was unclear at the time whether Koreans should be treated as a “liberated” people or as part of “Japan’s Inner Empire.”²⁴ The policies implemented in

21 “Memorandum by the Joint Chiefs of Staff,” United States Department of State, *The British Commonwealth, The Far East*, Foreign Relations of the United States, 1945, ed. the Historical Office, vol. VI. Washington, DC: U.S. Government Printing Office, 1969, 657-658.

22 “An Estimate of Conditions in Asia and the Pacific at the Close of the War in the Far East and the Objectives and Policies of the United States,” in *Foreign Relations of the United States*, 1945, 561-563.

23 Jongsoo James Lee, *The Partition of Korea after World War II: A Global History* (New York: Palgrave Macmillan, 2007), 39.

24 Charles M. Dobb, *The Unwanted Symbol: American Foreign Policy, the Cold War, and Korea, 1945-1950* (Kent: The Kent State University Press, 1981), 31.

Korea during the early days of American occupation created widespread suspicion among Koreans, who naturally had expected Japan's defeat to lead to immediate independence and self-governance.

Legal authority to govern Korea came in the form of a series of proclamations issued by General MacArthur, none of which reflected the consent or affirmation of the Korean people. *Proclamation No. 1*, which was directed to “the People of Korea,” declared that the *Instrument of Surrender* signed by the Japanese representatives was the legal basis of occupying Korea south of the 38th parallel.²⁵ Article I of the Proclamation stated that “all powers of Government over the territory of Korea south of 38 degrees....and the people thereof will be for the present exercised under my authority.” It further decreed severe punishment for “acts of resistance to the occupying forces or any acts which may disturb public peace and safety” and the retention of former Japanese civil servants who had previously served as colonial rulers. Although the Proclamation included the Cairo Declaration's phrase “in due course Korea shall become free and independent,” the unmistakable message was that the United States would delay independence and Korea would be again occupied by a foreign power pending resolution of its final status. The decision to retain Japanese colonial administrators caused particular outrage. This policy exemplified US ignorance of Korean feelings about the colonial past.²⁶ Further ignorance was revealed by *Proclamation No. 2*, which decreed punishment by death for acts “hostile to the Allied Forces”—language more befitting of an enemy state than a liberated colony.²⁷

Communist and nationalist factions in Korea fought over independence, causing social instability that confused the United States. General MacArthur's orders had been to treat Korea as a “liberated people,” but General Hodge who had led American troops into Seoul in September 1945 soon characterized Korea as an “enemy of the United States” who were subject to the Instrument of Surrender and accorded

25 “Proclamation No. 1 by General of the Army Douglas MacArthur,” in *Foreign Relations of the United States, 1945*, 1043-1044.

26 Lee, *The Partition of Korea*, 46.

27 Dobb, *The Unwanted Symbol*, 34.

treatment befitting an enemy country.²⁸ Much of this attitude can be attributed to the volatile domestic situation during the early months of the occupation in Korea. Koreans' trust in their liberators had quickly deteriorated. Koreans had dreamed for so long that all vestiges of colonial rule would be eradicated and a new Korean government would take its place, yet the United States showed no intention of fostering an independent, sovereign and undivided Korean nation. The division of Korea at the 38th parallel was also remarkably similar to a proposal Russia had made to Japan preceding the Russo-Japanese War in 1904 for the creation of a neutral zone in Korea north of the 39th parallel.²⁹ General Hodge pointed out to General MacArthur the intensifying sentiment among the older generation of Koreans who still recalled that proposal and warned that the division of Korea "created a situation impossible of peaceful correction with credit to the United States" and that "continuation of the separation of the country into two parts under opposed ideologies will be fatal."³⁰ Whether the United States characterized Korea as a "liberated state" or an "enemy" had to do with defining the precise legal nature of Korea's relationship with Japan. Unlike Germany or Japan, which had been sovereign states, as a former colony of Japan, Korea had not been a sovereign state; under international law, liberation itself would not automatically restore Korea's sovereignty.³¹ By the same token, military occupation of Korea by the United States did not necessarily extinguish Japan's sovereign rights to Korea.³² A memorandum dated August 31, 1945, entitled "Transfer of Title to Korea" discussed this

28 William Stueck and Boram Yi, "An Alliance Forged in Blood: The American Occupation of Korea, the Korean War, and the US–South Korean Alliance," *Journal of Strategic Studies* 33, no. 2 (2010): 183; Sang Sook Jeon, "U.S. Korean Policy and the Moderates During the U.S. Military Government Era," in *Korea under the American Military Government, 1945-1948*, ed. Bonnie Oh (Westport: Praeger, 2002), 81.

29 Pash, *The Currents of War*, 301.

30 "Memorandum by Lieutenant General John R. Hodge to General of the Army Douglas MacArthur at Tokyo" (Conditions in Korea, September 24, 1945), in *Foreign Relations of the United States, 1945*, 1054-1057.

31 Jeon, "U.S. Korean Policy and the Moderates During the U.S. Military Government Era," 81.

32 Chaihark Hahm and Sung Ho Kim, *Making We the People: Democratic Constitutional Founding in Postwar Japan and South Korea* (New York: Cambridge University Press, 2015), 248.

precise issue and recommended an official Japanese government declaration, or a declaration from the Emperor, renouncing Japan's rights and titles to Korea.³³

The division and occupation of Korea in early 1945 highlight the ambiguity of Korea's legal status. By the time negotiations for the San Francisco Treaty had commenced, two separate Korean states had already been established (on August 15, 1948 and September 9, 1948, respectively). By this time, the implementation of a trusteeship as an interim measure pending full Korean independence had become a moot point. However, for purposes of defining Korea in the San Francisco Treaty, the same legal ambiguity persisted—to which Korea had Japan renounced its rights? No significant change is discernible in the legal definition of Korea between division and occupation in 1945 and the San Francisco Treaty in 1951. The creation of two separate Koreas raised the identical legal question. In the strictest legal sense, the Republic of Korea under international law would have been the rightful party to represent the entire “Korea” as the United Nations through Resolution 195(III) recognized that “this is the only such government in Korea.”³⁴ However, the ideological divide that separated the two Koreas into distinct and separate spheres of alliance—communist and anti-communist—contributed directly to the exclusion of either Korea from the peace conference. The reference to a single Korea in the treaty appears therefore to have been left purposely ambiguous; “Korea” could mean a country or a geographic location.³⁵ A review of drafts indicates how the drafters of the treaty grappled with this issue, from the 1947 draft, in which Japan renounces all rights and title to “Korea (Chosun) and all offshore Korean islands,” to the 1948 draft, in which Japan renounces “in favor of the Korean people” all rights and title and so forth, until the final text, which makes a simple reference just to “Korea.”³⁶

33 “The Acting Political Advisor in Japan (Atcheson) to the Secretary of State” (November 17, 1945), in *Foreign Relations of the United States, 1945*, 1128.

34 The Problem of the Independence of Korea, GA Res. 195 (III), UN Doc. A/RES/195(III) (December 12, 1948).

35 Hara, *Cold War Frontiers*, 42-43.

36 For a detailed summary of the changes to the text of the San Francisco Treaty's reference to Korea, see Hara, *Cold War Frontiers*, 25-42.

*Korean War Linkages to the Creation of the
San Francisco System*

Conflicting territorial claims to Dokdo/Takeshima date back to 1905 when Japan incorporated the islands under its administrative control. Upon the conclusion of World War II, evidence of US awareness of the dispute over the islands came to light through a series of three directives.³⁷ The first directive, SCAPIN 677, made specific reference to “minor islands” and directed the Japanese government to cease exercising authority over “(a) Utsuryo (Ullung) Island, *Liancourt Rocks (Take Island)* [emphasis provided] and Quelpart (Saishu or Cheju) Island.”³⁸ The US government issued this directive with the caveat that nothing should be “construed as an indication of Allied policy relating to the ultimate determination of the minor islands referred to in Article 8 of the Potsdam Declaration.” Dokdo (or “Liancourt Rocks” as it had been known previously) was initially determined to be outside of Japanese jurisdictional control. The second directive, SCAPIN 1033, prohibited Japanese vessels from approaching “closer than twelve (12) miles to Takeshima ... nor have any contact with said island”³⁹ and also contained a similar exception clause that the directive “is not an expression of allied policy relative to ultimate determination of national jurisdiction, international boundaries or fishing rights in the area concerned or in any other area.” The final directive issued on September 16, 1947, designated Dokdo as a bombing range.⁴⁰ The so-called “MacArthur Line” demarcating the administrative jurisdiction of Japan had clearly excluded Dokdo from Japanese jurisdiction but does not appear to be legally determinative in supporting an argument for Korean claims to the island, since the Northern Territories and Okinawa had also been excluded from this line.⁴¹ The Potsdam Declaration on July 26, 1945,

37 See also, Lee, “Territorial Disputes,” 63.

38 “Governmental and Administrative Separation of Certain Outlying Areas from Japan” SCAPIN (Supreme Commander for the Allied Powers Instruction Note) 677 (January 20, 1946).

39 “Area Authorized for Japanese Fishing and Whaling” SCAPIN 1033 (June 22, 1946).

40 “Liancourt Rocks Bombing Range” SCAPIN 1778 (September 16, 1947).

41 Kimie Hara, “50 Years from San Francisco: Re-Examining the Peace Treaty and Japan’s Territorial Problems,” *Pacific Affairs* 74, no. 3 (2001): 368.

articulated the legal basis for determining the rightful territory of Japan. Article 8 stipulated that “Japanese sovereignty shall be limited to ... and such minor islands as we determine.” Furthermore, the Cairo Declaration had provided that “Japan will also be expelled from all other territories which she has taken by violence and greed.” Early drafts of the San Francisco Treaty from 1946 conformed to the three directives excluding Dokdo from the administrative jurisdiction comprising Japan. These drafts were also consistent with the prevailing thinking in the United States that Dokdo would be part of Korea.⁴² But in December 1949, an amended draft placed Dokdo within the territory of Japan, in response to a policy shift spearheaded by the State Department, which realized the advantage of Dokdo’s proximity to Japan as the Cold War escalated. This slow shift towards placing Japan at the center of America’s security strategy in Asia was confirmed by the creation of the “Acheson Line” in January 1950, which arguably had excluded Korea from the US primary line of defense.⁴³ The outbreak of the Korean War on June 25, 1950, confirmed many fears that Japan and the United States had regarding communist expansion and the effects it would have on security in the area.

The Korean War changed the strategic thinking of the United States and ultimately resulted in strengthening the US-Japan relationship to the detriment of Korea. The outbreak of war on the Peninsula prompted the United States to seek a final peace treaty with Japan as expeditiously as possible, even if it meant lenient punishment of Japan for its war crimes over the objections of China and the Soviet Union.⁴⁴ The reference to Dokdo thereafter disappeared altogether from drafts of the San Francisco Treaty. A plausible explanation appears to be that the United States had no desire to slow down the negotiation process by addressing detailed and contentious issues regarding territory.⁴⁵ Subsequent drafts of other provi-

42 Ibid., 369.

43 Yong Kyun Kim, “The Mutual Defense Treaty of 1953 with the United States: With an Appraisal on the Possibility of a Pacific NATO,” *The Journal of East Asian Affairs* 2, no. 2 (1982): 317. www.jstor.org/stable/23253962.

44 Kim, “The San Francisco Peace Treaty and ‘Korea,’” 100.

45 Seokwoo Lee and Jon Van Dyke, “The 1951 San Francisco Peace Treaty and Its Relevance to the Sovereignty over Dokdo,” *Chinese Journal of International Law* 9 (2010): 748.

sions of the treaty which tended to become more streamlined but vague appear to support this explanation. However, a more plausible explanation may be that at the height of the Korean War, the United States was uncertain about the eventual outcome and had entertained the possibility that the entire Korean Peninsula could come under communist rule. Under this scenario, omission of any reference to Dokdo in the treaty served the dual purpose of hedging against the possible loss of the island and also planting a future “wedge” for ensuring discord between Japan and its communist neighbors.⁴⁶ This omission inevitably left unresolved many of the contentious issues regarding territorial rights of the parties that were at odds with US security interests in the region.⁴⁷ The net effect is that the Korean War became intricately tied to the conclusion of the San Francisco Treaty and the security arrangement comprising what is known collectively as the San Francisco System. The Korean War had undeniably played a major role in accelerating the time table for the treaty’s conclusion and implementation of the San Francisco System. Further, security concerns and doubts about the outcome of the Korean conflict contributed to the ambiguity in the San Francisco Treaty concerning the disposition of territory that endures as a major source of conflict between Korea and Japan.

The Korean War ended in 1953 through an Armistice Agreement and not a Peace Treaty, two years following signing of the San Francisco Treaty. Whereas the San Francisco Treaty provided a formal and legal end to World War II for Japan, the Armistice Agreement failed to provide a legal ending to the Korean War. For Korea, this kind of “end” to international conflict followed a familiar pattern: Korea had again been excluded as a signatory. Furthermore, over the vigorous objections of President Rhee Syngman who had advocated unification of the Korean Peninsula, the agreement to halt military hostilities on the Korean Peninsula was signed on behalf of

⁴⁶ Hara, “50 Years from San Francisco,” 373-374; see also Lee, “The 1951 San Francisco Peace Treaty,” 748-750.

⁴⁷ Seokwoo Lee, “Territorial Disputes in East Asia, the San Francisco Peace Treaty of 1951, and the Legacy of U.S. Security Interests in East Asia,” in *Dokdo: Historical Appraisal and International Justice*, ed. Seokwoo Lee et al. (Leiden: Martinus Nijhoff Publishers, 2011), 42-43.

the United Nations by an American general and representatives of North Korea and China. Whereas the San Francisco Treaty and the San Francisco System provided a clear legal framework for Japan's relationship with the Allied Powers, neither the San Francisco Treaty nor the Armistice Agreement has provided a functional legal framework or status for Korea. While World War II formally ended for Japan in 1952, the Armistice Agreement, designed as a temporary measure pending conclusion of a formal peace treaty, has dragged on for more than sixty years as the "legal" basis to determine the relationship of the two Koreas. Neither the San Francisco Treaty nor the Armistice Agreement has brought peace to Korea.

*The "Unresolved" Division of Korea and the
San Francisco System*

The San Francisco Treaty created an imperfect solution for countries that were excluded from either the negotiation conference or the actual treaty itself. The three countries that were notably either excluded from the treaty or did not sign it—China, Russia and Korea—continue to have territorial claims against Japan that have yet to be resolved. The lingering disputes over the Northern Territories with Russia, Senkaku/Diaoyu with China and Dokdo with Korea are just a few of the deficiencies of the San Francisco Treaty, which has inadvertently laid the foundation for potential conflict. What had been envisioned for creation of a treaty system to lend legal finality for Japan and formally end World War II achieved this immediate goal but left unanswered other core matters of vital sovereign interest for those excluded.

In addition to the territorial claim over Dokdo, the lack of compensation for the suffering of "comfort women" remains unresolved from Korea's standpoint. The comfort women controversy did not begin to take shape until the early 1990s, well after Korea and Japan had signed the 1965 Normalization Agreement.⁴⁸ Accordingly, the comfort women issue had not been addressed in the Normalization

⁴⁸ See, in particular, "Agreement on the Settlement of Problems concerning Property and Claims and on Economic Co-operation between Japan and the Republic of Korea" signed on June 22, 1965.

Agreement. However, Japan has linked the San Francisco Treaty to Article 2(1) of the 1965 Normalization Agreement to maintain that its legal obligations had been absolved.⁴⁹ Article 2(1) reads: “the problem concerning property rights, rights and interests of the two Contracting Parties and their nationals ... concerning claims ... including those provided for in Article IV, paragraph (a) of the Treaty of Peace with Japan ... is settled completely and finally.” But that treaty did not resolve the unspeakable consequences of the war for Korea, illustrating linkages that exist under the San Francisco Treaty framework and unresolved Korean interests.

More fundamentally at issue is identifying the impact of the end of World War II on Korea and clarifying the connection of the San Francisco System (as opposed to just the treaty) to the root causes of events leading to the perpetuation of two separate Koreas. If the initial division of Korea in 1945 to accept the surrender of Japanese troops and the rationale for the later creation of the San Francisco system share a common source, it would be the end of World War II. Put differently, the initial division in 1945 (the single event that put into motion a sequence of events leading to Korea’s present-day division) served as one of the instrumentalities to bring World War II to a close for the Allied Powers and also served as one of the starting points in the creation of what now is known as the San Francisco System. Although Korea was not a signatory to the San Francisco Treaty or even a participant in the negotiations, in a broad sense, the linkage between the San Francisco System and events that have transpired on the Korean Peninsula since 1945 is strong.

Korea’s exclusion from the peace conference and the San Francisco Treaty were historic anomalies. At the same time, to view the question of Korea as distinct and separate from the overall umbrella of the San Francisco System on account of circumstances in 1945 raises several problems. First, to do so ignores the intricately overlapping and clearly linked historic circumstances that gave rise to both the initial division of Korea and the end of World War II, which

49 Koji Teraya, “A Consideration of the so-called Comfort Women Problem in Japan-Korea Relations: Embracing the Difficulties in the International Legal and Policy Debate,” *Journal of East Asia & International Law* 6 (2013): 201-202.

in turn gave rise to the San Francisco Treaty and the creation of the security arrangement between the United States and Japan. Second, ambiguities contained in the body of the treaty are unmistakably interconnected to the Korean War. The San Francisco System and division of Korea must therefore be viewed as part of the same organism. This commonality is particularly true if we assume that the division is still “temporary” as envisioned in 1945. The simultaneous entry into the United Nations by both Koreas in 1991 does not transform the basic notion of a single unified Korea.

The sequence of events from the 1945 division to the creation of the two Koreas in 1948 to the Korean War and Armistice Agreement that has perpetuated the uncertain nature of the legal relationship between the two Koreas need therefore to be viewed as parts of the San Francisco System. The logical extension of this argument would be to forge a peace on the Korean Peninsula under the umbrella of the San Francisco System by addressing the root causes of the division of Korea and confronting the still existing divide.

Conclusion

The end of the Cold War brought subtle but discernible changes to geopolitical relations among the actors in East Asia. Today the United States, Japan, China, Russia and South Korea enjoy unprecedented levels of economic exchange and mutual recognition, although certain tensions inevitably exist among them. What has not changed in any fundamental way is Korea’s status as a divided nation or the US security posture toward East Asia under the San Francisco System. Geopolitical circumstances in the 1950s legitimized the creation of a San Francisco System that was imperfect at best, not only leaving unresolved issues of core national interest to China, Russia and Korea but also spawning new, unforeseen areas of conflict. In particular, the North Korean nuclear threat has dramatically altered assumptions that underlie the security scheme under the San Francisco System.

Regional dynamics and debates on Korean unification or the creation of a permanent peace regime have taken on a different

dimension with a nuclear-capable North Korea, leaving South Korea and Japan as the only non-nuclear powers among the parties who comprised the Six Party Talks. As the major actors in the region shift toward dealing with this new nuclear threat, South Korean interests are at risk of coming in second to the immediate policy goal of addressing and resolving changes to the regional security balance. A potential new paradigm could very well entail a grand compromise or realignment, raising the question as to South Korea's role in the process. As a starting point for creating that new paradigm, however, the San Francisco System is problematic, as it innately excludes Korea. A security system put in place to address the immediate exigencies of geopolitical circumstances in the 1950s has become outmoded.

The parties have discussed and negotiated many different iterations of a peace regime on the Korean Peninsula, but none has endured the challenges of balancing the conflicting geopolitical interests of the stakeholders. At a minimum, any peace regime would require the formulation of a permanent system that is legally binding on all the actors. The need to take into account interests of all parties involved and ensure their proper representation adds to the complexity of creating such a system.

Lessons from history should be clear for Korea. Its exclusion from the legal framework ending wars has adversely affected its rights and has prompted many of the tumultuous events that ensued on the Korean Peninsula. In particular, the division and military occupation in 1945 have resulted in disastrous outcomes for Korea. From the Treaty of Portsmouth in 1905 to the Armistice Agreement in 1953, Korea has suffered the consequences of ambiguity in its status as a sovereign nation. To develop a new paradigm that can bring about a permanent peace regime requires carefully re-conceptualizing and revisiting the legal order created by the San Francisco System. Seeking a solution to the Korean question without considering the possibility of a reconfigured San Francisco System may continue to perpetuate the unintended consequences of what was only intended as a viable solution to the then pressing need to achieve legal finality to World War II.

REFERENCES

- Barnes, Robert. *The US, the UN and the Korean War: Communism in the Far East and the American Struggle for Hegemony in the Cold War*. New York: I.B. Tauris, 2014.
- Beasley, W. G. *Japanese Imperialism 1894-1945*. New York: Oxford University Press, 1987.
- Dobb Charles M. *The Unwanted Symbol: American Foreign Policy, the Cold War, and Korea, 1945-1950*. Kent: The Kent State University Press, 1981.
- Dower, John W. "The San Francisco System: Past, Present, Future in U.S.-Japan-China Relations," *The Asia-Pacific Journal* 12, no. 8 (2014): 1-39.
- Dudden, Alexis. *Japan's Colonization of Korea: Discourse and Power*. Honolulu: University of Hawai'i Press, 2005.
- Hahm, Chaihark, and Sung Ho Kim. *Making We the People: Democratic Constitutional Founding in Postwar Japan and South Korea*. New York: Cambridge University Press, 2015.
- Hara, Kimie. "50 Years from San Francisco: Re-Examining the Peace Treaty and Japan's Territorial Problems." *Pacific Affairs* 74, no. 3 (2001): 361-382.
- . *Cold War Frontiers in the Asia Pacific: Divided territories in the San Francisco System*. New York: Routledge, 2007.
- Jeon, Sang Sook. "U.S. Korean Policy and the Moderates During the U.S. Military Government Era." In *Korea under the American Military Government, 1945-1948*, edited by Bonnie Oh, 79-101. Westport: Praeger, 2002.

- Kim, Dong-Choon. "The San Francisco Peace Treaty and 'Korea.'" In *The San Francisco System and Its Legacies: Continuation, transformation, and historical reconciliation in the Asia-Pacific*, edited by Kimie Hara, 97-114. New York: Routledge, 2015.
- Kim, Yong Kyun. "The Mutual Defense Treaty of 1953 with the United States: With an Appraisal on the Possibility of a Pacific NATO." *The Journal of East Asian Affairs* 2, no. 2 (1982): 310-31.
- Lee, Jongsoo James. *The Partition of Korea after World War II: A Global History*. New York: Palgrave Macmillan, 2007.
- Lee, Seokwoo, and Jon Van Dyke. "The 1951 San Francisco Peace Treaty and Its Relevance to the Sovereignty over Dokdo." *Chinese Journal of International Law* 9 (2010): 741-762.
- Lee, Seokwoo. "Territorial Disputes in East Asia, the San Francisco Peace Treaty of 1951, and the Legacy of U.S. Security Interests in East Asia." In *Dokdo: Historical Appraisal and International Justice*, edited by Seokwoo Lee and Hee Eun Lee, 41-69. Leiden: Martinus Nijhoff Publishers, 2011.
- . "Korea and Japan: The Dokdo/Takeshima problem." In *The San Francisco System and Its Legacies: Continuation, transformation, and historical reconciliation in the Asia-Pacific*, edited by Kimie Hara, 20-36. New York: Routledge, 2015.
- Neu, Charles. "Theodore Roosevelt and American Involvement in the Far East, 1901-1909." *Pacific Historical Review* 35, no. 4 (1966): 433-449.
- Pash, Sidney L. *The Currents of War: A New History of American-Japanese Relations, 1899-1941*. Lexington: The University Press of Kentucky, 2014.

- Rockhill, William Woodville. *Treaties and Conventions with or concerning China and Korea, 1894-1904: together with various state papers and documents affecting foreign interests*. Washington: Government Printing Office, 1904.
- Schmid, Andre. *Korea Between Empires: 1895-1919*. New York: Columbia University Press, 2002.
- Shin, Bok-ryong. "The Decision Process of the Trusteeship in Korea, 1945-1946: Focusing on the Change of U.S. Ideas." *Pacific Focus* XIX, no. 1 (2004): 169-211.
- Stueck, William, and Boram Yi. "An Alliance Forged in Blood: The American Occupation of Korea, the Korean War, and the US-South Korean Alliance." *Journal of Strategic Studies* 33, no. 2 (2010): 177-209.
- Stueck, William. *Rethinking the Korean War: A New Diplomatic and Strategic History*. Princeton: Princeton University Press, 2002.
- . *The Korean War: an International History*. Princeton: Princeton University Press, 1995.
- Teraya, Koji. "A Consideration of the so-called Comfort Women Problem in Japan-Korea Relations: Embracing the Difficulties in the International Legal and Policy Debate." *Journal of East Asia & International Law* 6 (2013): 195-220.
- Trani, Eugen, and Donald Davis. "Roosevelt and the U.S. Role: Perception Makes Policy." In *The Treaty of Portsmouth and Its Legacies*, edited by Steven Ericson and Allen Hockley, 62-74. Hanover: Dartmouth College Press, 2008.
- UN Doc. A/RES/195(III) (December 12, 1948).
- United States Department of State. *The British Commonwealth, The Far East*. Foreign Relations of the United States, 1945, edited by the Historical Office, Vol. VI. Washington, DC: U.S. Government Printing Office, 1969.

Van Dyke, Jon. "Reconciliation between Korea and Japan."
Chinese Journal of International Law 5, no. 1 (2006):
215-239.

CHAPTER 2

What Have Twenty-Five Years of Nuclear Diplomacy Achieved?

Leon V. Sigal

Introduction

Nuclear diplomacy with North Korea is not the abject failure it is frequently portrayed to be. The negotiating record is mixed—much more successful than its detractors acknowledge and far superior to the record of pressure of sanctions and isolation without negotiations.

Any successes have been temporary because neither side has kept its commitments or sustained negotiations. Although there were good grounds for skepticism about North Korea's willingness to keep its commitments, allied failure to live up to their obligations is more difficult to understand—especially when they were the first to renege, thereby failing to test the North's dependability.

A detailed examination of the 1994 Agreed Framework, the 2005 Six-Party Joint Statement, and the so-called Leap Day Deal of 2012 demonstrates that pressure without negotiations has never worked. That is also the most important takeaway from North Korea's recent nuclear and missile tests and fissile-material production.

The examination also suggests that the most promising periods in US-DPRK and North-South relations have occurred when Seoul and Washington acted in concert to sustain dialogue and engagement with Pyongyang in 1991, 1999 to 2000, and 2007 to 2008.

The most intense crises, by contrast, occurred when Pyongyang concluded that Seoul was impeding Washington's efforts to engage in 1993 to 1994, 2008 to 2010, and now. And Seoul could make little progress with Pyongyang when Washington was not engaging, as in 2001 to 2006.

The Agreed Framework and Its Collapse

North Korea, many observers believe, was determined to acquire nuclear arms ever since 1986 when its Yongbyon reactor went critical or since 1988 when construction of a reprocessing facility was first detected nearby. Yet after the United States announced withdrawal of its nuclear arms from Korea in September 1991, North Korea signed a Joint Declaration on Denuclearization of the Korean Peninsula, committing it not to "test, manufacture, produce, receive, possess, store, deploy, or use nuclear weapons" and "not possess nuclear reprocessing and enrichment facilities." It then signed a safeguards agreement with the International Atomic Energy Agency (IAEA), facilitating inspections. Its deeds matched its words. As IAEA inspectors would soon discover, in the fall of 1991, North Korea stopped reprocessing to extract plutonium, the explosive ingredient in nuclear arms, and did not complete construction of the reprocessing facility.

Yet those actions received less public notice than the North's May 1992 initial declaration to the IAEA, claiming it had reprocessed spent fuel one time and extracted sixty-two grams of plutonium. IAEA inspectors subsequently detected that it had conducted three, not one, reprocessing campaigns, though none since the fall of 1991. The amount the North claimed to have reprocessed has remained contested ever since, although later US estimates put it at probably less than a bomb's worth.

Had Pyongyang wanted to arm, however, it could have shut down its reactor at any time thereafter and removed the spent fuel for reprocessing. It did not do so until May 1994, long after experts expected it to. The reactor shutdown triggered an intense crisis, but instead of reprocessing the five or six bombs' worth of spent

fuel and restarting its reactor to generate more, the North agreed to the October 1994 Agreed Framework, freezing its nuclear program under around-the-clock monitoring. In return, Washington pledged to “move toward full political and economic normalization,” end enmity, “make arrangements for the provision” of two light-water reactors (LWRs), and supply heavy fuel oil for electricity and heat in the interim.

No sooner had the agreement been concluded than Republicans took control of the House and Senate, putting it in jeopardy. In 1997, after Washington had taken only minimal steps to end enmity, was slow to get the reactor project off the ground, and seldom delivered the promised heavy fuel oil on schedule, the DPRK began warning that if Washington did not live up to the Agreed Framework, it was not obliged to either. It then began to acquire the means to enrich uranium from Pakistan and elsewhere.

Yet it made no attempt to reprocess the spent fuel stored under inspection at Yongbyon or to restart its reactor. Twelve years would elapse before it would do so. In those twelve years, it had foregone generating enough fissile material for one hundred nuclear weapons, by US intelligence estimates. It had also allowed its nuclear facilities, worth many millions of dollars, to deteriorate to a point where they could not be salvaged.

Pyongyang tried again; it offered to curtail its missile program as further inducement to end enmity. North Korea, it was widely assumed, was hell-bent on developing medium- and longer-range missiles to deliver nuclear weapons. That was the conclusion of the Commission to Assess the Ballistic Missile Threat to the United States (commonly known as the Rumsfeld Commission), which made a case for missile defense in July 1998. Yet Pyongyang had conducted just two medium- or longer-range test launches over the previous decade—both of them failures. The United States had begun negotiations with North Korea on missiles in 1996 but had held just two rounds of talks, hardly a sign of its seriousness. On June 16, 1998, North Korea made public an offer to negotiate an end not only to its missile exports but also to “development”—its word—of new missiles. It linked that offer to the conclusion of a

“peace agreement.”¹ Along with the offer, it issued a threat to resume missile tests, a threat the North carried out on August 31 when it launched a three-stage rocket, the Taepodong, in a failed attempt to put a satellite into orbit.

Former Secretary of Defense William Perry broached the possibility of a missile deal in talks in Pyongyang in May 1999. He also gave the North a draft of a joint communique that would be issued during Marshal Jo Myung-rok’s visit to Washington in October 2000. It pledged “steps to fundamentally improve...bilateral relations,” including “replacing the 1953 Armistice Agreement with permanent peace arrangements.” It was explicit about an end to enmity: “As a crucial first step,” it noted, “neither government would have hostile intent toward the other.”² That helped pave the way for the first ever North-South summit meeting. It also led to the resumption of missile talks and North Korean acceptance of a test-launch moratorium while the talks proceeded.

Within weeks, Secretary of State Madeleine Albright went to Pyongyang to meet with Kim Jong-il, who offered to end not only exports of missile technology but also development, production, and deployment of all medium- and longer-range missiles in return for an end to enmity.³ The North wanted a commitment from President Clinton to come to Pyongyang before pursuing the offer further in diplomatic channels. Persuaded that President-elect Bush would continue the negotiation once in office, Clinton decided to leave the matter to him.

Clinton’s assumption proved wrong. The Bush administration opted to confront rather than engage North Korea and other so-called “rogue states.” A rogue is a criminal, and the way to treat criminals is to punish them, not make deals with them. The crime-and-pun-

1 “Nobody Can Slander DPRK’s Missile Policy,” *Korean Central News Agency*, June 16, 1998.

2 US-DPRK Joint Communique, October 12, 2000.

3 As President Clinton described the deal this way, “They stop missile development and the sale of missiles. Now, they obviously need to earn some funds from some other places and we think there are ways they can do that.” (White House transcript of Associated Press interview aboard *Air Force One*, November 4, 2000.) North Korea’s version is in “Conclusion of Non-Aggression Treaty between DPRK and US Called for,” *Korean Central News Agency*, October 25, 2002.

ishment approach to prevent proliferation had never worked in the past, and it would not work now.

In 2002, State Department officials began formulating a proposal to resume negotiations—what they called the “bold approach”—but hard-liners seized on newly gathered raw intelligence to head them off. The intelligence showed the North was importing many more centrifuges than previously estimated. A version of the resulting estimate, declassified at Senator John Kyl’s request, read,

We assess that North Korea embarked on the effort to develop a centrifuge-based uranium enrichment program about two years ago. Last year the North began seeking centrifuge-related materials in large quantities. It also obtained equipment suitable for use in uranium feed and withdrawal systems. We recently learned that the North is constructing a plant that could produce enough weapons-grade uranium for two or more nuclear weapons per year when fully operational—which *could be as soon as mid-decade*.

The issue came to head in the State Department on July 16. To Assistant Secretary of State John Bolton, that was conclusive evidence of cheating: “I wanted a decisive conclusion that the Agreed Framework was dead.” To others, like Assistant Secretary of State James Kelly, what mattered for national security was when the enrichment plant would be in operation and how long it would take to generate enough highly enriched uranium for a weapon. Bolton recalls, “Kelly responded that there was still disagreement about exactly when North Korea would have enough highly enriched uranium to make a warhead, which was true but irrelevant to the point that the DPRK was violating the Agreed Framework.”⁴ It turned out that those who assessed that it would take a full decade for the plant to become operational were correct.

In October 2002, having balked at talks for nearly two years, President Bush sent Kelly to Pyongyang—not to negotiate but to

⁴ John Bolton, *Surrender Is Not an Option* (New York: Simon and Schuster, 2008), 107–108.

confront it over enrichment. The North Koreans offered to forgo uranium enrichment, as well as plutonium production, in return for diplomatic recognition; legal assurances of nonaggression, including nonuse of nuclear weapons; and not impeding its economic development, as Kelly himself acknowledged three weeks later: “They did suggest after this harsh and—personally, to me—surprising admission that there were measures that might be taken that were generally along those lines.”⁵ Under instructions, Kelly ignored the offer. In her memoir, Condoleezza Rice is more forthcoming. Kelly, she recalls, was bound in a diplomatic straitjacket:

Usually there is enough trust in an experienced negotiator that the guidance is used more as points of reference than as a script. But in this case, given the fissures, the points were to be read verbatim. There were literally stage directions for Kelly. He was not to engage the North Koreans in any side conversation in any way. That left him actually moving to the corner of the table to avoid Pyongyang’s representatives.⁶

Rice’s conclusion is worth underscoring: “*Because his instructions were so constraining, Jim couldn’t fully explore what might have been an opening to put the program on the table.*”⁷

Instead, administration officials claimed that the North Koreans had “admitted” they had an enrichment “program” and should be punished. They overcame resistance from South Korea and Japan to suspend shipments of heavy fuel oil, thereby tearing up the Agreed Framework. While US forces were tied down preparing to invade Iraq, North Korea retaliated by reprocessing the five or six bombs’ worth of plutonium, which, when weaponized, would allow it to conduct nuclear tests for the first time. It also moved to restart its reactor, ramped up imports of enrichment equipment, and aided Syria in constructing a reactor of its own. The North’s nuclear

5 Doug Struck, “North Korean Program Not Negotiable, US Told N. Korea,” *Washington Post*, October 20, 2002, A-18.

6 Condoleezza Rice, *No Higher Honor: A Memoir of My Years in Washington* (New York: Crown, 2011), 161 (emphasis in original).

7 *Ibid.*, 162 (emphasis added).

effort, largely held in check for a decade through negotiations, was now unleashed.

Bush's initial response was to ignore North Korea's nuclear actions. Soon, however, hard-liners in the administration began touting regime change. Many were convinced that Iraq's fate would chasten North Korea. On the very day that Saddam Hussein's statue was toppled from its pedestal in Baghdad, Assistant Secretary of State John Bolton said, "We are hopeful that a number of regimes will draw the appropriate lesson from Iraq."⁸ Far from making Pyongyang more pliable, however, the war on Iraq strengthened its determination to arm unless Washington had a change of heart. As a DPRK Foreign Ministry spokesman noted on April 6, 2003, the United States had first demanded that Iraq submit to inspections, and it did. The United States next demanded that Iraq disarm, and it began to. The United States then attacked it anyway. "This suggests that even the signing of a non-aggression treaty with the US would not help avert war," he said. "Only military deterrent force, supported by ultra-modern weapons, can avert a war and protect the security of the nation. This is the lesson drawn from the Iraqi war."⁹ Yet Pyongyang was still prepared to suspend arming if Washington moved to end enmity.

The September 2005 Six-Party Joint Statement

Why did Pyongyang still seek to resume negotiations in the face of hostility from Washington? In October 2001, Kim Jong-il had decided to reform North Korea's moribund economy by allowing a greater role for markets in place of the state distribution system, a policy formally promulgated in July 2002.¹⁰ The economy began to recover, but full recovery would be more difficult without reconciliation with the United States, South Korea, and Japan, which would

8 Guy Dinmore, "Heed Lesson of Iraq, US Tells Iran, Syria, and North Korea," *Financial Times*, April 10, 2003, 4.

9 "Statement of Foreign Ministry Spokesman Blasts UNSC's Discussion of Korean Nuclear Issue," *Korean Central News Agency*, April 6, 2003.

10 Robert L. Carlin and Joel S. Wit, *North Korean Reform: Politics, Economics, and Security*, Adelphi Paper 382 (London: International Institute for Strategic Studies, 2006).

facilitate a reallocation of resources from military to civilian use and aid and investment from outside.

In the belief that North Korea was on the verge of collapse, however, hardliners in the Bush administration pushed for an economic embargo and naval blockade to strangle it. All the North's neighbors knew that pressure would provoke it to arm sooner than collapse, which is why they resisted. Instead, they pursued talks of their own with North Korea, which convinced them it might be willing to deal. Pressed by President Kim Dae-jung in Seoul and Prime Minister Koizumi Junichiro in Tokyo, President Bush eventually relented and resumed talks in 2003. It took two years before Washington, again under allied pressure, allowed its negotiators to meet directly with the North Koreans in August and September 2005. Diplomacy worked. Pyongyang grudgingly accepted a six-party joint statement, incorporating the main goal Washington was seeking, a pledge to abandon "all nuclear weapons and existing nuclear programs."

Yet Pyongyang was not about to settle for fine words any more than Washington was. It insisted on phased reciprocal steps by Washington to reconcile—end enmity—as it eliminated its nuclear programs. The September 19, 2005, joint statement embodied that point: "The six parties agreed to take coordinated steps to implement the aforementioned consensus in a phased manner in line with the principle 'commitment for commitment' and 'action for action.'"¹¹ The accord laid out in general terms some of the steps Pyongyang sought. The United States undertook to "respect [the DPRK's] sovereignty," diplomatic code for not attempting to overthrow its government. It was the same pledge Washington had made in the US-DPRK joint statement of June 1993 but one that the Bush administration had hitherto refused to reaffirm. The Bush administration went further than Clinton's had when it said it "has no intention to attack or invade the DPRK with nuclear or conventional weapons." Like Clinton, however, it stopped short of agreeing to normal relations, committing only to "take steps to normalize their relations subject to their bilateral policies." It wanted diplomatic recognition held up until the North reduced its forces along the DMZ and embraced human

11 Joint Statement of the Fourth Round of Six-Party Talks, September 19, 2005.

rights. At the urging of the other parties, Washington committed to “respecting” Pyongyang’s right to nuclear power and “agreed to discuss at an appropriate time the subject of the provision of light-water reactors [LWRs] to the DPRK.” The North would not be entitled to reactors until it eliminated its weapons and weapons programs to the satisfaction of the International Atomic Energy Agency and rejoined the NPT as a member in good standing.

Yet the ink was hardly dry on the September 19 accord when Vice President Dick Cheney and other administration hard-liners struck back, undoing the deal and hamstringing US negotiators. When China had first circulated a draft of the agreement before the February 2004 round of talks, Cheney had intervened to turn it down, arguing, “We don’t negotiate with evil. We defeat it.”¹² Now, in a closing plenary statement, US negotiator Christopher Hill announced a decision, dictated by the hard-liners, to “terminate KEDO,” the international consortium set up to provide the reactors.¹³ Later that day, Secretary of State Condoleezza Rice implied that the “appropriate time” for discussion of replacement reactors was when hell froze over: “When the North Koreans have dismantled their nuclear weapons and other nuclear programs verifiably and are indeed nuclear-free...I suppose we can discuss anything.”¹⁴

Pyongyang reacted sharply. “The basis of finding a solution to the nuclear issue between the DPRK and the US is to wipe out the distrust historically created between the two countries and a physical groundwork for building bilateral confidence is none other than the US provision of LWRs to the DPRK,” said a Foreign Ministry spokesman. “The US should not even dream of the issue of the DPRK’s dismantlement of its nuclear deterrent before providing LWRs, a physical guarantee for confidence-building.”¹⁵

12 Warren P. Strobel, “Administration Struggles to Find Right Approach to N. Korea,” *Knight Ridder*, December 20, 2003.

13 US Department of State, Ambassador Christopher R. Hill, “Statement at the Closing Plenary,” Six-Party Talks, September 19, 2005.

14 US Department of State, Secretary of State Condoleezza Rice, Press Availability at UN Headquarters, September 19, 2005.

15 “Spokesman for the DPRK Foreign Ministry on Six-Party Talks,” *Korean Central News Agency*, September 20, 2005.

Even worse, having declared in the September 19 accord that it had “no intention” of attacking the North “with conventional or nuclear weapons” and having pledged to “respect [DPRK] sovereignty,” renouncing military attack and regime change, the Bush administration backed away. Under pressure from hard-liners, Hill undercut those commitments in prepared testimony to Congress days later by echoing an old refrain, “All options remain on the table.”

Worse yet, when Hill tried to go to Pyongyang to jump-start denuclearization by seeking an initial declaration of its nuclear programs, hard-liners set a precondition for talks. Hill was instructed not to go unless the North had shut down its Yongbyon reactor, thereby assuring that no talks took place.

Worst of all, the administration began taking action under the Illicit Activities Initiative (IAI) to put a roadblock in the way of negotiations. On September 15, the day that the six-party accord was reached but two days before it was made public, it had capitalized on a Treasury Department investigation of money-laundering at the Banco Delta Asia in Macao to get banks around the globe to freeze North Korean hard currency accounts—some with ill-gotten gains from illicit activities, but many with proceeds from legitimate foreign trade. Some officials who favored diplomatic give-and-take, like Secretary of State Rice, saw financial sanctions as a source of leverage. Hardliners saw them as a bulwark against negotiations, which they opposed. Branding North Korea a “criminal state,” they sought to punish it. Washington refused the direct talks on money-laundering proposed by Pyongyang, preferring to maintain the sanctions rather than to induce it to end its illicit activities. By late summer, a senior official told the *New York Times*, the administration decided “to move toward more confrontational measures.” A senior official described the strategy: “Squeeze them, but keep the negotiations going.” In the words of Undersecretary of State Robert Joseph, “We believe that they will reinforce the prospect for success of those talks.” What did success mean? Another senior State Department official put it this way: IAI turned six-party talks into nothing more than “a surrender mechanism.”¹⁶

16 David E. Sanger, “US Widens Campaign on North Korea,” *New York Times*, October 24, 2005, A-7.

How much the freezing of North Korea's hard currency accounts curtailed its trade is unclear, but it looked a lot like regime change to Pyongyang, which responded by refusing to return to six-party talks until its accounts at the Banco Delta Asia were unblocked. In talks in New York on March 17, 2006, it proposed a bilateral US-DPRK mechanism to resolve the issue.¹⁷ Hill, however, was not allowed to meet with the North Koreans.

Far from giving Washington leverage, the financial sanctions provoked Pyongyang to retaliate. It began preparations for missile test launches. When a high-level Chinese delegation came to Pyongyang to urge top officials to call them off and warn of UN action, they were kept waiting for three days—and then ignored. The July 4, 2006, fireworks display, conducting seven launches including the Taepodong-2, prompted China to vote for a US-backed resolution in the UN Security Council condemning the tests and threatening sanctions. Undaunted, North Korea immediately began preparations for a nuclear test, a test it carried out on October 9, 2006. It was demonstrating that it would never bow to pressure—whether from the United States or China or both. Only US moves to end enmity would get it to change course.

In announcing the nuclear test three days before conducting it, the DPRK Foreign Ministry denounced the UN Security Council resolution imposing sanctions on the North for its July 4 launches, “a de facto ‘declaration of war’ against the DPRK,” and added, “The US extreme threat of a nuclear war and sanctions and pressure compel the DPRK to conduct a nuclear test, an essential process for bolstering [our] nuclear deterrent, as a corresponding measure for defense.” Nevertheless, the North insisted, its aim of negotiated denuclearization of the Korean Peninsula remained unchanged. So did its price—an end to enmity.

The ultimate goal of the DPRK is not “denuclearization” to be followed by its unilateral disarmament but one aimed at settling the hostile relations between the DPRK and the US

17 Mike Chinoy, *Meltdown: The Inside Story of the North Korean Nuclear Crisis* (New York: St. Martin's Press, 2008), 269.

and removing the very source of all nuclear threats from the Korean Peninsula and its vicinity.¹⁸

When President Bush took office, North Korea, thanks to diplomacy, had stopped testing longer-range missiles. It had less than a bomb's worth of plutonium and was verifiably not making more. Six years later, as a result of Washington's broken promises and financial sanctions, it had seven to nine bombs' worth, had resumed longer-range test launches, and felt free to test nuclear weapons. The strategy of pressure had failed.

Implementing the September 2005 Joint Statement

On October 31, just three weeks after the nuclear test, President Bush returned to diplomacy, permitting US negotiator Hill to meet bilaterally with his DPRK counterpart. Hill offered a compromise on North Korean accounts frozen in the Banco Delta Asia. That opened the way to negotiations to implement the September 2005 joint statement, which yielded a first-phase agreement on February 13, 2007, suspending nuclear testing, and shutting down the North's reactor and reprocessing facility.¹⁹

A second-phase agreement on October 3, 2007, committed the North to provide "a complete and correct declaration of all its nuclear programs" and put Pyongyang on a path to disable its plutonium facilities at Yongbyon, making it more time-consuming and costly to restart and thereby whittling away its nuclear leverage. In return, the other parties pledged to supply the North with energy aid and the United States agreed to ease sanctions under the Trading with the Enemy Act and delist the DPRK as a "state-sponsor of terrorism."²⁰ The second-phase agreement said nothing about verifying the North's declaration, which was left to a later phase of implementation.

18 "DPRK Foreign Minister Clarifies Stand on New Measures to Bolster War Deterrent," *Korean Central News Agency*, October 3, 2006.

19 US Department of State, Initial Actions for the Implementation of the Joint Statement, February 13, 2007.

20 US Department of State, Second Phase Agreement for Implementation of the Joint Statement, October 3, 2007.

The accord coincided with promising developments in inter-Korean relations. A second North-South summit meeting from October 2 to 4, 2007, produced an agreement to deepen economic engagement by further development of the Kaesong Industrial Complex and construction of ship-building complexes at Anbyun and Nampo in the North, a shared commitment to “terminate the existing armistice regime and to build a permanent peace regime,” and establishment of “a joint fishing area in the West Sea to avoid accidental clashes and turning it into a peace area,” a potentially creative way to link economic cooperation to security through confidence-building measures.²¹

Once again, however, Washington failed to sustain this promising diplomatic course, this time with enthusiastic backing from the incoming government in Seoul. Within months of the second inter-Korean summit meeting, Lee Myung-bak took over the Blue House, determined to back away from the “sunshine policy” and his predecessors’ summit commitments.²² Lee also moved to impede implementation of the six-party agreements.

On June 26, 2008, the DPRK handed China a written declaration of its plutonium program, as required by the October 2007 accord. The declaration had been worked out in US-DPRK talks. North Korea reportedly declared it had separated thirty-eight kilograms of plutonium—within the range of US estimates, albeit at the lower end. In a side agreement with Washington, Pyongyang committed to disclose its enrichment and proliferation activities, including its help for Syria’s reactor. Many in Washington, Tokyo, and Seoul questioned whether the declaration was “complete and correct,” as required by the October 2007 agreement. The crux of the dispute was how much plutonium the North had separated before the end of 1991.

Washington decided to demand arrangements to verify the declaration before completing the disabling and moving on to the dismantlement phase of talks. The trouble was the October 2007

21 Declaration on the Advancement of South-North Korean Relations, Peace and Prosperity, October 4, 2007.

22 Sang-hun Choe, “Lee Plans to Harden Seoul’s Line with North Korea,” *International Herald Tribune*, December 20, 2007; Jung Sung-ki, “Peace Zone Project Faces Derailment,” *Korea Times*, December 30, 2007.

agreement contained no provision for verification in the second phase of denuclearization. The day that Pyongyang turned in its declaration, the White House announced its intention to relax sanctions under the Trading with the Enemy Act and to delist the DPRK as a “state-sponsor of terrorism”—but with a caveat. As Secretary of State Rice told the Heritage Foundation on June 18, “[B]efore those actions go into effect, we would continue to assess the level of North Korean cooperation in helping to verify the accuracy and completeness of its declaration. And if that cooperation is insufficient, we will respond accordingly.” Rice acknowledged Washington was moving the goalposts: “What we’ve done, in a sense, is move up issues that were to be taken up in phase three, like verification, like access to the reactor, into phase two.”²³

In bilateral talks with Hill, the DPRK agreed to establish a six-party verification mechanism and allow visits to declared nuclear facilities, a review of documents, and interviews with technical personnel. These commitments were later codified in a July 12 six-party communiqué. Undisclosed at the time, it also committed to cooperate on verification during the dismantlement phase.

That was not good enough for the new governments in South Korea and Japan. They demanded a written verification protocol, and President Bush agreed. US officials gave the North Koreans a draft with demands for highly intrusive verification, and on July 30, the White House announced it had delayed delisting the DPRK as a “state-sponsor of terrorism” until they agreed to it.²⁴ North Korea’s reaction was swift. Retaliating for what it took to be a renege on the October 2007 accord, it suspended the disabling at its Yongbyon plutonium facilities on August 14 and soon began to restore them. It also attempted to send WMD equipment by air to Iran, overflying India in a transparent threat to resume the proliferation that it had forsworn under the very same October 2007 accord. On August 26, a Foreign Ministry spokesman accused the United States of an “outright violation” of the October agreement in failing to delist the

23 Secretary of State Condoleezza Rice, Address at the Heritage Foundation, “US Policy towards Asia,” June 18, 2008.

24 “Verification Measures Discussion Paper,” www.washingtonpost.com/wp_srv/politics/documents/kesslerdoc_092608.pdf?sid=ST2008092600020.

DPRK as a “state-sponsor of terrorism” and threatened to resume operations at Yongbyon. Noting that verification was to be fulfilled in the final phase of denuclearization, the spokesman added that the September 2005 agreement had called for denuclearization of the entire Korean Peninsula and required verification to ensure that no nuclear weapons had been reintroduced “in and around South Korea.”²⁵ On October 9, it barred IAEA inspectors from its Yongbyon nuclear complex.

With the freeze and disabling in jeopardy, Hill met his DPRK counterpart Kim Gye-gwan in Pyongyang on October 1 to 3 armed with a revised draft protocol. Stopping short of accepting it, Kim agreed to allow “sampling and other forensic measures” at the three declared sites at Yongbyon—the reactor, reprocessing plant, and fuel fabrication plant—which might suffice to ascertain how much plutonium it had produced. If not, he also accepted “access, based on mutual consent, to undeclared sites,” according to the State Department announcement. “The US-North Korea agreement on these verification measures has been codified in a joint document between the United States and North Korea and certain other understandings, and has been reaffirmed through intensive consultations.”²⁶

Again, the oral commitment was not good enough for Japan or South Korea. They insisted the North’s commitment be put in writing. Nevertheless, on October 11, President Bush went ahead and delisted the North as a “state-sponsor of terrorism,” angering Prime Minister Aso Taro in Tokyo. Secretary of State Rice recalls, “It began to feel as if the Japanese wanted the Six-Party Talks to fail lest they lose their leverage with us to help them with the admittedly tragic abduction issue.”²⁷

Disabling resumed with nearly 60 percent of the eight thousand fuel rods removed from the reactor and the question of how to dispose of the replacement fuel rods as yet unresolved. Roughly half the energy aid promised to the DPRK in return for disabling in the

25 “Foreign Ministry Spokesman on DPRK’s Decision to Suspend Activities to Disable Nuclear Facilities,” *Korean Central News Agency*, August 26, 2008.

26 US Department of State, Office of the Spokesman, “US-North Korea Understandings on Verification,” October 11, 2008.

27 Rice, *No Higher Honor*, 648.

October 2007 agreement had yet to be delivered. Japan clung to its long-held position that without progress on abductions, it would not contribute its share of energy aid, 200,000 tons of heavy fuel oil or its equivalent in other energy aid.

Without more intrusive verification arrangements, Tokyo and Seoul insisted on halting energy aid, and Washington went along. The issue came to a head at the seventh round of six-party talks from December 8 to 11, 2008. The chairman's statement tried to paper over the differences, but there was no disguising the threat by South Korea, Japan, and the United States to suspend provision of energy aid unless the DPRK accepted a written verification protocol. On his departure from the talks, DPRK envoy Kim Gye-gwan made it clear the North would retaliate for any renege: "We'll adjust the speed of our disablement work if it [energy aid] doesn't come in."²⁸ Much worse was soon to follow.

For two years, diplomatic give-and-take had induced the North to stop producing fissile material and suspend nuclear and missile testing. Unless South Korea reversed its decision to pressure North Korea by halting shipments of energy aid, that renege would put the diplomatic success in jeopardy.

The Leap Day Deal

During the 2008 presidential campaign, Barack Obama had expressed willingness to meet with the leaders of North Korea and Iran, among others. That gave rise to the myth that he had held his hand out to Kim Jong-il only to have it slapped away. Jeffrey Bader, Obama's special assistant for national security affairs and his top National Security Council adviser on Asia, characterizes the administration's initial outlook quite differently in his memoir. "We needed a policy that would force North Korea to reassess the value of its program and therefore maximize the chance of pursuing denuclearization seriously."²⁹ It was, in short, a policy of pure pressure without negotiations. "Strate-

28 "North Korea Warns Nuclear Disabling Might Slow," *Associated Press*, December 13, 2008.

29 Jeffrey A. Bader, *Obama and China's Rise: An Insider's Account of America's Asia Strategy* (Washington: Brookings, 2012), 7 (emphasis added).

gic patience” became the watchword of that policy. On his very first day at work in 2009, Bader killed a State Department cable intended “to provide the North Koreans with a sense of continuity in policy” and upbraided the deputy assistant secretary for East Asia responsible: “Henceforth, I added, we would not communicate with the North Koreans without first coordinating with Seoul, Tokyo, and ideally with Beijing and Moscow.”³⁰ President Lee in Seoul and Prime Minister Aso in Tokyo strongly favored a resort to pressure.

The North responded to the suspension of promised energy aid by beginning to assemble a rocket at its Musudan-ri launch site, starting in late January. It did not launch the rocket until April 5, giving the administration more than two months to undo the renege or open talks to resolve the issue.

In the run-up to the launch, the new administration was torn between the desire of some officials to resume negotiations and the determination of Seoul and Tokyo to pressure Pyongyang. Picking up hints of the North’s interest in resuming missile talks, which had seemed promising in 2000, Secretary of State Hillary Clinton told a March 11 press conference, “We need to have a conversation about missiles, and it wasn’t in the six-party talks. We would like to see it be part of the discussion with North Korea.”³¹ Ambassador Stephen Bosworth, newly named special representative on North Korea policy, told reporters on April 3,

We believe that a defiance of a UN Security Council resolution is an action that requires that there be some consequences, and that will be our objective. At the same time, however, I would also say that we continue to look with great interest, and give great priority, to the need to resume the six-party discussions with the goal of the verifiable denuclearization of the Korean Peninsula. And that remains, of course, our long-term goal. And we would hope to be able to return to that goal in as reasonable a period of time as possible.

³⁰ *Ibid.*, 29–30.

³¹ US Department of State, Secretary of State Hillary Clinton, Remarks after Her Meeting with Chinese Foreign Minister Yang Jiechi, March 11, 2009.

Asked about the agenda for negotiations, he spoke not only about denuclearization, but also about “what might be required to normalize the relationship between the DPRK and the United States” and “how we can facilitate North Korea’s integration into the region.” Washington, he added, was open to bilateral talks: “I am prepared to go to Pyongyang whenever it appears to be useful.” He did not mention that the DPRK had been told he could come only if it called off the launch. Asked about US leverage to pressure North Korea not to launch, he answered, “In my experience in dealing with North Koreans, pressure is not the most productive line of approach.”³²

Opting for negotiations instead of pressure, Bader makes clear, was precisely what the administration decided not to do:

In March the president chaired a National Security Council meeting in which the political and military contingencies were considered and responses decided upon...The president told his senior staff he wanted to break the cycle of provocation, extortion, and reward that various US administrations had confronted and ultimately accommodated in the past fifteen years...Defense Secretary Gates stressed the importance of not providing inducements to bring North Korea back to the table, or “not paying for the same horse three times.” The president agreed. There was no mention then, or at any subsequent time, of candidate Obama’s suggestion of a willingness to meet Kim Jong-il.³³

With no change in Washington’s stance, Pyongyang proceeded with the launch, portraying it as a peaceful attempt to put a satellite in orbit. On March 12, it announced its accession to the 1967 Outer Space Treaty, which provides for “freedom of scientific investigation in outer space.” Unlike for its prior test launches, the North gave notice to international civil aviation and maritime agencies about the time and flight path. The United States, Japan, and South Korea

32 US Department of State, Special Representative for North Korea Policy Stephen Bosworth, Briefing at the Foreign Press Center, April 3, 2009.

33 *Ibid.*, 31.

began warning that if it went ahead, they would seek additional sanctions under UN Security Council Resolution 1718, adopted after the North's October 2006 nuclear test, which decided "that the DPRK shall suspend all activities related to its ballistic missile program and in this context re-establish its pre-existing commitments to a moratorium on missile launching." There was tough talk in Tokyo about intercepting the launch. China and Russia, in contrast, contended that the rocket was a space-launch vehicle, making Resolution 1718 inapplicable.

After the launch President Obama, deferring to Japan and South Korea, sought a punitive sanctions resolution in the UN Security Council. China and Russia were opposed. From its talks in Pyongyang in January and reports in North Korean media, Beijing believed that condemnation of the launch and imposition of sanctions would prompt retaliation by Pyongyang and delay six-party talks, which in its view was the only way to end North Korea's missile and nuclear programs. Yet it was not about to take the blame in Washington for blocking UN action. Nor did Obama want to pick a fight with China over North Korea. The two sides drafted a presidential statement on behalf of the Security Council that "condemns" the "launch" in "contravention" of Resolution 1718, thereby covering space-launch vehicles and closing a loophole some saw in earlier resolutions. It demanded that the DPRK halt launches and called on member states to implement sanctions.³⁴ The council then imposed sanctions on three North Korean firms involved in missile trading.

Pyongyang's reaction was predictable. Noting that Japan and others had tested space-launch vehicles—neglecting to mention South Korea's disclosed plans to launch one of its own that summer—the DPRK Foreign Ministry spokesman on April 14 rejected the Security Council action as an unjust infringement on its sovereignty. He went on to list three steps it would take in response. First, denouncing the six-party talks as having turned into "an arena which infringes upon our sovereignty and which aims only at disarming us and overthrowing our system," he said, "we will never participate in such talks and will no longer be bound to any agreement." That

³⁴ "UN Security Council Draft Statement on N. Korea," *Reuters*, April 11, 2009.

called into question its commitment in the September 2005 joint statement to “abandon all nuclear weapons and existing nuclear programs.” Second, “we will actively examine the construction of a light-water reactor plant of our own,” ostensibly a threat to enrich uranium to fuel it. Third, the Yongbyon nuclear facilities “will be restored to the original state for normal operation.” That stopped just short of a threat to restart the reactor, which could be accomplished in months, if not weeks. Fourth, all 6,500 “spent fuel rods” removed during disabling “will be reprocessed.”³⁵ Extracting another bomb’s worth of plutonium put Pyongyang in position to conduct a second nuclear test without further depleting its stock of fissile material. It conducted that test explosion on May 25, 2009.

On June 12, the Security Council enacted Resolution 1874, which “sharpened its weapons import-export ban...by calling on States to inspect, seize and dispose of the items and by denying fuel or supplies to service the vessels carrying them,” including intercepting vessels at sea. It also banned “the provision of financial services...that could contribute to the Democratic People’s Republic of Korea’s nuclear-related, ballistic missile-related or other weapons of mass destruction-related programs or activities.”

The DPRK Foreign Ministry responded within hours, saying that “nuclear abandonment has now become absolutely impossible” and warning that all the plutonium it had just removed from its reactor would “be weaponized,” that its uranium-enrichment program would move beyond the test phase to an operational plant, and “if the United States and its follower forces attempt to carry out a blockade, [that] will be regarded as an act of war and [the DPRK] will resolutely respond militarily.”³⁶

Once again, the resort to pressure had failed to stop North Korean nuclear and missile advances.

In 2011, with elections on the horizon, the administration moved to head off trouble by resuming negotiations. With preparations for resumption of testing underway, North Korea agreed to suspend

35 “DPRK Foreign Ministry Vehemently Refutes UNSC’s ‘Presidential Statement,’” *Korean Central News Agency*, April 14, 2009.

36 “DPRK Foreign Ministry Statement,” *Korean Central News Agency*, June 13, 2009.

uranium enrichment, keep its reactor at Yongbyon shut down, and allow international monitoring. It also accepted a moratorium on nuclear and missile testing while “productive dialogue” continued.

These arrangements were to be finalized at talks in December 2011, the very week that Kim Jong-il died. They were delayed until Leap Day, February 29, 2012. Instead of issuing a joint statement, the United States and the DPRK issued separate announcements of the deal. In the US version, “the DPRK has agreed to implement a moratorium on long-range missile launches, nuclear tests and nuclear activities at Yongbyon, including uranium enrichment activities. The DPRK has also agreed to the return of IAEA inspectors.” The United States, in turn, “agreed to meet with the DPRK to finalize administrative details necessary to move forward with our proposed package of 240,000 metric tons of nutritional assistance along with the intensive monitoring required for the delivery of such assistance.” It also reaffirmed that “it does not have hostile intent toward the DPRK and is prepared to take steps to improve our bilateral relationship” as well as its “commitment to the September 19, 2005, Joint Statement.”³⁷ It also recognized the 1953 Armistice Agreement as the cornerstone of peace and stability on the Korean Peninsula.” The DPRK announcement differed on several points: “The DPRK, upon request by the US and with a view to maintaining positive atmosphere for the DPRK-US high-level talks, agreed to a moratorium on nuclear tests, long-range missile launches, and uranium enrichment activity at Yongbyon and [to] allow the IAEA to monitor the moratorium on uranium enrichment *while productive dialogues continue*.” It conditioned its commitment to the armistice: “*Both the DPRK and the US* reaffirmed their commitments to the September 19 Joint Statement and recognized that the 1953 Armistice Agreement is the cornerstone of peace and stability on the Korean Peninsula *until the conclusion of a peace treaty*.” It added, “Once the six-party talks are resumed, priority will be given to the discussion of issues concerning the lifting of sanctions on the DPRK and provision of

37 US Department of State, Press Statement, February 29, 2012.

light water reactors.”³⁸ Neither statement mentioned whether the missile moratorium extended to satellite launches. During the talks, North Korea had insisted on its right to launch despite a UN Security Council ban. The United States had warned that a launch would be a deal-breaker.

Had he lived, it is not clear whether Kim Jong-il would have gone ahead with the launch, but his son and successor did. On April 23, North Korea fired off a long-range Unha-3 rocket. It failed to reach orbit, breaking up soon after the blastoff.

Many in Washington and Seoul saw the launch as a test of Kim Jong-un’s mettle. In a fit of wishful thinking, some even speculated that the failure could lead to the untried leader’s downfall. Yet in announcing the launch, North Korea’s media referred repeatedly to his father, Kim Jong-il, not him. North Korean officials were even more explicit in private, saying Kim Jong-il made both the decision to suspend some of the North’s nuclear activities and the decision to proceed with the launch, making it difficult for his untried son to reverse his father’s legacy.

Some former US officials experienced in negotiating with the North thought it was a mistake not to get a written deal that covered satellite launches. That criticism left Pyongyang off the hook for proceeding with the launch and a third nuclear test when it had every reason to believe that the Obama administration was finally negotiating in earnest. It was a fateful North Korean mistake. Diplomacy had failed.

The response was to ratchet up pressure. UN Security Council Resolution 2094, passed unanimously on March 7, 2013, further tightened financial and trade sanctions. Again, it did not dissuade North Korea from producing more fissile material or conducting more nuclear and ballistic missile tests.

Administration officials understandably felt double-crossed by the collapse of the Leap Day Deal, which only reinforced their reluctance to resume negotiations. In the fall of 2013, North Korea indicated a willingness to return to the Leap Day Deal and possibly not exercise its asserted “right” to launch satellites. That was not good

³⁸ US Department of State, Press Statement, February 29, 2012.

enough for Washington, which insisted that Pyongyang had to do more—and without reciprocity from Washington. That was unacceptable to Pyongyang, which saw “commitment for commitment, action for action,” enshrined in the September 2005 six-party joint statement, as the only way to build trust.

Sanctions without Negotiations: A Recipe for Failure

What does the past imply for today? Many in Washington and Seoul still contend that negotiation is pointless if North Korea remains unwilling to give up the handful of crude nuclear weapons it has. That premise ignores the potential danger that an unbounded weapons program in North Korea poses to US and allied security. It also ignores the possibility that Pyongyang may be willing to suspend its nuclear and missile programs if its security concerns are satisfied.

That was the gist of its January 9, 2015, offer of “temporarily suspending the nuclear test over which the US is concerned” if the United States “temporarily suspends joint military exercises in South Korea and its vicinity this year.”³⁹ Like most opening bids, it was unacceptable, but instead of probing it further, Washington rejected it out of hand—within hours—and publicly denounced it as an “implicit threat.”⁴⁰

Unofficial contacts later that January indicated that Pyongyang was prepared to suspend not just nuclear testing but also missile and satellite launches and fissile-material production. In return, it was willing to accept a toning down of the scale and scope of joint exercises, rather than their cancellation. This underscored the need for reciprocal steps to improve both sides’ security. Those contacts might have opened the way to talks at that time, but the initiative was squelched in Washington. Instead, US officials, with the zealous backing of Seoul, continued to insist Pyongyang had to take unilateral steps to demonstrate its commitment to denuclearizing and ruled out reciprocity by Washington at Seoul’s behest. Their stance was based on the flawed premise that the North alone had failed to

³⁹ “KCNA Report,” *Korean Central News Agency*, January 10, 2015.

⁴⁰ US Department of State, Deputy Spokesperson Marie Harf, Daily Briefing, January 12, 2015.

live up to past agreements. As Daniel Russel, assistant secretary of state for East Asian and Pacific Affairs, put it on February 4, “North Korea does not have the right to bargain, to trade or ask for a pay-off in return for abiding by international law.”⁴¹ This crime-and-punishment approach, however warranted by North Korean flouting of international law, has never stopped North Korea from arming in the past, and it is unrealistic to think it would work now.

A July 6 statement by the DPRK government indicated its willingness to discuss denuclearization—not first but in return for reciprocal measures including a peace process:

The US has declined the DPRK’s constructive proposal for replacing the Armistice Agreement with a peace treaty under such absurd preconditions as “north’s dismantlement of nukes first” and squarely challenged the DPRK’s sincere proposals and efforts for dialogue for the improvement of the north-south ties and Korea’s reunification with such words as “north’s denuclearization first.” ... If the US and the South Korean authorities have an iota of interest in the denuclearization on the Korean peninsula, they should accept the principled demand of the DPRK before anything else, the statement said, and went on: Firstly, *all the nuclear weapons should be opened to public*, first of all, which the US has neither acknowledged nor denied after bringing them to south Korea. Secondly, *all the nukes and their bases should be dismantled* and verified in the eyes of the world public. Thirdly, the *US should ensure that it would never bring again the nuclear strike means to South Korea*, which the US has frequently deployed on the Korean peninsula and in its vicinity. Fourthly, *it should commit itself to neither intimidating the DPRK with nukes or through an act of nuclear war nor using nukes against the DPRK* in any case. Fifthly, the *withdrawal of the US troops holding the right to use nukes* from South Korea should be declared. If the US and the South Korean authorities truly want to see the denuclearization on the Korean peninsula and build a “peaceful

41 “US: No Sign Yet N. Korea Serious on Nuke Talks,” *Associated Press*, February 4, 2015.

world without nuclear weapons,” there will be no reason for them to turn down the just demand of the DPRK. *If such security guarantee comes true, the DPRK will also take steps in response to it and a decisive breakthrough will be made in realizing the denuclearization on the Korean peninsula.*⁴²

All but the reference to dismantling “bases” in the second point seemed negotiable. That very day, however, Washington imposed sanctions on Kim Jong-un.⁴³ At this point, Washington and Seoul are applying pressure on Pyongyang to accept talks on their terms. If the past is prologue, this strategy will not work. As North Korea’s latest missile barrage and nuclear test demonstrate, pressure without negotiations is a recipe for failure.

42 “DPRK Government Denounces US, S. Korea’s Sophism about ‘Denuclearization of the Korean Peninsula,’” *Korean Central News Agency*, July 6, 2016.

43 US Department of Treasury, “North Korea Human Rights Report Delivered to Congress This Morning,” July 6, 2016.

REFERENCES

- Associated Press*. “North Korea Warns Nuclear Disabling Might Slow.” December 13, 2008.
- . “US: No Sign Yet N. Korea Serious on Nuke Talks.” February 4, 2015.
- Bader, Jeffrey A. *Obama and China’s Rise: An Insider’s Account of America’s Asia Strategy*. Washington: Brookings, 2012.
- Bolton, John. *Surrender Is Not an Option*. New York: Simon and Schuster, 2008.
- Carlin, Robert L., and Joel S. Wit. *North Korean Reform: Politics, Economics, and Security*. Adelphi Paper 382. London: International Institute for Strategic Studies, 2006.
- Chinoy, Mike. *Meltdown: The Inside Story of the North Korean Nuclear Crisis*. New York: St. Martin’s Press, 2008.
- Choe, Sang-hun. “Lee Plans to Harden Seoul’s Line with North Korea.” *International Herald-Tribune*, December 20, 2007.
- Declaration on the Advancement of South-North Korean Relations, Peace, and Prosperity. October 4, 2007.
- Dinmore, Guy. “Heed Lesson of Iraq, US Tells Iran, Syria, and North Korea.” *Financial Times*, April 10, 2003.
- Joint Statement of the Fourth Round of Six-Party Talks, September 19, 2005.
- Jung, Sung-ki. “Peace Zone Project Faces Derailment.” *Korea Times*, December 30, 2007.
- Korean Central News Agency*. “Nobody Can Slander DPRK’s Missile Policy.” June 16, 1998.
- . “Statement of Foreign Ministry Spokesman Blasts UNSC’s Discussion of Korean Nuclear Issue.” April 6, 2003.

- . “Spokesman for the DPRK Foreign Ministry on Six-Party Talks.” September 20, 2005.
- . “DPRK Foreign Minister Clarifies Stand on New Measures to Bolster War Deterrent.” October 3, 2006.
- . “Foreign Ministry Spokesman on DPRK’s Decision to Suspend Activities to Disable Nuclear Facilities.” August 26, 2008.
- . “DPRK Foreign Ministry Statement.” June 13, 2009.
- . “DPRK Foreign Ministry Vehemently Refutes UNSC’s ‘Presidential Statement.’” April 14, 2009.
- . “DPRK Foreign Ministry Spokesman on Result of DPRK-US Talks.” February 29, 2012.
- . “KCNA Report.” January 10, 2015.
- . “DPRK Government Denounces US, S. Korea’s Sophism about ‘Denuclearization of the Korean Peninsula.’” July 6, 2016.
- Reuters*. “UN Security Council Draft Statement on N. Korea.” April 11, 2009.
- Rice, Condoleezza. *No Higher Honor: A Memoir of My Years in Washington*. New York: Crown, 2011.
- . “US Policy Toward Asia.” Speech, Heritage Foundation, June 18, 2008.
- Sanger, David E. “US Widens Campaign on NorthKorea.” *New York Times*, October 24, 2005.
- Strobel, Warren P. “Administration Struggles to Find Right Approach to N. Korea.” *Knight-Ridder*, December 20, 2003.

Struck, Doug. “North Korean Program Not Negotiable, US Told N. Korea.” *Washington Post*, October 20, 2002.

US Department of State. US-DPRK Joint Communiqué. October 12, 2000.

———. Secretary of State Condoleezza Rice, Press Availability at UN Headquarters. September 19, 2005.

———. Ambassador Christopher R. Hill, Statement at the Closing Plenary, Six-Party Talks. September 19, 2005.

———. Initial Actions for the Implementation of the Joint Statement. February 13, 2007.

———. Second-Phase Agreement for Implementation of the Joint Statement. October 3, 2007.

———. Office of the Spokesman. “US–North Korea Understandings on Verification.” October 11, 2008.

———. Secretary of State Hillary Clinton, Remarks after Her Meeting with Chinese Foreign Minister Yang Jiechi, March 11, 2009.

———. Special Representative for North Korea Policy Stephen Bosworth, Briefing at the Foreign Press Center. April 3, 2009.

———. Press Statement. February 29, 2012.

———. Deputy Spokesperson Marie Harf. Daily Briefing. January 12, 2015.

US Department of Treasury. “North Korea Human Rights Report Delivered to Congress this Morning.” July 6, 2016.

“Verification Measures Discussion Paper,” www.washingtonpost.com/wpsrv/politics/documents/kesslerdoc_092608.pdf?sid=ST200809260020.

CHAPTER 3

The Future of US Policy toward North Korea and the Role of South Korea

Joel S. Wit and Sun Young Ahn

Introduction

One of the most pressing, vexing, and dangerous challenges facing a new US administration will be dealing with North Korea. For over two decades, the United States has pressed North Korea to give up its nuclear weapons program but has ultimately failed. The North's expanding and more capable nuclear weapons stockpile, its stepped-up ballistic-missile programs, continued periodic provocations, and an apparent willingness to proliferate nuclear and missile technology and materials pose a mounting security challenge to the United States, its close allies South Korea and Japan, and the international community. Another concern that only makes a dangerous challenge even worse is the possibility that Pyongyang will see its growing arsenal as license to conduct more provocations in the future, also taking advantage of its growing cyberwarfare capabilities displayed in the recent attack on Sony Pictures, the growing potential for the North to export nuclear technologies, and its continued human rights abuses.

Given North Korea's recent nuclear and missile tests, a new administration will be faced with the same task: what to do about North Korea. In view of the growing realization that the Obama

administration's policy toward the North has failed, the pressures to formulate a new approach may be even greater. Moreover, formulating a new policy will require careful and close consultation with Washington's allies in Northeast Asia, particularly South Korea. That process may be complicated if a US administration does indeed come up with a new approach, since President Park's government will remain in office until the end of 2017. Moreover, the outcome of the late 2017 presidential election in the South of course remains unclear, further complicating peering into the future of US-ROK relations in dealing with the North.

The Current Situation

On the central issue of its WMD capabilities, Pyongyang's nuclear-weapons stockpile is growing at what appears to be an alarming rate, while its efforts to build more capable missile-delivery systems are progressing much faster than anticipated. From an estimated baseline of ten to sixteen nuclear weapons in 2015, Pyongyang's stockpile is expected to grow to anywhere from fifty to one hundred weapons by 2020. It is now believed that it can mount a nuclear warhead at least on missiles able to reach targets in Northeast Asia. Moreover, the North is working on a significant technological improvement—building a hydrogen bomb that will have greater explosive power than its existing weapons—that could be ready by 2020. If Pyongyang increases the rate of nuclear tests it conducts—from the current one every three years to one or more every year—that device could be ready even sooner.

In addition to North Korea's current force of about one thousand ballistic missiles able to attack targets in Northeast Asia, it is developing a family of more threatening new delivery systems. Of particular importance is a new submarine-launched ballistic missile (SLBM) that could be deployed by 2019 that would severely complicate efforts to defend South Korea and Japan with ballistic-missile defenses. Even more threatening is the KN-08 road-mobile intercontinental ballistic missile (ICBM) seen in military parades in Pyongyang and able to reach targets in the United States. While

it was expected that the new missile might not be ready until 2020, once again if the North's increase in the pace of testing extends to this new weapon, deployment could accelerate. Tests of the KN-08 could begin in the next year or so.

The implications for the United States, its allies, and the international community are profound and clear. First, its growing nuclear-weapons arsenal and development of more capable ballistic-missile delivery systems poses a threat to our troops in Northeast Asia and our allies that is orders of magnitude greater than that posed in the past. It will severely complicate our ability to defend them in the future. That challenge will become even greater if North Korea proceeds to test and deploy its road-mobile intercontinental ballistic missile—and there is no reason to believe it will not do so—since the danger will then extend to the continental United States. Second, Pyongyang's nuclear arsenal could call into question our ability to meet our alliance commitments—cornerstones of America's rebalance to Asia—and particularly our extended-deterrence guarantee. Third, an expanding North Korean nuclear-and-missile arsenal will seriously undermine regional stability as South Korea and Japan deploy their own conventional military systems, enabling them to launch preventive or even preemptive strikes against North Korea. (South Korea is building a large accurate force of conventional missiles able to cover targets in the entire North.) Fourth, in response to these developments, it's possible our allies will adopt a nuclear hedging strategy, putting into place whatever technology building blocks are necessary to allow them to deploy their own nuclear weapons and delivery systems if necessary. That would seriously undermine our decades-old policy of promoting nuclear nonproliferation. Finally, the same can be said if the North feels it has leeway to export technology and know-how to third countries or nongovernment groups seeking to build their own nuclear weapons.

While these WMD developments are of great concern, other political realities further complicate the situation. Three factors are:

- **Kim Jong-un's power consolidation.** Considerable speculation that North Korea is unstable, and even on the brink of collapse, fed by high-profile and sometimes violent steps

taken by Kim Jong-un to put loyalists in place, appears to be wrong. Entering its fifth year, Kim Jong-un's rule appears stable. If he did face challenges to his authority, they seem to have been surmounted. Moreover, he is no longer the young, inexperienced figure many observers considered him to be when he took over. Still, Kim's North Korea remains a work in progress. Living standards have improved, with the economy improving slightly and the regime coming to terms with market activity growth. The Party's Seventh Congress in May 2016 signaled that there has been no retreat from earlier signs of a new but still cautious approach to economic policy. Within the regime's proclaimed two-line policy—improvement of the economy and simultaneous pursuit of a nuclear weapons program—Kim's report at the Congress appeared to carve out additional room for attention to the economy, although his policy faces a significant challenge in the face of international sanctions. On the political front, the young leader has continued a long-term effort begun by his father near the end of his life of rebuilding the Workers' Party and better balancing its power and prestige against that of the military.

- **China's unchanging strategic calculus.** Despite the stock US talking point over the past thirteen years that China, as Pyongyang's main economic partner, must curb North Korea's bad behavior, there is no evidence that Beijing shares the same approach or understanding of the North Korean challenge as the United States. There is even less evidence to suggest that China will fundamentally alter its calculus in response to American pleas or threats—namely, that the strategic depth provided by North Korea, stability on its borders, and a client in Pyongyang (however hard to control) trumps the American priority of denuclearization. The ups and downs in the Beijing-Pyongyang relationship have given rise to hopes that China will exert greater pressure on the North, most recently when Beijing reacted angrily to the North's fourth nuclear test in January 2016, voting for tough

new UN Security Council sanctions. Yet barely six months later after the US-ROK announcement of plans to deploy THAAD in South Korea, China swung around and stated that Washington and Seoul—as much as Pyongyang—would now be at fault if North Korea conducted more nuclear and missile tests. The Chinese oscillated again after North Korea's recent successful test of a submarine-launched ballistic missile, condemning Pyongyang. Since more gyrations in Beijing's relations with North Korea are likely, even if there is another downturn, it would be a mistake to believe that China will actively work on its own to solve the challenges Washington and Seoul see posed by North Korea. At most, developing limited cooperation may be possible if Washington can demonstrate that in addition to acting decisively to protect its interests, even at the risk of alienating Beijing, it is also willing to consider measures addressing North Korean and Chinese complaints.

- **Moribund Six-Party Talks.** Established in 2003 as a multilateral forum to achieve the denuclearization of the Korean Peninsula, the Six-Party Talks have not reconvened since December 2008. In the eight years since then, Pyongyang's nuclear capabilities have increased, and its public statements have only added to doubts that it is willing to consider denuclearization in any forum. The fact that the United States also seemed to be demanding “meaningful steps” by North Korea on the denuclearization front as a condition for restarting the multilateral talks only further fueled doubts about the Six-Party Talks. North Korea's authoritative July 6 government statement supporting denuclearization of the Korean peninsula appears to focus on bilateral discussions with the United States rather than a resumption of multilateral discussions. Nevertheless, all of these developments do not mean that multiparty diplomacy has no role to play in future negotiations but rather that the Six-Party Talks as they existed in the 2000s cannot be resurrected.

Three factors that offer at least a ray of hope are:

- **Consistent and pragmatic but often conflicting North Korean strategic goals.** Stripped of its routinely boisterous rhetoric, Kim Jong-un's approach to foreign policy has been much the same as his father's and his grandfather's—more pragmatic than ideological. A small, weak country that cannot trust its security to others and cannot afford permanent enemies, for fifty years North Korea has remained exquisitely alert to the ways it must maneuver to cope with negative external conditions, pursuing a mix of high-priority goals, some in perpetual tension with others, which help define and explain its actions. DPRK policies have focused on three relatively pragmatic objectives—preventing absorption by the larger, more economically successful South Korea; deterring the United States, which is seen as seeking the North's elimination as a state; and ensuring the survival of the Kim regime—including a fierce desire to maintain its own freedom of action in the pursuit of national priorities. Tensions between these objectives have led Pyongyang constantly to look for new solutions, resulting in windows of opportunity that open and close regularly as the North shifts its stance in response to perceived threats and opportunities.

These tensions may result in open windows of opportunity in the future. For example, staying out from under China's shadow has been among the North's most difficult tasks, requiring a shifting mix of policies and a resulting roller-coaster ride over the decades. These shifts included a strategic decision in the early 1990s leading to a serious, sustained effort to establish "normal relations" with the United States in order to buffer Chinese influence. After the move toward the United States collapsed in 2001, there was an unprecedented warming of relations with China, a trend in turn that was interrupted by a precipitous downturn as Beijing objected to the North's third and fourth nuclear tests in 2013 and 2016. Pyongyang continues to believe it has good reason never to trust China, and that, in turn, could lead under the right circumstances to

efforts to improve relations with the United States as a balancer. Second, in order to bolster popular support, improving North Korea's economic performance is an important objective for Kim Jong-un. At the same time, Pyongyang has developed a growing nuclear arsenal to reverse what it fears is a dangerous external image as a toothless military threat. But its development, while intended to address this challenge, has seriously constricted opportunities for attracting foreign investors. For now, the regime hopes its nuclear development will address both goals—establishing the North as a formidable military force while freeing up resources for the civilian sector that have gone to maintaining a large conventional military. It is unclear whether this strategy will work, and therefore it is an open question whether Kim's concerns with the economy can be used more effectively to bring him to reverse course on nuclear weapons.

- **Signs of a shifting North Korean position on denuclearization.** The trajectory of North Korea's nuclear-weapons program as well as other developments (for example, enshrining that program in its constitution) have led most experts to write off any chance that Pyongyang will denuclearize. However, while the North has issued a number of previous statements insisting that any future dialogue should focus on a peace treaty ending the Korean War instead of denuclearization, it has also signaled at least four times in the past three years that it is willing to talk about nuclear issues. The most recent pronouncement was a significant government statement issued on July 7 that, aside from associating the objective of denuclearization with all three Kims, also appeared to take a major, long-term step in opening the possibility for dialogue on that subject by reintroducing concepts, most from the January 1992 North-South Denuclearization Declaration, that both Seoul and Washington had previously accepted. Moreover, the July 7 statement made no mention of its previous priority of focusing on a peace treaty. There is no reason to believe that if this is a serious initiative, it is anything but an opening

position designed to signal there is room to begin this process, but the proposal potentially makes it easier for both sides to take initial steps.

The most recent government statement may reflect the elevation at the recent Korean Workers' Party Congress of Ri Yong-ho, the vice foreign minister in charge of the Six-Party Talks, to foreign minister and an alternative politburo member. An expert on the United States as well as nuclear disarmament, Ri was involved in negotiating the 1994 US–North Korea Agreed Framework and was a protégé of Kang Sok-ju, the agreement's chief architect. In recent years, he has participated in Track II meetings with former American officials advancing proposals that later turned up as DPRK policy. For example, in May 2014 at a private meeting in Mongolia, he floated the idea of a moratorium on nuclear testing in return for the United States' suspending its joint military exercises, noting something similar had been done in 1992 when the "Team Spirit" military exercise was suspended. Ri's idea surfaced in January 2015 as a formal North Korean proposal. A highly capable diplomat, Ri clearly understands the tension between North Korea's nuclear program and its ability to modernize its economy as well as the risks imposed by mounting Chinese influence.

- **The “how much is enough” question.** Virtually every country that has built a nuclear arsenal addresses the “how much is enough” question during the course of its development. For example, at the beginning of the Cold War, Washington's nuclear arsenal expanded dramatically to the point that it planned to build tens of thousands of weapons deployed on delivery systems ranging from intercontinental ballistic missiles (ICBMs) to jeeps. Those plans were drastically scaled back during the Kennedy administration, which formulated a new force-building plan based on answering the question of how much would be enough, taking into such considerations US deterrence policy, nuclear strategy, and targeting requirements. Other countries have addressed the same issue.

China, at the other extreme, for years has maintained what many would call a minimum nuclear deterrent, building just enough missiles and nuclear warheads to make a credible nuclear threat of response in case of attack. Pakistan, on the other hand, given its emerging strategy based on the threat of first use of nuclear weapons, has been developing a growing nuclear stockpile and a wide range of systems beginning at the battlefield level, to credibly execute such a threat.

North Korea's nuclear strategy and deterrent is still a work in progress, and therefore may be influenced not only by domestic considerations but also an evolving external security environment. Right now, it appears that the North is striving to build a nuclear deterrent able to execute an assured-retaliation strategy—in other words, to absorb an attack and still be able to respond in a manner that is unacceptable to its enemy. That requires survivable delivery systems such as mobile missiles as well as submarine-launched weapons. If the North decides to go beyond assured retaliation to a strategy of threatening early or first use—which makes some sense since, like Pakistan and NATO before it, Pyongyang faces an enemy with conventionally superior forces—that will require a more diversified nuclear weapons stockpile as well as delivery systems.

The Direction of Future US Policy

Confronted with a steadily deteriorating situation largely created by North Korea's WMD programs, a new administration will be faced with two policy choices. The first is essentially a China-centric policy that relies heavily on coaxing and occasionally strong-arming Beijing, Pyongyang's main ally, to help us secure our most important objective, the denuclearization of North Korea. History demonstrates that such an approach is doomed to failure, largely because China's national interests—with a top priority of maintaining a stable North Korea as a buffer state—are not the same as those of the United States. That reality and the poor overall state of US-Chinese relations mean that Beijing will never agree to put overwhelming

political and economic pressure on its ally that will force Pyongyang to give up its nuclear weapons but could also lead to instability. And even if it did put significant pressure on the North, an intensely nationalistic Pyongyang in all likelihood would never submit. In short, a China-centric approach's only value would be to allow a new administration to deflect what will likely be mounting blame if the security situation on the peninsula worsens.

The alternative is a policy of "strategic clarity," based on five elements: 1) a pragmatic reassessment of the dangerous developments in North Korea and how those dangers may grow during the new administration's term in office; 2) a clear understanding of how those growing dangers will affect US national interests in Asia and around the world; 3) a recognition that China's interests on the Korean Peninsula and in North Korea in particular are fundamentally different from those of the United States and its allies, although there may be some room for very limited cooperation; 4) a recognition of the tremendous although not unlimited resources the United States has at its disposal for managing and potentially resolving the growing challenge; and 5) an approach that seeks to protect American and allied interests against this growing threat through simultaneously deploying new political, security, economic, and other disincentives but also incentives needed to contain, mitigate, and eventually eliminate the challenges posed by Pyongyang.

The five pillars of this policy are:

- **Strengthening alliances in East Asia.** The foundation of our presence in Asia, while US alliances with South Korea and Japan are in good shape, complex and evolving security challenges in the region—particularly in North Korea—call for new levels of cooperation, both bilaterally and trilaterally. It will be essential for South Korea to make the necessary investments in its national-defense capabilities to meet its obligations under the counter-provocation plan as well as wartime contingency and collapse scenarios.
- **Enhancing US extended deterrence and reassuring allies.** The United States will need to ensure that its commitments remain credible even in the face of the growing North Korean threat.

This may require not only continued periodic demonstrations of its resolve—such as B 52 and B 2 flights over the Korean Peninsula—but also steps to strengthen the regional deterrence posture, including new conventional strike weapons and missile defenses. While increased consultation on nuclear planning will be essential, whether it will be sufficient to avoid strategic divergence remains unclear. Washington may also be confronted with unpalatable demands for a greater say in how US nuclear weapons may be used in defending its allies, similar to arrangements with NATO.

- **Understanding that the United States is the indispensable nation in dealing with North Korea.** Two US administrations have based US policy on the assumption that the path to solving the North Korea crisis runs through Beijing because of its economic and political ties with Pyongyang. That policy has reached a dead end. China's interests are fundamentally different from those of the United States and are unlikely to change. Moreover, in reality the United States and not China is the indispensable country in dealing with the North for our allies, for China, which argues that only Washington can resolve this problem directly with the North and for North Korea, which see the United States as the main threat and because it is still the only global superpower. There may be some overlap in interests between Washington and Beijing that could lead to limited cooperation, but the United States should move forward with initiatives that it believes will serve its national interests, regardless of Chinese views.
- **Strengthen sanctions but recognize their limits.** Washington should continue to push for stronger sanctions at the United Nations and enact whatever measures it feels are appropriate unilaterally, recognizing that Beijing will never support measures intended to generate the kind of pressure on North Korea that the United States and European Union mounted on Iran. Moreover, secondary sanctions by the United States that negatively affect China's businesses are unlikely to change Beijing's attitudes and could easily provoke Beijing to retal-

iate economically. China may support denuclearization, but its top priority is to maintain North Korea as a stable buffer against American influence in South Korea. Washington will have to understand that there are no sanction-related “magic bullets” for China or North Korea and that only incremental gains are possible in the sanctions area, such as promoting better implementation of UN sanctions. The United States might also use the threat of significant sanctions as a deterrent redline to drastic actions by North Korea, such as the transfer of nuclear weapons, technology, or know-how.

- **Conduct principled diplomacy with Pyongyang.** Whatever the risks associated with a new diplomatic initiative, they are less than those that come with allowing the current drift to continue. The main elements of a new approach would include: 1) getting inside the decision loop quickly to avoid letting external developments dramatically narrow US policy options; 2) choreographing the formal resumption of dialogue through “talks about talks” intended to make sure that Pyongyang will seriously address a process leading to denuclearization, as laid out in its July 7 government statement, and a possible package of confidence-building steps that may affect Pyongyang’s nuclear and missile programs and US–South Korean joint military exercises; 3) a transformative and transactional WMD negotiating agenda that will have to address head-on North Korea’s demand to replace the armistice with a peace regime as a sign of lessening tensions in the context of a step-by-step process starting with a freeze on its nuclear and missile programs and ending with denuclearization; 4) confidence-building talks to lessen the dangers of inadvertent escalation, part of which could address the continuing differences over the West Sea; 5) a transformative negotiation, part of which will be moving US-DPRK relations away from confrontation, that will allow the United States to pursue an agenda that seeks a process of gradual change in North Korea, including on the human rights front; 6) given the important substantive objectives for negotiations, the United States

should focus on achieving those objectives rather than fixating on, for example, resurrecting the Six-Party Talks, through whatever process can work best, making sure others are folded in depending on the issues to be addressed; and 7) setting a redline on the transfer of nuclear technology as well as take steps to enforce such a redline—for example, by working with our allies and friends to make sure strict systems of radiation monitoring and inspections are in place.

In this context, two of the steps mentioned above deserve further attention. First is the issue of whether the United States should insist on denuclearization as a goal in renewed dialogue or whether it should fall back and demand just a freeze, given the realities of Pyongyang's nuclear effort. While falling back to just insisting that North Korea freeze its nuclear weapons program would seem prudent, it is impractical and inadvisable. It is hard to imagine any US administration dropping that objective, if only for domestic political reasons, given the history of tense relations with North Korea. Second, dropping that objective could have extremely negative regional consequences, particularly with South Korea and Japan, where such a step would be seen as clear overt acceptance of North Korea as a nuclear-weapons state. Finally and perhaps most importantly, why fall back, given the fact that the North Koreans are willing to begin talks with the objective of denuclearization as outlined in their July 6 government statement? In that context denuclearization would remain a long-term objective agreed to by both sides.

Even more important, a fact missed by many regional political experts but not by those with experience in nuclear arms control and disarmament issues is that denuclearization, rather than happening overnight, will be a process. That's just a practical reality, once again because of the growing size of Pyongyang's program. Such a process would begin with a freeze and proceed through phases to rolling back Pyongyang's program and eventual elimination. While some might argue that this amounts to tacit acceptance of North Korea's nuclear-weapons status, maintaining that the ultimate objective of such a process is denuclearization not only provides public fireproof-

ing against such a claim, but it also has the virtue of being true.

Another issue that will have to be addressed is whether, like Iran, the DPRK would be allowed to pursue peaceful uses of nuclear energy in the context of eventually rejoining the NPT and accepting full-scope safeguards, or whether an agreement would go even further and incorporate the objectives of the 1992 North-South Denuclearization Declaration.

Second, the question arises of whether building a change agenda, and particularly steps on human rights, into negotiations interferes with progress on the peace and denuclearization front. Given the current high profile of these issues, that would seem unavoidable and desirable. However, two considerations should be kept in mind as a change agenda is pursued in the context of renewed diplomacy. First, even under the best of circumstances, the successful pursuit of a change agenda to reinforce and accelerate political, economic, and social trends already underway in the North is not going to produce results overnight. Change is only likely to come over years and perhaps generations. Second, pursuing a change agenda that seeks progress on addressing human rights concerns and other issues will require a delicate balancing act. On the one hand, pursuing such an agenda will need to avoid a “Cheneyesque” approach that draws a bright distinction between good and evil and that could threaten to overwhelm the more important security agenda. On the other hand, it is no longer possible for a number of reasons (or for that matter, desirable) to relegate the change agenda—and particularly human rights abuses—to the policy back seat.

In this context, it is worth considering a practical roadmap for encouraging progress with regard to our human rights concerns in the DPRK, starting with the “low-hanging fruit” rather than the most difficult challenges. For example, Pyongyang showed some willingness to consider some of the suggestions in the latest Universal Periodic Review at the UN Human Rights Council, a change from its past rejection of any criticism. That willingness should be probed and explored. Pyongyang has also shown that it is receptive to listening to concerns on issues such as the rights of the disabled, women, and children. Once again, these could be integrated into a

dialogue. Finally, another possibility would be discussions on overseas labor practices, given the North's reliance on forced labor abroad to earn hard currency. The purpose would be to push Pyongyang to adapt and conform to international standards as well as to join the International Labor Organization (ILO).

A change agenda will naturally be embedded in any new diplomatic initiative, for the simple reason that a key component of any dialogue will be to improve bilateral relations between the United States and North Korea as part of the broader effort to move away from confrontation and insecurity in the region. That, in turn, will create opportunities for the United States to press Pyongyang on the important issue of human rights and secure steps that address some of Washington's concerns. As part of this effort, we should also seek a coordinated approach with South Korea and Japan, in particular, since Japan remains seriously interested in resolving the issue of its citizens abducted by North Korea in the past.

Other opportunities for promoting a change agenda will present themselves in the context of renewed diplomacy. For example, while a new negotiation will focus on security concerns, economic issues—such as the provision of different forms of assistance to Pyongyang as well as the lifting of sanctions—will come into play, providing important tools to promote gradual change and increase ties with the international community. Successful security talks will also create a better atmosphere in which nongovernmental organizations can pursue humanitarian, development, and technical assistance; educational and professional training programs; and other programs inside the North. To be sure, Pyongyang will still resist efforts that it deems threaten regime cohesion. However, past experience has shown that while it will regulate these activities closely, the North will allow programs that enhance the livelihood of its people. In addition, parallel efforts should be made to promote information flow into North Korea, to help cultivate a greater ripeness for change.

In examining which of these options should be adopted, aside from assessing US national interests, a new administration is likely to also ponder its chances of success, particularly in mitigating and eventually eliminating the North Korean threat. Quite frankly, if a

new administration chooses the second course of action, even under the best of circumstances, achieving the ultimate objective of denuclearization could prove elusive. Success may have to be defined as stopping the growth of Pyongyang's WMD threat and dampening tensions in the region while continuing to sustain our alliances. However, choosing the first approach guarantees failure and will essentially give Pyongyang running room to continue to pursue its current course of action with both the threat and challenges to our interests mounting.

The Role of US-ROK Relations: Some Observations

A key component of formulating and implementing a new approach to North Korea will be consultation and coordination with US allies in the region, particularly South Korea. Seoul has in the past and will in the future play a critical role in every aspect of the strategy outlined above, from strengthening alliance relationships and extended deterrence to the pursuit of new diplomatic initiatives. That role will not only include the commitment of new fiscal resources in the case of military steps but also providing political support if new sanctions are pursued and participating directly in negotiations with North Korea when issues to be addressed affect its interests (such as replacing the armistice with a peace agreement), as well as taking part in North-South talks, which will be a key bilateral track in the dialogue process.

The current situation on the Korean Peninsula is obviously tense, and the prospects for improvement are not encouraging. Already at a low point at the end of President Lee Myung-bak's administration in February 2013, the North-South relationship has fallen further under Park Geun-hye. Whatever her rhetoric, President Park's approach has been poorly executed, baffling many veteran ROK officials with long experience dealing with the North. Following the North's nuclear test and subsequent space launch earlier this year, President Park has adopted a rigidly hard-line stance, abandoning her earlier "Dresden Initiative" to further inter-Korean cooperation on less sensitive areas such as humanitarian aid, pulling out

of the long-running joint Kaesong Industrial Complex project, and announcing her decision to deploy THAAD. Her stated priority now is North Korean denuclearization, but in the process she is also pushing policies that strike Pyongyang as a clear effort to bring down the regime. As of the writing of this chapter, it now seems unlikely that President Park will remain in office for her full term. Entangled in a mounting scandal over her relationship with her close friend, Choi Soon-sil, it appears that she will either be forced to resign or be impeached. The overall effect in the near term may be to give a new incoming US administration a monetary free hand in formulating a policy toward the North.

However, whoever replaces her, the North Korean nuclear issue is opening a Pandora's box of problems for the United States in terms of policy challenges from Seoul, ranging from increasing talk of the South building its own nuclear weapons to a growing view among both conservatives and liberals that US policy toward North Korea has been misguided and a failure. Following two conservative administrations in Seoul that have shared and helped feed Washington's perspective on North Korea, it is more likely than not that the next ROK administration will have a fundamentally different perspective on North Korea and China. Although a conservative government is still possible, it is much more likely that a progressive presidential candidate will emerge as things stand now. Either way, we are already entering the period when Korean politics will dominate Seoul's decision-making, a situation that Beijing and Pyongyang are well aware of and one in which North Korea and China, as they have in past Korean election years, will seek to drive wedges between the United States and Seoul. The possibility of change in South Korea and a rocky period in US-Korean ties should not be underestimated and will require considerable time, effort, and attention from Washington over the next year.

Much will also depend on policies pursued by the incoming Trump administration. While President-elect Trump made a number of widely varying statements during the 2016 campaign on both the alliance relationship with South Korea and on North Korea policy, the new administration's policy is likely to be a work in progress over

the coming months. Certainly, the more radical statements made by the incoming president—for example, asserting that maybe South Korea should acquire nuclear weapons—are likely to fall by the wayside once he enters office. On the issue of North Korea, once again his statements have varied—ranging from a willingness to meet Kim Jong-un to forcing China to solve the nuclear challenge. Exactly where the new administration will end up is uncertain, although given the current prevailing mood in the Washington foreign policy establishment, it is probably more than likely that a Trump administration will seek to enact crippling sanctions against Pyongyang and increase secondary sanctions against Chinese businesses and financial institutions, bringing about growing tensions with Beijing and having very little if no effect on the North.

If that proves to be the case, tensions with a new South Korean government bent on a more moderate course are inevitable, and how that will affect the alliance and long-term US-ROK relationship is also unclear. While Seoul has no other option than to continue to rely on the United States as its main ally, one possibility is a gradual erosion of that relationship on a number of fronts, particularly if a Trump administration pursues other initiatives such as seeking to pressure South Korea to shoulder a greater proportion of the defense burden. That erosion may take the form of diverging approaches to Pyongyang, increasingly close economic ties with Beijing, a gradual buildup of South Korean conventional military forces, a decreasing reliance on the United States to defend the South, and finally, a continuing “edging” strategy intended to give Seoul the option of rapidly deploying its own nuclear arsenal if necessary. The overall result may be an erosion of US influence in Northeast Asia and increasing instability in the region.

PART II

Assessing the Current Spiral of Escalation

CHAPTER 4

The Endgame Question: Where Is Escalation Leading Us, and Is It Worth It?

Alexandre Y. Mansourov

*Men will not look at things as they really are,
but as they wish them to be.*

— Niccolò Machiavelli, *The Prince*

Introduction

Forecasting North Korea's future—the endgame—may have little to do with sound intelligence analysis and much to do with effective communication of Western and ROK moral and policy preferences and public advocacy of their preferred courses of action. Intelligence alerts about dangerous trends alone will not help policy makers make good plans. Helping them to understand the context and believe in it are required to overcome natural skepticism about or outright opposition to North Korean actions. The challenge of obtaining acceptance is even greater when policy makers are certain in their beliefs, and wrong. It is almost impossible for any amount of intelligence analysis to erase the “flawed model” of North Korea in their minds.

Any storyteller is faced with a moral dilemma when it comes to North Korea. He or she can tell a fairy tale in which the forces of good—represented by “the peace-loving liberal democratic government of the Republic of Korea and its Western allies”—persevere, outsmart, and finally overcome the forces of evil embodied by “the war-mongering totalitarian regime of DPRK,” bringing freedom and prosperity to the people of the North through a long-yearned-for unification with their brethren in the South. In the West, everyone despises the North Korean dictator Kim Jong-un and cheers at this ending. Alternatively, one can tell a horror story in which “the North Korean villain and his brainwashed cohorts” prevail over good and innocent folks by deceit and violence, causing death and destruction. No one wants to hear this story. The analyst who tells it risks disgusting the public, upsetting the policy maker, and taking heat for spreading public misinformation and frustration.

All readers of our analysis have mind-sets. If we reach conclusions that support the current US policy toward North Korea, they are readily accepted. In contrast, analysis that contradicts current policy will most likely be ignored. Hence, there is a subtle pressure to conform analysis to policy. Policymakers may also twist or misconstrue intelligence assessments to fit a particular policy preference. We prefer our analysis to be challenged by our readers rather than ignored or misinterpreted.

Framing the Question

The North Korean leadership is committed to development on two fronts—economic modernization in parallel with the advancement of WMD programs (the so-called “byungjin” strategy)—in order to cement its power, guarantee regime survival, and safeguard national sovereignty and independence. Mounting international pressure, diplomatic isolation, and economic sanctions have so far failed to dissuade or deter it in its single-minded pursuit of nuclear weapons and strategic missile capabilities, as evidenced by dozens of short- and medium-range missile tests and two nuclear tests carried out in 2016 alone. On the contrary, the DPRK gov-

ernment strives to convince the world that “the US-intensified hostile policy, hideous nuclear threat, sanctions, and blackmail only resulted in making the DPRK gradually bolster its nuclear attack capabilities.”¹ Moreover, the North Korean Foreign Ministry openly ridiculed the “strategic patience” policy of the Obama administration as the “totally bankrupt DPRK policy, which only resulted in compelling the DPRK to increase its nuclear attack capabilities moment by moment,” while insisting that “Obama’s campaign to deny the DPRK’s strategic position as a legitimate nuclear weapons state is as foolish an act as trying to eclipse the sun with a palm.”² Even some influential US observers of Korean affairs call North Korea’s runaway nuclear program “the worst stain on the Obama pivot to Asia.”³

How can the international community get Pyongyang to step back from its current course of action, alter its strategic calculations, adjust its policy preferences, and change its developmental trajectory? Should the United States and its allies and partners respond to North Korea’s provocative behavior with further escalation—or attempt to negotiate their way out of this worsening conflict? This is emerging as the most important security issue for the US and ROK governments.

North Korea’s rapid nuclear breakout emboldened its young and untested leadership to break off the decades-old security commitments made by its predecessors and to issue clear and present threats of preemptive nuclear strikes against its perceived enemies. Why is Pyongyang escalating tensions? What underpins the “cult of the offensive” in Pyongyang, and what are the possible limitations and policy implications of “offensive realism” on the Korean Peninsula?

- 1 “Foreign Ministry Spokesman Blasts Anti-DPRK Invective of US Official,” *Korean Central News Agency*, September 9, 2016, accessed September 18, 2016, <https://kcnawatch.co/newstream/1473407435-463723260/foreign-ministry-spokesman-blasts-anti-dprk-invective-of-u-s-official/>.
- 2 “DPRK Foreign Ministry Spokesman Refutes Obama’s ‘Statement’ against Nuclear Warheads Explosive Test,” *Korean Central News Agency*, September 11, 2016, accessed September 18, 2016, www.nepaltoday.com.np/home/diplomacy_detail?id=1711.
- 3 Jae-soon Chang, “US Experts Call for Nonverbal, Real Consequences for NK Nuclear Test,” *Yonhap News*, September 9, 2016, accessed October 14, 2016, <http://english.yonhapnews.co.kr/focus/2016/09/09/49/1700000000AEN20160909007300315F.html>.

How far is Kim Jong-un willing to go? How seriously should we take these new developments, and what should we do about Kim's intransigence and belligerence next?

Three Factors Shaping North Korean Behavior

In the first few years, most experts were quick to dismiss the North Korean tests, threats, and warnings as a Potemkin village, typical of Pyongyang's grandstanding and rhetorical bluster. They argued that the North was bluffing to get attention and compel Washington and Seoul to return to the negotiation table on terms favorable to the North. But a series of later developments—the increasingly short intervals between nuclear and missile tests and the technical advances demonstrated during some of these tests—began to convince some observers to take the DPRK's accomplishments more seriously. The North appears to be inching closer to completing its nuclear-and-missile-development programs and finally acquiring operational nuclear weapons capabilities. Hence, some observers worry that Pyongyang's strategic calculus may also be changing. In particular, the North Korean leadership may be seriously contemplating an offensive military action against the South to expedite Korea's reunification on terms favorable to the North.

Three main factors drive the North Korean leadership under Kim Jong-un to reconsider its strategic calculus: 1) the increasing obsolescence and irrelevance of the Korean People's Army's (KPA) conventional deterrent capabilities and its pivot to nuclear and missile forces, 2) a growing fear of US-ROK attack, and 3) an opening window of opportunity to lock in the emerging strategic advantage by quickly achieving its strategic goals on acceptable terms.

First, the North Korean leadership increasingly fears that the KPA's aging and rusting conventional capabilities make the country less secure and invite aggression. The KPA Air and Anti-Air Force is doomed to lose any air war against the United States and its allies. Moreover, since the 2002 ROK-US alliance-transformation initia-

tives, including the Land Partnership Plan⁴ and redeployment of the Second Infantry Division,⁵ may have weakened the KPA's traditional long-range artillery deterrent.⁶

The Libyan War convinced North Korean military planners of the technological superiority of US-led air forces against any indigenous conventional air defense capabilities. The US Forces, Korea (USFK) can now attack KPA positions and other strategic targets inside the DPRK from the air with impunity. The KPA faces a “use it or lose it” dilemma over its strategic arsenal, pushing the North Korean political and military leadership to seriously contemplate a preemption of any US air strike. Consequently, the North Korean government asserts that “the only way of averting a war and defending peace in Korea is to increase in every way the military capabilities for self-defense *with the nuclear deterrence as a pivot*” (italics mine).

Second, the passage of punitive UN Security Council resolutions 2087, 2094, 2270, and 2321, publication of the UN Commission of Inquiry Report on North Korean Human Rights, and ongoing US-ROK joint military exercises have aggravated North Korean fears about a hostile intervention by the United States and its allies. Pyongyang is convinced that by intensifying international diplomatic pressure, economic sanctions, and psychological warfare, the United States is employing the same strategy against North Korea that it used against its enemies in the Balkans, Iraq, and Libya. That's why the Ministry of People's Armed Forces (MPAF) spokesman emphatically stated on March 5, 2013, that “the DPRK is neither the Balkans nor Iraq and Libya” and

4 Under the Land Partnership Plan (LPP) signed on 29 March 2002, the U.S. Forces Korea (USFK) and the government of the Republic of Korea agreed to consolidate 41 USFK troop installations and 54 small camps and support sites (241,984,560 sq. m) into 23 (initially) and then 16 enduring bases (83,140,870 sq. m) in 10 years.

5 In 2004, Seoul and Washington agreed to proceed in two stages to redeploy most of the US forces deployed in the so-called “kill box” near the inter-Korean demilitarized zone into two major hubs (central & southern) with easy access to air/sea lift capabilities along the West Sea littoral south of the Han River.

6 “DPRK FM Spokesman Slams Obama's Reckless Remarks,” *Korean Central News Agency*, September 8, 2016, accessed September 18, 2016, <https://nkaggregator.com/2016/09/08/dprk-fm-spokesman-slams-obamas-reckless-remarks21/>.

threatened “to counter the US imperialists with diversified precision nuclear strike means of Korean style.”⁷

The North Korean leaders believe that “the US is ‘intoxicated’ with ‘successful wars’ in Iraq, Afghanistan, and Libya” and assert that “the DPRK was forced against its will to develop a nuclear deterrent and now to take a stand and fight back in order to stop the encroachments of US imperialism.”⁸ They stress that “any country could not but be concerned about its fate when thinking of what the United States and the West did against Yugoslavia, Iraq, Afghanistan, etc.” They say that “the DPRK does not have enough electricity and food, but it opted for an underground nuclear test because it keenly realized that no one else but itself could provide it with security assurances.” They believe that had North Korea failed to acquire nuclear weapons, it would have been leveled like Yugoslavia and Iraq.⁹

In addition, they claim that “the anti-DPRK UNSC resolutions are reminiscent of the ‘Munich Pact,’ which was concluded in 1938, aiming to deprive a sovereign state of its territory.” According to Kim Ha-il, a researcher at the State Academy of Social Sciences quoted by the Korean Central News Agency (KCNA) on January 29, 2013, “the results of the ‘Munich Pact’ teach a lesson that one-step concession to hegemonic forces leads to one hundred-step concessions and to death in the long run.”¹⁰

The third factor that has North Korean leaders reconsidering their strategic calculus is that the acquisition of nuclear weapons may have solved their deteriorating security predicament and gave them a perception of invincibility made them appear invincible. In

7 “Spokesman for Supreme Command of KPA Clarifies Important Measures to Be Taken by It,” *Korean Central News Agency*, March 5, 2013, accessed October 14, 2016, www.kcna.co.jp/item/2013/201303/news05/20130305-21ee.html.

8 “KPA Supreme Command Spokesman’s Statement Encourages DPRK People,” *Korean Central News Agency*, March 6, 2013, accessed October 14, 2016, www.kcna.co.jp/item/2013/201303/news06/20130306-17ee.html.

9 “Senior Official of Russian Political Party Hails DPRK’s Nuclear Test,” *Korean Central News Agency*, March 1, 2013, accessed October 14, 2016, www.kcna.co.jp/item/2013/201303/news01/20130301-05ee.html.

10 “UN ‘Resolution’ Reminiscent of ‘Munich Pact’: Social Scientist,” *Korean Central News Agency*, January 29, 2013, accessed October 14, 2016, www.kcna.co.jp/item/2013/201301/news29/20130129-15ee.html.

his speech at the military parade held on April 15, 2012, Kim Jong-un for the first time ever said that “[m]ilitary technological supremacy is not a monopoly of imperialists anymore, and the time has gone forever when the enemies threatened and intimidated us with atomic bombs.” Less than a year later, on March 13, 2013, the spokesman of the Ministry of People’s Armed Forces took that message much further by asserting that “[a]n army of the nation and people possessed of nuclear weapons can always win a victory in the struggle against formidable enemies and reliably guarantee the grandeur and security of the country.”¹¹ These authoritative statements of official beliefs form the conceptual foundations for the revised KPA operational plans approved by Kim Jong-un; they are not propaganda rhetoric.

The DPRK leadership may now believe that, thanks to its acquisition of the capability to deliver “diversified precision nuclear strikes of Korean style,” the North can overwhelm a defending conventional force. Therefore, the KPA leadership may be convinced that the first one to strike on the Korean Peninsula will score victory over enemy forces in the near term.

In 2016 alone, on numerous occasions, Kim Jong-un showed off strategic rocket forces in order to convince his enemies of the KPA’s power to deliver “diversified precision nuclear strikes” (다종화된 정밀핵타격) over great distances by “smaller, lighter, and diversified nuclear capabilities” (소형화, 경량화, 다종화된 우리 핵억제력). In his statement on September 11, 2016, the North Korean foreign ministry spokesman insisted that “we will continue to take measures for increasing the nuclear force of the country in quality and in quantity to safeguard the dignity and the right to existence of the DPRK and ensure genuine peace from the US increasing threat of a nuclear war.”¹²

11 “Statement of a Spokesman for the Ministry of the People’s Armed Forces of the DPRK National Defense Commission,” *Korean Central News Agency*, March 13, 2013.

12 “DPRK Foreign Ministry Spokesman Refutes Obama’s ‘Statement’ against Nuclear Warheads Explosive Test,” *Korean Central News Agency*, September 11, 2016, accessed September 18, 2016, www.nepaltoday.com.np/home/diplomacy_detail?id=1711.

Checking Our Assumptions

Foreign experts believe that the North will not attack the South militarily for three main reasons: 1) the North Korean leadership is not suicidal; 2) the North Korean regime is rational and, therefore, can be deterred by the US nuclear umbrella and conventional military presence in the South; and 3) the North cannot mount a successful military attack without the blessing and backing of its main and sole ally, China, which no longer supports the North's provocations and opportunistic behavior.

First, I agree that the North Korean leadership is not suicidal, however, the North Korean regime knows its weaknesses and feels increasingly cornered; with its back against the wall and no face-saving way out, it might lash out. Why risk it all? Because everything the North Korean leadership holds dear is already at risk, in their judgment. As for the general population, their lives are already miserable and not about improve, and they know it. They may be willing to gamble on a violent reunification if it brings them a better quality of life in the long run.

Is Kim Jong-un a martyr? We do not know the answer to this question yet. But, we do know that he can be very obdurate and hard to dissuade from his preferred course of action, which may lead us into war against our wills. Kim is young and immature. He has not been tested by a real crisis yet. Nobody knows whether he has any "internal breaks" or not. Strategic arms are his toys of choice. He wants more and better toys, and we do not know yet whether he will simply show them off or whether he intends to play with them for real.

Kim Il-sung, too, was not suicidal, but he initiated the first Korean War because he was afraid of losing power to his more hawkish peers if he did not use every means possible to quickly reunify the country. Kim Jong-un wants to emulate his grandfather, which means he might also take a gamble on unification by military means.

Second, I agree that the North Korean leadership is rational, but under some circumstances it may be a rational choice for Pyongyang to preempt a US preemptive strike with its own nuclear attack, if

the North Koreans come to believe that a US strike is inevitable and annihilating. It could well be that the real question for them is not whether to attack but when.

Despite some reservations in Washington and Seoul, there is no doubt that Kim Jong-un is mentally stable. Although some of the North Korean rhetoric may sound crazy or bizarre, I consider it an intentional part of their deterrence strategy—the game of chicken—aimed at keeping their enemies guessing and at bay while trying to force them to swerve and abandon their preferred course of action. Kim Jong-un is not a “reckless maniac.”¹³ Rather, he is a spoiled child who has never been told no.

From Pyongyang’s perspective, the fact that the United States cannot be deterred by the North Korea’s nuclear status does not make the United States an irrational actor. In the same vein, the fact that the North Korean leadership appears to be undeterred by US nuclear capabilities does not make it irrational. If anything, the North Korean regime is inching toward the feeling that their nuclear capability is credible, and when that happens they may psyche themselves into believing that aggression is a better alternative than de-escalation. It is increasingly possible that, no matter the correlation of forces, one day Kim Jong-un will do something that Seoul and Washington will judge an act of war.

The North Koreans have convinced themselves that the United States will attack sooner or later. Serbia did not have nuclear weapons, but it came under the US-led NATO attack under some pretext invented by its enemies. The same excuse—“the right to protect”—can easily be applied to the North Korean case. Iraq did not have nuclear weapons, although Saddam pretended that he did to ward off his enemies, but he failed in his strategic deception-and-dissuasion campaign, and Iraq became the target of US attack. Although Libya disarmed unilaterally and gave up its weapons of mass destruction, it did not help Qaddafi to stave off the US-led NATO attack. The North Korean leaders saw what happened in the Balkans, Iraq,

¹³ Chris Graham and Julian Ryall, “North Korea Accused of ‘Maniacal Recklessness’ after Most Powerful Nuclear Test Yet,” *Telegraph*, September 9, 2016, accessed October 14, 2016, www.telegraph.co.uk/news/2016/09/09/north-korea-believed-to-have-carried-out-nuclear-test-after-smal/.

and Libya, and they repeatedly say it loud and clear that they will not let that happen to them.

Thus, the fundamental question for the North Korean leadership is not whether to strike first; it is about the timing of the offensive. The KPA can attack sooner, using a very limited arsenal of strategic arms but backed by national power, high morale and the population's loyalty. Or they can take some time to expand and improve their arsenal of strategic weapons, at the risk of degrading their national power, undermining public morale and loyalty to the regime, and weakening state resilience by intensifying international sanctions and embargoes, not to mention possible periodic punitive offensive actions by the hostile powers.

In other words, the North Korean leaders have to decide whether to attack with fewer WMDs earlier, when their national power is still intact and public support for the regime is high, or to take time and develop more and better WMDs to attack with a few more nuclear weapons and ICBMs when their national power has been weakened by international sanctions and periodic attacks and the domestic public's dissatisfaction with the regime has heightened. In my judgment, Kim Jong-un has not come up with any definitive answer yet. The canary in the coal mine is still alive.

Third, China obviously plays a paramount role in Korean security affairs, but I speculate that China's perceived abandonment of North Korea will be short-lived. However, it may actually push Pyongyang to attack Seoul sooner rather than later. Why? Because any hesitation and inaction in Pyongyang may allow the Chinese to use their economic and political influence to bully Kim, undermine the unity of the North Korean leadership, and subvert the North Korean population from inside.

One cannot rule out the possibility of Kim Jong-un thinking that he might be better served by presenting his Chinese backers with a *fait accompli* then asking them to help him negotiate a peaceful settlement to the renewed inter-Korean civil war or defend his construct of a reunified Korea against American reinvasion. War may be preferable to allowing the Chinese to slowly squeeze his regime out of power and replace it with a more pro-Beijing satellite.

Lee Hong Zhang, Vice-Roy of Imperial China, who prepared four drafts of the first Korean-American treaty, negotiated it with Admiral Robert Shufeldt and prodded recalcitrant Koreans to accept it in 1883, summarized traditional Korean-Chinese relations in his *Memoirs*:

With scarcely a tribute that was worthwhile in all these hundreds of years, Corea has ever been independent and even resentful of our influence or interests; but just as soon as trouble looms up on the horizon, from causes having their source either within or without the kingdom, she comes begging for help. And help has never been denied, for the people of the country are our people, and they share with us the ever-lasting dislike for the pigmy Nipponese, with their strutting ways and ignorant presumptions.¹⁴

This statement underscores a profound invisible bond in Korean-Chinese relations that is full of symbols, procedures, and tedious routines, but it's very important for both Korea and China and virtually impossible to break for endless historical, ideological, political, military security, economic, cultural, and other reasons.

“Spirit of the Offense” and Key Ingredients of a Successful KPA Offensive

Since the beginning of the current confrontation cycle, the North Korean media have repeatedly referred to the “spirit of the offense” as a key concept in Kim Jong-un’s military doctrine. The *Rodong Sinmun*, the Korean Worker’s Party’s official daily, has emphasized the Juch’e revolutionary origins of the “spirit of the offense,” grounded it in ancient and medieval classics of military theory, and headlined it with Kim Jong-il’s maxim “I love offense!” The North Korean media assert that Kim Jong-un’s “spirit of at-one-go offense” (단숨에의 공격정신) embodies his revolutionary heritage, including the

¹⁴ Alexandre Y. Mansourov, “North Korea Is Poised to Cross the Nuclear Rubicon: Will the Canary Die in the Mine?” *Institute for Corean-American Studies, Inc.*, April 23, 2003, accessed October 14, 2016, www.icasinc.org/2003/2003l/2003laym.html.

“spirit of offense of Mt. Paektu” (백두의 공격정신),^{15,16} a reference to Kim Il-sung’s belief in the power of the revolutionary offensive, and the “spirit of one-beats-a hundred offense” (일당백공격정신), a reference to Kim Jong-il’s belief in the power of the professional military offense. On February 6, 2013, *Rodong Sinmun* cited this passage from Sun Tzu’s *Art of War*: “Attack when the enemy is not ready for an attack; attack when the enemy is not contemplating an attack; attack after confusing the enemy.”¹⁷ On February 6, 2013, *Rodong Sinmun* also cited this passage from Carl von Clausewitz’s *On War*: “Since there is no precedent of winning a war by defense, there is a general tendency to regard defense with disdain, although it is a more solid form of warfare than offense.”¹⁸

In February 2013, *Rodong Sinmun* published a political essay titled “I Love Offense” (나는 공격을 좋아합니다).¹⁹ According to its author, in early January 1992, Kim Jong-il reportedly told his aides, “I love offense. Offense is the main form of battle. We need to arm our army and people with the spirit of the offense.”²⁰ Kim Jong-il also said “defense is necessary for offense,” and “without counter-offense, one will lose the war.”²¹ He added that “without the spirit of offense, one risks surrender in front of difficulties and defeat in war.”²²

15 *Rodong Sinmun*, February 11, 2010, 1.

16 *Rodong Sinmun*, May 26, 2010, 1.

17 “최초의 병서로 알려진 《손자병법》에도 적이 준비가 없을 때에 공격하라, 적이 뜻하지 않을 때에 공격하라, 적을 혼란시킨 뒤에 공격하라 등으로 공격에 대하여 언급되어있다.” See “나는 공격을 좋아합니다” [I like offense], *Rodong Sinmun*, February 6, 2013, 2.

18 “클라우제위츠의 《전쟁론》에도 《방어에 의하여 승리한 전례가 없으므로 일반적으로 방 경시하는 경향이 있으나 방어는 원래 공격보다 견고한 전투방식이라는 것을 놓쳐서는 안된다.》고 지적되어있다.” Ibid.

19 “존엄 높은 선군 조선의 선언,” *Rodong Sinmun*, February 24, 2013, 2.

20 “나는 공격을 좋아합니다. 전투방식에서도 기본은 공격입니다.” “군대와 인민이 공격정신으로 무장해야 한다.” See “나는 공격을 좋아합니다” [I like offense], *Rodong Sinmun*, February 6, 2013, 2.

21 “방어도 공격을 위하여 필요한 것이고 반공격을 하지 않으면 패하게 된다.” Ibid.

22 “공격정신이 없으면 난관앞에 겁을 먹고 주저하며 앉아뭇개다가 물러나게 된다고 하시면서 적과 싸워이기자고 해도 그렇고 경제건설에서 성과를 거두자고 해도 군대와 인민을 용감성과 대담성에 기초한 높은 공격정신으로 무장시켜야 한다.” Ibid.

In order to execute a decisive offensive strike, the North Korean military strategy emphasizes two preconditions: initial strategic *surprise* and *speed* of execution, aimed at presenting the United States and its allies with a *fait accompli* before the South can mobilize sufficient military power on its own or receive reinforcements from the United States to push back the KPA. To achieve strategic surprise, North Korea is likely to engage in a deception-and-denial campaign in the lead-up to the initial offensive. Kim Jong-il allegedly often cited Sun Tzu's dictum "Make noise in the west, but strike in the east." Missile strikes can guarantee a high speed of execution of offensive operations.

During Kim Jong-il's rule, North Korea pursued a set of limited war aims, including local battlefield victories in island-to-island warfare (I2I warfare) and naval clashes in the West Sea. Since Kim Jong-un's assumption of power, the North Korean regime appears to have expanded its war aims by emphasizing the pursuit of *total war aims*—national reunification on North Korean terms and defense of a reunified peninsula against US reinvasion.

In late October 2016, as the Choi Sun-sil scandal sparked a leadership crisis in Seoul, leading to the impeachment of President Park Geun-hye on December 9, 2016,²³ the North Korean propaganda machine ran special lectures for soldiers and residents to inform them of intensifying mass anti-Park rallies and predicted "early collapse" of the "corrupt anti-people regime" in the South while urging DPRK citizens to get ready "to achieve the great goal of national reunification."²⁴ This propaganda campaign also used to two historical antigovernment rebellions that led to confusion, national paralysis, and eventual regime change in the Republic of Korea—the April 19 Revolution in 1960 and the June 10 Democratic Uprising in 1987. The media harked back to Kim Il-sung's laments that these were missed opportunities for reunification, stressing that the North

23 Euan McKirdy, Paula Hancocks and K.J. Kwon, "South Korea's parliament votes to impeach President Park Geun-hye," *CNN*, December 9, 2016, accessed December 9, 2016, www.cnn.com/2016/12/09/asia/south-korea-park-geun-hye-impeachment-vote/.

24 Son Min Choi, "Claiming 'Imminent Collapse' of SK, NK Pushes Unification in Lectures," *Daily NK*, November 16, 2016, accessed November 16, 2016, www.dailynk.com/english/read.php?num=14191&cataId=nk01500.

should not squander this new chance to take advantage of the political chaos and leadership crisis in the South.²⁵

It is noteworthy that the North Korean military doctrine based on the concepts of preemption and total all-out war implies that the Korean People's Army not only would use nuclear weapons in a retaliatory strike but also would use the nuclear weapons first to counter an imminent, conventional US-ROK invasion. If the North Korean leadership decides that the enemy's conventional attack is imminent, it is unlikely to deliberate long about whether it is a limited action as punishment for some earlier provocation or a precursor to regime change. Pyongyang will likely assume the worst and rush to use the nuclear weapons out of fear of losing them to the allied preemption in the early hours of hostilities. The North Korean government is on the record as threatening to *preempt the allied preemption* if a military crisis erupts on the Korean Peninsula.

Prospects for Negotiations Are Remote

Since the onset of Kim Jong-un's rule at the end of December 2011, the security situation on the Korean Peninsula has been steadily deteriorating, turning from bad to worse. The DPRK's botched satellite launch on April 13, 2012,²⁶ undercut the initial diplomatic overtures between the new supreme leader and Washington²⁷ and killed the tentative Leap Day deal²⁸ between the new

25 Jong Sik Ahn, "North Korea Attempts to Incite Disorder in South with Coastal Live-Fire Exercise," *Daily NK*, November 15, 2016, accessed November 16, 2016, www.dailynk.com/english/read.php?num=14190&catald=nk03600.

26 Sang-hun Choe and Rick Gladstone, "North Korean Rocket Fails Moments after Lift-Off," *New York Times*, April 12, 2012, accessed October 14, 2016, www.nytimes.com/2012/04/13/world/asia/north-korea-launches-rocket-defying-world-warnings.html.

27 Andrew Quinn, "Insight: Obama's North Korean Leap of Faith Falls Short," *Reuters*, March 30, 2012, accessed October 14, 2016, www.reuters.com/article/us-korea-north-usa-leap-idUSBRE82T06T20120330.

28 On 29 February 2012, Washington and Pyongyang announced the so-called "leap day" agreement whereby the United States vowed to supply food aid in return for the DPRK's promise to declare a moratorium on uranium enrichment and missile testing and a return of IAEA inspectors to Yongbyon, bringing the parties back to the six-party talks in Beijing.

regime in Pyongyang and the Obama administration in February of that year.²⁹ Upon the North's successful satellite launch on December 12, 2012,³⁰ and the third nuclear test on February 12, 2013,³¹ the UN Security Council passed resolutions 2087 and 2094, respectively, on January 22 and March 7, 2013, condemning both tests and imposing tough new international sanctions on Pyongyang.^{32,33} In response, the DPRK formally withdrew from the six-party talks, abrogated the 1953 armistice agreement and 1991 nonaggression pact with the Republic of Korea, nullified the 1992 inter-Korean denuclearization agreement, shut down the KPA Panmunjom liaison mission, and cut off the Red Cross hotline.^{34,35,36} Following North Korea's fourth "thermonuclear" test on January 6, 2016,³⁷ and a successful satellite launch on February 7, 2016,³⁸ South Korea unilaterally shut down the Kaesong Indus-

- 29 Ankit Panda, "A Great Leap to Nowhere: Remembering the US–North Korea 'Leap Day' Deal," *The Diplomat*, February 29, 2016, accessed October 14, 2016, <http://thediplomat.com/2016/02/a-great-leap-to-nowhere-remembering-the-us-north-korea-leap-day-deal/>.
- 30 Jack Kim and Mayumi Negishi, "North Korea Rocket Launch Raises Nuclear Stakes," *Reuters*, December 12, 2012, accessed October 14, 2016, www.reuters.com/article/us-korea-north-rocket-idUSBRE8BB02K20121212.
- 31 David E. Sanger and Sang-hun Choe, "North Korea Confirms It Conducted Third Nuclear Test," *New York Times*, February 11, 2013, accessed October 14, 2016, www.nytimes.com/2013/02/12/world/asia/north-korea-nuclear-test.html?_r=0.
- 32 UN Security Council Resolution 2087, S/RES/2087. January 22, 2013, accessed October 14, 2016, www.refworld.org/docid/51f8cc144.html.
- 33 Victor Cha and Ellen Kim, "UN Security Council Passes New Resolution 2094 on North Korea," CSIS, March 7, 2013, accessed October 14, 2016, www.csis.org/analysis/un-security-council-passes-new-resolution-2094-north-korea.
- 34 "Statement of the Spokesman of KPA Supreme Command," *Rodong Sinmun*, March 6, 2013, 1.
- 35 "Statement of the Spokesman of DPK Ministry of Foreign Affairs," *Rodong Sinmun*, March 8, 2013, 2.
- 36 Sang-hun Choe, "North Korea Declares 1953 War Truce Nullified," *New York Times*, March 11, 2013, accessed October 14, 2016, www.nytimes.com/2013/03/12/world/asia/north-korea-says-it-has-nullified-1953-korean-war-armistice.html.
- 37 Euan McKirdy, "North Korea Announces It Conducted Nuclear Test," *CNN*, January 6, 2016, accessed October 14, 2016, www.cnn.com/2016/01/05/asia/north-korea-seismic-event/.
- 38 Ju-min Park and Louis Charbonneau, "North Korean Rocket Puts Object into Space, Angers Neighbors, US," *Reuters*, February 8, 2016, accessed October 14, 2016, www.reuters.com/article/us-northkorea-satellite-idUSKCN0VG00H.

trial Complex,³⁹ on February 10,⁴⁰ and the UN Security Council unanimously passed the much tougher and more punitive anti-DPRK sanctions resolution 2270, on March 2, 2016.⁴¹ As diplomatic and military tensions escalated, the DPRK carried out over a dozen and a half ballistic missile tests, including road-mobile and submarine-based medium-range missiles, as well as conducting the fifth nuclear test on September 9, 2016.⁴²

A series of successful missile and nuclear tests allowed Kim Jong-un to boast that “the US mainland and the operational theatre in the Pacific are now within the striking range of the KPA, no matter how hard the US tries to deny it”⁴³ and to threaten that “the KPA is now capable of hitting the heads of the South Korean puppet forces and the US imperialists anytime as we please.”⁴⁴ The KPA Supreme Command repeatedly threatened to launch a preemptive nuclear strike against South Korea and its allies in response to the US-ROK joint military exercises practicing precision strikes against the North Korean leadership and WMD targets. After a successful test-fire of a strategic submarine-launched ballistic missile on August 24, 2016,⁴⁵ Kim

39 Justin McCurry, “Seoul Shuts Down Joint North–South Korea Industrial Complex,” *Guardian*, February 10, 2016, accessed October 14, 2016, www.theguardian.com/world/2016/feb/10/seoul-shuts-down-joint-north-south-korea-industrial-complex-kaesong.

40 Sang-hun Choe, “South Korea to Shut Joint Factory Park, Kaesong, over Nuclear Test and Rocket,” *New York Times*, February 10, 2016, accessed October 14, 2016, www.nytimes.com/2016/02/11/world/asia/north-south-korea-kaesong.html.

41 UN Security Council, “Security Council Imposes Fresh Sanctions on Democratic People’s Republic of Korea, Unanimously Adopting Resolution 2270 (2016),” March 2, 2016, accessed October 14, 2016, www.un.org/press/en/2016/sc12267.doc.htm.

42 Sang-hun Choe and Jane Perlez, “North Korea Tests a Mightier Nuclear Bomb, Raising Tension,” *New York Times*, September 8, 2016, accessed October 14, 2016, www.nytimes.com/2016/09/09/world/asia/north-korea-nuclear-test.html.

43 “Kim Jong Un Guides Strategic Submarine Underwater Ballistic Missile Test-Fire,” *Korean Central News Agency*, August 25, 2016, accessed September 15, 2016, <https://kcnawatch.co/newstream/1472221858-93156933/kim-jong-un-guides-strategic-submarine-underwater-ballistic-missile-test-fire/>

44 Ju-min Park and Jack Kim, “North Korea Test-Fires Submarine-Launched Ballistic Missile,” *Yahoo*, April 23, 2016, accessed October 14, 2016, www.yahoo.com/news/north-korea-test-fires-submarine-launched-ballistic-missile-215107710.html

45 Ju-min Park and Jack Kim, “North Korea Fires Submarine-Launched Ballistic Missile toward Japan,” *Reuters*, August 24, 2016, accessed October 14, 2016, www.reuters.com/article/us-northkorea-missiles-idUSKCN10Y2B0.

asserted that “now the DPRK has in place all substantial means capable of standing up against the US nuclear hegemony” and declared that the DPRK would use its newly acquired nuclear-power status to “break the chains of sanctions, blockade, and pressure of the enemies.”^{46,47}

Pyongyang’s recalcitrance and steady progress toward becoming a nuclear weapons state compel the international community to reassess and possibly even overhaul its hard-line policy, which has not only failed to moderate the North Korean regime’s nuclear ambitions, let alone to freeze, degrade, and disable its nuclear capabilities, but also reduced room for Western maneuvering.

Yet despite such growing criticisms of the Western approach as “too lopsided” and skewed toward sanctions and military pressure, a resumption of negotiations seems to be hardly possible at this time. The West cannot give the DPRK what it wants: recognition as a nuclear power and a peace treaty. If Washington acquiesced to Pyongyang’s demands, it would be perceived as appeasement and a shameful capitulation of the world’s sole superpower to one of the Axis of Evil’s most aggressive states. Moreover, the United States’ Asian allies would lose trust in the credibility of US security commitments, which could damage the United States’ alliances and security partnerships around the world and prompt South Korea and Japan to beef up their own strategic deterrent capabilities, including independent nuclear options, thereby destabilizing Northeast Asia and resulting in region-wide conventional and nuclear arms races.⁴⁸

In turn, Pyongyang does not seem to be interested in returning to negotiations, despite numerous invitations and incentives from

⁴⁶ JH Ahn, “Pyongyang Will Break Chains of Sanctions and Rise, Says North Korea,” *NK News*, September 9, 2016, accessed October 14, 2016, www.nknews.org/2016/09/pyongyang-will-break-chains-of-sanctions-and-rise-says-north-korea/.

⁴⁷ “Kim Jong Un Guides Strategic Submarine Underwater Ballistic-Missile Test-Fire,” *Korean Central News Agency*, August 25, 2016, accessed September 15, 2016, <https://kcnawatch.co/newstream/1472221858-93156933/kim-jong-un-guides-strategic-submarine-underwater-ballistic-missile-test-fire/>.

⁴⁸ Shane Smith, “Implications for US Extended Deterrence and Assurance in East Asia,” US-Korea Institute at SAIS, November 2015, accessed October 14, 2016, <http://38north.org/wp-content/uploads/2015/11/NKNF-Smith-Extended-Deterrence-Assurance.pdf>.

its counterparts. With five nuclear tests completed by the fifth year into his rule, Kim Jong-un was feeling pleased with himself. He does not appear to have any interest in settling for anything less than the DPRK's admission into the exclusive clubs of nuclear weapons states and world space powers. With a nuclear big stick in his hands, he also sees no reason to back off from his country's long-standing demands that the United States withdraw its troops from South Korea and that Seoul terminate its military alliance with Washington, which the North Korean regime regards as "the source of perennial military danger and instability on the Korean Peninsula." It goes without saying that these demands are unacceptable to the United States and its allies.

Furthermore, significant opposition to negotiations and domestic political constraints exist in the United States, the Republic of Korea, and Japan. Although China and Russia voice official support for reengaging the North in nuclear talks, the growing divergence between their national interests and those of their Western counterparts is likely to block any meaningful progress in negotiations.

With its unilateral shutdown of the Kaesong Industrial Complex in February 2016, Seoul gave up its last serious economic and financial leverage vis-à-vis Pyongyang. The inter-Korean relationship is now hostile as ever, with absolutely no contact across the tense and heavily militarized border. The DPRK authorities gave up on hardline ROK President Park Geun-hye and refused to recognize her as a legitimate negotiating partner, seeking to capitalize on the growing political uncertainty and paralysis in the South.

Although Japan toughened its stance toward the DPRK since the passage of the UNSCR 2270 in March 2016, Prime Minister Shinzo Abe continued to display some interest in finding a solution to the abductees' problem; for domestic political reasons, he would probably not support an all-out escalation with the DPRK. That said, the trilateral US-Japan-ROK alliance makes Tokyo unlikely to show any independent initiative in reengaging Pyongyang.

Although China says it would like to see the Korean Peninsula denuclearized by international negotiations, the spotty record of the aborted six-party nuclear talks in Beijing gives pause to any-

one contemplating future talks with North Korea. Besides, Chinese efforts to cooperate are likely to be hard-pressed and lackluster because of China's long-standing commitments to its North Korean ally and persistent difficulties with Western powers, as evidenced by the simmering conflict in the South China Sea, the dispute with Japan over the Senkaku Islands, concerns about growing US efforts to counterbalance China, and the US-ROK decision to deploy the THAAD missile defense system despite Beijing's strong opposition. Beijing believes that the THAAD deployment poses a threat to Chinese strategic forces by allowing the United States to collect more intelligence about Chinese test firings of missiles, decoys, and warheads. The prospects for Chinese cooperation are further clouded by mounting challenges at home, ranging from a slowing economy to President Xi Jinping's increasingly authoritarian leadership style and intense political jockeying in the lead-up to the nineteenth CCP Congress in late 2017, which is expected to reveal the next generation of leaders.

Although Russia supports the resumption of multilateral talks aimed at the denuclearization of the Korean Peninsula, the Kremlin's surrogates have suggested that it might make sense to internationally recognize the DPRK as a nuclear weapons state in exchange for its agreement to limit its nuclear arms. The Obama administration made its opposition to any recognition of the DPRK nuclear status loud and clear. Although Moscow is willing to work with Washington on the North Korean nuclear problem, the broader, persistent Russian-US confrontation will likely prevent Moscow from joining a US-led Western coalition in any multilateral talks with the DPRK, impede the full implementation and strict enforcement of international sanctions against North Korea, and foment Moscow's opposition to any military action against Pyongyang.

But Escalation May Fall Short of Expectations

A careful reading of North Korea's authoritative media suggests a mixed rationale for its acquisition of nuclear weapons, ranging from self-defense to deterrence and even compellence. Its defensive

aspects are grounded in the North's view of the Korean nation as victim throughout its history, its analysis of the war-and-peace record in the nuclear age, Pyongyang's current threat perceptions, and Kim Jong-un's domestic political and economic considerations. Adding an offensive dimension to the North's nuclear posture, including its predisposition to proliferate, are the process of competitive legitimation and multifaceted confrontation with the South and Pyongyang's interest in cooperating with and aiding any country opposed to the United States.

More importantly, the survival of the ruling Kim family is intimately linked to the nuclear weapons development program, because nuclear arms help legitimize Kim Jong-un's hereditary rule, keep his foreign foes at bay, and allow the DPRK government to prop up the civilian economy with the resources previously spent on conventional weapons.⁴⁹ On March 31, 2013, Kim Jong-un said, "Powerful nuclear weapons guarantee peace, economic prosperity, and people's happy life."⁵⁰

If we accept the increasingly popular proposition that the North Korean regime will never give up its nuclear arsenal, then regime change in Pyongyang arguably offers the only way forward toward the denuclearization of the Korean Peninsula. There are many pathways to regime change in the North: covert action, military intervention, regime implosion, domestic collapse, leadership transition, and negotiated settlement.⁵¹ Whatever the point of departure, all exits must lead to Korean reunification—preferably by peaceful and democratic means, but, if necessary, by way of arms.^{52,53}

49 "A Nuclear Nightmare," *The Economist*, May 28, 2016, accessed October 14, 2016, www.economist.com/news/leaders/21699445-it-past-time-world-get-serious-about-north-koreas-nuclear-ambitions-nuclear.

50 This is what Kim said in Korean: "강위력한 핵무력우에 평화도 있고 부강번영도 있으며 인민들의 행복한 삶도 있습니다." See "Report on the March 2013 Plenum of WPK Central Committee," *Rodong Sinmun*, April 1, 2013, 1.

51 David Maxwell, "The North Korean Threat: Where Do We Go from Here?" *Vocativ*, February 12, 2016, accessed October 14, 2016, www.vocativ.com/283367/the-north-korean-threat-where-do-we-go-from-here/.

52 David Maxwell, "Should the United States Support Korean Unification and if So, How?" *International Journal of Korean Studies* XVIII, no. 1 (Spring 2014): 139–156.

53 Victor Cha, "Five Theories of Korean Unification," *Beyond Parallel*, June 30, 2016, accessed October 14, 2016, <http://beyondparallel.csis.org/5-theories-of-unification/>.

The “party of war” advances a number of arguments in support of immediate military action to put down Kim Jong-un’s strategic challenge. The hawks argue that North Korea’s rapidly advancing nuclear and missile capabilities present a “clear and present danger” to the security of the United States and its allies,⁵⁴ thereby making imperative precision strikes against the North’s WMD assets.^{55,56} The militant defenders of human rights urge immediate “humanitarian intervention” to save lives and stop human rights abuses in the North, citing the so-called international “right to protect” and “responsibility to intervene.”^{57,58,59} The neocons advocates of the “euthanasia” approach, who regard the hermit kingdom as a cancer carrier at the final stage of disease, believe that it is time to kill the terminally ill patient in order to relieve the country and region from more pain and suffering.⁶⁰ Many institutionalist hard-liners insist that we have not tried real escalation yet (like imposing an oil embargo, total naval-and-air blockade, and tough secondary sanc-

- 54 Ashton B. Carter and William J. Perry, “The Case for a Preemptive Strike on North Korea’s Missiles,” *Time*, July 8, 2006, accessed October 14, 2016, <http://content.time.com/time/world/article/0,8599,1211527,00.html>.
- 55 David Maxwell, “A Preemptive Strike on North Korea?” *War on The Rocks*, July 16, 2013, accessed October 14, 2016, <http://warontherocks.com/2013/07/a-preemptive-strike-on-north-korea/>.
- 56 Chad O’Carroll, “US Should Consider Striking North Korea—Former CIA Chief (Preemptive Strike Plans “Ought to Be on the Agenda for Very Serious Consideration),” *NK News*, June 24, 2013, accessed October 14, 2016, www.nknews.org/2013/06/u-s-should-consider-striking-north-korea-former-cia-chief/.
- 57 Andrew Carr, “A Case for Humanitarian Intervention in North Korea,” *ONLINE Opinion*, November 20, 2010, www.onlineopinion.com.au/view.asp?article=11287.
- 58 Sylvia Kim, “Where Is Our Responsibility to Protect the North Korean People?” *The Huffington Post*, August 24, 2015, accessed October 14, 2016, www.huffingtonpost.com/sylvia-kim/responsibility-to-north-korea_b_8028728.html.
- 59 Robert Park, “Responsibility to Protect in North Korea,” *Harvard International Review*, December 7, 2011, accessed October 14, 2016, <http://hir.harvard.edu/responsibility-to-protect-in-north-korea/>.
- 60 Pascal-Emmanuel Gobry, “The Case for Invading North Korea,” *The Week*, January 7, 2015, accessed October 14, 2016, <http://theweek.com/articles/441214/case-invading-north-korea>.

tions, etc.).^{61,62} Conspiracy theorists argue that military escalation is needed to strengthen the US-ROK-Japan trilateral alliance of maritime powers in light of the growing strategic challenges from rising China and recalcitrant Russia. Lastly, in a display of imperial hubris, some hardcore realists demand military action just because we can do it, and we will win without doubt, so let's get it over with once and for all.

The "party of peace" makes a very strong case against military escalation, citing potentially high human costs and tremendous destruction of infrastructure that are likely to ensue from any use of military force on the peninsula.⁶³ They predict enormous damages to regional economies,⁶⁴ unwanted regional spillovers (refugee flows, illegal flows of arms into and out of the conflict zone, a rise in transborder criminality, uncontrolled WMD proliferation, etc.), and destabilization of Northeast Asia as a result of the resumption of armed conflict in Korea.⁶⁵ They argue that radical revolutions tend to cause much more pain than incremental reforms.⁶⁶ They urge the party of war to let other means of dissuasion and compellence (sanctions and pressure) work their way through and advocate a mature and prudent consideration of the possible downsides of

- 61 Joshua Stanton, "North Korea, Secondary Sanctions, Tertiary Impacts, and the Coming Death Spiral," *FreeKorea.us*, October 14, 2016, accessed October 14, 2016, <http://freekorea.us/2016/10/14/north-korea-secondary-sanctions-tertiary-impacts-and-the-coming-death-spiral/>.
- 62 Sung-Yoon Lee and Joshua Stanton, "How to Get Serious with North Korea," *CNN*, January 15, 2016, accessed October 14, 2016, www.cnn.com/2016/01/15/opinions/lee-stanton-north-korea-sanctions/index.html.
- 63 Jeremy Bender, "Here's the Kind of Damage North Korea Could Do if It Went to War," *Business Insider*, August 26, 2015, accessed October 14, 2016, www.businessinsider.com/damage-north-korea-could-do-if-it-went-to-war-2015-8.
- 64 Rick Newman, "How a Second Korean War Would Harm the US Economy," *US News*, April 3, 2013, accessed October 14, 2016, www.usnews.com/news/blogs/rick-newman/2013/04/03/how-a-second-korean-war-would-harm-the-us-economy.
- 65 Robert E. Kelly, "The Ultimate Nightmare: Why Invading North Korea Is a Really Bad Idea," *National Interest*, January 30, 2015, accessed October 14, 2016, <http://nationalinterest.org/blog/the-buzz/the-ultimate-nightmare-why-invading-the-north-korea-really-12157>.
- 66 Claire Chaeryung Lee, "An Interview with David Kang: The New Sanctions Regime against North Korea and Its Implications for US Policy," *The National Bureau of Asian Research*, March 17, 2016, accessed October 14, 2016, <http://nbr.org/research/activity.aspx?id=658>

war.^{67,68} They insist that we have to give dialogue and multilateral cooperation another chance,^{69,70} reminding us of the importance of respect for state sovereignty and noninterference in domestic affairs of other states.⁷¹ Lastly, some cynics suggest that we should let North Korea decay in its own rotten stew: it will implode on its own sooner or later without outside intervention.⁷²

In the absence of negotiations, all signs indicate that the US-led international community ought to prepare for further escalation of tensions, a regional arms race, and possible all-out confrontation with the DPRK. Kim Jong-un's regime appears to be undeterrable, and any offer of negotiation may only prompt it to redouble its efforts to build its nuclear program or even demonstrate it.

In the wake of the DPRK's fifth nuclear test on September 9, 2016, the United States reiterated its commitment to defend South Korea with all possible measures, including extended nuclear deterrence, and it decided to augment its strategic assets around the Korean Peninsula in order to increase military pressure on the North Korean regime.⁷³

- 67 Joseph DeThomas, "Reality Check on North Korean Sanctions," *38 North*, January 21, 2016, accessed October 14, 2016, <http://38north.org/2016/01/jdethomas012116/>.
- 68 Katharine H.S. Moon, "It's Groundhog Day with North Korea," Brookings, February 8, 2016, accessed October 14, 2016, www.brookings.edu/blog/order-from-chaos/2016/02/08/its-groundhog-day-with-north-korea/.
- 69 Jane Harman and James Person, "The US Needs to Negotiate with North Korea," *Washington Post*, September 30, 2016, accessed October 14, 2016, www.washingtonpost.com/opinions/global-opinions/the-us-needs-to-negotiate-with-north-korea/2016/09/30/c1f0123e-85b2-11e6-92c2-14b64f3d453f_story.html?utm_term=.ab4df98b5584.
- 70 Josh Rogin, "Inside the Secret US–North Korea 'Track 2' Diplomacy," *Washington Post*, August 28, 2016, accessed October 14, 2016, www.washingtonpost.com/opinions/global-opinions/inside-the-secret-us-north-korea-track-2-diplomacy/2016/08/28/ef33b2d4-6bc0-11e6-ba32-5a4bf5aad4fa_story.html?utm_term=.91067e3455af.
- 71 Robert Carlin, "North Korea Said It Is Willing to Talk about Denuclearization... but No One Noticed," *38 North*, July 12, 2016, accessed October 14, 2016, <http://38north.org/2016/07/rcarlin071216/>.
- 72 Harry Kazianis, "Why Invading North Korea Would Be Insane," *The Week*, January 16, 2015, accessed October 14, 2016, <http://theweek.com/articles/532678/invading-north-korea-insane>.
- 73 Joint Communiqué of the Forty-Eighth US-ROK Security Consultative Meeting, October 20, 2016, accessed October 14, 2016, www.defense.gov/Portals/1/Documents/pubs/USROKSecurityJointCommunique2016.pdf.

These include the massive B 52 strategic bombers,⁷⁴ based in Guam and capable of carrying nuclear weapons, powerful B 1B Lancer bombers,⁷⁵ capable of carrying the largest payload of bombs and missiles in the US Air Force inventory, F 22 strike fighters,⁷⁶ the nuclear-powered attack submarines USS *Columbus*,^{77,78} and USS *Mississippi*,^{79,80} and the USS *Ronald Reagan*,⁸¹ a Nimitz-class nuclear-powered aircraft carrier, as well as the expedited deployment of two Terminal High Altitude Area Defense (THAAD) batteries.^{82,83} But many ROK experts are concerned that these assets won't reach the peninsula in time, if needed: the B 52 and B 2 strategic bombers are

- 74 Tony Munroe and Jack Kim, "US Flies B-52 over South Korea after North's Nuclear Test," *Reuters*, January 11, 2016, accessed October 14, 2016, www.reuters.com/article/us-northkorea-nuclear-idUSKCN0UN0Y420160111.
- 75 Brad Lendon, "US B-1 Bombers Fly over South Korea in Show of Force," *CNN*, September 13, 2016, accessed October 14, 2016, www.cnn.com/2016/09/12/politics/us-air-force-bombers-korea/.
- 76 "US Flies F-22 Jets over South Korea in Show of Force against the North," *Guardian*, February 17, 2016, accessed October 14, 2016, www.theguardian.com/world/2016/feb/17/us-f22-jets-south-korea-air-force-north-seoul-flyover.
- 77 "Nuclear-Powered US Submarine Arrives in S. Korea," *China Daily*, March 3, 2014, accessed October 14, 2016, www.chinadaily.com.cn/world/2014-03/03/content_17318859.htm.
- 78 The Pearl Harbor-based USS *Columbus*, a Los Angeles-class submarine, is a seven-thousand-ton submarine commissioned in 1993. It is loaded with Tomahawk cruise missiles with a range of some 3,100 km and Harpoon antisubmarine missiles. See "USS *Columbus* (SSN-762)," *Wikipedia*, accessed September 19, 2016, [https://en.wikipedia.org/wiki/USS_Columbus_\(SSN-762\)](https://en.wikipedia.org/wiki/USS_Columbus_(SSN-762)).
- 79 The Pearl Harbor-based USS *Mississippi* (SSN 782), commissioned in 2012, is one of the most advanced submarines in the world; it is equipped with torpedoes and Tomahawk cruise missiles. See "USS *Mississippi* (SSN-782)," *Wikipedia*, accessed September 18, 2016, [https://en.wikipedia.org/wiki/USS_Mississippi_\(SSN-782\)](https://en.wikipedia.org/wiki/USS_Mississippi_(SSN-782)).
- 80 Kim Gamel, "N. Korea Calls Arrival of Nuclear-Powered US Submarine a Direct Threat," *Stars and Stripes*, June 17, 2016, accessed October 14, 2016, www.stripes.com/news/n-korea-calls-arrival-of-nuclear-powered-us-submarine-a-direct-threat-1.415057.
- 81 Kim Gamel, "Joint Drills Kick Off in S. Korea ahead of *Reagan* Aircraft Carrier's Arrival," *Stars and Stripes*, October 9, 2016, accessed October 14, 2016, www.stripes.com/news/joint-drills-kick-off-in-s-korea-ahead-of-reagan-aircraft-carrier-s-arrival-1.433375.
- 82 Denny Ruelos, "US Deployment of THAAD Antimissile System to South Korea Expedited," *Newsline*, September 28, 2016, accessed October 14, 2016, <https://newsline.com/u-s-deployment-of-thaad-anti-missile-system-to-south-korea-expedited/>.
- 83 Michael Casey, "Ignore China and Deploy THAAD to South Korea," *National Interest*, April 17, 2016, accessed October 14, 2016, <http://nationalinterest.org/feature/ignore-china-deploy-thaad-south-korea-15810>.

based, respectively, at the Andersen Air Base in Guam and at the Whiteman Air Force Base in Missouri, nuclear attack submarines are based in Pearl Harbor, and the Ronald Reagan aircraft carrier group is homeported in Yokosuka Naval Base in Japan. ROK observers contend that these assets cannot be effective unless they are permanently stationed at the US bases on the peninsula.⁸⁴ Besides, the THAAD system won't be deployed until the end of 2017 at the earliest.

The Park Geun-hye administration announced three-layered autonomous countermeasures to be deployed by the South Korean military, in addition to the USFK moves.⁸⁵ The first of three levels is the so-called "Kill Chain" designed to detect imminent missile launches from the North and to strike the sources before launches.⁸⁶ The second is the Korean Air Missile Defense (KAMD) system, which is designed to shoot down incoming missiles in midair.⁸⁷ The third level is based on the so-called "Korea Massive Punishment and Retaliation" (KMPR) plan, which involves concentrated missile strikes and air raids against command-and-control centers and leadership targets in Pyongyang.⁸⁸ The KMPR stipulates a massive preemptive strike aimed at "wiping Pyongyang off the face of the earth," as a senior official at the ROK Joint Chiefs of Staff put it.⁸⁹

84 Myo-ja Ser, "Bring Back US Nukes, Says Blue House Report," October 14, 2016, *Korea JoongAng Daily*, accessed October 14, 2016, <http://koreajoongangdaily.joins.com/news/article/Article.aspx?aid=3024895>.

85 "ROK and US Defense Ministries Held KIDD to Discuss Countermeasure against NK WMD Threat," *APEX*, September 12, 2016, accessed October 14, 2016, www.apexupdate.com/read/543659-s-korea-us-allies-promise-to-strengthen-countermeasures-against-n-k.

86 Byong-su Park, "South Korean Military Announces Response to North Korea's Two-Track Approach," *Hankyoreh*, May 10, 2016, accessed October 14, 2016, http://english.hani.co.kr/arti/english_edition/e_northkorea/743195.html.

87 Kukil Bora, "South Korea Seeks Indigenous Missile Defense System to Deal with North, Raises 2017 Defense Budget," *International Business Times*, August 30, 2016, accessed October 14, 2016, www.ibtimes.com/south-korea-seeks-indigenous-missile-defense-system-deal-north-raises-2017-defense-2409128.

88 Min-sik Yoon, "Allies to Step Up Military Measures against NK," *Korea Herald*, September 12, 2016, accessed October 14, 2016, www.koreaherald.com/view.php?ud=20160912000887.

89 "Pyongyang Will Be Ashes' South Korea to Punish Kim Jong Un with Massive Missile Attack," *Arez.us*, September 12, 2016, accessed October 14, 2016, <http://arez.us/news/%E2%80%98Pyongyang-will-be-ashes%E2%80%99-South-Korea-to-PUNISH-Kim-Jong-un-with-massive-missile-attack>.

But many military experts question the effectiveness of the proposed countermeasures because designs for Kill Chain, KAMD, and KMPR will not be completed until the mid-2020s, leaving the ROK defenses vulnerable for another decade. Besides, they argue that the conventional weapons deployed by the ROK military won't be able to penetrate and destroy the KPA's hardened facilities hidden in underground bunkers.

At the same time, the ROK government stepped up its diplomatic and propaganda offensives. In mid-September 2016, ROK foreign minister Yun Byung-se began to tell his foreign counterparts that the North's fifth nuclear test was as grave as the al-Qaida attack on September 11, 2001, in that it had damaged the South's national security and shaken the psyche of the South Korean people.⁹⁰ And, as much as the US perception of terrorism changed after the 9/11 attacks, so should the world's perception of North Korea's nuclear program change after its September 9, 2016, nuclear test. Foreign Minister Yun went as far as asking other foreign officials whether their countries stood with the ROK or sided against it⁹¹ and calling for the expulsion of the DPRK from the United Nations.⁹² In an unprecedented move, on October 1, 2016, President Park publicly urged the North Korean people to abandon their homeland and defect en masse to the South where they would find freedom and prosperity.⁹³ The WPK official newspaper *Rodong Sinmun* swiftly condemned Madam Park's appeal and accused her of "inciting violent conflict."⁹⁴

90 "S. Korea's FM Says Pyongyang's Fifth Nuke Test Tantamount to 9/11 Attack," *Yonhap News*, October 2, 2016, accessed October 14, 2016, <http://english.yonhapnews.co.kr/news/2016/10/02/0200000000AEN20161002000800315.html>.

91 "ROK Questions DPRK's UN Membership," *Associated Press*, September 21, 2016, accessed October 14, 2016, www.chinadailyasia.com/asia/2016-09/21/content_15498546.html.

92 David Brunnstrom, "South Korea Says Time to Reconsider North Korea's UN Membership," *Reuters*, September 22, 2016, accessed October 14, 2016, www.reuters.com/article/us-un-assembly-southkorea-northkorea-idUSKCN11T04N.

93 Byong-su Park, "Pres. Park Calls on North Koreans to Defect to 'the Land of Freedom,'" *Hankyoreh*, October 3, 2016, accessed October 14, 2016, http://english.hani.co.kr/arti/english_edition/e_northkorea/763868.html.

94 "North Korea Denounces South Korea's Park Geun-hye's Call for Defections," *UPI*, October 3, 2016, accessed October 14, 2016, www.headlines-news.com/2016/10/04/1873819/north-korea-denounces-south-korea-park-geun-hyes-call-for-defections.

As the international community learned about the unprecedented role that President Park's longtime confidante Choi Sun-sil played in her personnel management, policy speeches, and decisions about her policy toward the North, in early November 2016, Pyongyang condemned Madam Park for provoking war and sacrificing inter-Korean relations on the altar of her cult of "Eternal Life" upon instruction from her shamanistic "Rasputin in the skirt."

North Korea's strategic breakout has caught the ROK political and military establishment completely by surprise. Many South Korean observers, who discounted North Korean nuclear and missile advances in the past, now call for very aggressive military plans to destroy not just much of Pyongyang⁹⁵ but all of North Korea in order to prevent the North Korean leadership from threatening the South, its people, and their way of life.⁹⁶ They demand that the Blue House "draw the red line" by declaring the potential sixth nuclear test a *casus belli* justifying all-out war against the North.⁹⁷ To justify their newfound thirst for blood and total destruction, they point to the North's threats "to transform Seoul into a sea of fire" and "to bomb all of South Korea into the Stone Age." But, more importantly, they argue that if South Korea attempts to kill Kim Jong-un, it cannot afford to miss because the repercussions of botching such a mission would be horrendous for the South.⁹⁸ Any political-military strategy aimed at forced regime change or unification against the will of the North Korean leadership might compel Pyongyang to use every means at its disposal in self-defense, including nuclear

95 "S. Korea Unveils Plan to Raze Pyongyang in Case of Signs of Nuclear Attack," *Yonhap News*, September 11, 2016, accessed October 14, 2016, <http://english.yonhapnews.co.kr/northkorea/2016/09/11/65/0401000000AEN20160911000500315E.html>.

96 Vishakha Sonawane, "North Korea-South Korea War? Seoul Planning to Annihilate Pyongyang in Case of Nuclear Attack Signs, Report Says," *International Business Times*, September 11, 2016, accessed October 14, 2016, www.ibtimes.com/north-korea-south-korea-war-seoul-planning-annihilate-pyongyang-case-nuclear-attack-2414218.

97 John Lee, "South Korea and the US Must Be Prepared to Hit Back at Pyongyang," *NK News*, September 12, 2016, accessed October 14, 2016, www.nknews.org/2016/09/south-korea-and-the-u-s-must-be-prepared-to-hit-back-at-pyongyang/.

98 *Ibid.*

weapons. Attempted regime change might provoke a nuclear war on the Korean Peninsula.

Some Western analysts argue that the US-ROK alliance can pursue a limited war in Korea by limiting its policy objectives, restricting the military assets to be used, and restraining its military actions.⁹⁹ But it is hard to see how US-ROK precision strikes against the North's WMD assets or leadership, let alone a foreign military intervention, would not lead to an outbreak of total war, including nuclear exchanges, guerrilla insurgency, and a possible civil war, inviting Chinese and Russian military interventions and causing a repartitioning of the Korean Peninsula along new lines.

Conclusion

I do not want to sound alarmist, but we are set on a trajectory that is potentially very dangerous and destructive. We know what happened in the Balkans, Iraq, Libya, and Syria, and how much destruction and human suffering took place. Because of the possible use of WMDs on the Korean Peninsula, the human cost and physical destruction could be exponentially higher. Are we ready and willing to fight a second Korean War with nuclear arms?

We all have the reasonable desire to avoid the “blame game.” The consequences of intelligence failure to predict either the collapse of the North Korean regime or the outbreak of nuclear war in Korea would be enormous. Policy makers abhor surprises. They want to be alerted about developing threats and emerging opportunities that might affect their plans. The purpose of this chapter is to explore the main drivers of conflict escalation and de-escalation on the Korean Peninsula. Without attempting to prescribe policy, this chapter outlines possible answers to the big question. That is, if we can no longer kick the proverbial can down the road and leave it to future generations to resolve the North Korean problem, what is the most feasible way forward now?

⁹⁹ Van Jackson and Hannah Suh, “The Biggest Myth about North Korea,” *National Interest*, June 9, 2015, accessed October 14, 2016, <http://nationalinterest.org/feature/the-biggest-myth-about-north-korea-13290>

This chapter attempts to give both analysts and policy makers a better understanding of the degree and nature of uncertainty surrounding developments in North Korea, urging them to pay closer attention to the disconfirming facts as an antidote to wishful thinking and cherry picking. We need to moderate our expectations, exercise caution, and keep open minds about what we can expect to see on the Korean Peninsula.

REFERENCES

- Ahn, J. H. "Pyongyang Will Break Chains of Sanctions and Rise, Says North Korea." *NK News*, September 9, 2016. Accessed October 14, 2016. www.nknews.org/2016/09/pyongyang-will-break-chains-of-sanctions-and-rise-says-north-korea/.
- Ahn, Jong Sik. "North Korea Attempts to Incite Disorder in South with Coastal Live-Fire Exercise." *Daily NK*, November 15, 2016. Accessed November 16, 2016, www.dailynk.com/english/read.php?num=14190&cataId=nk03600.
- APEX*. "ROK and US Defense Ministries Held KIDD to Discuss Countermeasure against NK WMD Threat." September 12, 2016. Accessed October 14, 2016. www.apexupdate.com/read/543659-s-korea-us-allies-promise-to-strengthen-countermeasures-against-n-k.
- Arez.us*. "Pyongyang Will Be Ashes' South Korea to Punish Kim Jong-un with Massive Missile Attack." September 12, 2016. Accessed October 14, 2016. <http://arez.us/news/%E2%80%98Pyongyang-will-be-ashes%E2%80%99-South-Korea-to-PUNISH-Kim-Jong-un-with-massive-missile-attack>.
- Associated Press*. "ROK Questions DPRK's UN Membership." September 21, 2016. Accessed October 14, 2016. www.chinadailyasia.com/asia/2016-09/21/content_15498546.html.
- Bender, Jeremy. "Here's the Kind of Damage North Korea could do if it went to war." *Business Insider*, August 26, 2015. Accessed October 14, 2016. www.businessinsider.com/damagenorth-korea-could-do-if-it-went-to-war-2015-8.
- Bora, Kukil. "South Korea Seeks Indigenous Missile Defense System to Deal with North, Raises 2017 Defense Budget." *International Business Times*, August 30, 2016. Accessed October 14, 2016. www.ibtimes.com/south-korea-seeks-indigenous-missile-defense-system-deal-north-raises-2017-defense-2409128.

- Brunnstrom, David. "South Korea Says Time to Reconsider North Korea's UN Membership." *Reuters*, September 22, 2016. Accessed October 14, 2016. www.reuters.com/article/us-unassembly-southkorea-northkorea-idUSKCN11T04N.
- Carlin, Robert. "North Korea Said It Is Willing to Talk about Denuclearization...but No One Noticed." *38 North*, July 12, 2016. Accessed October 14, 2016. <http://38north.org/2016/07/rcarlin071216/>.
- Carr, Andrew. "A Case for Humanitarian Intervention in North Korea." *ONLINE Opinion*, November 20, 2010. Accessed October 14, 2016. www.onlineopinion.com.au/view.asp?article=11287.
- Carter, Ashton B., and William J. Perry. "The Case for a Preemptive Strike on North Korea's Missiles." *Time*, July 8, 2006. Accessed October 14, 2016. <http://content.time.com/time/world/article/0,8599,1211527,00.html>.
- Casey, Michael. "Ignore China and Deploy THAAD to South Korea." *National Interest*, April 17, 2016. Accessed October 14, 2016. <http://nationalinterest.org/feature/ignore-china-deploythaad-south-korea-15810>.
- Cha, Victor. "Five Theories of Korean Unification." *Beyond Parallel*, June 30, 2016. Accessed October 14, 2016. <http://beyondparallel.csis.org/5-theories-of-unification/>.
- Cha, Victor, and Ellen Kim. "UN Security Council Passes New Resolution 2094 on North Korea." *CSIS*, March 7, 2013. Accessed October 14, 2016. www.csis.org/analysis/un-securitycouncil-passes-new-resolution-2094-north-korea.
- Chang, Jae-soon. "US Experts Call for Nonverbal, Real Consequences for NK Nuclear Test." *Yonhap News*, September 9, 2016. Accessed October 14, 2016. <http://english.yonhapnews.co.kr/focus/2016/09/09/49/1700000000AEN2016099007300315F.html>.

- China Daily*. "Nuclear-Powered US Submarine Arrives in S. Korea." March 3, 2014. Accessed October 14, 2016. www.chinadaily.com.cn/world/2014-03/03/content_17318859.htm.
- Choe, Sang-hun. "North Korea Declares 1953 War Truce Nullified." *New York Times*, March 11, 2013. Accessed October 14, 2016. www.nytimes.com/2013/03/12/world/asia/north-korea-says-it-hasnullified-1953-korean-war-armistice.html.
- . "South Korea to Shut Joint Factory Park, Kaesong, over Nuclear Test and Rocket." *New York Times*, February 10, 2016. Accessed October 14, 2016. www.nytimes.com/2016/02/11/world/asia/north-south-korea-kaesong.html.
- Choe, Sang-hun, and Jane Perlez. "North Korea Tests a Mightier Nuclear Bomb, Raising Tension." *New York Times*, September 8, 2016. Accessed October 14, 2016. www.nytimes.com/2016/09/09/world/asia/north-korea-nuclear-test.html.
- Choe, Sang-hun, and Rick Gladstone. "North Korean Rocket Fails Moments after Liftoff." *New York Times*, April 12, 2012. Accessed October 14, 2016. www.nytimes.com/2012/04/13/world/asia/north-korea-launches-rocket-defying-world-warnings.html.
- Choi, Son Min. "Claiming 'Imminent Collapse' of SK, NK Pushes Unification in Lectures." *Daily NK*, November 16, 2016. Accessed November 16, 2016, www.dailynk.com/english/read.php?num=14191&cataId=nk01500.
- DeThomas, Joseph. "Reality Check on North Korean Sanctions." *38 North*, January 21, 2016. Accessed October 14, 2016. <http://38north.org/2016/01/jdethomas012116/>.
- Gamel, Kim. "N. Korea Calls Arrival of Nuclear-Powered US Submarine a Direct Threat." *Stars and Stripes*, June 17, 2016. Accessed October 14, 2016. www.stripes.com/news/nkorea-calls-arrival-of-nuclear-powered-us-submarine-a-direct-threat-1.415057.

- . “Joint Drills Kick Off in S. Korea ahead of *Reagan* Aircraft Carrier’s Arrival.” *Stars and Stripes*, October 9, 2016. Accessed October 14, 2016. www.stripes.com/news/joint-drills-kick-off-in-s-korea-ahead-of-reagan-aircraft-carrier-s-arrival-1.433375.
- Gobry, Pascal-Emmanuel. “The Case for Invading North Korea.” *The Week*, January 7, 2015. Accessed October 14, 2016. <http://theweek.com/articles/441214/case-invading-north-korea>.
- Graham, Chris, and Julian Ryall. “North Korea Accused of ‘Maniacal Recklessness’ after Most Powerful Nuclear Test Yet.” *Telegraph*, September 9, 2016. Accessed October 14, 2016. www.telegraph.co.uk/news/2016/09/09/north-korea-believed-to-have-carried-out-nuclear-test-after-smal/.
- Guardian*. “US Flies F-22 Jets over South Korea in Show of Force against the North.” February 17, 2016. Accessed October 14, 2016. www.theguardian.com/world/2016/feb/17/usf22-jets-south-korea-air-force-north-seoul-flyover.
- Harman, Jane, and James Person. “The US Needs to Negotiate with North Korea.” *Washington Post*, September 30, 2016. Accessed October 14, 2016. www.washingtonpost.com/opinions/global-opinions/the-us-needs-to-negotiate-with-north-korea/2016/09/30/c1f0123e-85b2-11e6-92c214b64f3d453f_story.html?utm_term=.ab4df98b5584.
- Jackson, Van, and Hannah Suh. “The Biggest Myth about North Korea.” *National Interest*, June 9, 2015. Accessed October 14, 2016. <http://nationalinterest.org/feature/the-biggest-myth-about-north-korea-13290>.
- Joint Communiqué of the Forty-Eighth US-ROK Security Consultative Meeting. October 20, 2016. Accessed October 14, 2016. www.defense.gov/Portals/1/Documents/pubs/USROKSecurityJointCommunique2016.pdf.

- Kazianis, Harry. "Why Invading North Korea Would Be Insane." *The Week*, January 16, 2015. Accessed October 14, 2016. <http://theweek.com/articles/532678/invading-north-korea-insane>.
- Kelly, Robert E. "The Ultimate Nightmare: Why Invading North Korea Is a Really Bad Idea." *National Interest*, January 30, 2015. Accessed October 14, 2016. <http://nationalinterest.org/blog/the-buzz/the-ultimate-nightmare-why-invading-the-north-korea-really-12157>.
- Kim, Jack, and Mayumi Negishi. "North Korea Rocket Launch Raises Nuclear Stakes." *Reuters*, December 12, 2012. Accessed October 14, 2016. www.reuters.com/article/us-korea-north-rocket-idUSBRE8BB02K20121212.
- Kim, Sylvia. "Where Is Our Responsibility to Protect the North Korean People?" *The Huffington Post*, August 24, 2015. Accessed October 14, 2016. www.huffingtonpost.com/sylviakim/responsibility-to-north-korea_b_8028728.html.
- Korean Central News Agency*. "DPRK Foreign Ministry Spokesman Refutes Obama's 'Statement' against Nuclear Warheads Explosive Test." September 11, 2016. Accessed September 18, 2016. www.nepaltoday.com.np/home/diplomacy_detail?id=1711.
- . "DPRK FM Spokesman Slams Obama's Reckless Remark." September 8, 2016. Accessed September 18, 2016. <https://nkaggregator.com/2016/09/08/dprk-fm-spokesman-slams-obamas-reckless-remarks-21/>.
- . "Foreign Ministry Spokesman Blasts Anti-DPRK Invective of US Official." September 9, 2016. Accessed September 18, 2016. <https://kcnawatch.co/newstream/1473407435-463723260/foreign-ministry-spokesman-blasts-anti-dprk-invective-of-u-s-official/>.

- . “Kim Jong-un Guides Strategic Submarine Underwater Ballistic Missile Test-Fire.” August 25, 2016. Accessed September 15, 2016. <https://kcnawatch.co/newstream/1472221858-93156933/kim-jong-un-guides-strategic-submarine-underwater-ballistic-missile-test-fire/>.
- . “KPA Supreme Command Spokesman’s Statement Encourages DPRK People.” March 6, 2013. Accessed October 14, 2016. www.kcna.co.jp/item/2013/201303/news06/2013030-17ee.html.
- . “Senior Official of Russian Political Party Hails DPRK’s Nuclear Test.” March 1, 2013. Accessed October 14, 2016. www.kcna.co.jp/item/2013/201303/news01/20130301-05ee.html.
- . “Spokesman for Supreme Command of KPA Clarifies Important Measures to Be Taken by It.” March 5, 2013. Accessed October 14, 2016. www.kcna.co.jp/item/2013/201303/news05/20130305-21ee.html.
- . “Statement of a Spokesman for the Ministry of the People’s Armed Forces of the DPRK National Defense Commission.” March 13, 2013. Accessed October 14, 2016. <https://nkleadershipwatch.wordpress.com/dprk-security-apparatus/ministry-of-peoples-armed-forces-spokesmans-statement-13-march-2013/>.
- . “UN ‘Resolution’ Reminiscent of ‘Munich Pact’: Social Scientist.” January 29, 2013. Accessed October 14, 2016. www.kcna.co.jp/item/2013/201301/news29/20130129-15ee.html.
- Lee, Claire Chaeryung. “An Interview with David Kang: The New Sanctions Regime against North Korea and Its Implications for US Policy.” *The National Bureau of Asian Research*, March 17, 2016. Accessed October 14, 2016. <http://nbr.org/research/activity.aspx?id=658>.

- Lee, John. "South Korea and the US Must Be Prepared to Hit Back at Pyongyang." *NK News*, September 12, 2016. Accessed October 14, 2016. www.nknews.org/2016/09/south-korea-and-the-u-s-must-be-prepared-to-hit-back-at-pyongyang/.
- Lee, Sung-Yoon, and Joshua Stanton. "How to Get Serious with North Korea." *CNN*, January 15, 2016. Accessed October 14, 2016. www.cnn.com/2016/01/15/opinions/lee-stanton-north-korea-sanctions/index.html.
- Lendon, Brad. "US B-1 Bombers Fly Over South Korea in Show of Force." *CNN*, September 13, 2016. Accessed October 14, 2016. www.cnn.com/2016/09/12/politics/us-air-force-bombers-korea/.
- Mansourov, Alexandre Y. "North Korea Is Poised to Cross the Nuclear Rubicon: Will the Canary Die in the Mine?" *Institute for Corean-American Studies, Inc.*, April 23, 2003. Accessed October 14, 2016. www.icasinc.org/2003/2003l/2003laym.html.
- Maxwell, David. "A Preemptive Strike on North Korea?" *War on the Rocks*, July 16, 2013. Accessed October 14, 2016. <http://warontherocks.com/2013/07/a-preemptive-strike-on-north-korea/>.
- . "Should the United States Support Korean Unification and if So, How?" *International Journal of Korean Studies* XVIII, no. 1 (Spring 2014): 139-156.
- . "The North Korean Threat: Where Do We Go from Here?" *Vocativ*. February 12, 2016. Accessed October 14, 2016. www.vocativ.com/283367/the-north-korean-threat-where-do-we-go-from-here/.
- McCurry, Justin. "Seoul Shuts Down Joint North–South Korea Industrial Complex." *Guardian*, February 10, 2016. Accessed October 14, 2016. www.theguardian.com/world/2016/feb/10/seoul-shuts-down-joint-northsouth-korea-industrial-complex-kaesong.

- McKirdy, Euan. "North Korea Announces It Conducted Nuclear Test." *CNN*, January 6, 2016. Accessed October 14, 2016. www.cnn.com/2016/01/05/asia/north-korea-seismic-event/.
- McKirdy, Euan, Paula Hancocks and K.J. Kwon. "South Korea's parliament votes to impeach President Park Geun-hye." *CNN*, December 9, 2016. Accessed December 9, 2016. www.cnn.com/2016/12/09/asia/south-korea-park-geun-hye-impeachment-vote/.
- Moon, Katherine H. S. "It's Groundhog Day with North Korea." *Brookings*, February 8, 2016. Accessed October 14, 2016. www.brookings.edu/blog/order-from-chaos/2016/02/08/itsgroundhog-day-with-north-korea/.
- Munroe, Tony, and Jack Kim. "US Flies B-52 over South Korea after North's Nuclear Test." *Reuters*, January 11, 2016. Accessed October 14, 2016. www.reuters.com/article/us-northkorea-nuclear-idUSKCN0UN0Y420160111.
- Newman, Rick. "How a Second Korean War Would Harm the US Economy." *US News*, April 3, 2013. Accessed October 14, 2016. www.usnews.com/news/blogs/ricknewman/2013/04/03/how-a-second-korean-war-would-harm-the-us-economy.
- O'Carroll, Chad. "US Should Consider Striking North Korea—Former CIA Chief (Preemptive Strike Plans 'Ought to Be on the Agenda for Very Serious Consideration')." *NK News*, June 24, 2013. Accessed October 14, 2016. www.nknews.org/2013/06/u-s-shouldconsider-striking-north-korea-former-cia-chief/.
- Panda, Ankit. "A Great Leap to Nowhere: Remembering the US–North Korea 'Leap Day' Deal." *The Diplomat*, February 29, 2016. Accessed October 14, 2016. <http://thediplomat.com/2016/02/a-great-leap-to-nowhere-remembering-the-us-north-korea-leap-day-deal/>.

- Park, Byong-su. "Pres. Park Calls on North Koreans to Defect to 'the Land of Freedom.'" *Hankyoreh*, October 3, 2016. Accessed October 14, 2016. http://english.hani.co.kr/arti/english_edition/e_northkorea/763868.html.
- . "South Korean Military Announces Response to North Korea's Two-Track Approach." *Hankyoreh*, May 10, 2016. Accessed October 14, 2016. http://english.hani.co.kr/arti/english_edition/e_northkorea/743195.html.
- Park, Ju-min, and Jack Kim. "North Korea Test-Fires Submarine-Launched Ballistic Missile." *Yahoo*, April 23, 2016. Accessed October 14, 2016. www.yahoo.com/news/north-korea-test-fires-submarine-launched-ballistic-missile-215107710.html.
- . "North Korea Fires Submarine-Launched Ballistic Missile Toward Japan." *Reuters*, August 24, 2016. Accessed October 14, 2016. www.reuters.com/article/usnorthkorea-missiles-idUSKCN10Y2B0.
- Park, Ju-min, and Louis Charbonneau. "North Korean Rocket Puts Object into Space, Angers Neighbors, US." *Reuters*, February 8, 2016. Accessed October 14, 2016. www.reuters.com/article/us-northkorea-satellite-idUSKCN0VG00H.
- Park, Robert. "Responsibility to Protect in North Korea." *Harvard International Review*, December 7, 2011. Accessed October 14, 2016. <http://hir.harvard.edu/responsibility-to-protect-in-north-korea/>.
- Quinn, Andrew. "Insight: Obama's North Korean Leap of Faith Falls Short." *Reuters*, March 30, 2012. Accessed October 14, 2016. www.reuters.com/article/us-korea-north-usa-leapidUSBRE82T06T20120330.
- Rodong Sinmun*. "나는 공격을 좋아합니다" [I like offense], February 6, 2013.
- . "Statement of the Spokesman of DPK Ministry of Foreign Affairs." March 8, 2013.

- . “Statement of the Spokesman of KPA Supreme Command.” March 6, 2013.
- . “Report on the March 2013 Plenum of WPK Central Committee.” April 1, 2013.
- Rogin, Josh. “Inside the Secret US–North Korea ‘Track 2’ Diplomacy.” *Washington Post*, August 28, 2016. Accessed October 14, 2016. www.washingtonpost.com/opinions/global-opinions/inside-the-secret-usnorth-korea-track-2-diplomacy/2016/08/28/ef33b2d4-6bc0-11e6-ba325a4bf5aad4fa_story.html?utm_term=.91067e3455af.
- Ruelos, Denny. “US Deployment of THAAD Antimissile System to South Korea Expedited.” *Newsline*, September 28, 2016. Accessed October 14, 2016. <https://newsline.com/u-s-deployment-of-thaad-anti-missile-system-to-south-korea-expedited/>.
- Sanger, David E., and Choe Sang-Hun. “North Korea Confirms It Conducted Third Nuclear Test.” *New York Times*, February 11, 2013. Accessed October 14, 2016. www.nytimes.com/2013/02/12/world/asia/north-korea-nucleartest.html?_r=0.
- “Security Council Imposes Fresh Sanctions on Democratic People’s Republic of Korea, Unanimously Adopting Resolution 2270 (2016).” *United Nations Security Council*, March 2, 2016. Accessed October 14, 2016. www.un.org/press/en/2016/sc12267.doc.htm.
- Ser, Myo-ja. “Bring Back US Nukes, Says Blue House Report.” *Korea Joongang Daily*, October 14, 2016. Accessed October 14, 2016. <http://koreajoongangdaily.joins.com/news/article/Article.aspx?aid=3024895>.
- Smith, Shane. “Implications for US Extended Deterrence and Assurance in East Asia.” *US-Korea Institute at SAIS*, November 2015. Accessed October 14, 2016. <http://38north.org/wpcontent/uploads/2015/11/NKNF-Smith-Extended-Deterrence-Assurance.pdf>.

Sonawane, Vishakha. “North Korea–South Korea War? Seoul Planning to Annihilate Pyongyang in Case of Nuclear Attack Signs, Report Says.” *International Business Times*, September 11, 2016. Accessed October 14, 2016. www.ibtimes.com/north-korea-south-korea-war-seoul-planning-annihilate-pyongyang-case-nuclear-attack-2414218.

Stanton, Joshua. “North Korea, Secondary Sanctions, Tertiary Impacts, and the Coming Death Spiral.” *FreeKorea.us*, October 14, 2016. Accessed October 14, 2016. <http://freekorea.us/2016/10/14/north-korea-secondary-sanctions-tertiaryimpacts-and-the-coming-death-spiral/>.

The Economist. “A Nuclear Nightmare.” May 28, 2016. Accessed October 14, 2016. www.economist.com/news/leaders/21699445-it-past-time-world-getserious-about-north-koreas-nuclear-ambitions-nuclear.

UN Security Council Resolution 2087. S/RES/2087. January 22, 2013. Accessed October 14, 2016. www.refworld.org/docid/51f8cc144.html.

UN Security Council. “Security Council Imposes Fresh Sanctions on Democratic People’s Republic of Korea, Unanimously Adopting Resolution 2270 (2016).” March 2, 2016. Accessed October 14, 2016. www.un.org/press/en/2016/sc12267.doc.htm.

UPI “North Korea Denounces South Korea’s Park Geun-hye’s Call for Defections.” October 3, 2016. Accessed October 14, 2016. www.headlines-news.com/2016/10/04/1873819/north-korea-denounces-south-koreas-park-geun-hyes-call-for-defections.

Wikipedia. “USS *Columbus* (SSN-762).” Accessed September 19, 2016. [https://en.wikipedia.org/wiki/USS_Columbus_\(SSN-762\)](https://en.wikipedia.org/wiki/USS_Columbus_(SSN-762)).

———. “USS *Mississippi* (SSN-782).” Accessed September 18, 2016. [https://en.wikipedia.org/wiki/USS_Mississippi_\(SSN-782\)](https://en.wikipedia.org/wiki/USS_Mississippi_(SSN-782)).

- Yonhap News*. "S. Korea's FM Says Pyongyang's Fifth Nuke Test Tantamount to 9/11Attack." October 2, 2016. Accessed October 14, 2016. <http://english.yonhapnews.co.kr/news/2016/10/02/0200000000AEN2016100200800315.html>.
- Yoon, Min-sik. "Allies to Step Up Military Measures against NK," *Korea Herald*, September 12, 2016. Accessed October 14, 2016. www.koreaherald.com/view.php?ud=20160912000887.

CHAPTER 5

Sanctions and North Korea: The Absence of a Humanitarian Emergency and the Crisis of Development

Hazel Smith

Introduction

This chapter argues that the humanitarian costs of the comprehensive economic sanctions on the Democratic People's Republic of Korea (DPRK, commonly known as North Korea) have been comparatively insignificant. The thesis of this chapter is that, while sanctions have not contributed directly to deterioration in the well-being of the population such that they can be understood as causing or contributing to a humanitarian emergency, they have engendered costs for economic development that contribute to medium and long-term disadvantage for the well-being of the population. Sanctions, of themselves, are not the only reason for the inability of the country's government to provide sustainable growth for its citizens, but they have been a powerful deterrent to the foreign investment that would be required to revive and restructure the economy of the DPRK.

Whether this effect of sanctions is normatively justified is, of course, a political matter. Such an evaluation cannot be undertaken by positivist scientific analysis or procedures, although further research from the perspective of rigorous ethical reasoning using diverse philosophical literature might bring interesting insights into

the normative conundrums arising from economic sanctions on the DPRK. The methodology of this chapter, however, is empirical (although not empiricist) and analytical; the aim is to assess the extant data using fairly settled conceptual categorizations, including of the key concepts of humanitarianism and development.

The chapter proceeds by finessing the distinction between the humanitarian and development spheres. Next, the chapter summarizes the extent and intent of economic sanctions on the DPRK. The chapter then considers change in the DPRK in terms of well-being and humanitarian conditions and finds that, both in domestic longitudinal comparisons and in comparative country evaluation, the population of the DPRK is not any worse off than populations living in poor countries that do *not* suffer from externally imposed economic sanctions. Given that these are *economic* sanctions and designed to provide *economic* constraints on government, it is perhaps counterintuitive to find that the population does not face a humanitarian crisis and well-being, as assessed by conventional global indicators, like child mortality and malnutrition figures, continues to improve. It is also, however, only an explanation of why humanitarian-crisis conditions have not occurred with sanctions; a very different story would be told if development indicators were used as the criteria of assessment.

What This Chapter Is About

First let me say what this chapter is not about. It is not about the theory and policy of sanctions per se. It does not enter the debate as to whether sanctions are useful as an instrument of foreign policy, whether they are used as a substitute for military sanctions or as an accompaniment to military activity, or whether they are supposed to damage the elites or the populations of the country being sanctioned. It does not delve into the debates as to whether sanctions should be comprehensive, smart, or targeted or whether sanctions are best implemented multilaterally or unilaterally.¹ These are all

1 For an accessible review of relevant literature, see Daniel W. Drezner, "Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice," *International Studies Quarterly* 13 (2011): 96–108, accessed August 1, 2016, http://fletcher.tufts.edu/~media/Fletcher/News%20Images/Drezner_Sanctions.pdf.

important debates, albeit in many ways unresolvable, but they do not provide the focus for this chapter.

Neither does this chapter provide a generalized discussion of the impact of all sanctions on the DPRK, nor is it a discussion of the varying post–Cold War (in Europe at least) humanitarian condition of the population of the DPRK, including the terrible famine of the 1990s, which I have treated extensively elsewhere.² Instead, my focus remains a narrow one. I take the research question as the following: What is the humanitarian cost of the escalation of sanctions on the DPRK since 2006? This is an important question, as it takes on a debate about sanctions that is often shaped more by political polarity than rigorous analysis. The aim is therefore both to answer the specific question and to bring analytical, conceptual, and empirical clarity to the terms of reference of the debate.

The chronological context is of the increasingly extensive and intensive economic sanctions imposed by the UN Security Council from 2006 onward in response to the DPRK's escalating nuclear programs.³ The empirical context is of the post–Cold War globalized economic dynamics in which the DPRK no longer has preferential trading regimes abroad and in which the supply, cost, and price of goods is largely determined by these global dynamics.

The Humanitarian and the Development Spheres

In ordinary discourse, any damage or threat to well-being, whether in the short, medium, or long-term, has deleterious effects, and these are “humanitarian” costs by definition, because they affect the human being. In this sense, all threats to well-being have humanitarian consequences. Economic sanctions on the DPRK, because they contribute to an environment in which growth is precarious and the well-being of individuals can never be taken for granted, have humanitarian costs. This approach is valid and true at a very

2 Hazel Smith, *Hungry for Peace: International Security, Humanitarian Assistance and Social Change in North Korea* (Washington, DC: United States Institute of Peace Press, 2005).

3 Hazel Smith, *North Korea: Markets and Military Rule* (Cambridge: Cambridge University Press, 2015).

general level of analysis, but it is not very helpful for understanding differentiated threats to well-being.

In this chapter, I acknowledge that economic sanctions have a human cost insomuch as they are designed to limit the economic options of the country, and it is simply a truism to observe that there are very likely human costs arising from constraints on economic growth in any society, including in the DPRK. To assess to what extent there are humanitarian implications of economic sanctions on the DPRK, however, it is useful to further conceptualize what we understand by the concept of *humanitarian*. We can use the scholarly and policy literature on development and humanitarianism to distinguish these two concepts and help us assess how and why, specifically, the population of the DPRK is affected by international sanctions.

Humanitarianism and Development

There is a large and diverse literature on the theory and practice of humanitarianism, the theory and practice of development, and the relationship between these two spheres of policy and activity.⁴ Some of the literature is based in the world of scholarship, but a lot of it is produced as policy analysis by very large international agencies, the governments who fund them, and operational actors who engage in projects that fall under their rubric. This is not the place to consider the relative scientific merit of these publications; instead, it is sufficient to identify core ideas that provide conventional and widely accepted understandings of the different spheres.

⁴ Useful contributions include Larry Minear, *The Humanitarian Enterprise* (Bloomfield: Kumarian, 2002); Ian Smillie and Larry Minear, *The Charity of Nations: Humanitarian Action in a Calculating World* (Bloomfield: Kumarian, 2004); Alex de Waal, *Famine Crimes: Politics and the Disaster Relief Industry in Africa* (Bloomington: Indiana University Press for African Rights and the International Africa Institute, 1997); Craig N. Murphy, *The United Nations Development Programme* (Cambridge: Cambridge University Press, 2006); Deborah Eade and Tony Vaux, eds., *Development and Humanitarianism* (Bloomfield: Kumarian, 2007); Michael Barnett and Thomas G. Weiss, *Humanitarianism in Question: Politics, Power, Ethics* (Ithaca: Cornell University Press, 2008). The international agencies often provide very useful analysis of the debates and issues. See websites of IFRC, UNDP, and UNOCHA in particular.

Of course, in practice, the two spheres of activity can and do have fuzzy boundaries, and there is a good deal of research activity that explores the gray areas between the two. Nevertheless, for the purposes of this chapter, it is sufficient to recall that in theory, in international law, and in a good part of international practice, the humanitarian and development spheres are distinct from each other. Humanitarian and development activities have different aims and are governed by different international legislation. A major difference between the humanitarianism and development spheres is that while international humanitarian actors substitute for governmental capacity, international development actors complement government capacity.

In the literature, there are as many understandings of what constitutes “humanitarian” as there are writers, but as Barnett and Weiss point out, unless one is prepared to stretch the concept so much that every action that helps other human beings is construed as humanitarian, some conceptual clarity is required.⁵ In this chapter, we adopt the conventional understanding of humanitarian threats as those posing immediate danger to life and well-being. Conventionally then a humanitarian crisis is understood as occurring if there are immediate threats to the lives and well-being of a population.

In international law, which is still largely based on state sovereignty, it is states and their respective governments that have legal responsibility to provide for the welfare of their populations. International humanitarian actors generally intervene when the respective government or prevailing political authority does not or cannot respond to threats to life. Humanitarianism is therefore dealing with extreme threats to life, usually short-term threats, and by definition, humanitarian actors are acting in lieu of government capacity.

By contrast, development as a concept has come to be understood as a social and economic process that includes economic growth but also material well-being for the population, improved quality of life, a fair distribution of resources, and sustainable environments. Governments own the development process, not the international

5 Michael Barnett and Thomas G. Weiss, *Humanitarianism in Question: Politics, Power, Ethics* (Ithaca: Cornell University Press, 2008), 11.

partners with whom they often work. A development crisis then can best be understood as a failure by government over a medium to long duration to maintain sustainable, improved quality of life for the population.

International Humanitarian and Development Actors and Indicators

The major international agencies tend to operate primarily in either the humanitarian or development sphere, with each having different criteria for programming and different operating procedures. The UN World Food Program (WFP), for example, often works via short-term interventions in crises while the World Health Organization (WHO) and the Food and Agriculture Organization (FAO) tend to work in more long-term programs of structural change and UNICEF works in both. These are not hard and fast distinctions, but they provide useful delineators.

Humanitarian agencies and the humanitarian work they do are focused on short-term responses to major disasters—whether from war and armed conflict or other causes like floods, earthquakes, and epidemics. By contrast, at least in theory, development work takes over when the immediate threats are mitigated; although, on the ground, it is sometimes difficult to distinguish between when a humanitarian crisis is in progress and when needs are more developmental. International agencies and the governments that fund them, however, do not engage in arbitrary decision making.

The agencies rely on common assessments of well-being, using basic indicators, including child mortality, infant mortality, malnutrition, and disease incidence. Sometimes, for instance during armed hostilities, it is difficult to collect relevant data, and in some cases, it might be immoral to engage in data-collection exercises when devastation is obvious and horrible, as in Aleppo at the time of writing (August 2016). Nevertheless, in most countries, including the DPRK, the major international agencies rely on a collective institutional knowledge and data systematically collected, collated, and analyzed using internal and external expertise.

UN agency data collection follows strict international protocols, led by high-quality senior epidemiologists and statisticians from all over the globe, who are contracted in to work with the UN agencies, and the UN data is in turn systematically collated and analyzed by World Bank statisticians over time. The same basic indicators are used to evaluate social and economic development in all counties throughout the globe; it is this massive statistical expertise that has underpinned the successful MDG Goals exercise, which is entirely based on quantitative assessment of achievements in poverty reduction.⁶

The major international agencies involved in large-scale development strategies are the World Bank and the United Nations Development Program (UNDP) along with global partners like the Gates Foundation. The World Bank is a major provider of capital investment, whereas the UNDP, while it funds some projects, positions itself as a provider of development policy advice. Wealthy governments often fund development projects overseas bilaterally but also work through the major agencies like the World Bank. Home governments do not always rely on external development agencies to fund domestic development projects. China, for example, substantially funds development projects at home—sometimes working in partnership with external funders on projects designed to bring long-term national benefits. International business may also be understood as sometimes engaging in development projects in partnership with the recipient government.

Economic Sanctions and the DPRK

The DPRK has been targeted by different types of sanctions by different actors since its inception as a state in 1948. What makes recent sanctions different is that they are universal. Since 2006, the UN Security Council has imposed progressively more expansive economic sanctions in response to nuclear tests and the development of ballistic missile technology by way of UNSC Resolutions 1718 (2006), 1874 (2009), 2087 (2013), 2094 (2013), and 2270 (2016). We can call the period from 2006 onward the “era of uni-

6 Millennium Project, accessed August 1, 2016, www.unmillenniumproject.org/goals/.

versal sanctions,” given that these were United Nations promulgated sanctions that had the effect of legally committing all UN member states to their implementation. The universal sanctions regime should be distinguished from the previous period of various bilateral sanctions imposed on the DPRK by individual states like the United States and the United Kingdom.

Universal sanctions prohibit the export to the DPRK of luxury goods and all goods that could contribute to the nuclear and missile programs. Individuals, organizations, and businesses, including banking and finance companies, that are judged to contribute to the DPRK’s nuclear arms programs are specifically targeted. North Korean coal, iron, and iron ore may not be exported from the DPRK except and unless those exports are necessary for “livelihood” purposes and the export revenues do not contribute to North Korea’s arms programs. Food and basic “humanitarian” trade are excluded from the sanctions measures.

One consequence of economic sanctions is that the major development agencies are prohibited from lending to the DPRK. Sanctions also deter public investors (governments) and private investors (business) even when such investments do not directly contravene international sanctions rules. This is because of the political instability that threatens investments and the fear of having global non-DPRK economic relations caught up in the international sanctions surveillance under which any DPRK investment, including legal investment, operates. There are few countervailing forces to encourage major foreign investors to take risks with their capital or to lobby for exemptions to the rules. The DPRK has little to offer in terms of strategic goods like oil or gas.

Implementation

All UN member states, including China and Russia, which both share land (and maritime) borders with the DPRK and through which most of the DPRK’s trade flows, are enjoined to implement these universal sanctions, but it is up to each individual UN member state to decide what counts as falling within and without the

sanctions regimes. China and Russia are frequently accused by the United States of not being stringent enough in their application of sanctions on the DPRK; both China and Russia refute these allegations and argue that they are only allowing trade that is not prohibited by UN sanctions.

Sanctions are not implemented in a political or historical vacuum. The five permanent members of the Security Council have very different ideological and security aims in their relationship with the DPRK, and these aims are reflected in their varying approaches to the aims and function of the sanctions. The US policy to the DPRK is shaped by a multiplicity of goals that can perhaps be summed up as a regime-change preference; China and Russia, in contrast, prioritize regional stability. China and Russia have little interest in prohibiting trade flows in respect to food, shelter, energy, agriculture, health, and other goods that relate to humanitarian notions of well-being, for example, educational materials, clothing, and civilian transport. China has explicitly stated that, apart from directly sanctioned goods, trade relations with the DPRK remain “normal.”⁷

The Importance of China

China’s perspective on the implementation of sanctions is crucial, as the DPRK is trade dependent on China; by 2016, over three-quarters of DPRK trade was with China. The DPRK, therefore, relies on trade with China to sustain its limited economic growth. It is difficult, however, to assess definitively structural trends in DPRK trade relations with China, as the data is somewhat episodic; the relatively small volume of trade (for China and in global terms) can vary for short-term, conjunctural reasons. In the first quarter of 2016, for example, Chinese-DPRK trade actually grew compared to the previous year; DPRK exports to China grew by 10 percent, and its imports from China increased by 14 percent.⁸ In May 2016, however, DPRK import and export trade figures posted a decline against

7 “China’s Q1 Trade with North Korea Up Despite Sanctions,” *Straits Times*, April 13, 2016, accessed July 31, 2016, www.straitstimes.com/asia/east-asia/chinas-q1-trade-with-north-korea-up-despite-sanctions.

8 *Ibid.*

the same month the previous year.⁹ Given that South Korea's trade with China also reported decreases in the same period, the reduction in DPRK-China trade should perhaps be attributed to global trends, including generally low world commodity prices for North Korean exports and the slowdown in Chinese growth, as well as perhaps because of tighter sanctions enforcement by China.

Irrespective of the reasons for fluctuations, another salient feature of DPRK-China trade is that of its low volume. DPRK-China trade volumes are insignificant compared to Chinese global trade volumes, as well as compared to China's trade with the Republic of Korea. Scott and Jung report that "South Korea–China trade sharply increased from US\$31 billion in 2000 to US\$227 billion in 2015," while Frank reports that the DPRK's *total* trade volume in 2015 was just \$7.6 billion (US), with 90 percent of that figure representing China-DPRK trade volumes.¹⁰

Given the underlying economic deprivation in the DPRK and the unresolved security tensions that inhibit foreign investment, there are no indications that DPRK trade with China or any other country is likely to significantly increase in the short or medium term, such as to take it out of what the World Bank defines as the low-income category of states.¹¹ From July 1, 2016, the World Bank clarified its data categories such that "low-income economies are defined as those with a GNI per capita...of \$1,025 or less in 2015; lower middle-income economies are those with a GNI per capita between \$1,026 and \$4,035; upper middle-income economies are those with a GNI per capita between \$4,036 and \$12,475; high-income economies are those with a GNI per capita of \$12,476 or

9 Deok-hyun Kim, "China's Imports of N. Korean Goods Fall 12.6 Pct in May," *Yonhap News*, June 22, 2016, accessed July 30, 2016, <http://english.yonhapnews.co.kr/national/2016/06/22/26/0301000000AEN20160622010200315F.html>.

10 Jeffrey J. Schott and Euijin Jung, "South Korea–China FTA Falls Short on Reform," *East Asia Forum*, May 29, 2016, accessed August 1, 2016, www.easiaforum.org/2016/05/29/south-korea-china-fta-falls-short-on-reform/; Rüdiger Frank, "North Korea's Foreign Trade," 38 *North*, October 22, 2015, accessed August 1, 2016, <http://38north.org/2015/10/rfrank102215/>.

11 World Bank, *World Development Indicators*, accessed August 1, 2016, <http://data.worldbank.org/?locations=XM-KP>.

more.”¹² South Korea, in contrast to the North, is a “high-income” country, while China, in 2016, had upper-middle-income status.¹³

The point does not need to be labored. China’s approach to DPRK sanctions is based on continued attempts to promote stability in the region in terms of how China conceives its own national interest. The DPRK has thus far depended on this Chinese perspective to maintain enough trade and growth to avoid a recurrence of the tragedy of the 1990s that killed up to a million from starvation and malnutrition-related disease.¹⁴

The Humanitarian Condition in the DPRK 2006–2016

How then, in humanitarian terms, has the population fared under the sanctions regime prevalent since 2006? To answer the question, I proceed by using the standard categories of assessing humanitarian need through surveying change in infant mortality, child mortality, acute malnutrition, chronic malnutrition, vaccine-preventable diseases, and the two great poverty-related global killer diseases of tuberculosis (TB) and malaria. I assess change across time, and where relevant, I compare DPRK data to that of other countries.¹⁵ I find that, in many categories, the humanitarian conditions of the population have *not* deteriorated since the implementation of UN sanctions, and in *none* of these standard categories is the population worse off than any other low-income country (as designated by the World Bank) anywhere in the world. In a number of these standard categories, humanitarian conditions have *improved* since the start of the implementation of universal sanctions in 2006. This is not to

12 World Bank, The Data Blog, accessed August 1, 2016,

<http://blogs.worldbank.org/opendata/category/tags/news>.

13 World Bank, World Development Indicators, accessed August 1, 2016, <http://data.worldbank.org/income-level/high-income> and <http://data.worldbank.org/country/china>.

14 I have dealt with this period, its history, and the consequences in two full-length monographs and a number of other publications. See Hazel Smith, *Hungry for Peace: International Security, Humanitarian Assistance and Social Change in North Korea* (Washington DC: United States Institute of Peace Press, 2005), and Hazel Smith, *North Korea: Markets and Military Rule* (Cambridge: Cambridge University Press, 2015).

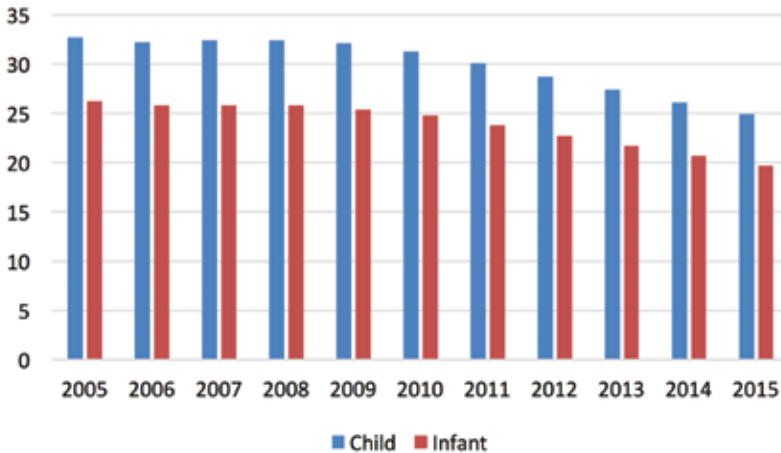
15 In this section, I draw on Hazel Smith, “Nutrition and Health in North Korea: What’s New, What’s Changed and Why It Matters,” *North Korean Review* 12, no. 1 (Spring 2016): 7–34.

say that without sanctions, things might not be better. No one can make those counterfactual judgments with any degree of certitude.

Mortality

Table 1 shows that both infant and child mortality rates demonstrated a gradually improving trend during the period of universal economic sanctions on the DPRK.

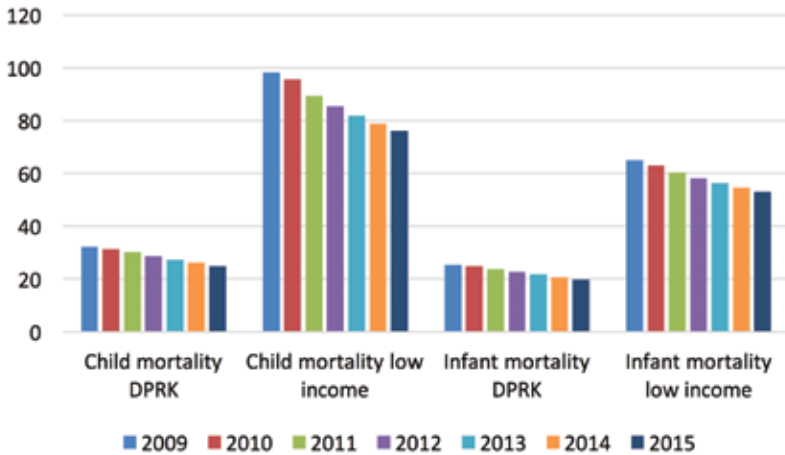
Table 1. DPRK Infant and Child Mortality Rates 2005–2015



Source: World Bank, *World Development Indicators 2015* (Washington DC: International Bank for Reconstruction and Development/The World Bank, 2015), available on <http://data.worldbank.org/products/wdi>.

Another useful way to think about DPRK humanitarian conditions is comparatively as against other low-income countries. Table 2 shows that infant and child mortality rates in the DPRK remained lower than all other low-income countries in the period of universal sanctions.

Table 2. DPRK and Low Income Countries' Infant and Child Mortality Rates 2005–2015



Source: World Bank, *World Development Indicators 2015* (Washington DC: International Bank for Reconstruction and Development/The World Bank, 2015), available on <http://data.worldbank.org/products/wdi>.

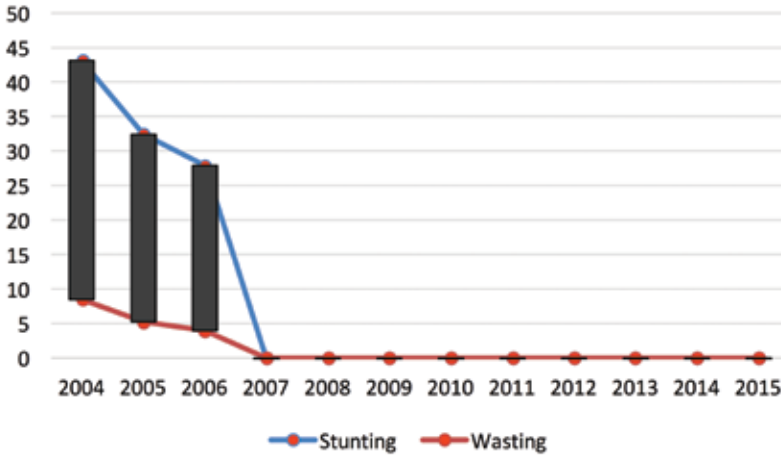
Malnutrition

Levels of malnutrition provide a key indicator of poverty and deprivation in any society. In the DPRK, levels of malnutrition are always of special salience and concern given that this country suffered famine in recent memory and depended on massive external food assistance during the 1990s to address widespread hunger.

Malnutrition in any country is measured by way of the nutritional classifications of stunting, wasting, and severe wasting. *Stunting* or low height for age is the standard indicator of chronic malnutrition in a population and is used by nutritionists worldwide. *Wasting* or low weight for height is a standard indicator of acute malnutrition in a given population. Rates of stunting and wasting comprise two key indicators of malnutrition in a given population.

Figure 1 uses the available data from the World Bank between the periods 2004 and 2015 and shows changing stunting and wasting rates in the DPRK over the period of universal sanctions. The data indicate continued improvement in the chronic and acute malnutrition status of the population.

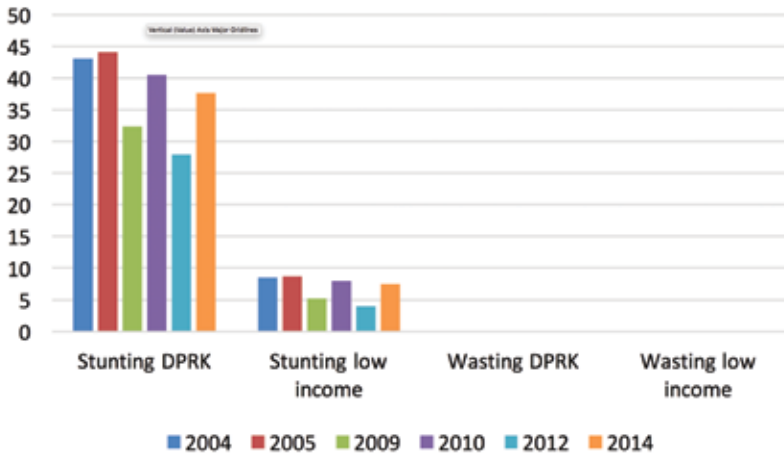
Figure 1. DPRK Malnutrition Rates 2004–2012.



Source: World Bank, *World Development Indicators 2015* (Washington DC: International Bank for Reconstruction and Development/The World Bank, 2015), available on <http://data.worldbank.org/products/wdi>.

In comparative terms, the DPRK malnutrition figures were consistently better than other low-income countries. The available data shows that between 2004 and 2014 stunting and wasting in the DPRK diminished, and it consistently remained at a lower level than in other low-income countries. Table 3 shows that during the period of universal sanctions on the DPRK from 2006 onward, the humanitarian condition of the population in terms of malnutrition, as measured by the standard categories of stunting and wasting, did not worsen and, to the contrary, improved.

Table 3. DPRK and Low-Income Countries' Malnutrition Rates 2004–2014



Source: World Bank, *World Development Indicators 2015* (Washington DC: International Bank for Reconstruction and Development/The World Bank, 2015), available on <http://data.worldbank.org/products/wdi>.

Disease

Data on changes in the incidence of disease and mortality resulting from disease provide an additional indicator of the humanitarian condition of the North Korean population and also gives a hint of DPRK governmental priorities and capacity. Two sorts of diseases are important in this respect; one is the group of vaccine-preventable diseases, and the other is what we can understand as the classic and often fatal diseases of poverty. The first group is surveilled by the WHO, which has had international officials resident in the DPRK since the mid-1990s, and includes polio, measles, diphtheria, pertussis (whooping cough), rubella, Japanese encephalitis, tetanus, and yellow fever. The second group includes malaria and tuberculosis (TB).

The incidence of all vaccine-preventable diseases has decreased in the DPRK since the early 2000s in significant terms.¹⁶ The last cases (six) of polio were reported in 1996. Since then, up until 2015, there have been no reported cases. Of the vaccine-preventable diseases, the last serious outbreak of measles was in 2007 with a reported 3,550 cases. Nevertheless, since 2007, during the period of universal sanctions, only eleven measles cases were reported—eight in 2008 and three in 2014. The remaining WHO-surveilled vaccine-preventable diseases show a null incidence in 2013, 2014, and 2015 (the latest figures available). In 2012, eleven mumps cases, eight pertussis cases, and one rubella case were reported. These figures reflected a declining pattern of incidence from the previous year, 2011, which was at sixty-six mumps cases, thirteen pertussis cases, and five rubella cases—while diphtheria, yellow fever, Japanese encephalitis, and tetanus recorded zero cases in both 2011 and 2012. Perhaps most salient to the research question of this chapter, in the decade of the 2000s, prior to the implementation of increasingly comprehensive universal sanctions, disease incidence of the common childhood and adult vaccine-preventable diseases of measles, mumps, and rubella were significantly higher than in the decade of the 2010s. To be explicit, vaccine-preventable diseases decreased at the same time as sanctions became more comprehensive and extensive.

WHO clarifies that the data on the tetanus rates in the DPRK may be under-recorded and it may be that some of the incidences of other vaccine-preventable diseases are under-recorded as well. Nevertheless, it is extremely difficult to hide a widespread incidence of a disease like measles, mumps, or pertussis, given the relatively large number of foreigners in the country and the porous DPRK-China border through which information and people flow. Other information available to WHO, however, also suggests the veracity of disease incidence figures. WHO/UNICEF monitoring shows increasingly

16 All data in this paragraph is taken from the World Health Organization, “WHO Vaccine-Preventable Diseases: Monitoring System: 2016 Global Summary,” accessed August 7, 2016, http://apps.who.int/immunization_monitoring/globalsummary/countries?countrycriteria%5Bcountry%5D%5B%5D=PRK#.

comprehensive national vaccination coverage for the major vaccine-preventable diseases from the early 2000s to figures in the high 90 percents by 2015; this level of vaccination coverage is as high as in the developed countries.¹⁷

Change in the Humanitarian Condition of the DPRK Population during the Era of Universal Sanctions

We can see from the previous discussion that not only is there no evidence of a growing humanitarian emergency under the period of universal sanctions but that, quite to the contrary, basic humanitarian indicators show an improvement in the humanitarian condition of the population. The indicators also suggest that the DPRK population has consistently fared better in mortality, malnutrition, and disease incidence than other low-income countries.

In 2012, UNICEF, reflecting the views of the UN agencies working in the DPRK, stated that “the [humanitarian] situation is not critical and does not suggest emergency operations.”¹⁸ The absence of a humanitarian emergency does not mean, however, that the population has a good quality of life or is free from poverty in health and nutrition or any other terms. In 2016, UNICEF also argued that undernutrition in children had increased since 2008. UNICEF argued that more needed to be done by the international agencies and that there was strong evidence of increases in wasting (acute malnutrition) and pointed out that although the percentage of the child population suffering severe acute malnutrition was highest in the northern province of Ryanggang, the absolute numbers were higher in Pyongyang and the other more populous provinces. Incidentally, UNICEF also argued “*the Government is fully committed to address undernutrition: they have established progressive policies, international standard guidelines and health staff are highly moti-*

17 WHO/UNICEF, “WHO Vaccine-Preventable Diseases: Monitoring System: 2016 Global Summary, WHO UNICEF Estimates Time Series for Democratic People’s Republic of Korea (the) (PRK),” accessed August 7, 2016, http://apps.who.int/immunization_monitoring/globalsummary/estimates?c=PRK.

18 UNICEF, “DPRK National Nutrition Survey: Executive Summary,” accessed August 6, 2015, www.unicef.org/dprk/support_20884.html.

vated, responsive to training and committed. *DPRK present one of the best programming environments UNICEF staff have ever seen*¹⁹ (emphasis in the UNICEF document).

UNICEF in 2016 was not, however, arguing for the existence of a humanitarian emergency in the DPRK, so we have an apparent contradiction. If severe acute malnutrition is increasing and if undernutrition is also growing, how is it that the humanitarian agencies consider that a humanitarian emergency does not exist in the DPRK?

The answer to this conundrum is the levels of malnutrition that we see in the DPRK are so common in large parts of the world, including in middle-income countries like India and Indonesia, that they are not conventionally understood as a symptom of a humanitarian emergency but of underdevelopment.

Development and the DPRK

We have seen that economic development is not only about economic growth but about the well-being of the population. A standard way of assessing development in terms of the experience of the population is through the criteria established by the UN's Human Development Index (HDI). The HDI is a socioeconomic measure of development focusing on three dimensions of human welfare; these are (i) a long and healthy life, (ii) access to knowledge, and (iii) standard of living.²⁰ These three dimensions are measured using quantitative indicators of, respectively, life expectancy at birth, years of schooling for adults aged twenty-five years and more and expected years of schooling for children of school-entering age, and GNI per capita.²¹ The annual HDI reports rank most of the world's states but do not include the DPRK in the rankings because of incomplete data for HDI generalizability comparative purposes. Nevertheless, for the purposes of this chapter, we have sufficient

19 UNICEF, "Nutrition Situation for Women and Children in DPRK: A Presentation by UNICEF for Development Partners," February 12, 2016 (Pyongyang: UNICEF, 2016).

20 UNDP, The Human Development Index (HDI), accessed August 12, 2016, <http://hdr.undp.org/en/content/human-development-index-hdi>.

21 Ibid.

data to make use of the HDI tripartite concept of human development to indicate changes in human development prospects for the DPRK population.

Taking the first HDI criterion of “a long and healthy life,” we can see that during the period of universal sanctions, life expectancy increased from 68 in 2006, with the World Bank reporting a slightly improved figure of 70 in 2014.²² These life-expectancy trends do not indicate a humanitarian crisis. In 2013, the DPRK life expectancy of 70 was close to the world life-expectancy figure of 71.5 and much higher than the figure for low-income countries at 61.²³ DPRK life expectancy was, however, lower than that of East Asia as a whole, where life expectancy was 75 in 2014.²⁴ Life expectancy in the DPRK remained better, even throughout the famine period, than for low-income countries and the least developed countries, but the comparative life-expectancy data also indicate a government that struggles to maintain global well-being for its population as compared to either its own historic achievements in the Cold War period or as compared to its developed neighbors. The life-expectancy data therefore indicate, at the very least, a stalling of development in the DPRK.

In terms of the second HDI criterion, which is access to knowledge, using data on school enrollment and literacy rates, the DPRK scores highly in human development terms. One hundred percent of boys and girls continue to be enrolled for twelve years of compulsory, free education, and the population has had virtually 100 percent literacy at least since the 1960s.²⁵

It is in terms of the third criterion, of standard of living, as measured through GDP per capita and purchasing power parity (PPP),

22 For figures, sources, and discussion, see Hazel Smith, *North Korea: Markets and Military Rule* (Cambridge: Cambridge University Press, 2015), 30, 260, and 267; World Bank, “World Development Indicators 2016” (Washington DC: International Bank for Reconstruction and Development/The World Bank, 2016), accessed August 12, 2016, <http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD?locations=Z4-K>.

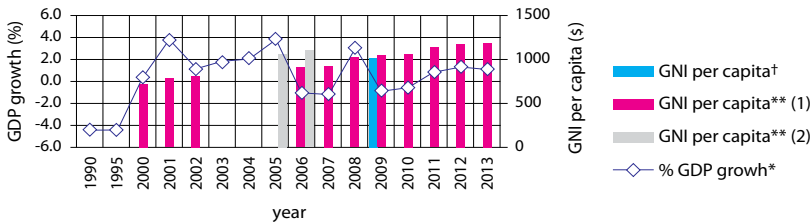
23 Ibid.

24 Ibid.

25 For details, see Hazel Smith, *Hungry for Peace: International Security, Humanitarian Assistance and Social Change in North Korea* (Washington DC: United States Institute of Peace Press, 2005)

that the data indicate that the DPRK faces a development crisis. We have enough data to show that although the economic freefall of the 1990s has come to a halt, economic growth remained sufficient only to achieve a level of economic stability at a very low level of economic activity. Figure 2 shows that GDP growth was negligible from 2006 to 2013 (the figures available for the period of universal sanctions). GNI per capita slightly increased but from a very low basis and remained less than \$1,000 in 2013.

Figure 2. DPRK Economic Indicators



Sources: *Bank of Korea, “Gross Domestic Product Indicators for the North Korean Economy” (Annual Report, 2013), http://www.nkeconwatch.com/nk-uploads/GDP_of_North_Korea_in_2013_F.pdf.

**Bank of Korea, “Gross Domestic Product Indicators for the North Korean Economy” (Annual Report, 2000–2013, except for the years 2003, 2004, and 2005), <http://www.nkeconwatch.com/north-korea-statistical-sources/>.

†The two different figures for 2009 GNI both come from the Bank of Korea.

Key:

1. All figures in this row converted from Korean won at the exchange rate prevailing in August 2015.
2. All figures in this row were given in the original documents in US dollars.

The Humanitarian Costs of Sanctions

Sanctions, by their nature, inhibit foreign economic investment. Universal economic sanctions contribute to a lack of growth in the DPRK because they are intended to do so. They, therefore, have human costs. They cannot, however, be said to have contributed to a humanitarian crisis. There is no humanitarian emergency in the DPRK, as the concept is understood by the humanitarian agencies.

Instead, the condition of life for North Korea’s population can be understood as reflecting the conditions of life for many people in the

world, including sections of the population in the developed countries. Incomes remained low, and given that almost all food and goods since the late 2000s come from the market and therefore have to be paid for in market prices that are determined by global pricing, the possibilities of having regular access to nutritious, expensive food like meat, eggs, fish, and dairy products are low for most of the population. The widespread absence of sophisticated technology means that work is physically hard for many and especially for women, whose responsibility it remains to care for the sick, prepare food, and engage in physically onerous household tasks and who are also likely to be working; the effects are to reduce the quality of life for many people.

That there is no humanitarian emergency in the DPRK, despite the low level of economic activity and the low GNI per capita over the period of universal sanctions should be the subject of further research, but the government's commitment to the maintenance of active public health and vaccination programs and the extension of compulsory, free primary and secondary education from eleven to twelve years in 2012 must be contributory. Another factor is access to the private market sector, which has been available nationally, although differentially, since the early 2000s. The benefits of the market are only available, of course, to those with purchasing power and that does not include all of the population all of the time.

A major component of the lack of development and the substantive economic growth that is required for economic development to succeed is the absence of significant foreign investment, which is prevented by sanctions. It is by no means the only factor and cannot be disentangled in empirical terms from the political dynamics of the government's unwillingness to change security policy to allow for universal sanctions to be mitigated or eliminated. This is not the only issue, however; an unwillingness to negotiate on any terms with the DPRK by important domestic sectors in the United States and South Korea may not be conducive to finding ways through the ongoing security dilemmas that will need to be resolved before significant economic investment, which will necessarily have to be financed by foreign investors, finds its way to the benefit of the population of the DPRK.

REFERENCES

- Barnett, Michael, and Thomas G. Weiss. *Humanitarianism in Question: Politics, Power, Ethics*. Ithaca: Cornell University Press, 2008.
- de Waal, Alex. *Famine Crimes: Politics and the Disaster Relief Industry in Africa*. Bloomington: Indiana University Press for African Rights and the International Africa Institute, 1997.
- Drezner, Daniel W. "Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice." *International Studies Quarterly* 13 (2011): 96–108. Accessed August 1, 2016. http://fletcher.tufts.edu/~media/Fletcher/News%20Images/Drezner_Sanctions.pdf. Accessed August 1, 2016.
- Eade, Deborah, and Tony Vaux, eds. *Development and Humanitarianism*. Bloomfield: Kumarian, 2007.
- Frank, Rüdiger. "North Korea's Foreign Trade." *38 North*. October 22, 2015. Accessed August 1, 2016. <http://38north.org/2015/10/rfrank102215/>.
- Kim, Deok-hyun. "China's Imports of N. Korean Goods Fall 12.6 Percent in May." *Yonhap News*, June 22, 2016. Accessed July 30, 2016. <http://english.yonhapnews.co.kr/national/2016/06/22/26/0301000000AEN2016062201200315F.html>.
- Millennium Project. Accessed August 1, 2016. www.unmillenniumproject.org/goals/.
- Minear, Larry. *The Humanitarian Enterprise*. Bloomfield: Kumarian, 2002.
- Murphy, Craig N. *The United Nations Development Programme*. Cambridge: Cambridge University Press, 2006.

- Schott, Jeffrey J., and Euijin Jung. "South Korea–China FTA falls short on reform." *East Asia Forum*, May 29, 2016. Accessed August 1, 2016. www.eastasiaforum.org/2016/05/29/south-korea-china-fta-falls-short-on-reform/.
- Smillie, Ian, and Larry Minear. *The Charity of Nations: Humanitarian Action in a Calculating World*. Bloomfield: Kumarian, 2004.
- Smith, Hazel. *Hungry for Peace: International Security, Humanitarian Assistance, and Social Change in North Korea*. Washington, DC: US Institute of Peace Press, 2005.
- . *North Korea: Markets and Military Rule*. Cambridge: Cambridge University Press, 2015.
- . "Nutrition and Health in North Korea: What's New, What's Changed, and Why It Matters." *North Korean Review* 12, no. 1 (Spring 2016): 7-34.
- Straits Times*. "China's Q1 Trade with North Korea Up Despite Sanctions." April 13, 2016. Accessed July 31, 2016. www.straitstimes.com/asia/east-asia/chinas-q1-trade-with-north-korea-up-despite-sanctions.
- UNDP. *The Human Development Index (HDI)*. Accessed August 12, 2016. <http://hdr.undp.org/en/content/human-development-index-hdi>.
- UNICEF. "DPRK National Nutrition Survey: Executive Summary." Accessed August 6, 2015. www.unicef.org/dprk/support_20884.html.
- . "Nutrition Situation for Women and Children in DPRK: A Presentation by UNICEF for Development Partners, February 12, 2016." Pyongyang: UNICEF, 2016.

WHO/ UNICEF. “WHO Vaccine-Preventable Diseases: Monitoring System. 2016 Global Summary. WHO UNICEF Estimates Time Series for Democratic People’s Republic of Korea (the) (PRK).” Accessed August 7, 2016. http://apps.who.int/immunization_monitoring/globalsummary/estimates?c=PRK.

World Bank. World Development Indicators. Accessed August 1, 2016. <http://data.worldbank.org/?locations=XM-KP>.

———. The Data Blog. Accessed August 1, 2016. <http://blogs.worldbank.org/opendata/category/tags/news>.

———. World Development Indicators. Accessed August 1, 2016. <http://data.worldbank.org/income-level/high-income> and <http://data.worldbank.org/country/china>.

———. “World Development Indicators 2016.” Washington, DC: International Bank for Reconstruction and Development/ The World Bank, 2016. Accessed August 12, 2016. <http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD?locations=Z4-K>.

World Health Organisation. “WHO Vaccine-Preventable Diseases: Monitoring System. 2016 Global Summary.” Accessed August 7, 2016. http://apps.who.int/immunization_monitoring/globalsummary/countries?countrycriter%5Bcountry%5D%5B%5D=PRK#.

CHAPTER 6

Sanctions against North Korea: An Analysis from an International Human Rights Law Perspective

Kyung-ok Do

Introduction

Prompted by North Korea's fourth nuclear test on January 6, 2016, and the launch of its long-range missiles on February 7, the UN Security Council unanimously adopted Resolution 2270 on March 2.¹ This resolution not only reinforced existing measures but also included a number of new measures. Furthermore, before and after the adoption of Resolution 2270, South Korea, Japan, the United States, and the European Union announced unilateral sanctions against North Korea. Amid the international community's attention on the effects and substantial implementation of sanctions against North Korea, North Korea conducted its fifth nuclear test on September 9, 2016. The Security Council strengthened its sanctions regime against North Korea by unanimously adopting Resolution 2321 on November 30, 2016.² South Korea, Japan and the United States announced additional sanctions on North Korea in December 2016.

1 UN Doc. S/RES/2270 (2016).

2 UN Doc. S/RES/2321 (2016).

Although North Korea's nuclear and missile development directly triggered these international responses, they also referenced North Korean people or North Korean human rights. UN Security Council Resolutions 2270 and 2321 expressed deep concern about the grave hardship to which the North Koreans were subject. The resolutions also expressed great concern that revenues generated by North Korea's arms sales paid for the pursuit of nuclear weapons and ballistic missiles, while North Korean citizens' needs were greatly unmet. The United States also set one of the purposes of its North Korea Sanctions and Policy Enhancement Act of 2016 as "to ease the suffering of the people of North Korea." Title II and Title III of the act provide for sanctions against North Korean human rights abuses and the promotion of North Korean human rights. For its part, the South Korean government did not explicitly include such references in its sanctions, but it has strived to strengthen sanctions while emphasizing the need to improve human rights in North Korea. However, given that the aim of sanctions is to cause harm in order to induce changes, it is difficult to envision a sanction, whether imposed on a particular state or an individual, that has no adverse effects on individual human rights. Assuming that sanctions are indeed effective, sanctions regimes pose a human rights dilemma in that stronger sanctions increase the economic burden for citizens of the sanctioned state. This dilemma may deteriorate if one of the aims of imposing sanctions includes improving the human rights situation of the target state.

The purpose of this chapter is to analyze how sanctions infringing individual human rights can be addressed under international human rights law and further draw implications applicable to the case of sanctions against North Korea. Prior to the analysis, it is important to emphasize that this chapter does not question the legitimacy of sanctions as an instrument to enforce international law

or as a response to human rights violations.³ Nevertheless, there appears to be a broad consensus that whether applied multilaterally or unilaterally, sanctions must be imposed with some legal limitations. Of those legal limitations, the applicability of international human rights standards is the focus of this chapter. First, the chapter will discuss the general effects of sanctions on human rights. Then it will examine the extent to which contemporary international law can limit the sanctions that may have a negative impact on individual human rights. Finally, it will conclude with implications concerning present sanctions against North Korea.

The Impact of Sanctions on Human Rights

Comprehensive Sanctions and Targeted Sanctions

The primary responsibility of the Security Council is to maintain international peace and security. To this end, the Security Council determines the existence of any threat to the peace, breach of the peace, or act of aggression and makes recommendations or takes decisions on nonmilitary or military measures, in accordance with Article 41 or Article 42.⁴ Of these, the nonmilitary measures specified in Article 41 are generally referred to as “UN sanctions.” These types of sanctions include the complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication and the severance of diplomatic relations.⁵ From the mid-1940s to the early 1990s, these types of

3 However, it should be noted that the legality of sanctions is a frequently debated topic under international law. Whereas in the case of sanctions by the Security Council, the scope of its authority is the main point of contention, in the case of unilateral sanctions by states, some see those sanctions as impermissible under international law. For example, Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (New York: Frederick A. Praeger, 1964), 733; Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart Publishing, 2004), 136; Alexander Orakhelashvili, “The Impact of Unilateral EU Economic Sanctions on the UN Collective Security Framework: The Case of Iran and Syria,” in *Economic Sanctions under International Law*, eds. Ali Z. Marossi and Marisa R. Bassett (Hague: Springer, 2015); Rahmat Mohamad, “Unilateral Sanctions in International Law: A Quest for Legality,” in *Economic Sanctions under International Law*, eds. Ali Z. Marossi and Marisa R. Bassett (Hague: Springer, 2015).

4 Article 39 of the UN Charter.

5 Article 41 of the UN Charter.

sanctions were rarely imposed. The only instances of UN sanctions were against Southern Rhodesia in 1966 and South Africa in 1977. However, cases of UN sanctions drastically increased after the end of the Cold War.

In most cases, sanctions that began as limited embargoes have gradually been extended to become comprehensive sanctions. Only in the case of Iraq in 1990 did the Security Council immediately introduce comprehensive sanctions.⁶ Under Resolution 661, the Security Council prohibited member states from importing any product from Iraq or Kuwait and engaging in activities that might promote exports from Iraq or Kuwait. The resolution also suspended the sale and supply of all products, except medicine or food provided for humanitarian purposes, and prohibited the supply of funds and resources toward the Iraqi government or companies, with the exception of those intended for humanitarian aid.⁷ However, the implementation of comprehensive sanctions led to serious economic ramifications for the general public and subsequent political and social costs. The Iraqi government, NGOs, and UN officials brought to light the deprivation experienced by the Iraqi people, eventually leading the international community to skepticism about comprehensive sanctions. Accordingly, the Security Council has increasingly used targeted sanctions, which are imposed not on the state but rather on individuals with the power to affect policy or direct accountability for the situation at hand. This type of sanction, which mainly freezes assets, bans travel, and embargoes arms, is also referred to as “smart sanctions.” Because of human rights concerns, as well as humanitarian implications, individual states have also resorted to targeted or smart sanctions in imposing unilateral sanctions.

The Impact of Comprehensive Sanctions on Human Rights

In most cases, comprehensive sanctions have the greatest impact on economic, social, and cultural rights (ESC rights), such as the right to food, the right to health, and the right to an adequate

6 Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity*, 5th ed. (Leiden: Martinus Nijhoff Publishers, 2011), 937.

7 UN Doc. S/RES/661 (1990).

standard of living, recognized in the International Covenant on Economic, Social, and Cultural Rights (ICESCR). The General Comment No. 8 on the relationship between economic sanctions and respect for the ESC rights adopted by the Committee on Economic, Social, and Cultural Rights (CESCR) states:

While the impact of sanctions varies from one case to another, the Committee is aware that they almost always have a dramatic impact on the rights recognized in the Covenant. Thus, for example, they often cause significant disruption in the distribution of food, pharmaceuticals and sanitation supplies, jeopardize the quality of food and the availability of clean drinking water, severely interfere with the functioning of basic health and education systems, and undermine the right to work. In addition, their unintended consequences can include reinforcement of the power of oppressive élites, the emergence, almost invariably, of a black market and the generation of huge windfall profits for the privileged élites which manage it, enhancement of the control of the governing élites over the population at large, and restriction of opportunities to seek asylum or to manifest political opposition. While the phenomena mentioned in the preceding sentence are essentially political in nature, they also have a major additional impact on the enjoyment of economic, social and cultural rights.⁸

In 2000, the negative effects of comprehensive sanctions on human rights were also addressed by the Sub-Commission on the Promotion and Protection of Human Rights of the UN Commission on Human Rights.⁹ Its working paper examined the upshot of sanctions on Iraq, Burundi, and Cuba. The three cases have not only provoked international controversy but are also exemplary of Security Council sanctions, regionally imposed sanctions, and unilater-

8 UN CESCR General Comment, no. 8 (1997), para. 3.

9 Marc Bossuyt, "The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights," Working paper prepared for the Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/2000/33 (2000).

ally imposed sanctions. The working paper concluded that Iraqi sanctions instigated a “humanitarian disaster comparable to the worst catastrophes of the past decade,” with an increase in child mortality rates, the lack of food, and collapse of the medical system ultimately sweeping aside the ESC rights of the Iraqi people.¹⁰ This sanctions regime against Iraq was found to be unequivocally illegal under existing international humanitarian law and human rights law.¹¹ Likewise, in the case of Burundi, serious shortages of fuel, spare parts, medicines, and fertilizers led to drastic price increases and inflation. Commerce and industry were paralyzed by the lack of raw material and spare parts, unemployment skyrocketed, and income plummeted. Agriculture also suffered because of the shortage of seeds and fertilizers.¹² Such a sanction was also deemed illegal under international law.¹³ Finally, in the case of Cuba, the US embargo, combined with pressure from other countries, posed serious difficulties for the citizens of Cuba. In particular, health and nutrition were the two primary victims of sanctions.¹⁴ It has been argued that US sanctions have violated human rights law on two accounts. First, the US status as a major regional economic power and the main source of new medicines and technologies meant deprivations that impinged on Cubans’ human rights; second, the United States attempted, through various acts passed in the past decade, to extra-territorialize its own foreign-trade policy.¹⁵ On the basis of this working paper, the Sub-Commission appealed to states to promptly terminate all aspects of sanctions regimes that adversely affected human rights, contravened international law, or conflicted with other norms of international law.¹⁶

Since then, the United Nations has continued to discuss the effects of sanctions on human rights with a particular focus on the legitimacy of unilateral sanctions from a human rights perspective.

10 Ibid., paras. 63–67.

11 Ibid., para. 71.

12 Ibid., paras. 79–82.

13 Ibid., para. 86.

14 Ibid., paras. 91–94.

15 Ibid., paras. 98–100.

16 UN Doc. E/CN.4/Sub.2/2000/L.33 (2000).

A study by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in 2012, requested by the Human Rights Council (HRC), is one example.¹⁷ The study concluded that unilateral economic sanctions may have negative effects on the target state's general public, especially on the vulnerable class:

The primary victims of these measures are often the most vulnerable classes, including women, children, the infirm and older person, as well as the poor. These groups suffer more acutely as a result of denial of access to life-saving equipment and medications, basic food products and educational equipment. Others are prevented from joining the job market... This seems to indicate that unilateral coercive measures often have negative impacts that appear to disproportionately affect the poor and the vulnerable, the very persons for whom human rights principles seek to provide particular safeguards.¹⁸

Nevertheless, it is not easy to assess the harmful effects on human rights of sanctions that target a whole economy rather than particular individuals, unless the case at hand is extreme, like Iraq. Multiple factors may cause the general public's economic suffering, and sanctions may be no more than one of those factors. The issue becomes more complicated when the relevant state is the target of both multilateral and unilateral sanctions, because it is difficult to separate out the impact of respective sanctions. While it is possible to assert that "comprehensive sanctions, whether imposed by the Security Council or unilaterally, have negative impacts on the human rights of the general public," it is difficult to argue that a particular type of sanction violates individual human rights.

¹⁷ OHCHR, *Thematic Study of the Office of the United Nations High Commissioner for Human Rights on the Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, Including Recommendations on Actions Aimed at Ending Such Measures*, UN Doc. A/HRC/19/33 (2012).

¹⁸ *Ibid.*, para. 32.

The Impact of Targeted Sanctions on Human Rights

Although targeted sanctions emerged as an alternative measure to address the disadvantages of comprehensive sanctions, it also led to new problems concerning human rights. This issue drew international attention with the Security Council's adoption of Resolution 1267 in 1999.¹⁹ The 1267 sanctions regime required member states to freeze assets, restrict travel, and embargo arms of specifically designated individuals and entities associated with Al-Qaeda and the Taliban. However, the 1267 committee did not grant the listed individuals an opportunity to respond. As a result, individuals with no connections to Al-Qaeda or the Taliban were designated as targets of sanctions. Some individuals filed lawsuits in domestic and regional courts claiming that their rights had been violated by measures implementing the resolution of the Security Council. In September 2008, the European Court of Justice (ECJ) became the first of the regional or international courts to acknowledge the court's authority to evaluate the legitimacy of measures implementing the resolution of the Security Council. Furthermore, the ECJ ruled that the measures adopted to implement the requirements under the 1267 sanctions regime infringed on the claimant's certain fundamental rights, such as the right to be heard, the right to an effective legal remedy, and the right to property, and were therefore invalid.²⁰

In particular, the lack of judicial protection was seen as a major shortcoming, and the Security Council created the Office of the Ombudsperson of the 1267 Committee to make up for the deficiency.²¹ The ombudsperson is an independent and impartial person who deals with requests from individuals to be removed from the sanctions list. While the creation of the ombudsperson's position is a remarkable development, it has not solved the judicial protection problem because the ombudsperson only has the power to make

¹⁹ UN Doc. S/RES/1267 (1999).

²⁰ *Kadi v. Council and Commission*, Case C-402/05 P & C-415/05 P (2008), paras. 348, 349, 369–371. For further analysis on the ECJ's ruling in the Kadi case, see Kyung-ok Do, "UN Targeted Sanctions against Suspected Terrorists: with Special Reference to the Kadi Decision of the ECJ," *Seoul International Law Journal* 17, no. 1(2010): 139–165 (in Korean).

²¹ UN Doc. S/RES/1904 (2009).

observations.²² What is more, the functioning of the ombudsperson is limited to the 1267 sanctions regime.

It seems that the controversy over targeted sanctions cannot be easily resolved under the rule of law and human rights standards. Targeted sanctions may prevent indiscriminate impacts on the general economy, but they can still infringe on the rights of the selected targets: the freedom of movement set forth in Article 12 of the International Covenant on Civil and Political Rights (ICCPR) and Article 2 of Protocol 4 to the European Convention on Human Rights (ECHR); the right to property set forth in Article 1 of Protocol 1 to the ECHR; the right to privacy set forth in Article 17 of the ICCPR and Article 8 of the ECHR; and the right to a fair trial set forth in Article 14 of the ICCPR and Article 6 of the ECHR.²³ The OHCHR also mentioned in the 2012 study that the targeted effect of such individualized sanctions may be more likely to violate individual rights than the more diffuse general trade sanctions.²⁴ However, when targeted sanctions are imposed to end gross human rights violations, it appears that the OHCHR prioritizes the human rights of the general public over those of the targeted few:

In particular, the positive impact that sanctions imposed with the objective of protecting human rights can be reasonably expected to have must outweigh the negative impact, taking into account the views of the population suffering under the human rights violations that gave rise to the sanctions and the impact on the most vulnerable parts of society. In this context, it has to be borne in mind that targeted sanctions aimed at applying pressure on specific decision-makers bearing responsibility for the human rights situation typically have a less harmful impact on the population as a whole than measures targeting the economy as a whole.²⁵

22 Schermers and Blokker, *supra* note 6, 938, 939.

23 For further analysis, see Eugenia López-Jacoiste, "The UN Collective Security System and Its Relationship with Economic Sanctions and Human Rights," *Max Planck Yearbook of United Nations Law* 14 (2010): 273–335.

24 OHCHR, *supra* note 17, para. 27.

25 *Ibid.*, para. 38.

Human Rights as Legal Limits of Sanctions

Limits for States

Whether comprehensive or targeted, sanctions can have far-reaching implications for human rights. In such cases, can international human rights law impose substantive legal limits on sanctions-imposing entities, such as the Security Council or individual states? Some experts argue that regulating sanctions through human rights law poses legal difficulties, because human rights law “is concerned with the relationship between States and those in their territorial domain and not with international relations.”²⁶ In other words, they argue that a state is only responsible for persons or territories within its power or effective control under international law. However, especially in the case of ICESCR, others have argued for the introduction of an extraterritorial dimension of the ICESCR by the CESCR.²⁷

Article 2, Paragraph 1, of the ICESCR stipulates that the ESC rights be realized through “international assistance and cooperation.” In contrast, Article 2, Paragraph 1 of the ICCPR identifies territory and jurisdiction as standards for application. This distinction clearly shows the ICESCR drafters’ intent for its extraterritorial application. Article 2, Paragraph 1 of the ICESCR states:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

²⁶ Nema Milaninia, “*Jus ad bellum economicum* and *jus in belloeconomico*: The Limits of Economic Sanctions under the Paradigm of International Humanitarian Law,” in *Economic Sanctions under International Law*, eds. Ali Z. Marossi and Marisa R. Bassett (Hague: Springer: 2015), 98, 99.

²⁷ Paul de Waart, “Economic Sanctions Infringing Human Rights: Is There a Limit?,” in *Economic Sanctions under International Law*, eds. Ali Z. Marossi and Marisa R. Bassett (Hague: Springer, 2015), 143.

Examination of the ICESCR drafting process suggests that states share a consensus on the importance of international assistance and cooperation in realizing the ESC rights.²⁸ However, the member states have taken “international assistance and cooperation” to mean different things. In particular, states held conflicting views on whether there exist legal obligations to pursue or provide international assistance and cooperation.²⁹ They eventually adopted and ratified the ICESCR without clearly defining the phrase and subsequently the dispute dragged on. In 1987, Philip Alston and Gerard Quinn argued that policy trends and events in the general area of international development and cooperation subsequent to the adoption of the Covenant in 1966 may be such as to necessitate a reinterpretation of Article 2(1).³⁰ Furthermore, they argued, “it seems appropriate to assume that States are likely to accept a far greater level of international obligation *in practice* than they will ever formally accept *in writing*.”³¹ This analysis is grounded in the application of Article 31(3) of the Vienna Convention on the Law of Treaties, which provides that when interpreting treaties, subsequent agreement and subsequent practice must be taken into account. It is premature to claim that follow-up agreement or practice that amounts to “subsequent agreement” or “subsequent practice” has been reached. However, to some extent, concerned states’ intents or practices do appear to be converging. The CESCR has led much of this progress.³²

To realize the ESC rights, the Committee has continuously and consistently emphasized the obligations of international assistance and cooperation, and gradually made the content of such obliga-

28 Sigrun I. Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation* (Antwerp: Intersentia, 2006), 85.

29 UN Doc. A/C.3/SR.1203 (1962); UN Doc. A/C.3/SR.1204 (1962).

30 Philip Alston and Gerard Quinn, “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights,” *Human Rights Quarterly* 9 (1987): 191.

31 *Ibid.*, 192.

32 It is generally agreed that decisions of the human rights treaty bodies, including the CESCR, are not legally binding over their member states. However, general comments, country reports, and concluding observations adopted by these bodies can be regarded as “soft law.”

tions more concrete.³³ According to General Comments on member states' international obligations, the CESCR appears to apply a tripartite obligation to respect, protect, and fulfill the ESC rights in describing states' obligations concerning the ESC rights at the international level. In other words, states parties should avoid measures that hinder or prevent the enjoyment of the ESC rights in another state ("obligation to respect"), take measures to prevent nonstate entities under their jurisdiction from interfering with the enjoyment of the ESC rights abroad ("obligation to protect"), and undertake to fulfill the ESC rights in another state ("obligation to fulfill").³⁴

Imposing embargoes or similar measures that prevent the supply of goods essential to securing the ESC rights or using essential goods as an instrument of political and economic pressure can be considered a breach of "obligation to respect" the ESC rights at the international level.³⁵ The CESCR emphasized that "just as the international community insists that any targeted State must respect the civil and political rights of its citizens, so too must that State and the international community itself do everything possible to protect at least the core content of the economic, social and cultural rights of the affected peoples of that State."³⁶ Furthermore, the CESCR presented three obligations for the party responsible for the imposition, maintenance, or implementation of sanctions, whether it be the international community, an international or regional organization, or a state or group of states. First, the ESC rights must be taken

33 For further analysis, refer to Kyung-ok Do, "The Significance of 'International Assistance and Cooperation' under the International Covenant on Economic, Social and Cultural Rights: Implications Regarding North Korea," *Journal of Multicultural Society* 9, no. 2 (2016): 95–125 (in Korean).

34 Magdalena Sepúlveda Carmona, "The Obligations of 'International Assistance and Cooperation' under the International Covenant on Economic, Social and Cultural Rights: A Possible Entry Point to a Human Rights Based Approach to Millennium Development Goal 8," *International Journal of Human Rights* 13, no. 1 (2009): 89–94.

35 The CESCR has stated in its general comments on the rights to food, health, and water that states parties should refrain at all times from imposing embargoes or similar measures that prevent the supply of food, health care, and water, as well as goods and services essential for securing these rights; denial of access to such rights should never be used as an instrument of political and economic pressure. UN CESCR General Comment, No. 12 (1999), para. 37; UN CESCR General Comment, No. 14 (2000), para. 41; UN CESCR General Comment, No. 15 (2003), para. 32.

36 UN CESCR General Comment, No. 8 (1997), para. 7.

fully into account when designing a sanctions regime; second, effective monitoring should be undertaken throughout the period that sanctions are in force; and third, the external entity has an obligation “to take steps, individually and through international assistance and cooperation, especially economic and technical” to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.³⁷

The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights (the Maastricht Principles), adopted by international law and human rights experts in 2011, take a similar approach. Specifically, the section concerning the “obligation to respect” addresses “sanctions and equivalent measures (Principle 22).”³⁸

States must refrain from adopting measures, such as embargoes or other economic sanctions, which would result in nullifying or impairing the enjoyment of economic, social and cultural rights. Where sanctions are undertaken to fulfil other international legal obligations, States must ensure that human rights obligations are fully respected in the design, implementation and termination of any sanctions regime. States must refrain in all circumstances from embargoes and equivalent measures on goods and services essential to meet core obligations.³⁹

Principle 22 addresses situations where there would be a significant negative impact on the ability of groups of people to realize their ESC rights.⁴⁰ These include circumstances where sanctions on a particular industry lead to the layoffs of low-paid workers without

³⁷ *Ibid.*, paras. 11–14.

³⁸ The Maastricht Principles are not legally binding. However, according to the drafters, it is noteworthy that the normative framework presented in the principles are nothing new but are restatements and explanations of existing human rights law. Fons Coomans, “Situating the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights,” *Maastricht Faculty of Law Working Paper* (2013), 4.

³⁹ Principle 22 of the Maastricht Principles.

⁴⁰ Olivier De Schutter et al., “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights,” *Human Rights Quarterly* 34 (2012): 1131.

adequate provision for their social security.⁴¹ However, Principle 22 does not apply to sanctions that simply reduce the income of producers or government officials.⁴² It stipulates that human rights obligations must be taken under consideration not only in the design and implementation of sanctions regimes but also in terminating the sanctions. Therefore, if the impact on the ESC rights outweighs the objectives being sought, sanctions must be terminated.⁴³ Furthermore, the last sentence of Principle 22 sets an unconditional limitation on sanctions, stipulating that states may not restrict the provision of goods and services essential to meet core obligations.⁴⁴

The specific scope and contents of the phrase “international assistance and cooperation” in the ICESCR are still open to debate. However, no member state can deny its importance in realizing the ESC rights. This means that there is an acceptance at the general level of the existence of the obligation to cooperate under the covenant, even if some elements of that obligation remain ambiguous. State parties to the ICESCR need to recognize their obligation to respect the ESC rights not only at the domestic level but also at the international level and that sanctions are imposed under such obligation. The United States, the state that has most frequently imposed unilateral sanctions, signed the ICESCR in 1977 but has yet to ratify it. Nevertheless, the United States is not free from the ICESCR because under Article 18 of the Vienna Convention on the Law of Treaties, a state that has signed the treaty is obliged to refrain from acts that would defeat the object and purpose of a treaty.

Limits for the UN Security Council

Is it logical to assume that international human rights law that limits states imposes the same restraints on the Security Council, made up of those very states? This question concerns the legal limits placed on the Security Council’s measures by Chapter VII of the UN Charter, a challenge that has persisted since the United Nations was established. Some

41 Ibid.

42 Ibid.

43 Ibid., 1133.

44 Ibid.

argue that the key to understanding the powers of the Security Council lies in understanding their delegated nature.⁴⁵ In other words, “the UN Charter constitutes an act of common will of the member states which transfers certain limited powers to the Council, so that the resulting legal product cannot acquire more power than its creator.”⁴⁶ According to this approach, international organizations are bound by the obligations of their member states. It may be, *prima facie*, a legitimate argument. However, the theory of delegated powers, or the theory of attributed powers, runs into at least two problems: first, if international organizations are little more than the mouthpieces of their member states, then their very *raison d’être* comes into question; second, international organizations are usually held to be dynamic and living organisms, in constant development, and it is accepted that their founders can never completely envisage the future.⁴⁷ The theory of implied powers is more dominant than the theory of attributed powers. Indeed, the International Court of Justice (ICJ) accepted the theory of implied powers in its *Reparations for Injuries* advisory opinion.⁴⁸ Nevertheless, there seems to be general agreement on the basic assumption that “international organizations are subjects of international law and as such, are bound by any obligations incumbent upon them under general rules of international law.”⁴⁹ Since it is unclear what rules bind international organizations, the issue becomes even more complex.

Article 1, Paragraph 3, of the UN Charter stipulates as one of the United Nation’s objectives, “to achieve international cooperation in solving international problems of economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms.”⁵⁰ Fur-

45 See Eugenia López-Jacoiste, *supra* note 23, 293.

46 *Ibid.*

47 Jan Klabbers, *An Introduction to International Organizations Law* (Cambridge: Cambridge University Press, 2015), 55, 56.

48 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Rep. 1949, 182.

49 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Rep. 1980, 90.

50 Article 55(c) of the UN Charter also stipulates that “the United Nations shall promote...universal respect for, and observance of, human rights and fundamental freedom for all without distinction as to race, sex, language, or religion.”

thermore, Article 24, Paragraph 2 states that in discharging its duties, the Security Council “shall act in accordance with the Purpose and Principles of the United Nations.” Accordingly, when acting under Chapter VII, the Security Council must consider promoting and encouraging respect for human rights and for fundamental freedoms. However, given that the United Nations, as an international organization, is not a party to any international human rights treaties, none of the UN organs, including the Security Council, is directly bound by these instruments.⁵¹ Nevertheless, there seems to be broad agreement that “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm,”⁵² also known as *jus cogens*, applies to measures imposed by the Security Council under Chapter VII.⁵³ One challenge, however, is that there is considerable controversy regarding which human rights shall be considered *jus cogens*. Admittedly, aside from the general and principled conclusion that the Security Council is subjected to certain limitations of international human rights law, there is much legal theory that remains obscure. In the analysis of Henry G. Schermers and Niels M. Blokker,

Even though the Security Council is not formally bound by the specific rules laid down in relevant treaties of humanitarian or human rights law, the Council is bound by the principles inherent in these treaties. Developments in practice with regard to economic sanctions demonstrate—as in the case of peace-keeping—an increased tendency to take these principles into account. The negative consequences of economic sanctions are limited, for example by the use of so-called smart

51 Christopher Michaelsen, “Human Rights as Limits for the Security Council: A Matter of Substantive Law or Defining the Application of Proportionality?,” *Journal of Conflict & Security Law* 19, no. 3 (2014): 453, 454.

52 Article 53 of the Vienna Convention on the Law of Treaties.

53 Christopher Michaelsen, *supra* note 51, 458; Eugenia López-Jacoiste, *supra* note 23, 291; August Reinisch, “Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions,” *American Journal of International Law* 95, no. 4 (2001): 859.

sanctions (targeted at specific (groups of) individuals) and by restricting the sanctions in time.⁵⁴

Although it cannot be said that international human rights law limits the Security Council in the same way that it limits individual states, practice confirms that the Security Council is not free from international human rights law, and the tendency for the Security Council to be bound by international human rights law has grown stronger over time. In addition to the introduction of targeted sanctions and the Office of the Ombudsperson, the inclusion of humanitarian exceptions to the UN embargo programs aims expressly at guaranteeing respect for human rights. According to the CESCR, “it is commonly assumed that [humanitarian] exemptions ensure basic respect for economic, social and cultural rights within the targeted country.”⁵⁵

Furthermore, it is important to note that some scholars have pushed for a more progressive and flexible interpretation of the UN Charter. For example, Bardo Fassbender emphasizes that the UN Charter is a “living instrument.”⁵⁶ He argues, “Following the adoption of the Charter, human rights, which at the international level in 1945 were still moral postulates and political principles only, have become legal obligations of States under international treaty and customary law.”⁵⁷ Likewise, Eugenia López-Jacoiste argues that the UN Charter’s broad and vague treatment of human rights is largely a reflection of the state of international human rights development at the time of the Charter’s adoption, and that the Charter must be interpreted with an evolving human rights referent in mind.⁵⁸ Fassbender and López-Jacoiste both argue that international human rights law has undergone significant development since the adoption of the UN Charter in 1945. Given that the United Nations has led much of this advancement, an argument

⁵⁴ Schermers and Blokker, *supra* note 6, 1003.

⁵⁵ UN CESCR General Comment, No. 8 (1997), para. 4.

⁵⁶ Bardo Fassbender, “Targeted Sanctions and Due Process,” UN Report, accessed September 15, 2016, http://www.un.org/law/counsel/Fassbender_study.pdf.

⁵⁷ *Ibid.*, 25, 26.

⁵⁸ Eugenia López-Jacoiste, *supra* note 23, 296, 297.

can be made that the charter must be interpreted in the context of present-day human rights law. It will not be easy to set clear legal limits to satisfactorily prevent human rights violations arising from the Security Council's authority granted by Article 41 of the UN Charter. However, strengthening the human rights accountability of the Security Council would help to stabilize the delicate balance between international peace and security and human rights.

Review of Sanctions against North Korea

UN Security Council Resolutions 2270 and 2321

Various measures have been imposed across numerous fields relevant to Resolutions 2270 and 2321. Of those, restrictions on operating aircraft and ships, as well as external trade restrictions, may have a direct impact on the people of North Korea and thus require extra attention. In particular, the Security Council decided that North Korea should not supply, sell or transfer coal, iron and iron ore, and that all states should prohibit the procurement of those materials from that country, with the exception of total coal export to all member states not exceeding \$400,870,018 or 7,500,000 metric tons per year, whichever was lower. Furthermore, the Council prohibited North Korea from exporting gold, titanium ore, vanadium ore, rare earth minerals, copper, nickel, silver and zinc, without any exceptions. These measures may indicate the evolution of UN sanctions against North Korea from targeted to comprehensive. However, it is not easy to determine whether the sanctions are comprehensive or not by merely looking at the restrictions of minerals. What is interesting is the official position taken by the South Korean government right after Resolution 2270 was passed:

This UN Security Council Resolution is unprecedented throughout the past 70 years of history, the strongest, and by far, the most effective non-military measure undertaken by the UN. It is a historical resolution with almost all articles being binding.... This Resolution not only deals with North

Korea's development of WMDs, but also includes various other comprehensive sanctions that may gravely affect all North Korea related aspects.⁵⁹

The South Korean government expressed a similar position right after Resolution 2321 was passed. The statement could simply be emphasizing the strength and breadth of the sanctions imposed. However, phrases such as “unprecedented throughout the past 70 years of history, the strongest, and by far, the most effective non-military measure undertaken by the UN” and “may gravely affect all North Korea related aspects” sound like characteristics of comprehensive sanctions. When North Korea sent a letter to the UN secretary general to complain about Resolution 2270, it quoted the South Korean government's phrase, “harshest and comprehensive sanctions.”⁶⁰

From a human rights perspective, assessing sanctions resolutions based on schematic terms such as comprehensive or targeted does not appear to be particularly meaningful. Resolutions 661 and 1267 are extreme examples of *comprehensive* and *targeted* sanctions, respectively, making it possible to identify which sanctions regime has violated which kind of right. However, targeted sanctions may contain elements that affect the human rights of the general population. In this regard, it is noteworthy that Resolutions 2270 and 2321 contain exceptions for humanitarian or livelihood purposes.⁶¹ These resolutions also contain a very specific general provision compared to previous resolutions:

[these resolutions] are not intended to have adverse humanitarian consequences for the civilian population of the DPRK or to affect negatively those activities, including economic activities and cooperation, that are not prohibited by [previous resolutions or these resolutions], and the work of interna-

59 Republic of Korea, Ministry of Foreign Affairs, Press Release, “Adoption of UN Security Council Resolution 2270 on North Korea” (March 3, 2016) (in Korean).

60 UN Doc. A/70/776-S/2016/214 (2016).

61 UN Doc. S/RES/2270 (2016), paras. 8, 13, 14, 18, 19, 20, 22, 29, 31, 32, and 35; UN Doc. S/RES/2321 (2016), paras. 22, 26, and 33.

tional and non-governmental organizations carrying out assistance and relief activities in the DPRK for the benefit of the civilian population of the DPRK.⁶²

This provision shows not only that these resolutions contain elements that will affect the North Korean people but also that the Security Council is conscious of the impact sanctions will have on them.

One problem with applying the resolutions is that phrases like *humanitarian purpose* and *livelihood purpose* can be interpreted in various ways. A broad definition can limit negative effects on the North Korean people but would dilute the sanctions' effectiveness. Conversely, a rigid application would ensure effective sanctions at the expense of North Koreans' human rights. It is important to balance international peace and security and human rights, even if finding that balance is not an easy feat. Nevertheless, whereas discussion of North Koreans' humanitarian or livelihood concerns are rare, there are abundant concerns about how these exceptions may weaken the effect of sanctions against North Korea. What is more, since North Korea's fifth nuclear test on September 9, 2016, such exceptions have been pinpointed as the weak spot. However, it is indisputable that from a human rights point of view, other problems exist as well. For example, the CESCR argued that humanitarian exemptions tend to be ambiguous and are interpreted arbitrarily and inconsistently; that delays, confusion, and the denial of requests to import essential humanitarian goods cause resource shortages; and that the effect inevitably falls most heavily on the poor.⁶³

As seen above, it would be erroneous to assume that the Security Council is free from international human rights law. Nevertheless, at present, it is difficult to claim that international human rights law restrains the Security Council to the same extent that it restrains individual states. Thus compared to sanctions measures taken unilaterally by states, measures taken by states as implementation of Security Council resolutions imposing sanctions against North

⁶² UN Doc. S/RES/2270 (2016), para. 48; UN Doc. S/RES/2321 (2016), para. 46.

⁶³ UN CESCR General Comment, No. 8 (1997), para. 5.

Korea pursuant to Article 25 of the UN Charter⁶⁴ are less likely to raise calls of violations of international human rights law. The OHCHR also states that if states take coercive measures to implement Security Council resolutions, those measures may be legally justified, even if they contravene treaty obligations or customary international law rules per se.⁶⁵

Unilateral Sanctions by Individual States

From a human rights perspective, a more pressing concern than unilateral sanctions that fall within the scope granted by the Security Council resolution are unilateral sanctions that go beyond that scope. South Korea, Japan, the United States, and the European Union, among others, have adopted unilateral sanctions measures. Since 2010, through Measure 5.24, South Korea has adopted comprehensive sanctions against North Korea, including prohibition of the exchange of goods, prohibition of North Korean ships in South Korean waters, and prohibition of new investment in North Korea. In addition, in 2016, South Korea halted operations at the Kaesong Industrial Complex, expanded the list of financial sanction targets, and tightened restrictions on shipping and imports and exports. Japan adopted measures concerning the movement of persons, financial measures, and measures concerning maritime transport. The European Union adopted measures regarding restrictions on shipping and imports and exports. South Korea, Japan, and the European Union have *all* strengthened restrictions on shipping. More specifically, the ROK government has prohibited a foreign vessel from docking in South Korea within one year of calling at ports in North Korea. The government of Japan has banned the entry of any vessel that has called at a port in North Korea. The European Union has prohibited any vessel owned, operated, or crewed by North Korea from entering EU ports. The strengthening of such shipping restrictions may affect North Korea's trade and commerce.

⁶⁴ "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

⁶⁵ OHCHR, *supra* note 17, para. 24.

Furthermore, US unilateral sanctions are not only wide in scope but also include various new measures. President Barack Obama signed the North Korea Sanctions and Policy Enhancement Act of 2016 into law on February 18, 2016. This act grants the president authority to implement what are known as “secondary sanctions.”⁶⁶ Secondary sanctions are “economic restrictions designed to deter third-country actors from supporting a primary target of unilateral sanctions.” They tighten the noose of conventional unilateral sanctions by inhibiting non-US citizens and companies from transacting with or supporting a target regime.⁶⁷ On March 15, 2016, President Obama issued Executive Order 13722 pursuant to, inter alia, the North Korea Sanctions and Policy Enhancement Act of 2016.⁶⁸ Sections 2 and 6 of Executive Order 13722 outline secondary sanctions. In addition to secondary sanctions, Executive Order 13722

- blocks the property and interests in property of the Government of North Korea and the Workers’ Party of Korea
- prohibits the exportation or re-exportation, direct or indirect, from the United States, or by a US person, wherever located, of any goods, services, or technology to North Korea
- prohibits new investment in North Korea by a US person
- prohibits any approval, financing facilitation, or guarantee by a US person, wherever located, of a transaction by a foreign person where the transaction by that foreign person would be prohibited by the executive order if performed by a US person or within the United States⁶⁹

The enactment of the act and the promulgation of the executive order make US sanctions against North Korea virtually comprehensive.

It is hard to estimate what the effects of such unilateral sanctions will be on ordinary North Korean people. In a 2012 study, the

⁶⁶ Section 104 of the North Korea Sanctions and Policy Enhancement Act of 2016.

⁶⁷ Jeffrey A. Meyer, “Second Thoughts on Secondary Sanctions,” *University of Pennsylvania Journal of International Law* 30, no. 3 (2009): 906.

⁶⁸ Executive Order 13722 of March 15, 2016: Blocking Property of the Government of North Korea and the Workers’ Party of Korea and Prohibiting Certain Transactions with Respect to North Korea, Federal Register, 81, no. 53 (March 18, 2016).

⁶⁹ Sections 1 and 3 of Executive Order 13722.

OHCHR suggested that assessors of the impact of unilateral coercive measures on human rights in any given country consider “the volume and type of trade/finance affected” as well as “the extent of the economic linkage between the sender State and the target State.”⁷⁰ Given that North Korea’s dependence on foreign trade is low and that over 90 percent of its foreign trade is done with China,⁷¹ the effect of the sanctions on the North Korean people may be mitigated. In addition, many North Korean residents rely on private economic activities for their livelihoods and the self-sufficiency rate for food has largely increased. However, if sanctions are prolonged, they will inevitably affect the lives of ordinary North Koreans. The OHCHR warns that long-term sanctions may result in social problems and may raise humanitarian concerns for the most vulnerable segments of society.⁷² States that impose unilateral sanctions against North Korea need to keep in mind the OHCHR recommendations—states must refrain from adopting unilateral coercive measures that breach their human rights obligations under treaty or customary international law, and states are urged to adopt measures ensuring that essential supplies, such as medicines and food, are not used as tools for political pressure and that under no circumstances should people be deprived of their basic means of survival.⁷³

Conclusion

It cannot be denied that sanctions are important instruments to enforce international law or respond to human rights violations. One concern is that in the face of current sanctions against North Korea, international attention disproportionately lies on how much pressure should be put on the North Korean regime. Those with any interest in the effect of sanctions on the civilian population of North Korea limit their focus to potential sociopolitical phenomena, such as the emergence of parties that hold differing views from the North

⁷⁰ OHCHR, *supra* note 17, para. 33.

⁷¹ Korea Trade-Investment Promotion Agency, *Trend of North Korea’s Trade in 2015* (KOTRA, 2016) (in Korean).

⁷² OHCHR, *supra* note 17, para. 34.

⁷³ *Ibid.*, paras. 40–42.

Korean regime. If the severity of sanctions is great enough to induce such phenomena, it is possible that sanctions will have a negative impact on the human rights of ordinary North Korean people. Yet, efforts to assess sanctions against North Korea in terms of human rights are uncommon. This is somewhat surprising given that the international community, through historical tribulation, has taken many strides toward reducing human rights violations in the application of sanctions and that North Korea's human rights situation has garnered so much attention both at home and abroad.

In that context, this chapter has reviewed sanctions imposed on North Korea from the perspective of international human rights law. First, it is important to clarify that because the United Nations is not party to any international human rights treaties, none of the UN organs, including the Security Council, is directly bound by these instruments. Nevertheless, the Security Council's practice confirms that it is generally not free from international human rights law, a tendency that has been increasing over time. Still, if UN member states take measures to implement Security Council resolutions that impose sanctions against North Korea, such measures are less likely to raise calls of violation of international human rights law. Therefore, in terms of international human rights law, it is more problematic when individual states impose unilateral sanctions against North Korea going beyond the scope granted by the Security Council resolution.

If these unilateral sanctions are targeted sanctions, they may incur fewer problems than comprehensive sanctions. Individuals subject to targeted sanctions will be denied the freedom of movement, right to property, and the right to a fair trial. However, if the aim of the sanctions is to end gross human rights violations, the sanctions would prioritize human rights of the general public over those of the individuals subject to the targeted sanctions. Still, since other unilateral sanctions regimes against North Korea, apart from the US North Korea Sanctions and Policy Enhancement Act of 2016, have not identified the improved human rights as an aim, this could become a point of controversy under international human rights law.

The unilateral sanctions measures against North Korea are in fact highly suggestive of comprehensive sanctions. It is important to remember that states that have signed or ratified the ICESCR have an “obligation to respect” the ESC rights at the international level under Article 2, Paragraph 1, specifically, the covenant’s stipulation on “international assistance and cooperation,” and that sanctions are dealt with under such obligation. In adopting the General Comment on the relationship between economic sanctions and respect for the ESC rights, the CESCR emphasized “the fact that the inhabitants of a given country do not forfeit their basic economic, social and cultural rights by virtue of any determination that their leaders have violated norms relating to international peace and security.”⁷⁴ Furthermore, the committee stated, “lawlessness of one kind should not be met by lawlessness of another kind which pays no heed to the fundamental rights that underlie and give legitimacy to any such collective action.”⁷⁵ States imposing unilateral sanctions on North Korea must bear this in mind at all times.

74 UN CESCR General Comment, No. 8 (1997), para. 16.

75 *Ibid.*

REFERENCES

- Alston, Philip, and Gerard Quinn. "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights." *Human Rights Quarterly* 9, no. 2 (1987): 156-229.
- Bossuyt, Marc. "The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights." Working paper prepared for the Commission on Human Rights. Sub-Commission on the Promotion and Protection of Human Rights. UN Doc. E/CN.4/Sub.2/2000/33 (2000).
- Carmona, Magdalena Sepúlveda. "The Obligations of 'International Assistance and Cooperation' under the International Covenant of Economic, Social and Cultural Rights: A Possible Entry Point to a Human Rights Base Approach to Millennium Development Goal 8." *The International Journal of Human Rights* 13, no. 1 (2009): 86-109.
- Coomans, Fons. "Situating the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights." Maastricht Faculty of Law Working Paper, 2013.
- de Waart, Paul. "Economic Sanctions Infringing Human Rights: Is There a Limit?" *Economic Sanctions under International Law*, edited by Ali Z. Marossi and Marisa R. Bassett, 125-144. Hague: Springer, 2015.
- de Wet, Erika. *The Chapter VII Powers of the United Nations Security Council*. Oxford: Hart Publishing, 2004.
- Do, Kyung-ok. "UN Targeted Sanctions against Suspected Terrorists: With Special Reference to the Kadi Decision of the ECJ." *Seoul International Law Journal* 17, no. 1 (2010): 139-165 (in Korean).

- . “The Significance of ‘International Assistance and Cooperation’ under the International Covenant on Economic, Social and Cultural Rights: Implications Regarding North Korea.” *Journal of Multicultural Society* 9, no. 2 (2016): 95-125. (in Korean).
- Fassbender, Bardo. “Targeted Sanctions and Due Process.” UN Report. Accessed September 15, 2016, http://www.un.org/law/counsel/Fassbender_study.pdf.
- Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*. Advisory Opinion. International Court of Justice Report, 1980.
- Kadi v. Council and Commission*. Case C-402/05 P & C-415/05 P (2008).
- Kelsen, Hans. *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*. New York: Frederick A. Praeger, 1964.
- Klabbers, Jan. *An Introduction to International Organizations Law*. Cambridge: Cambridge University Press, 2015.
- Korea Trade-Investment Promotion Agency. *Trend of North Korea's Trade in 2015*. KOTRA, 2016 (in Korean).
- López-Jacoiste, Eugenia. “The UN Collective Security System and Its Relationship with Economic Sanctions and Human Rights.” *Max Planck Yearbook of United Nations Law* 14 (2010): 273-335.
- Meyer, Jeffrey A. “Second Thoughts on Secondary Sanctions.” *University of Pennsylvania Journal of International Law* 30, no. 3 (2009): 905-968.
- Michaelsen, Christopher. “Human Rights as Limits for the Security Council: A Matter of Substantive Law or Defining the Application of Proportionality?” *Journal of Conflict & Security Law* 19, no. 3 (2014): 451-469.

- Milaninia, Nema. “*Jus ad bellum economicum and jus in bello economico: The Limits of Economic Sanctions under the Paradigm of International Humanitarian Law.*” In *Economic Sanctions under International Law*, edited by Ali Z. Marossi and Marisa R. Bassett, 95-124. Hague: Springer, 2015.
- Mohamad, Rahmat. “Unilateral Sanctions in International Law: A Quest for Legality.” In *Economic Sanctions under International Law*, edited by Ali Z. Marossi and Marisa R. Bassett, 71-81. Hague: Springer, 2015.
- OHCHR. *Thematic Study of the Office of the United Nations High Commissioner for Human Rights on the Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, Including Recommendations on Actions Aimed at Ending Such Measures.* UN Doc. A/HRC/19/33 (2012).
- Orakhelashvili, Alexander. “The Impact of Unilateral EU Economic Sanctions on the UN Collective Security Framework: The Case of Iran and Syria.” In *Economic Sanctions under International Law*, edited by Ali Z. Marossi and Marisa R. Bassett, 3-21. Hague: Springer, 2015.
- Reinisch, August. “Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions.” *American Journal of International Law* 95, no. 4 (2001): 851-872.
- Republic of Korea, Ministry of Foreign Affairs. “Adoption of UN Security Council Resolution 2270 on North Korea.” Press Release. March 3, 2016 (in Korean).
- Reparation for Injuries Suffered in the Service of the United Nations.* Advisory Opinion. International Court of Justice Report, 1949.
- Schermers, Henry G., and Niels M. Blokker. *International Institutional Law: Unity within Diversity.* 5th ed. Leiden: Martinus Nijhoff Publishers, 2011.

Schutter, Olivier De, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon, and Ian Seiderman. "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights." *Human Rights Quarterly* 34 (2012): 1084-1169.

Skogly, Sigrun I. *Beyond National Borders: States' Human Rights Obligations in International Cooperation*. Antwerp: Intersentia, 2006.

UN Doc. A/C.3/SR.1203 (1962).

UN Doc. A/C.3/SR.1204 (1962).

UN Doc. S/RES/661 (1990).

UN Doc. S/RES/1267 (1999).

UN Doc. E/CN.4/Sub.2/2000/L.33 (2000).

UN Doc. S/RES/1904 (2009).

UN Doc. S/RES/2270 (2016).

UN Doc. S/RES/2321 (2016).

UN Doc. A/70/776-S/2016/214 (2016).

UN CESCR General Comment, No. 8 (1997).

UN CESCR General Comment, No. 12 (1999).

UN CESCR General Comment, No. 14 (2000).

UN CESCR General Comment, No. 15 (2003).

PART III

Proposing a De-Escalation

CHAPTER 7

Internal Conditions for Rapprochement: What Kind of Economic Opening Is Feasible?

Rüdiger Frank

Introduction: Why Rapprochement

There is little disagreement over the fact that the Democratic People's Republic of Korea, or North Korea, is a cause of concern. The focus of the latter is either on the human rights situation, the nuclear program, or more broadly on the potential of the divided peninsula to ignite a Cold War 2.0 conflict between China and the United States.

Much less uniformity can be found in proposals on how this challenge should be addressed. Three main trends can be discerned: pressure, ignorance, or rapprochement. As the title of this chapter suggests, we will explore options for the latter. The two main arguments for doing so are (1) pressure and ignorance, sometimes called "benign neglect," have not worked, if success is to be defined either by regime collapse, an end of the nuclear program, or Korean unification, and (2) the risks of an abrupt, nonconsensual solution are incalculable. The latter makes anything but a peaceful and gradual process prohibitively risky, if we consider the fact that some kind of nuclear devices are present in North Korea and that there is a high probability that the regime, if cornered, would not simply implode like what happened in Eastern Europe but fight back. This point can be strengthened by adding the humanitarian dimension; a disrupt-

tion would cause massive suffering on the side of the North Korean people, although it could also be argued that the prolongation of the current situation is equally problematic.

The possibility of a sudden change in North Korea exists and should not be denied. However, for this chapter, we will base our discussion on the scenario of a gradual and internal change. We thus take the North Korean system in its current form as a constant and explore options for an economic opening that would either be acceptable or unavoidable for the current leadership under the assumption of the goal of regime stability.¹

To do so, we first take a look at the features of the current state socialist system. The system determines the issues where action toward economic opening is needed but also the limitations on what can be done. We then look for best practices (i.e., cases of state socialist countries like China and Vietnam that have so far been successful in managing the transition without causing an Eastern Europe-type collapse of the system). We identify a number of crucial strategies that have been applied in China and Vietnam and explore the status and prospect of these issues in North Korea after 1990 and since the beginning of the Kim Jong-un era. Based on this theoretical and empirical foundation, in the final section, we discuss the North Korean options for economic opening.

Defining the Operating Environment: North Korea as a Socialist Economy

Socialism is one of those terms that is used frequently but with very diverse meanings. We have to differentiate between socialist policies and socialism as a system. The politically administered redistribution of wealth within a society is sometimes called socialist, often with a pejorative meaning. The use of taxes for welfare benefits or the legally binding participation in a health-care plan would be examples.

In the case of North Korea, however, we find that socialism goes far beyond single policies. It is of a systemic nature. This is a com-

1 Regime stability would here be roughly defined as continued rule by the Korean Workers' Party and the Kim family, in whatever form.

pletely different situation, which we therefore call state socialism to differentiate it from socialist policies, as they can occur anywhere, including in capitalist systems or in market economies. As Kornai shows,² there is a hierarchically structured causal relationship between a number of elements in any state socialist system. This relationship needs to be understood in order to explore options for any change, including economic opening.

At the top of that hierarchy stand a dominant ideology and the rule by a single communist party. *Communist* is used as collective term for political parties that subscribe, in one way or the other, to the idea of an antagonistic class relationship between the working class and the bourgeoisie, defined by ownership of the means of production. Those who own the means of production exploit those who do not. The only solution from this perspective is to eliminate the bourgeoisie and to make the working class the owner of the means of production.

The ideological aspect serves as the justification for strict intolerance against other ideas and for the so-called dictatorship of the proletariat. The latter is promoted in a rather undisguised way because it is seen as the perfect expression of democracy. The logic behind this is simple. Democracy is defined as the rule of the majority. From a class-based perspective, the majority is the working class. The representative of the working class is the Communist Party. Therefore, the unchallenged rule of the Communist Party is the realization of the rule of the majority and thus equals democracy.

It is crucial to understand that this logic forms the core of state socialist systems. Any change or reform that affects this logic will challenge the very existence of the whole system. This is why state socialist systems are so reluctant to allow reforms that affect the dominant ideology and the rule by the Communist Party. Furthermore, there is a causal relationship with lower elements of the hierarchy or the “main line of causation,” to remain with Kornai’s terminology.

The second element of this line is state ownership of the means of production. This is an inevitable necessity for any state social-

2 Janos Kornai, *The Socialist System: The Political Economy of Communism* (Princeton: Princeton University Press, 1992), 360ff.

ist system. The state is seen as the instrument of the ruling class (i.e., the workers). If the state owns the means of production, the workers do, and thus socialism is realized. If private ownership of the means of production is allowed, this will de facto result in the emergence of a bourgeoisie, which is the very class that has been disempowered by the socialist revolution. Privatization therefore equals counterrevolution.

This is the theory. The reality is more complex, due to the fact that “means of production” is hard to define. The land reform in the north of Korea in 1946 expropriated only those who owned more than five *chongbo* (about 2.45 acres or 5 hectares) of land³ and thus implicitly stated that any piece of land smaller than that does not count as a means of production. Currently, North Koreans are allowed to own kitchen gardens, which are officially not seen as a means of production, although they de facto are. We thus find that there is some flexibility that creates options for reforms, although the latter would typically not be promoted as such.

The first two elements of the main line of causality are of an ideological and political nature, but they have inevitable economic consequences. These include a preponderance of centralized bureaucratic coordination. It is indeed helpful to understand a classical state socialist economy as a large bureaucracy that has been extended to cover a whole country. Such a bureaucracy functions according to a logic that we know from any bureaucratic organization, including large companies, universities, or government offices. Typical features are a preference for quantity over quality, a soft budget constraint, a lack of free competition, no free market entry and exit, plan bargaining, and the desire to please superior levels of the bureaucracy rather than achieve operational efficiency. The consequences are well known and similar to the effects of monopolies: too little is produced at high costs and with low quality.

If we look for options to solve the problems resulting from these phenomena, it is crucial to understand that in market economies, monopolies and bureaucracies are parts of the system, whereas in

3 Charles Armstrong, *The North Korean Revolution 1945–1950* (Ithaca: Cornell University Press, 2003), 76.

state socialism, they are the system itself. Any change affecting these elements is a direct threat to the whole system.

Furthermore, it is important to be aware that operational economic efficiency defined as profit is not the sole criterion for success in such systems. Ideology plays a crucial role and must always be considered first before thinking about practical reform measures.

The combination of all these factors and their interrelatedness make the reform of state socialist economies so difficult. A piecemeal or gradual approach is easy to recommend but seems almost impossible to execute without affecting all parts of the system. Negative examples are the Soviet Union and the state socialist countries of Eastern Europe where economic reforms led to political collapse and the emergence of nonsocialist systems. Official North Korean publications on a number of occasions analyzed these cases and issued warnings.⁴

Looking for Best Practices: Applicability of the Eastern European, Chinese, and Vietnamese Models

With the above in mind, it is striking to see that there are indeed examples where such reform seems to have been tried with success. The latter is defined as a significant and lasting improvement of economic efficiency while at the same time maintaining political stability (i.e., the dominance of the ideology and the rule of the Communist Party).

China and Vietnam both still claim to be socialist systems and maintain the power monopoly of the Communist Party. It is in the eye of the beholder whether this is enough to justify the continued application of the label “socialism” or whether it is just a cover for a de facto accomplished transformation to another version of state capitalism or an East Asian developmental dictatorship. Kim Jong-un seems to be of the latter opinion. In his speech at the Seventh Party Congress in May 2016, he was rather critical of the Chinese example when he mentioned the “filthy wind of bourgeois

⁴ Kim Jong-il, *Giving Priority to Ideological Work Is Essential in Building Socialism*, June 19, 1995, accessed July 31, 2016, www.korea-dpr.info/lib/101.pdf.

liberty and ‘reform’ and ‘openness’ blowing in our neighborhood.”⁵

But regardless of the official North Korean position toward the experience of these two cases, they provide insights into practical options for the gradual opening of a state socialist economy without causing the system’s immediate collapse. Among the early strategies applied by China and Vietnam were special economic zones, reforms in agriculture, and the dual-plan system.⁶

- **Special Economic Zones (SEZs).** The rationale behind this is the idea that some rules need to be altered to change the incentives either for domestic production or for foreign direct investment but that there is no readiness to apply these new rules to the whole country. Special economic zones are thus a feature of many economies and exist in various forms. The concept is applied in selected geographical areas and can be displayed as the exception to the rule. If the experiment works, it can be expanded and lessons learned or new technologies can be spread beyond the confines of the zones. Among state socialist systems, China has been particularly noted for this strategy.

Two important factors in China’s success with SEZs were the contacts with overseas Chinese in Hong Kong, Macao, Singapore, or Taiwan, as well as the timing of the reforms, which took place during the Cold War. The United States had a strategic interest in the success of China’s gradual transformation and thus provided a market for the newly produced export products and did not try to intercept financial transactions related to the SEZs.

5 Kim Jong-un, “조선로동당 제 7 차대회에서 한 당중앙위원회 사업총화보고” [Report on the Work of the Central Committee Held at the 7th Congress of the Korean Workers’ Party], *Rodong Sinmun*, May 8, 2016, translated by Rüdiger Frank, accessed July 31, 2016, www.rodong.rep.kp/ko/index.php?strPageID=SF01_02_01&newsID=2016-05-08-0001.

6 For Vietnamese reforms, see Adam Fforde and Stefan de Vylder, *From Plan to Market: The Economic Transition in Vietnam* (Boulder: Westview Press, 1996). For reforms in China, see Barry Naughton, *The Chinese Economy: Transitions and Growth* (Cambridge: MIT Press, 2007).

- **Reforms in Agriculture.** There are a number of reasons why systemic reforms in this field have marked the beginning of the transformation in the state socialist systems of China and Vietnam. One is very pragmatic: securing a stable domestic supply of staple food. But this is not the only reason why this sector has played a pioneering role. We mentioned the key role of ideology and the vital need to maintain the appearance of coherence in this field. It is ideologically easier to push the boundaries of the socialist dogma in a sector that employs farmers, not workers. These two groups had previously been merged in the term “masses” in realization of the fact that there were hardly any workers in these initially mainly agrarian societies, but this ideological trick could be undone relatively easily. All that needed to be undone was collectivization, which had only followed the expropriation of large landowners. This was still upheld as the main achievement of the socialist revolution in the countryside.

In particular in China, the increased productivity in agriculture led to the liberation of a hidden labor surplus. This excess labor was utilized by the newly admitted local and township enterprises, which were usually SMEs and produced consumer goods. They produced goods for the farmers whose income had increased through the reforms and reduced the pitfalls of rural unemployment.

- **Dual Plan.** Reforms in urban industries were far more challenging. After expropriation, they had not been redistributed among workers like the land had been. They had been nationalized right away. Workers were theoretically the owners of the enterprises because the state was the workers’ representative. A privatization would have contradicted this notion and eventually have led to the emergence of a class of new capitalists that would have been impossible to reconcile with the official image of state socialism. At the same time, the existing incentive structure and the bureaucratic nature of enterprise organization led to the known inefficiency. The solution was to allow a *de facto* private operation of the enterprises while at the same time maintaining their role as a

supplier to the centrally planned economy. A hybrid system of plan and market was created. The state set modest goals for production and prescribed what to produce in what quantity and at what price. After these targets were achieved, however, the state allowed the managers of the enterprises to use the facilities as they saw fit. As a result, the state plan was fulfilled as quickly as possible, and then production was adjusted to the demand of the consumer and the producer market. Workers participated in the form of higher wages. The state could thus kill three birds with one stone: it maintained a continuous supply of goods within the centrally planned part of the economy but at the same time satisfied the hitherto unmet demand in the economy and improved the income of the workers—all this while maintaining the appearance of a state-owned socialist economy.

To summarize, we find the following:

1. A successful gradual transformation of a state socialist system requires due caution in the field of ideology. The impression of a counterrevolution must be avoided to secure the stability of the political system. The one-party system as well as the official claim to socialism must be maintained.
2. As long as the form is maintained, in reality, there exists a great deal of flexibility and room for pragmatism, in particular regarding the question of ownership of the means of production.
3. Since the main reason for the inefficiency of a state socialist economic system is its nature as a huge bureaucracy, a successful reform must involve some form of decentralization and the introduction of an alternative incentive system.
4. Special economic zones provide a safe option to experiment with new approaches in isolated areas.
5. Reforms in agriculture are less problematic than in industry from a technical and an ideological perspective.
6. The introduction of a hybrid system of central planning and decentralized economic activity can provide the necessary

incentives for productivity increases while at the same time maintaining the image of a state socialist system and avoiding a sudden disruption of bureaucratically organized supply chains.

In the following sections, we will thus explore the achievements and developments in North Korea in the fields of ideology, pragmatism, decentralization, SEZs, agricultural reform, and a dual plan.

Reform or Adjustment: Changes in North Korea's Economy since 1990

The goal of this chapter is to discuss the feasibility of options for an economic opening of North Korea from the perspective of internal conditions. This necessarily involves a good deal of speculation. It is thus useful to consider the known facts before exploring the most recent developments under Kim Jong-un and his prospects.

- **Ideology.** The major advantage of North Korea in this regard is its official *juche* ideology. The debate about the origin of *juche*⁷ notwithstanding, it was created to provide maximal flexibility to the North Korean leader and is thus remarkably unspecific. Unlike the form of Marxism-Leninism prevalent in Eastern Europe, it does not identify objective laws that determine the behavior of individuals but rather argues that “man is master of everything” and can thus do as he pleases and that anything needs to be adjusted to fit “the specific conditions of one’s own country.” In other words, a North Korean leader can do whatever he sees fit, and even if he does the opposite of what he or his predecessors have done in the past, he can justify this as the appropriate adjustment to changed conditions.
- **Pragmatism.** North Korea’s leadership has so far refrained from publicly making a statement like the famous Deng Xiaoping saying of 1962 about cats and mice.⁸ However, its

7 Brian Myers, “The Watershed that Wasn’t: Reevaluating Kim Il-sung’s Juche Speech of 1955,” *Acta Koreana* 9, no. 1 (January 2006): 89–115.

8 Mary Ann O’Donnell, “Cat Theory: Contextualizing Deng Xiaoping’s Pragmatism,” *Shenzhen Noted*, August 22, 2012, accessed July 31, 2016, <https://shenzhennoted.com/2012/08/22/cat-theory-contextualizing-deng-xiaopings-pragmatism>.

actions have been remarkably pragmatic, in particular with the way the mid-1990s crisis, also known as the “Arduous March,” has been dealt with. The 1998 constitutional change acknowledged the principles of cost, prices, and profit and promoted the military, thus reducing the weight of ideology as it was vested in the party and silently dropping the leading role of the working class.⁹ The June 2000 summit meeting with South Korean president Kim Dae-jung showed Kim Jong-il’s willingness to explore the possibilities of cooperation with the natural economic partner of North Korea, which, at the same time, is the biggest threat to its existence. The July 2002 economic measures legalized a number of results of the pragmatic approach to the crisis of 1995 to 1997.

- **Decentralization.** This trend has been going on since the 1980s with the promotion of the various forms of *ryōn-hap kiōpso* (combine) as the main production unit. As Park shows,¹⁰ this has been an on-again-off-again process, mainly because the state feared a loss of ideological control. But as a matter of fact, the logic of self-reliance has been transplanted to the provincial and later even to the county level, thereby creating an interesting combination of autonomous decision making and domestic exchanges. To some degree, provinces and counties were even able to conduct their own foreign trade and competed with each other. Local industries had been built since the 1960s and provided the link between agricultural and industrial units in each province and county. The official numbers reflect this process; the percentage of local budgetary revenue reached 23 percent in 2016.¹¹
- **Special Economic Zones.** The first North Korean SEZ was founded as early as 1991, at that time with the help of the

9 Rüdiger Frank, “Economic Reforms in North Korea (1998–2004): Systemic Restrictions, Quantitative Analysis, Ideological Background,” *Journal of the Asia Pacific Economy* 10, no. 3 (August 2005): 278–311.

10 Philipp H. Park, *Rebuilding North Korea’s Economy: Politics and Policy* (Seoul: Kyungnam University Press, 2016).

11 Rüdiger Frank, “The 2016 North Korean Budget Report: 12 Observations,” *38 North*, April 8, 2016, accessed July 31, 2016, <http://38north.org/2016/04/rfrank040816>.

UNDP. At a time when Russia and China both did not put a high priority on investment in that region, the Rajin-Sŏnbong (now Rasŏn) zone did not perform well despite grand plans to build a “Golden Triangle” of which the name of a local bank still reminds us. It took until 2004 before the next SEZ was opened, although it is difficult to classify the Kaesŏng Industrial Complex one as a normal SEZ. The KIC was essentially an inter-Korean project, and only under strong pressure from South Korea in 2013 did the North agree to include investors from other countries, although even that was planned to be done in a separate area. The closure of the KIC in February 2016 put an end to this experiment, at least for now.¹² Aside from the South Koreans, North Korea’s most natural partner for economic exchange would be China. The various zones under development in the Northwest in the Sinŭiju area, including Wihwado and Hwanggŭmp’yong, thus generated a lot of interest. It seems, however, that both have become victims of the current unfavorable bilateral relationship between Beijing and Pyongyang after the recent nuclear and missile tests.¹³

- **Agricultural Reform.** Reliable information on this field is difficult to obtain. Based on what we know, the size of work teams has indeed been reduced in various stages to a degree that they often resemble families. It is debatable whether this justifies talk about a North Korean version of China’s household responsibility system. The upgrading of the status of the markets and the increase of the legal size of kitchen gardens, which are effectively private plots of land, have led to increased productivity. The WFP has been reporting a growing output in agriculture for a number of years now but at the same time cautions that the country is still on the brink of a food crisis,

12 Rüdiger Frank and Theo Clement, “Closing the Kaesŏng Industrial Zone: An Assessment,” *Asia Pacific Journal* 14, no. 6, iss. 5 (March 2016), <http://apjif.org/2016/06/Frank.html>.

13 World Food Program, “Harvests in DPR Korea Up 5 Percent for Third Year but Chronic Malnutrition Persists,” November 28, 2013, accessed July 31, 2016, www.wfp.org/news/news-release/harvests-dpr-korea-5-percent-third-year-chronic-malnutrition-persists.

that food distribution is uneven, and that a balanced availability of various nutrients is not guaranteed.

- **Dual Plan.** The decentralization, as discussed earlier, and the introduction of the *ryŏnhap kiŏpso* organizational system include elements of a dual plan, in the sense that the single enterprises have a certain freedom in using spare resources to produce goods to be sold outside the centrally directed plan. Official publications, however, insist that this is not a paradigmatic decision to change the nature of the North Korean economic system but rather an expression of the pragmatic understanding that socialism is a transitory stage and thus necessitates special measures and exceptions that will later be corrected. Central planning has not been softened or partially abandoned for good; it has only been relaxed temporarily, at least according to Park's analysis of the North Korean journals *Kŭlloja* and *Kyŏngje Yŏn'gu*.¹⁴

To summarize the observations on the achievements and developments in North Korea in the fields of ideology, pragmatism, decentralization, SEZs, agricultural reform, and a dual plan, we find a number of signs that suggest the cautious emulation of the Chinese and the Vietnamese examples. In the field of ideology, North Korea even seems to have a structural advantage, thanks to the flexibility of its *juche* idea. At the same time, in all fields, the decisiveness of real reform is lacking. Neither is there a reform debate; nor has the market been openly acknowledged as the new organizing principle of the economy. Rather, it is being used as a tool to overcome a series of temporary difficulties. This makes all efforts, including the establishment of special economic zones, look rather halfhearted if compared to the Chinese and the Vietnamese examples.

¹⁴ Park, *Rebuilding North Korea's Economy*.

Progressive or Conservative: Changes in North Korea's Economy Since Kim Jong-un

Kim Jong-un started his leadership with a strong resolve to deliver tangible economic improvements for North Korean consumers. Hours after his nomination as the new leader in December 2011, stories were circulated in the state media about how he personally took care of the delivery of fresh fish to the citizens of the capital and of hot tea to the mourners who were waiting in long lines to pay their respects to the just deceased leader Kim Jong-il. During the first mass rally in his presence on December 30, 2011, posters reading "improvement of people's lives" were shown in the front row.¹⁵

Such a focus on material achievements makes sense. The downside of creating a system that is firmly built on the image of one towering figure, in this case Kim Il-sung, is that succession by an equally brilliant person is technically impossible. If someone was the greatest, the smartest, the most heroic, or the best, he would remain so forever or his legitimacy would be weakened if the same superlatives were to be applied to his successor. Kim Jong-il could resolve that dilemma by promoting himself not as a substitute for his father but as his most loyal follower and as the man who continued the work of the country's founder. This was a sensible approach for Kim Jong-il but left little of his own legitimacy to be delegated to his son.

Kim Jong-un can neither claim to have liberated the country from the Japanese or to have defended it against the Americans. Nor can he claim to have over decades accompanied the man who accomplished all these feats and have received his direct instructions. When his father died at the relatively young age of sixty-eight, Kim Jong-un had not yet built any source of ideological, imagined legitimacy. He thus had no other choice but to focus on material, performative legitimacy, at least in the first years of his rule.

Such an approach is dangerous. Every promise is eventually followed by the challenge of fulfillment. The latter is easy if the promise is of an ideological value, because the result is usually intangible

15 Rüdiger Frank, "North Korea after Kim Jong-il: The Kim Jong-un Era and Its Challenges," *Asia Pacific Journal* 10, no. 2, iss. 2 (January 6, 2012), accessed July 31, 2016, <http://apjif.org/2012/10/2/Rüdiger-Frank/3674/article.html>.

and a matter of perspective. The example of the Korean War shows this clearly. In the West, the war is seen as a failed attempt at forceful unification. In North Korea, however, it is called victorious and seen as a successful defense of the motherland against an American invasion. But the promise of a better material life is only in a very limited way subject to interpretation. The emergence of visible income inequalities will create an objective yardstick for individuals to assess their material situation in a comparative way. A leader who is unable to deliver will either have to opt for ever more radical measures to improve economic efficiency or try to change the promises back to being mostly ideational.

This determines the options for and the feasibility of an economic liberalization of North Korea. Before we discuss them and their potential consequences, we need to take a look at the performance of Kim Jong-un in the fields discussed earlier: ideology, pragmatism, decentralization, SEZs, agricultural reform, and a dual plan. This includes his latest statements made during the Seventh Congress of the Korean Workers' Party in May 2016.

- **Ideology.** Kim Jong-un's two main contributions to ideology were his announcement of the *byungjin* (*pyŏngjin*) line in 2013 and the creation of Kimilsungism-Kimjongilism as the new guiding ideology since 2012.

The latter is easily explained by the need for Kim Jong-un to merge the most powerful source of legitimacy, his grandfather Kim Il-sung, and his own most direct connection to that source, his father Kim Jong-il, into one entity. This has been symbolized by the erection of twin statues, starting with an ensemble in the Mansudae Art Studios in Pyongyang as early as January 2012 and most prominently with the main statues on Mansudae Hill, unveiled on the occasion of Kim Il-sung's one-hundredth birthday in April 2012. North Korea is, as is often the case, rather ambiguous about the actual meaning of this concept, limiting itself to statements like this sentence from Kim Jong-un's speech at the Seventh Party Congress in May 2016: "The remodeling of the whole society according to

Kimilsungism-Kimjongilism means that we must proceed with our revolution carrying Kimilsungism-Kimjongilism as the only guiding line and rely on Kimilsungism-Kimjongilism to build and improve an ideal society of the people.”¹⁶ I suggest understanding the term *Kimilsungism-Kimjongilism* as a way to subsume more or less all concepts and ideas of the two leaders of the past seventy years, including but not limited to *juche*,¹⁷ *sŏn’gun*,¹⁸ *kangsŏng taeguk*,¹⁹ and the Three Revolutions.²⁰

Byungjin is the line of parallel development of the economy and of nuclear weapons. It is in many ways instructive. As I have argued elsewhere in more detail,²¹ it is de facto the end of the military-first policy *sŏn’gun*, because the military now has to share top priority with economic affairs. It is also typical for North Korea, where we often find somewhat confusing statements like “priority will be put on A, along with a priority on B.” Park (2016) identified this flexibility as a major difference between North Korea and the Soviet Union and the other countries of the socialist bloc.

Aside from these new developments, there was no major ideological turn. Kim Jong-un seems to be focused on a normalization, defined as a return to the precrisis status. This includes the resuscitation of the party as the major organ of state power. But this normality we observe is a “new” normal (i.e., the previous status quo on a higher level, no clear break with the past but nevertheless gradual changes in various fields).

- **Pragmatism.** As indicated earlier, no “cats and mice” paradigm has been announced by the North Korean leader. He is,

16 Translation by Rüdiger Frank based on Kim Jong-un, *Report*.

17 Often translated as “self-reliance” in very general terms, including the economy, ideology, and national defense. The concept has experienced additions and reinterpretations over the years.

18 Usually translated as “military first.”

19 This term was popular in the run-up to the one-hundredth anniversary of Kim Il-sung’s birth in 2012 and has ever since been mentioned much less frequently. It can be translated as “strong and prosperous great country.”

20 Referring to revolutions in ideology, technology, and culture.

21 Rüdiger Frank, “Can North Korea Prioritize Nukes and the Economy at the Same Time?” *Global Asia* 9, no. 1 (Spring 2014): 38–42.

however, obviously focused on practical issues. Tourism, despite the ideological risk it carries and aside from the question of how realistic such a plan is, has been promoted as one of the key future industries.²² An education reform in autumn 2012 added one more year of compulsory schooling, which should explicitly be used for practical, technical education.²³ Upon acknowledgment that Japan has great potential as an economic partner, the talks about the resolution of the abductee issue have been restarted, and a meeting between the parents of Megumi Yokota and their grandchild was arranged in Mongolia.²⁴ Despite a hopeful start, this initiative has led nowhere, but at least the attempt was made. Since January 2013, foreign tourists can now carry their previously banned mobile phones while visiting the country. This list of major and minor examples could be continued. It shows that Kim Jong-un is clearly practically oriented, responding to the need to perform as outlined previously.

- **Decentralization.** We see two opposing trends here. On one hand, the policy of granting relative autonomy to local units has been continued and even expanded, in particular in the field of agriculture. The independent accounting system and other management rights of the enterprises were explicitly noted by Kim Jong-un in his speech at the party congress. On the other hand, we see moves toward a strengthened centralization, most prominently the announcement of the Five Year Plan 2016–2020, the first regular economic development plan in two decades. It seems that for now, decentralization in economic decision making in North Korea has reached its limits, at least in the eyes of the current leadership.

22 “DPRK to Develop Tourism as One of Major Industries,” *Korean Central News Agency*, August 23, 2013, www.kcna.co.jp/item/2013/201308/news28/20130828-25ee.html.

23 “Issues Concerning Enforcement of 12-Year Compulsory Education Discussed,” *Korean Central News Agency*, September 25, 2012.

24 “Yokota’s Parents, Child Meet,” *Japan Times*, March 16, 2014, accessed October 5, 2016, www.japantimes.co.jp/news/2014/03/16/national/parents-of-abductee-megumi-yokota-meet-granddaughter-for-first-time/#.V_Tc_02a1O8.

- **Special Economic Zones.** In this field, too, we see opposing trends. In particular, the closure of the Kaesong Industrial Complex in February 2016 has dealt a heavy blow to hopes that this place would function as a kind of testbed of new, market-oriented management strategies. The closure was an initiative of South Korea in response to a series of weapons tests by the North. This makes it understandable from a short-term perspective, but the long-term effects might be strongly negative.²⁵

But while on one hand Kaesong was closed and other zones showed only sluggish development, Kim Jong-un has been very active in opening new zones and upgrading existing ones. Rason has been showing remarkable signs of pragmatism, including the fact that the Golden Triangle Bank exchanged Western currency into North Korean banknotes at a rate that is otherwise known as the black market rate.²⁶ A book containing various laws and regulations on external economic affairs published in Pyongyang in late 2012 has almost seven hundred pages, reflecting the North Korean response to demands by international trade and investment partners for a stable legal foundation.²⁷ The troubles of ORASCOM, the Egyptian operator of the country's mobile phone network, are, however, a discouraging signal. And the fact that the whole country of North Korea was designated as a primary money-laundering concern under Section 311 of the US Patriot Act by the US Treasury Department in late May 2016,²⁸ along with already existing sanctions, will further discourage foreigners from economic cooperation.

25 Rüdiger Frank and Théo Clément, "Closing the Kaesong Industrial Zone."

26 Rüdiger Frank, "Rason Special Economic Zone: North Korea as It Could Be," 38 *North*, accessed July 31, 2016, <http://38north.org/2014/12/rfrank121614>.

27 KLP, 조선민주주의인민공화국 법규집 (대외경제부문) [Laws and Regulations of the Democratic People's Republic of Korea: External Economic Matters] (Pyongyang: Legislation Press, 2012).

28 Department of the Treasury, "Finding That the Democratic People's Republic of Korea Is a Jurisdiction of Primary Money Laundering Concern," May 27, 2016, accessed October 5, 2016, <http://federalregister.gov/a/2016-13038>.

- **Agricultural Reform.** Ireson notes that the changes made in this sector “do not constitute a Chinese or Vietnamese style economic reform.”²⁹ Nevertheless, the North Korean leadership has continued along the careful path of adjustments. The first indication of this was the so-called June 28 measures, named after the date of their announcement in 2012. The size of subwork teams was limited to around ten to twelve individuals. They would be able to make their own production decisions and, most important, would have to deliver only 70 percent of a set production target to the state. The remainder, including any production over the plan, could be kept and marketed by the farmers.³⁰

In an extended speech to several thousand participants in the National Conference of Subworkteam Leaders in the Agricultural Sector on February 6, 2014, Kim Jong-un outlined the principles of his agricultural policy.³¹ He emphasized the priority of ideology and the need to do farming scientifically, which is typical socialist rhetoric. But he also spoke about increasing the income share of farmers. Most important, he suggested the implementation of a further reduction in the size of production units by promoting the field-responsibility system as a part of the subworkteam management system. The socialist principle of distribution should be applied (i.e., no equal distribution but distribution according to input). Kim Jong-un further promoted the establishment of model units where new ideas could be tested and a competition between farming units.

In late May 2014, the so-called May 30 measures were announced. They confirmed the reduction of the size of the subworkteams to the size of a family and the field-responsibil-

29 Randall Ireson, “DPRK Agricultural Policy: Chinese Style Reform or Muddling towards Autonomy?” *38 North*, January 27, 2015, accessed October 5, 2016, <http://38north.org/2015/01/rireson012715>.

30 Randall Ireson, “Agricultural Reform Again—or Not?” *38 North*, November 15, 2012, accessed October 5, 2016, <http://38north.org/2012/11/rireson111512>.

31 “Kim Jong-un’s Letter to Participants in National Conference of Subworkteam Leaders in Agricultural Sector,” *Korean Central News Agency*, February 7, 2014, www.kcna.kp.

ity system, including the assurance that the same team could work on the same field for many years, thus promoting long-term investment in soil improvement and other measures to increase the yields. The share of the harvest that could be kept by the farmers was increased from 30 percent to 60 percent. There are also unconfirmed reports that the size of the quasi-private kitchen gardens has been increased dramatically from 100 m² to over 3,000 m².³²

The quality of information about these policies is low, and evidence of the results is limited. In fact, a full-scale liberalization of agriculture has not taken place under Kim Jong-un. However, he has introduced a few gradual measures that aim to utilize the potential for increased productivity through individual responsibility.

- **Dual Plan.** We have no evidence of any major new development here. The state deems the degree of autonomy granted to enterprises as being sufficient. Here and there are rumors about some test cases where a dual plan system is implemented. Toloraya reports that according to some unnamed North Korean economists, “under the plan, industrial enterprises are now obliged to give the state only 20% to 50% of their output while securing raw materials and selling the balance in what is essentially a free market, using Korean won to carry out transactions with market-based prices.”³³ So far, this does not seem to be introduced on a broad scale, but there is at least a tendency.

To summarize, the performance of Kim Jong-un in the fields of ideology, pragmatism, decentralization, SEZs, agricultural reform, and a dual plan is mixed. No full-fledged economic reform has been started. In particular, in the ideological field, we see an emphasis on conservative socialist values and positions. The promotion of *byungjin*

32 Andrei Lankov, “Reforming North Korea,” *Al Jazeera*, November 30, 2014, accessed July 7, 2016, www.aljazeera.com/indepth/opinion/2014/11/reformingnorthkorea20141117121917871925.html.

33 Georgy Toloraya, “Deciphering North Korean Economic Policy Intentions,” *38 North*, July 26, 2016, accessed July 31, 2016, <http://38north.org/2016/07/gtoloraya072616>.

could be interpreted as giving a higher priority to economic development than under *sŏn'gun*. The state of emergency since the mid-1990s that led to a focus on the military but also allowed for a more pragmatic approach in various fields seems to be over. It remains to be seen what will follow. The revival of speed battles and of five-year planning in 2016 does not suggest an increased role for decentralized decision making and coordination by the forces of the market.

However, given the crucial role of ideology in maintaining the stability of the system, it is not surprising that Kim Jong-un has refrained from openly calling for changes and reforms. This does not mean, however, that no such steps have been taken. Evidence of this is strongest in agriculture, but there are also indications that production in the other sectors is becoming more flexible. The number of special economic zones has been expanded significantly, although their actual effect on the economy is so far below their potential.

The first five years of Kim Jong-un's rule are over. He has restructured North Korea according to his goals. The country now seems to be under his form of control. He faces a number of challenges that will determine his future policy decisions. In particular, there is the need to provide tangible and sustainable improvement in the lives of his people while at the same time avoiding a regime collapse. This determines North Korea's options for an economic opening.

Conclusion and Outlook:

Feasible Options and Conditions for Economic Opening

We started our discussion by taking the North Korean system in its current form as a constant and asked about options for an economic opening that would either be acceptable or unavoidable for the current leadership under the assumption of the goal of regime stability. We then briefly outlined core characteristics of state socialist systems and the available experience with the liberalization of such systems.

Considering the limitations of the state socialist system with its interrelated elements, reform is far more than a simple question of economic policy. It is a life-or-death issue for the DPRK as a state in two ways. If it fails, the country could follow the destiny of the

Soviet Union, with higher costs for the elite. Any destabilization of North Korea would almost certainly be seized as an opportunity by South Korea and lead to the end of the current regime and the whole state, like was the case in East Germany.

But if economic reform is rejected by the leadership, the result could be the same. This dilemma is further complicated by three external factors: North Korea stands alone, without a bloc of socialist allies; there is a southern counterpart ready to absorb the country following the German example; and the United States, the global economic leader, has identified North Korea as a problem and denies it access to finance and markets.

With the above in mind, is economic opening an option for Kim Jong-un, and if so, under which conditions could it take place? If we look at the six points used as our analytical framework throughout this chapter (ideology, pragmatism, decentralization, SEZs, agriculture, and dual plan), we find that the North Korean state has followed related strategies since the mid-1980s and in particular after the mid-1990s. In other words, reforms started long ago.

However, changes were admitted only to a limited extent and driven by necessity, not a paradigmatic policy change. North Korea's economy still does not resemble either China's or Vietnam's. Reform has not been promoted by the leadership wholeheartedly and as an official paradigm; there is no North Korean equivalent to China's "reform and opening" or Vietnam's *doi moi*. The state's pragmatism has been of a temporary nature, a far cry from Deng Xiaoping's "black or white cat." Decentralization started thirty years ago but mainly as a tool to perfect the central economy, not as a new modus operandi. Special economic zones have existed since 1991 but have so far failed to play the same dynamic role as Shenzhen and others did in China. SEZs are being used to support the existing system, not to change it. Reforms in agriculture have led to smaller production units and better incentives for farmers. But North Korea's agriculture is far from being reprivatized. The state still collects its quota, sets production targets, organizes work, and determines what to produce. Perhaps most important, given the history of past ups and downs, farmers do not know how long the changes will last and

whether they will be undone. In industry, the dual plan, or hybrid system of plan and market, is in its early infancy at best.

The big question is whether North Korea is still on its way and only needs time to proceed further or whether this is as far as the leadership is willing to go. Judging by the policies and official announcements, Kim Jong-un seems to be interested in economic experiments, but he is not yet determined to start a radical change. An analysis of his speeches suggests that he regards the last two decades as a temporary reaction to an extraordinary situation and now wants to return to the pre-1990s normality of a nationalist state socialist system.

Despite this pessimistic assessment, we argue that Kim Jong-un might not be willing to embrace reform at the moment but that he will be eventually. This optimism is based on three interrelated factors: the long-term unfeasibility of the state socialist economic system as amply shown by reality and explained by scholars, such as Kornai; the growing demands and expectations of an increasingly diversified population; and the softening of the state's information monopoly.

The halfhearted reforms of the past decades, even though they were driven more by necessity and pragmatism than conviction, have created new realities. The new middle class in North Korea is growing. I have suggested using the number of mobile phone subscriptions as a rough estimate for its size,³⁴ which means we talk about three million out of twenty-four million people, or over 10 percent of the population. These people have benefited from the changes made so far, leading to the emergence of the much publicized *donju*³⁵ (masters of money). South Korean soap operas on DVDs and USB sticks certainly matter. Based on many private conversations with North Koreans, however, it seems to be mainly the example of China that makes North Koreans reconsider their own situation. Kim Jong-un's promise of a better life has strengthened expectations of growing economic prosperity among the middle class and among those who want to join that group.

³⁴ Rüdiger Frank, "Can North Korea Prioritize Nukes and the Economy at the Same Time?," *Global Asia* 9, no. 1 (Spring 2014): 38–42.

³⁵ Song-min Choi, "Money Secures Donju Power," *DailyNK*, March 18, 2015, accessed August 16, 2016, www.dailynk.com/english/read.php?num=13005&catald=nk01500.

This is where the domestic pressure to reform comes from. What can the outside world do to support these trends? There are two basic strategies.

Option 1 is to prevent Kim Jong-un from delivering on his promises of a better life and hope for a North Korean Spring—a domestic uprising, a coup, or a similar reaction. Change would in this case be abrupt and against the will of the leadership.

Option 2 is to support the growth of the middle class and provide incentives to the leadership to continue along the half-gone path of reform and opening. Change would, like in China and Vietnam, come from the top.

The first option is what is being tried at the moment through sanctions and international economic isolation. The second option was tried by South Korean presidents Kim Dae-jung and Roh Moo-hyun. None of these strategies has been successful. As indicated at the beginning of this article, we want to explore what could reasonably be done by the outside world to promote option 2. The six factors again serve as our analytical framework for a brief discussion.

- **Ideology.** Accept North Korea's claims to be a socialist country. Accept the rule by the Korean Workers' Party. Accept the leadership by Kim Jong-un. This is hard, if not unthinkable, for those who have grown up during the Cold War era and for those who are concerned about the nature of the regime and its human rights record. But without biting this bullet, without truly accepting North Korea as it is, no progress can be expected.
- **Pragmatism.** Success breeds success. Whenever the state decides to bend its own rules, make sure it benefits.
- **Decentralization.** Support the independence of local units, such as combines or provinces, by engaging in direct economic cooperation with them whenever possible.
- **Special Economic Zones.** These can only work as breeding grounds for new policies if they operate and generate revenue. Western and South Korean enterprises should invest heavily

there, like businesses did in China in the 1980s. SEZs are too valuable to be used as political pressure tools.³⁶

- **Agriculture.** China and Vietnam liberalized their agricultures with the goal of generating revenue for the development of the industrial sector. In North Korea, agricultural reforms are so far mainly aiming at self-sufficiency in food. This important strategic function does not allow for a complete liberalization with its incalculable results.³⁷ To change this, North Korea should be enabled to import a certain percentage of its food requirements. The necessary income would have to be generated through exports of manufactured goods and services.
- **Dual Plan.** North Korea has a shortage of hard currency. Countries like Japan, South Korea, and China started their economic development miracles by massively exporting cheap manufactured goods to the West, mainly to the United States. The chance to make hard currency is a much stronger incentive for enterprises to produce more and better products than domestic demand in an underdeveloped economy. North Korean enterprises, too, would benefit from that opportunity.

Obviously, the key to all these points is the cancellation of all economic sanctions and the opening of Western markets to North Korean products. But while it is at least thinkable that policy makers in Washington and Seoul will be able to overcome their ideological reservations, it is completely unrealistic to expect that they will do so as long as the North Korean nuclear program exists. The ball is therefore clearly in the North Korean court. It is, however, equally unrealistic to expect that Pyongyang will give up its nuclear program first and then hope for the mercy of the West and of South Korea.

We face a classical stalemate between two sides that over the duration of many decades and through scores of bad experiences have lost any trust in each other. It will take a long time to rebuild that trust.

36 Rüdiger Frank, "The Kaesong Closure: Punishment or Shot in the Foot?"

38 *North*, February 12, 2016, accessed August 16, 2016, <http://38north.org/2016/02/rfrank021216/>.

37 One possible example, farmers get complete freedom over what to produce and switch from staple food to cash crops; this leads to a famine.

This process could be started by a unilateral freeze of the North Korean nuclear program, including a moratorium on nuclear and missile tests. This could be matched by the acceptance by the West of the status quo, including the fact that North Korea is, for the time being, a nuclear state. Sanctions could then be lifted step by step, for example every five years that the promise to freeze the nuclear program has been honored. Appropriate and mutually acceptable mechanisms to monitor such an agreement should be introduced.

This would require strong determination and leadership in North Korea and in the West. Like with every true compromise, there will be no clear winners and losers in the short run, although eventually all sides will end up benefiting. After many years of propaganda wars on both sides, political skill will be necessary to convince the respective constituencies that such a policy is not a sign of weakness but is rather responsible and future-oriented. This will be tough in the entrenched hardline dictatorship of North Korea but even tougher in the populist democracies of the West with their sacrosanct ideological positions. Ironically, the outcome of the presidential election in the United States in November 2016 could turn out to be a blessing in disguise in this regard. President-elect Trump is feared by many to be more willing than his predecessors to start a conflict in East Asia. However, given his somewhat eccentric personality and lack of sympathy for the so-called establishment, he is also more likely to ignore past diplomatic quarrels and embark on a bold initiative to sit down and talk with the North Korean leadership.

REFERENCES

- Armstrong, Charles. *The North Korean Revolution 1945–1950*. Ithaca: Cornell University Press, 2003.
- Choi, Song Min. “Money Secures Donju Power.” *DailyNK*, March 18, 2015. Accessed August 16, 2016. www.dailynk.com/english/read.php?num=13005&cataId=nk01500.
- Department of the Treasury. “Finding that the Democratic People’s Republic of Korea Is a Jurisdiction of Primary Money Laundering Concern.” May 27, 2016. Accessed October 5, 2016. <http://federalregister.gov/a/2016-13038>.
- Fforde, Adam, and Stefan de Vylder. *From Plan to Market: The Economic Transition in Vietnam*. Boulder: Westview Press, 1996.
- Frank, Rüdiger. “Can North Korea Prioritize Nukes and the Economy at the Same Time?” *Global Asia* 9, no. 1 (Spring 2014): 38–42.
- . “Economic Reforms in North Korea (1998–2004): Systemic Restrictions, Quantitative Analysis, Ideological Background.” *Journal of the Asia Pacific Economy* 10, no. 3 (August 2005): 278–311.
- . “North Korea after Kim Jong-il: The Kim Jong-un Era and Its Challenges.” *Asia Pacific Journal* 10, no. 2 (2) (January 6, 2012). Accessed July 31, 2016. <http://apjif.org/2012/10/2/Rüdiger-Frank/3674/article.html>.
- . “Rason Special Economic Zone: North Korea as It Could Be.” *38 North* (2014). U.S.-Korea Institute at the School of Advanced International Studies (SAIS). Johns Hopkins University. Accessed July 31, 2016. <http://38north.org/2014/12/rfrank121614>.
- . “The 2016 North Korean Budget Report: 12 Observations.” *38 North* (April 8, 2016). Accessed July 31, 2016. <http://38north.org/2016/04/rfrank040816>.

———. “The Kaesong Closure: Punishment or Shot in the Foot?” *38 North* 2 (February 2016). Accessed August 16, 2016. <http://38north.org/2016/02/rfrank021216>.

Frank, Rüdiger, and Theo Clement. “Closing the Kaesong Industrial Zone: An Assessment.” *Asia Pacific Journal* 14, no. 6 (5) (March 2016). Accessed August 16, 2016. <http://apjff.org/2016/06/Frank.html>.

Ireson, Randall. “Agricultural Reform Again—or Not?” *38 North* (November 15, 2012). Accessed October 5, 2016. <http://38north.org/2012/11/rireson111512>.

———. “DPRK Agricultural Policy: Chinese Style Reform or Muddling towards Autonomy?” *38 North* (January 27, 2015). Accessed October 5, 2016. <http://38north.org/2015/01/rireson012715>.

Japan Times. “Yokota’s Parents, Child Meet.” March 16, 2014. Accessed October 5, 2016. www.japantimes.co.jp/news/2014/03/16/national/parents-of-abductee-megumi-yokota-meet-granddaughter-for-first-time/#.V_Tc_02a1O8.

Korean Central News Agency. “DPRK to Develop Tourism as One of Major Industries.” August 23, 2013. Accessed July 7, 2016. www.kcna.co.jp/item/2013/201308/news28/20130828-25ee.html.

———. “Kim Jong-un’s Letter to Participants in National Conference of Subworkteam Leaders in Agricultural Sector.” February 7, 2014. Accessed July 7, 2016. www.kcna.kp.

Kim, Jong-il. *Giving Priority to Ideological Work Is Essential in Building Socialism*. June 19, 1995. Accessed July 7, 2016. www.korea-dpr.info/lib/101.pdf.

Kim, Jong-un. “조선로동당 제 7 차대회에서 한 당중앙위원회 사업 총화보고.” [Report on the Work of the Central Committee Held at the Seventh Congress of the Korean Workers’ Party]. *Rodong Sinmun*, May 8, 2016. Accessed July 7, 2016. www.kcna.kp.

rodong.rep.kp/ko/index.php?strPageID=SF01_02_01&new
sID=2016-05-08-0001.

KLP. 조선민주주의인민공화국 법규집 (대외경제부문).

[Laws and Regulations of the Democratic People's Republic of
Korea: External Economic Matters.] Pyongyang: Legislation
Press, 2012.

Kornai, Janos. *The Socialist System: The Political Economy of Com-
munism*. Princeton: Princeton University Press, 1992.

Lankov, Andrei. "Reforming North Korea." *Al Jazeera*,
November 30, 2014. Accessed July 7, 2016. www.aljazeera.com/indepth/opinion/2014/11/reformingnorthkorea20141117121917871925.html.

Myers, Brian. "The Watershed that Wasn't: Reevaluating Kim
Il-sung's Juche Speech of 1955." *Acta Koreana* 9, no. 1 (January
2006): 89–115.

Naughton, Barry. *The Chinese Economy: Transitions and Growth*.
Cambridge: MIT Press, 2007.

O'Donnell, Mary Ann. "Cat Theory: Contextualizing Deng Xiaop-
ing's Pragmatism." *Shenzhen Noted*, August 22, 2012. Accessed
July 31, 2016. <https://shenzhennoted.com/2012/08/22/cat-theory-contextualizing-deng-xiaopings-pragmatism>.

Park, Philipp H. *Rebuilding North Korea's Economy: Politics and
Policy*. Seoul: Kyungnam University Press, 2016.

Toloraya, Georgy. "Deciphering North Korean Economic Policy
Intentions." *38 North* (July 26, 2016). Accessed July 31, 2016.
<http://38north.org/2016/07/gtoloraya072616>.

World Food Program. "Harvests in DPR Korea Up 5 Percent for
Third Year but Chronic Malnutrition Persists." November
28, 2013. Accessed July 31, 2016. <https://www.wfp.org/news/news-release/harvests-dpr-korea-5-percent-third-year-chronic-malnutrition-persists>.

CHAPTER 8

External Conditions for Rapprochement: What Avenues and Opportunities Would a North Korean Opening Up Present for the United States and Korea?

Chang-Seok Yang

Introduction

The Republic of Korea's interests in North Korea lie in promoting peace and stability on the Korean Peninsula and advancing co-prosperity and unification. To serve these interests, South Korean governments, both liberal and conservative, have pursued policies aimed at bringing about changes in North Korea. But policy priorities have differed from government to government. The conservative governments under Lee Myung-bak and Park Geun-hye focused more on denuclearizing North Korea to ensure peace and stability on the Korean Peninsula than on promoting inter-Korean rapprochement, while the liberal governments under Kim Dae-jung and Roh Moo-hyun engaged with North Korea to promote inter-Korean cooperation in various areas, including security. They believed improved inter-Korean relations would contribute to resolving the North Korean nuclear issue.

The two liberal governments focused their efforts on inter-Korean economic rapprochement, including operating an industrial

complex in Kaesong, a North Korean city near the Demilitarized Zone (DMZ). They hoped economic cooperation would spill over into political and security cooperation. When Kim Jong-il began undertaking economic reform in 2002, they took this as evidence that the engagement policy was working to promote changes in the North. But when North Korea conducted its first nuclear test in October of 2006 that hope was significantly diminished. Those in conservative circles, including the opposition party of then presidential hopeful Lee Myung-bak, criticized Roh's engagement policy for failing to stop North Korea's nuclear weapons development.

The United States' stake in North Korea has grown as North Korea has pursued its nuclear program. In the 1990s, US administrations aimed to denuclearize North Korea to enforce the Nonproliferation Treaty (NPT) and prevent conflicts on the Korean Peninsula. The Clinton administration tried to stop North Korea's nuclear development by engaging the country in diplomatic, economic, and humanitarian areas. But the Bush administration sought to denuclearize North Korea by means of "regime change," thus heightening tensions between Washington and Pyongyang and irritating South Korea's liberal governments. The Obama administration's policy toward Pyongyang has been in line with the conservative South Korean policy for North Korea, focusing more on the denuclearization. To some Korean specialists, however, the Pivot to Asia policy of the Obama administration has resulted in its Korea policy being subsumed into its China policy.¹

Currently, North Korea presents the United States and South Korea with two conflicting challenges. On the one hand, North Korea's advances in nuclear weapons development and delivery systems, including submarine-launched ballistic missiles (SLBMs), forces the two allies to toughen sanctions on what they see as an unpredictable and dangerous regime under Kim Jong-un. On the other hand, Kim's new economic reforms and opening-up measures offer the US and South Korea a new opportunity to increase leverage over the dictatorial regime by engagement.

1 This observation was made clear by liberal circles in South Korea when the Park Geun-hye government decided to have THAAD dispatched in South Korea.

In an attempt to improve the standard of living among ordinary citizens, Kim Jong-un has introduced further market elements into the economic systems.² Markets have expanded rapidly thanks to these new initiatives, leading to the proliferation of private business activities ranging from taxi companies to services like saunas, computer gaming, and *karaoke*.³ North Korean enterprises were allowed greater managerial freedom and are now able to produce whatever they find most profitable once they fulfill the production requirements set by the state. Yet despite the new opportunities for economic rapprochement brought by these policies, North Korea's latest nuclear test—the fifth of its kind—has made it more difficult overall for South Korea and the United States to engage the country in the near future.

This chapter examines how North Korea's economic opening up and cooperation have evolved and reviews reactions by the United States and South Korea. For US-DPRK relations, I will review the KEDO project as a model for economic rapprochement because North Koreans placed a high priority on the project as a key solution to their economic difficulties.⁴ The United States was “the principal point of contact with the DPRK for the LWR project,”⁵ although this energy project was operated by a public international consortium consisting of the United States, South Korea, Japan, and the European Union. The South Koreans considered the LWR project as a major economic cooperation project.

2 His economic reform program of 2012 is called “June 28 measures to improve economic management.”

3 Private business activities are allowed in the name of enterprise or public entity but are actually run by individual owners.

4 Dong-won Lim, *Peacemaker: Twenty Years of Inter-Korean Relations and the North Korean Nuclear Issue* (Seoul: Joongang Books, 2008), 624. In 1992, prior to the AF, a North Korean economic delegation headed by the deputy prime minister visited South Korea and proposed that South Korea construct LWR near the border as an inter-Korean economic cooperation. In April 2002, during his dinner for Lim Dong-won, special envoy for President Kim Dae-jung, Kim Jong-il stressed that he saw major problems for the North's economy stemming from energy shortages.

5 The supply agreement signed in December 1995 between the KEDO and DPRK government.

For North and South Korean economic rapprochement, I analyze the Kaesong Industrial Complex (KIC) in which more than 50,000 North Korean workers and 124 South Korean companies participated. This grand economic joint venture lasted more than twelve years but was terminated by North Korea on February 11, 2016, the day after the South Korean government announced its decision to stop the KIC project. In conclusion I will suggest opportunities that Kim Jong-un's economic opening up presents for the two countries in the future.

Review of North Korea's Economic Opening Up and Reaction by the United States and South Korea

US-DPRK Relations: LWR Project

President Roh Tae-woo's special declaration on July 7, 1988, stated that South Korea was willing to assist North Korea in improving relations with its allies, including the United States and Japan. The declaration implied changes in US policy toward North Korea, since South Korea had previously suggested the United States should not improve its relations until after Pyongyang took specific steps to improve relations with Seoul. The new US policies were delivered to Pyongyang through China. "The door [was] open for the DPRK to pursue an improvement of relations with the United States, if the DPRK abandon[ed] belligerence, confrontation and terrorism in favor of dialogue."⁶

But in January 1989, US administration officials were confronted with the North Korean nuclear program. The US addressed this development in two ways. First, they sought help from Soviet and Chinese officials in pressing North Korea to sign a safeguards agreement, permitting IAEA inspections. North Korea rejected this proposal. The second was to remove American nuclear weapons in South Korea, in exchange for North Korea abandoning its nuclear program. As part of the drawdown of US nuclear weapons worldwide, Washington withdrew all its nuclear weapons from

6 Don Oberdorfer and Robert Carlin, *The Two Koreas: A Contemporary History* (New York: Basic Books, 2013), 150–152.

South Korea. This action paved the way for South Korea to sign the Joint Declaration of Denuclearization on the Korean Peninsula with Pyongyang on December 31, 1991.

What motivated North Koreans to make such a deal? North Korean pragmatists “argued for making a deal—compromising the nuclear issues in return for economic benefits and normalization of relations with the United States and Japan.”⁷ Improving relations with the United States would balance South Korea’s normalization of relations with the North’s traditional allies, the Soviet Union and China.

High-level talks between Washington and Pyongyang in January 1992 led North Korea finally to accept the IAEA inspections. However, North Korea ultimately withdrew from the NPT following its dispute with the IAEA over inspections and cited as an excuse the US-ROK announcement of reinstating the joint military exercise Team Spirit. After North Korea discharged fuel rods in May 1994 and prompted a crisis of war on the Korean Peninsula, the United States and North Korea returned to the negotiation table in early July⁸ and finally agreed to a historic deal, called the Agreed Framework (AF), in October 1994.

The AF was the first substantial agreement signed between the two former adversaries and provided for normalization of relations and energy assistance in return for North Korea freezing all activities on its existing nuclear reactors and related facilities. Its purpose was to halt and then dismantle the North’s known fissile-material production facilities, although dismantling was linked with progress in the delivery schedule of the LWR units. At a critical juncture of national crisis following the collapse of the Soviet Union and its East European allies, German unification, and the declining relations with China, the North Korean regime had to find diplomatic and economic means for ensuring its survival. This was particularly true, since it began to fear the possibility of German-type unification, with the North being absorbed by the South. North Korea’s nuclear

7 Ibid., 205.

8 The Clinton administration considered surgical strikes on North Korean nuclear facilities at Yongbyon, and former president Carter’s visit to Pyongyang and his meeting with Kim Il-sung contributed to ending the crisis and getting the United States and North Korea back to the negotiation table.

program became its most valuable asset in dealing with the outside world, particularly the United States. The Workers' Party newspaper, *Rodong Sinmun*, hailed the AF as "the biggest diplomatic victory," and the North Korean negotiators were greeted with ceremonial honors at the Pyongyang airport upon their return from Geneva.

For the United States, the AF was a vehicle by which to seek the eventual, verifiable end to North Korea's nuclear weapons program. In accordance with the agreement, the United States began expert meetings to open liaison offices with the North in December 1994⁹ and from January 1995, lifted a few but not all of the economic sanctions imposed on North Korea. KEDO was established in March 1995 as a public international organization to implement the AF by constructing two 100-megawatt LWRs and supplying heavy fuel oil (HFO) for North Korea. These two jobs moved very slowly in the eyes of North Koreans, partly because of resistance to the agreement by the Republican-dominated Congress in the United States.¹⁰ North Korea complained particularly about the delay in the delivery of HFO and in the progress of construction at the LWR site in Kumho, a village town in the Northeastern seaside.

North Korean negotiators, headed by the director of the Bureau of the Light Water Reactor Project, said their leaders could not believe that the Americans would provide the LWRs by the agreed deadline of 2003.¹¹ In my private talks and KEDO meetings with North Korean officials, I could sense that North Korea was desperate to get the LWRs completed by the target date. They stressed that they had given up the graphite reactors they had had under construction and with it, their national plans to increase electricity pro-

9 US-DPRK talks to open a liaison office failed because of North Korean refusal to allow American diplomatic pouches to be delivered through Panmunjom, but eventually North Korea seemed uninterested in opening the office. It did not welcome the American office because it would have allowed American officials to contact North Korean people. Christopher Hill, *Outpost: Life on the Frontlines of American Diplomacy*, trans. Mi-sook Lee (Seoul: Medicibooks, 2015), 324.

10 Through the bi-election on November 8, 1994, the Republican Party won the majority of seats in Congress. Congress placed hurdles on the bill to pay for the HFO to be delivered to North Korea, causing a delay in the delivery schedule.

11 There was a difference between Americans and North Koreans regarding this deadline. Americans argued the year of 2003 was just a target date as in the Agreed Framework, but North Koreans insisted KEDO should meet the deadline of 2003.

duction, aggravating the energy-shortage problem.¹² Kim Yong-soon, North Korea's party secretary in charge of South Korean affairs, also complained to Lim Dong-won, special envoy from Seoul, that North Korea had stopped constructing nuclear power plants since the United States agreed to provide HFO and LWR, but its energy shortage was worsening because of delays in the LWR construction.¹³

North Koreans were relieved of such concerns in September 2001 when the LWR power block excavation took place at the construction site. Upon seeing the first concrete for the foundation of Reactor Unit One poured in August 2002, North Korean officials believed the LWRs would be provided, albeit with some delays in the schedule, and became cooperative in implementing protocols related to the LWR projects, including protocols for transportation and communications. "KEDO's work was enjoying its most productive period," opening a training center and new port, improving the sea link, agreeing on opening a direct air route between North and South Korean airports, and coming close to agreements on a satellite communications network.¹⁴

North Korea agreed to a new delivery schedule of 2008 for Unit One, since it realized the project was moving ahead. The year 2002 "had the markings of a curiously propitious year for KEDO. KEDO heard in mid-2002 that Kim Jong-il, during on-the-spot guidance near Kumho, had praised the well-paved road constructed by KEDO contractors and expressed hope that the overall project would proceed well."¹⁵ His comment must have encouraged North Korean officials to be more cooperative with KEDO. In June 2002, North Koreans came to talks with KEDO on the nuclear liability protocol, one of the most difficult items on the agenda, which they had refused to deal with prior to that. Although they did not fully accept

12 The Foreign Ministry statement claimed that because of the slow pace of construction, North Korea suffered a loss of electricity generation, one million kilowatts in 2003 and two million kilowatts per year from 2004. *Rodong Shinmun*, October 26, 2002.

13 Dong-won Lim, *Peacemaker*, 625–626.

14 Charles Kartman, Robert Carlin, and Joel Wit, "A History of KEDO," Stanford Center for International Security and Cooperation, June 2012, 106–107, accessed September 14, 2016, https://cisac.fsi.stanford.edu/sites/default/files/A_History_of_KEDO-1.pdf.

15 *Ibid.*, 107.

the principle that indemnification for damages was the sole responsibility of the plant operator (North Korea), they seemed at least to have understood basic tenets for the principle, as they asked KEDO negotiators whether KEDO could arrange funding for insurance.

The South Korean government characterized the LWR project as an important inter-Korean economic cooperation model, which it supported with money allocated from the state budget, called the "Inter-Korean Cooperation Fund." As North Koreans recognized the United States as a principal contact point, in the beginning they did not pay due attention to the South Korean delegates participating in the KEDO-DPRK talks. As the project made headway, however, they respected the South Korean presence in the meetings. They also began talking with South Koreans without any American presence, which had not previously been the case.

North Korea was assured of South Korea's positive cooperation and technical capabilities and believed it could work with the South on other economic cooperation projects. Through the LWR project, the two Koreas broadened contacts between people and developed new systems and practices to promote exchanges and cooperation, including travel, transportation, customs, communications, labor, and training.¹⁶ North Korea went so far as to allow its senior officials to visit South Korea for training and to inspect airports. North Korea also found the project to be in its interest, as they were gaining economic benefits and technical know-how. The North Korean regime seemed to be confident of minimizing the project's negative impact on its people by limiting their access to the construction site and KEDO personnel. The LWR project was a good learning experience for the North Korean regime in starting new economic joint ventures with the South, such as the KIC and Mount Keumgang Tour.

Just as the North Koreans were just beginning to show modest levels of trust in the LWR project, however, the AF, the foundation for the LWR project, began to fall apart. Key senior officials of the Bush administration, including Vice President Dick Cheney, Secretary of Defense Donald Rumsfeld, and Undersecretary of State John

16 The number of South Koreans who visited North Korea for the LWR project from 1995 to 2003 reached fourteen thousand.

Bolton were strongly opposed to the AF and determined to do away with it.¹⁷ Particularly, Bolton told Jack Pritchard, the US representative to KEDO, that “the North Koreans were not in compliance with technical aspects of all terms of the Agreed Framework, and therefore the administration would not seek funding for KEDO.”¹⁸

Assistant Secretary of State James Kelly’s visit to Pyongyang in early October 2002 provided the opportunity for the Bush administration to “shatter” the AF. Kelly’s mission was not to negotiate with North Korea but to warn that “no talks were possible until the North uranium enrichment program was stopped.” North Korean reaction to “the imperious tone of the US presentation” was to maintain that the North had a right to nuclear weapons and assert that they had something “even more powerful than nuclear weapons.”¹⁹ Kelly reported to Washington that the “North Koreans defiantly admit HEU program.” The Bush administration’s reaction to this report was that North Korea’s uranium enrichment program violated the country’s nuclear agreements, including the AF.

In a Foreign Ministry statement on October 25, North Korea denied admitting to the HEU program, as Kelly had reported to Washington. But the statement included a conciliatory note at the end about its wish for negotiations to continue, particularly on economic grounds. “The DPRK has taken a series of new steps in economic management and adopted one measure after another to reenergize the economy, including the establishment of a special economic region, in conformity with the changed situation and specific conditions of the country.”²⁰

South Korea and Japan intended to continue their bilateral engagement efforts with North Korea. But Washington’s hard-liners wanted to jettison the AF immediately.²¹ In mid-November, under intense pressure from Washington, the KEDO executive board met

17 Although the Bush administration’s review of North Korea’s policy included future discussions with North Korea for improved implementation of the AF, those senior officials had no intention of improving the AF; they meant to toss it overboard.

Oberdorfer and Carlin, *The Two Koreas*, 348–354.

18 Kartman, Carlin, and Wit, “A History of KEDO,” 118.

19 Oberdorfer and Carlin, *The Two Koreas*, 368–371.

20 *Rodong Sinmun*, October 26, 2002.

21 Oberdorfer and Carlin, *The Two Koreas*, 175.

and decided to suspend HFO shipments.²² Pyongyang responded to this decision by restarting nuclear facilities at Yongbyon in December, expelling the IAEA officials and withdrawing from NPT in January 2003. The AF was collapsing. After years of slowdowns at the construction site in the North, KEDO finally withdrew the last group of its staff in January 2006.

The AF halted North Korea's production of fissile material, created a multilateral organization, KEDO, which successfully forged working relations with the North Koreans, and provided an opening for the United States to address its concerns about the proliferation of North Korean missiles. The AF established the first non-hostile relationship between the two former foes and was instrumental in ending the nuclear crisis, though it deferred inspections and verification regarding the past nuclear activities. By freezing the North's nuclear program and thus reinforcing the NPT and nonproliferation system, the LWR project contributed to lessening tensions on the Korean Peninsula and establishing peace in Northeast Asia and the world.

US Reaction

The LWR project and North Korea's economic opening up and reform placed the United States in a strong position with respect to opportunities to engage North Korea. Kim Jong-il badly wished to improve relations with Washington.²³ He used his nuclear weapons program as a bargaining chip to extract political, diplomatic, and economic concessions from Washington. He sought to overcome his regime's crisis following the collapse of the Soviet Union and other socialist countries in Eastern Europe and South Korea's normalization of relations with his key patrons in Moscow and Beijing. The deliv-

22 Kartman, Carlin, and Wit, "A History of KEDO," 120–121. South Korea did not want to cut off the HFO that KEDO was scheduled to deliver, warning it would lead to serious consequences, including the North restarting its nuclear program. From 1995 to 2002, KEDO supplied North Korea with 3,561,000 tons of HFO worth \$521 million. For the same period, China delivered 4,722,000 tons of oil to the North.

23 The deal was really a diplomatic victory for Kim, as he was free of UN sanctions and IAEA inspections, gained 500,000 tons of HFO annually and 2,000 MW LWRs, and acquired a path to normalizing relations with the United States. Yong-joon Lee, *End of Games* (Seoul: Hanul, 2010), 102–104.

ery of HFO and the construction of two LWR units were expected to shore up the dilapidated economy. Normalizing relations with the United States on top of improved relations with South Korea and Japan was expected to create favorable conditions for economic reform and opening up. Thus, faced even with Kelly's ultimatum in October 2002, North Korea did not rule out the possibility of resolving the HEU problem through dialogue with the United States.

What mattered to the US about denuclearizing North Korea was not whether the North Koreans admitted to their nuclear program but what to do about it. However, with nothing to fill the vacuum created by the destruction of the AF, the Bush administration was ill-prepared to manage the new crisis that was emerging.²⁴ The administration failed to take advantage of "what North Korea wanted above all else, an improved relationship with Washington, which was probably its most effective leverage over the North."²⁵ North Korea still wished to resolve the crisis over the HEU issue through direct talks with the United States, while the Bush administration was not interested in talking with the North until it abandoned its HEU program. But according to Richard Armitage, then Deputy Secretary of State, Cheney and Rumsfeld disdained those who wanted to engage in diplomacy or negotiation, including Kelly and Christopher Hill.²⁶ They preferred "regime change" as a solution to the nuclear issue and indeed seemed "mesmerized by a preference for regime change."²⁷ In addition, President Bush had to focus on the coming war in Iraq and was not in a position to pay sufficient attention to the North Korean nuclear problem. Watching developments in Iraq, North Korea felt desperate to build up nuclear deterrence against US attacks.²⁸

24 Oberdorfer and Carlin, *The Two Koreas*, 372 and 380.

25 *Ibid.*, 384.

26 Yoichi Funabashi, *The Peninsula Question: A Chronicle of the Second Korean Nuclear Crisis*, trans. Young-hwan Oh (Seoul: Joongangilbo Sisamedia, 2007), 249–250. They (neoconservatives) considered negotiation with the enemy a sign of weakness and believed negotiation could not help settle problems. Christopher Hill, *Outpost: Life on the Frontlines of American Diplomacy* (New York: Simon & Schuster, 2014), 304–305.

27 Oberdorfer and Carlin, *The Two Koreas*, 384.

28 Jonathan Pollack, *No Exit: North Korea, Nuclear Weapons & International Security*, trans. Ewha Women's University Center for Interpretation and Translation (Seoul: Asan Institute for Policy Studies, 2011), 180–181.

However, America's weakness in engaging with the LWR project to achieve the denuclearization of North Korea was a lack of mutual trust. North Koreans could not be assured that the United States respected the AF, as HFO delivery and construction of reactors were delayed. North Koreans became suspicious of US willingness to provide LWR units, based on some Americans' assumption that the North Korean regime would not last long and thus the promised aid and concessions would not need to be delivered.²⁹ North Korea also complained about the US failure to move ahead in fully normalizing political and economic relations with it as agreed in the AF. As a result, North Korea was not relieved of its security concerns. To make matters worse, by including North Korea in the "axis of evil" and in the potential targets for preemptive nuclear strikes, the Bush administration made the North Korean regime suspicious of the United States' real intention.³⁰

North Korea also failed to build trust with the Americans. North Korean provocations, including the infiltration by a North Korean submarine, discovered in September 1996, and the long-range missile (*Taepodong*) launch in August 1998, were major causes of delays in the LWR project. Of course, given the difficulty of the task and the rocky strategic situation between North and South Korea during

29 Andrei Lankov, *The Real North Korea: Life and Politics in the Failed Stalinist Utopia* (Oxford: Oxford University Press, 2015), 185. Others argue such a collapse scenario is not true but was created only to persuade Congress; "Many senior US officials who supported the Agreed Framework in 1994 believed that North Korea would disintegrate long before the Korean Peninsula Energy Development Organization (KEDO) delivered the light-water reactors (LWRs)." David Albright, Holly Higgins, and Kevin O'Neill, "Epilogue," in *Solving the North Korean Nuclear Puzzle*, eds. David Albright, Holly Higgins, and Kevin O'Neill (Washington, DC: Institute for Science and International Security Press, 2000), accessed September 15, 2016, <http://isis-online.org/puzzle/epilogue>.

30 The Nuclear Posture Review of January 8, 2002, lists Iran, Iraq, Libya, North Korea, and Syria as "among the countries that could be involved in immediate, potential, or unexpected contingencies." The North Korean Foreign Ministry spokesperson stated such a US move "was a clear declaration of war against us (the North) and nullified the DPRK-US Joint Statement (of June 1993) and the Agreed Framework." *Rodong Sinmun*, October 26, 2002. Yong-joon Lee argued that as the time for inspections approached, North Korea might have desired to break the AF to avoid IAEA inspections and to maintain nuclear deterrence. Yong-joon Lee, *End of Games*, 128.

much of the 1990s, it was not surprising that the project encountered significant delays.³¹

However, the LWR project offered the United States important opportunities to engage with North Korea, involving almost all sectors of state affairs, including the military and telecommunications. As the principal point of contact with North Korea, the US officials from KEDO headquarters and its office in Kumho engaged in numerous contacts and negotiations with North Korean officials. They were also given chances to travel to many interesting places in the North, including power plants, chemical factories in Heungnam, and museums. The LWR project also offered opportunities for the United States to widen contacts with North Korean experts. In order to help North Koreans understand international practices on nuclear liabilities, KEDO staff and North Korean experts attended seminars in Vietnam. KEDO staff also spent nine days traveling to nuclear reactors and training centers in Spain and Sweden with nine North Korean officials and experts. Nineteen North Korean senior officials and nuclear-energy experts (some from Yongbyon) visited South Korean nuclear power plants and Doosan Heavy Industry manufacturing turbines, generators, and reactors in December 2001. KEDO's training center in Kumho started training 186 future North Korean operators from June 5, 2002.

A key flaw in the AF was that inspection of the North's past nuclear activities was deferred about six to seven years, until "a significant portion of the LWR project is completed." This raised the question of what would happen if the North Koreans refused to accept the IAEA inspections when the LWR project had made significant progress. The AF focused on freezing North Korea's nuclear activities to prevent additional nuclear weapons programs in the future. However, there was no way to enforce IAEA inspections on past nuclear activities if the North rejected them.³² Signing the AF and depending on North Korea's goodwill in respecting the nuclear

31 Albright, Higgins, and O'Neill, "Epilogue," accessed September 15, 2016, <http://isis-online.org/puzzle/epilogue>.

32 For more details on this argument, see Yong-joon Lee, *End of Games*, 98–102.

deal, meant taking a risk on an untrustworthy North Korea. Therefore, the United States pressed the North to accept IAEA safeguards inspections early so that key components for the reactors could be delivered without delay.³³ It was based on the IAEA estimates that it would take three years to complete inspections and verification work. But the North Koreans complained about the US pressure, arguing that the inspections would not take that long. North Korea insisted “the inspections would not come until after the significant portion like turbine and generator were delivered as agreed by the confidential memorandum.”³⁴

This meant the LWR project could be halted quite a long time while IAEA inspections and analysis took place if the North chose to defer its cooperation until the last moment. The LWR project, however, was threatened much earlier, this time by North Korea’s clandestine program of enriching uranium since the late 1990s. The LWR project, a symbol of the United States’ engagement policy, came to an end. The responsible governments failed to seize the moment. There is no denying that North Korea was most responsible for the failure, as it had secretly carried out activities that when discovered, destroyed the already thin political support for the AF in the United States.³⁵

Security concerns were always paramount to Pyongyang and we may assume that North Korean military hawks were deeply concerned about national security and felt they could not trust the Americans. On many issues, both trivial and important, North Korean officials involved in the LWR project dragged their feet, using the excuse that they had to consult with security-related agencies. The Foreign Ministry statement of February 22, 2001, threatened, “we (North Korea) would not be bound by the agreement if the US would not implement the Agreed Framework seriously.”

33 Article IV 3 of the AF states that when a significant portion of the LWR project is completed but before delivery of key nuclear components, the DPRK will come into full compliance with its safeguards agreement with the IAEA.

34 *Rodong Simmun*, October 26, 2002.

35 In January 2003, North Korea denied it had admitted the HEU program during Kelly’s visit, but in November 2010, it showed operational uranium enrichment factories to the Americans, proving that North Korean diplomats had been lying.

North-South Korean Relations

The North Korean regime learned lessons from the LWR project about pursuing economic rapprochement with the outside world while limiting the negative impact on its closed society. Security concerns were always paramount to the regime. But as it became assured of the economic benefits and confident of insulating its people from the project, the regime took additional steps to implement economic cooperation with South Korea.

When he met Hyundai's chairman, Chung Ju-yung, in Pyongyang on June 29, 2000, two weeks after his historic summit meeting with the South Korean president, Kim Jong-il stated that "he would like to earn hard currency from KIC" and promised to supply a sufficient number of workers to advance the industrial complex. When Chung replied that the KIC would need more than 350,000 workers in eight years, Kim said tension would be drastically reduced as inter-Korean relations would have developed by that time and he would put his soldiers into the KIC. In August 2001, South Korea's Hyundai Asan and North Korea's Asia-Pacific Peace Committee/National Economic Cooperation Federation signed an agreement on the development of the KIC. North Korea enacted the KIC Act in November 2002 and construction began in June 2003.³⁶ The KIC produced its first products in December 2004.

Before its closure in February 2016, the KIC area had developed into a full-fledged industrial district, equipped with proper infrastructure and convenient facilities. Around 53,000 North Koreans and 800 South Koreans were working together in the district. Thanks to mutual efforts, the district turned into a place of coexistence, fulfilling the blueprint of inter-Korean economic cooperation by combining South Korea's cutting-edge technologies and capital with North Korea's cheap labor force and land resources. Beyond its economic significance, the KIC had wider symbolic importance, contributing to peace on the Korean Peninsula and, even more broadly, to regional security.

³⁶ On October 23, 2002, North Korea designated the Mount Keumgang area as a special tourism district.

The KIC project was significant for both North and South Korea. First, as Kim Jong-il said, it served as a cash cow for the North Korean regime, providing much-needed hard currency. Although the regulation on wages stipulated direct payment to North Korean workers, North Korean officials argued they could not give dollars to the workers, since their domestic laws did not allow their citizens to possess foreign currencies.³⁷ The total amount of wages paid from 2004 to January 2016 was around \$550 million. In 2007 before Lee Myung-bak's government was inaugurated, the average wage per worker, including overtime payment and incentives, was only \$71 per month, with 22,500 North Korean workers employed. By August 2015, the wage had reached \$190 per month and workers numbered 54,000. The average cash payment to the Pyongyang government was \$1,597,500 per month in 2007 and \$10,260,000 per month in August 2015, more than six times what it had been in 2007. The KIC also paid the North for the water supply (\$0.07 per one metric ton, about \$160,000 was paid in 2015) and telephone charges.

Second, North Koreans learned technical skills and management know-how and came to know about market mechanisms, including quality control, delivery deadlines, and fulfilling orders from clients. It was significant that they were paid for overtime and Sunday work.³⁸ In 2016, every day, an average of 3,000 people worked overnight. Therefore, monthly payments differed from company to company.

Third, people living in and around Kaesong benefited from the KIC in several respects. They drank high-quality water (15,000 tons per day) supplied by the KIC. Their living standard was better from higher incomes, to better food, to being able to charge batteries at the KIC. Working conditions at the KIC were also high, with air conditioners and heaters, showers, and commuting buses.

For the South Korean side, there were benefits as well. First, the KIC offered new opportunities for small and medium-sized enter-

37 This sounds true, since most countries, including South Korea, once banned ordinary people from possessing foreign currencies. KEDO hired workers from Uzbekistan and paid their wages indirectly through the government, which paid workers with Uzbek currency.

38 They were paid time and a half for overtime work and double time for working on Sundays.

prises, particularly by providing cheaper labor, land leases, and transportation costs. One hundred and twenty-four companies also benefited from the skills of North Korean workers and lower employee turnover than in China and Vietnam. In addition, more than 4,000 small firms in the border towns of South Korea supplied the KIC with raw materials, food, and so on.

Second, the KIC contributed to peace and stability on the Korean Peninsula. During the Korean War, Kaesong was the main infiltration route for the North Korean army. Battlefields turned into peace zones. Kim Jong-il pulled back military units including some sixty thousand soldiers from the industrial site. Every day, more than three hundred people and four hundred vehicles traveled to and from the KIC through the DMZ.

Finally, the KIC served as a bridge to an economic community and unification. The KIC provided North and South Koreans with opportunities to recognize their similarities and differences and in so doing, promoted national affinity among those workers.

Nonetheless, the KIC presented a number of challenges to the South Korean government as well as to business firms. First, the KIC was at the mercy of the political climate. Inter-Korean relations, when they soured, had a serious impact on the development of the KIC. North Korea restricted entry to and exit from the KIC from December 1, 2008, and banned their entry and exit for three days in March 2009, citing as an excuse the US-ROK joint military exercise. Blaming the South Korean government, North Korea withdrew all its workers from the KIC, causing its operation to be discontinued for five months in 2013.

Second, and related to the first challenge, North Korea's security concerns hindered progress in developing the KIC into a more competitive and internationalized industrial park. South Korea repeatedly asked the North to improve communications, the commuting system, and customs clearance for South Korean companies and workers. South Korea complained about the lack of Internet access and cellular phone service, the requirement for seventy-two hours' advance notice for entry and exit, and the very strict and time-consuming customs clearance. But these issues were related to

the North's security and were beyond the authority given to North Korean agencies stationed in Kaesong to address. Thus, they had to be addressed in connection with overall inter-Korean relations.

Finally, South Korean companies demanded a more stable supply of North Korean workers. They needed a larger workforce, but they had to rely on the favor of North Korean labor authorities. The North Korean side, in turn, asked the South to build dormitories for additional workers, since they could not find any more workers around Kaesong but would need to bring them from distant areas.

South Korean Reaction

Inter-Korean economic cooperation at the KIC served South Korea's interests by maintaining peace and stability on the Korean Peninsula and promoting co-prosperity and economic community, an integral pillar of hopes for Korean unification. The KIC also served North Korea's interests, particularly by providing a source of hard currency, which the South Korean conservative governments under Lee Myung-bak and Park Geun-hye believed was a key reason why the North could not afford to shut down the KIC. In addition, the North Korean regime was relieved of its burden of feeding about 200,000 people in and around Kaesong. The tremendous economic benefits for the North were regarded as strengths for the South. In spite of that, the North Korean media denied that the North relied on the economic benefits of the KIC. Some North Korean workers at the KIC claimed they worked there not to make money but to help South Korean companies in trouble.

A matter of concern for the South was the fact that 800-1,000 South Koreans were staying in North Korean territory. The South Korean government was concerned that they could be held hostage. After the Mount Keumgang tours were suspended following the killing of a South Korean tourist by North Korean soldiers, tensions rose at the KIC after North Korea began to limit entry in December 2008. In late March 2009, North Korea held one South Korean worker in custody for 136 days on charges of criticizing North Korean systems. After North Korea sank the *Cheonan* vessel

in March 2010, the South Korean government reduced the number of its workers staying at the KIC to less than five hundred. Security for workers was one of the reasons for the Park government's decision in February 2016 to shut down the KIC.

The KIC provided good opportunities to induce changes in North Korean society. A long-term strategy for South Korea regarding the KIC, was to have North Korean workers and their families recognize a different reality about the South than what they had heard from the North's official propaganda. All the South Korean governments hoped such changes would spread across the whole North Korean region.³⁹ A matter of concern for both North and South was whether the KIC was a Trojan horse or hostage. North Korean authorities were concerned that the South would use the KIC as a platform to absorb the North, while South Korean authorities worried about possible attempts by the North to hold its workers hostage. Such perceptions, right or wrong, affected each side's policy toward the other. For instance, in early 2014 North Korean authorities banned *Choco Pies*⁴⁰ as snacks for North Korean workers. They gave no specific reason, but we can assume that some officials in Pyongyang may have seen an effort to undermine North Korean citizens' faith in socialism through *Choco Pies*.⁴¹ The existence of the prosperous South, symbolized by *Choco Pies*, may have been thought to pose a great threat to internal stability in North Korea.⁴² Such North Korean concern was bolstered and doubled when they found *Choco Pies* in the balloons sent by South Korean human rights activists. North Korea forced South

39 Myung-bak Lee, *President's Time 2008–2013* (Seoul: Random House Korea, 2015), 320.

40 A *Choco Pie* is a snack cake consisting of two small round layers of cake with marshmallow filling and chocolate covering. Every day, around 300,000 pieces were supplied to the KIC for snacks.

41 "Despite perceptions of North Koreans as brainwashed, insulated masses, the hunger and desire for Choco Pie shows that 'complete quarantine is impossible,' wrote Richard Lloyd Parry in the *London Review of Books*. Lloyd wrote that it 'reveals a susceptibility to outside influence in a society commonly regarded as impenetrable.' The crumbly mass of chocolate and marshmallow had taken on a subversive aspect," Madison Park, Frances Cha and Evelio Contreras, "How Choco Pie infiltrated North Korea's Sweet Tooth," *CNN*, January 27, 2014, <http://edition.cnn.com/2014/01/27/world/asia/choco-pie-koreas/>.

42 Lankov, *The Real North Korea*, 166.

Korean companies to replace *Choco Pies* with the North-made snacks, including pirated *Choco Pies* and instant noodles.

From the beginning of the KIC project, South Korea demanded that wages be paid directly to North Korean workers. For some in the South Korean government, it was a matter of great concern that a substantial amount of cash was given directly to the North Korean regime, including the Korean People's Army. One of the Park government's stated reasons for closing the KIC was concern that funds were being diverted to support developing nuclear weapons, though the government provided no clear evidence.⁴³ This concern had been raised from the beginning, but the cash amount was not substantial enough at that time to affect policy.

Advocates for the KIC argued that the KIC served as a model for unification and that it should be expanded as planned and that additional industrial parks be built in North Korea. This kind of economic engagement would help South Korea increase its leverage over the North. But expansion of the KIC lost momentum when the conservative government under Lee Myung-bak hinted at a link between the KIC and the nuclear issue, provoking the North Korean regime.⁴⁴ The Kim regime was further frustrated when the Lee government refused to build dormitories for their workers, which the previous government had promised to do. The Lee government assumed that the KIC could work as leverage over North Korea, as it provided cash to the Kim regime in Pyongyang. There is no denying that the Kim Jong-un regime did not underestimate the economic benefits. When North Koreans returned to work after the five-month

43 Unification Minister Yong-pyo Hong said "he believes that North Korea has used wages paid to its workers at the joint inter-Korean factory complex to develop nuclear and other military weapons," "S. Korea says N. Korea Used Kaesong Wages to Develop Weapons," *Yonhap News*, February 14, 2016, <http://english.yonhapnews.co.kr/northkorea/2016/02/14/4/0401000000AEN20160214000800315F.html>. But later he confessed that "I explained that what we had were concerns, not evidence," Jin-cheol Kim and Seung-joon Lee, "Unification Minister Admits There's No Evidence for Kaesong Diversion Claims," *Hankyoreh*, February 16, 2016, http://english.hani.co.kr/arti/english_edition/e_northkorea/730597.html.

44 In March 2008, the South Korean unification minister stated the KIC could not be expanded unless the North Korean nuclear issue was resolved. In response, North Korea expelled South Korean officials stationed at the KIC as representatives for inter-Korean economic cooperation.

closure in mid-September 2013, they looked pleased and some said, “It [the KIC] would never be stopped.” They assumed that the Kim regime would have to listen to the voices of its people. This mind-set is worth remembering in South Korea. If we can win the hearts of the North Korean people through KIC-type economic rapprochement, South Korean interests in promoting economic community and unification will be served.

Conclusion: Future Options

On March 31, 2013, the Party Central Committee, North Korea’s top decision-making organ, endorsed Kim Jong-un’s *Byungjin* (parallel development) policy of economy and nuclear weapons. During the plenary session, Kim warned of the threat of invasion when giving up deterrence by referring to past lessons from the Middle East. During the Seventh Party Congress on May 6 to 9, 2016, Kim called the new *Byungjin* policy “a permanent strategic guideline” to pursue in the coming days.

With the latest and fifth nuclear test on September 9, 2016, marking the sixty-eighth anniversary of the regime’s founding, it appears likely that North Korea will not give up nuclear weapons development at any cost. As reported by North Korea’s state-run media, Korean Central Television, “The standardization of the nuclear warhead will enable [North Korea] to produce at will and as many as it wants a variety of smaller, lighter and diversified nuclear warheads of higher strike power. This has definitely put on a higher level [the North’s] technology of mounting nuclear warheads on ballistic rockets.”

The younger Kim will not give up his nuclear weapons program, particularly on ideological grounds. The North Korean regime finds its legitimacy in its struggles with the US. The *raison d’être* for the North Korean regime, from its foundation by Kim Il-sung, Kim Jong-un’s grandfather, was to liberate people in the South from imperialist occupation by the United States. The North Korean regime used its confrontation with the United States to consolidate national unity and legitimize its dynastic rule. In this context,

we can see why Kim Jong-un raised tensions by launching long-range missiles and nuclear testing, and even issued a blatant threat to attack the mainland of the United States. Kim Jong-un needed to show off his military capability and brave resolve in deterring a possible US-led war.

In addition, North Koreans see their nuclear weapons development as an invaluable strategic asset in preventing what they fear to be an imminent American nuclear war. Such perception gained more rationality in Pyongyang after the United States invaded Iraq and ousted Libya's Gadhafi.⁴⁵ The inducements of the LWR and the KIC proved not to be great enough for the North Korean regime to abandon its nuclear weapons program.

What about "economic construction"? During the party congress, Kim Jong-un reiterated his commitment to "expand our own style of economic management approach," meaning that he would continue to pursue his economic reform and opening up. His words were accompanied by action at the Congress. He promoted Prime Minister Pak Bong-chu, widely known for initiating the July 1 reform measures of 2002 and then in charge of promoting new economic reforms, to a standing member of the Politburo of the Workers' Party.

In reality, however, Kim does not appear to be committed to improving the economic conditions of North Korean citizens but rather leaves them do cope with economic problems on their own. Although he stressed his country could afford to use the resources available for economic development, thanks to the strong military power status secured by his nuclear weapons capability, we only see limited signs of his efforts to improve the economy. Perhaps we can assume that Kim Jong-un has been relieved by the continued economic growth in the past several years.⁴⁶ This growth can be

45 Regarding the lessons the North learned from Libya: Doug Bandow, "Thanks to Libya, North Korea Might Never Negotiate on Nuclear Weapons," *National Interest*, September 2, 2015, accessed September 15, 2016, <http://nationalinterest.org/feature/thanks-libya-north-korea-might-never-negotiate-nuclear-13756>.

46 Lankov, *The Real North Korea*, 134 ("The last seven to ten years can be described as a time of modest but steady and undeniable improvement in North Korea's economic situation").

attributed to market forces. North Koreans produce many goods and services themselves, as they have come to see the farms and factories they run as their own private property.

What avenues are open to South Korea and the United States at this juncture? It is getting more difficult to curb North Korea's nuclear development, let alone achieve "complete, verifiable, irreversible dismantlement (CVID) of the nuclear weapons program," which remains the US policy objective for North Korea. What options do we have with regard to the North's nuclear weapons and missiles development? We may consider (1) a military option, meaning war; (2) stricter sanctions; (3) regime change; and (4) engagement and negotiation. The military option is too dangerous, as it would almost certainly lead to a large number of human casualties in Korea. Toughening sanctions would make life even more difficult for innocent people in North Korea, whereas the elites in Pyongyang would not be affected much, except for Kim Jong-un's luxury gifts. A weak point in the sanctions options is North Korea's insulation from the international economy. The North Korean economy is largely self-reliant, and almost 90 percent of its total trade is with China, meaning that sanctions will not work as long as China continues to mind its ally like "lips and teeth." China is unlikely to do anything that might trigger a severe domestic crisis in North Korea.⁴⁷ It would be difficult for the United States to push China harder to squeeze the North. And regime change is more easily said than done. It would not be plausible to think of regime change without military action or nurturing dissident groups in Pyongyang.

The only remaining option is engagement. It may look almost impossible and moreover be unpopular at the present to advocate engaging the North. As a matter of fact, the United States and South Korea have long aimed to induce changes in North Korean society. A major problem thus far has been that there has been no consistency, no patience, and no high-level attention being paid. The LWR project and the KIC were seen as the main tools for regular, sustained, and long-term engagement with the North. But they were

⁴⁷ *Ibid.*, 190.

not given high-level attention by subsequent administrations in both Washington, D.C. and Seoul and finally have fallen victim to the nuclear issue. Supporters of the AF and the LWR project assumed that the North Korean regime could be convinced to abandon its nuclear weapons if the rewards were sufficient. But with the fourth and fifth nuclear tests and continued long-range missile tests by the Kim Jong-un regime, this has turned out to be illusory, “since the North Korean regime never had either intention or, frankly, a valid reason to surrender its nuclear weapons.”⁴⁸

North Korea’s continued advance in nuclear weapons and its delivery system requires the United States and South Korea to reshape their policy from longer-term perspectives. Even as we consider options for engaging North Korea, we do not want to recognize the North as a nuclear weapons state or sit for disarmament talks, as Pyongyang has proposed. Establishing a permanent peace mechanism and replacing the unstable armistice on the Korean Peninsula would not be a good solution to the current stalemate either, as South Korea and the US do not trust the Kim regime. The Park government has rejected any kind of engagement, including military talks, as proposed by the North, and humanitarian aid for vulnerable people, because it thinks it is not the right time.

I assume what is happening in the North is that Kim Jong-un is not pursuing in parallel (*Byungjin*) but is instead separating the two pillars of his strategic goals. He is focusing on developing nuclear weapons, mobilizing all available resources, while also developing the economy through market forces. His successive measures to reinforce the socialistic economic management system led nonpublic sectors of the economy to grow so big as to compete with official sectors of the economy. “Kim Jong-un used private money owned by *Donju* for constructing his proud projects, like *Changjun* apartment and *Munsu* waterpark.”⁴⁹ It is not clear how long and to what extent Kim will let markets grow. But the party congress decided to let them go, with its driver Pak Bong-chu promoted. Based on this assumption, I would

⁴⁸ Ibid., 211.

⁴⁹ Eul-chul Lim, *The North Korean Economy in the Kim Jong-un Era* (Seoul: Hanul, 2016), 205.

suggest our version of a “dual-track (*Byungjin*) policy” of deterring the North and aggressively engaging market forces.

The first pillar of this dual-track policy aims at locking up the Kim regime in the nuclear swamp by strengthening deterrence and nonproliferation systems, backed by stricter sanctions. Assurance of “extended deterrence” by President Obama may have been viewed as the right approach, but reinstating tactical nuclear weapons on the Korean Peninsula should also be considered, depending on the level of future provocations by the North. Supported by continued sanctions,⁵⁰ the effort should be to exhaust the Kim regime economically and diplomatically by his irrational nuclear buildup, as happened to the former Soviet Union. Comprehensive and extended deterrence against the North would squeeze the impoverished Pyongyang regime to make a choice to go deeper into the nuclear mire or to come to its senses and seek a life-saving operation with outside help.

A serious problem with this option, however, is that the clock on the North’s nuclear program keeps ticking. For example, if 2017 is like 2016, the North will conduct two more nuclear tests and several successful long-range missiles. This will be the same in 2018. Thus, waiting to squeeze them would seem to have significant dangers.

The second pillar of new engagement aims at shoring up market forces as an alternative source of power in the totalitarian state. This policy requires shrewd, patient, strategic, and long-term effort. Despite limitations, it is worthwhile and invaluable strategically to find ways of consistently engaging market forces in North Korea, thereby helping the middle-class to grow. Market elements have expanded in the North, ranging from small-team or family-centered farms to convenience shops, housing construction, and private banking.⁵¹ Chinese traders or *Donju* (masters of money), including Chinese nationals from other Asian countries, have established cash-cow businesses, including high-interest-rate loans and wholesale shops. No doubt, deeper Chinese involvement in North Korean markets will increase China’s influence over the North, thus marginalizing the

⁵⁰ American strength in mobilizing its power and influences over the international community in isolating Iran in the past can be utilized to make the North Korean regime suffer more.

⁵¹ See generally, Eul-chul Lim, *The North Korea Economy in the Kim Jong-un Era*.

influence of the United States and South Korea. Chinese influence would have a significant impact on managing the future situation in North Korea, in the case of a contingency or democratization. We can support the growth of market forces by funding farms, enterprises, and traders, for instance, with microcredits and, from a longer-term perspective, by engaging in economic cooperation. Under the May 24, 2010 sanctions imposed on North Korea by South Korea after the *Cheonan* incident, this would not be possible. But this policy should be considered seriously on a long-term basis, probably by the next government in Seoul. However, this would not be likely if North Korea continues to develop nuclear weapons and long-range missiles.

Another tool for reaching the people is to provide humanitarian assistance, as it can mitigate hostile sentiments among ordinary North Koreans. The United States and South Korea have provided humanitarian aid for North Korea's people. In a sense, this aid was advocated for national security reasons, even though it was defined as separate from politics. Nonetheless, humanitarian aid provides donors with accesses to recipients. It is an efficient way to capture the hearts and minds of people in distress, an important element in the process of unification based on self-determination.

Another way to engage North Korean society, again from a long-term standpoint, is to invest in 19 special economic zones (SEZ). This has much to do with the task of nurturing market forces. By investing in the special economic regions, we can help North Korean farms and enterprises raise their production and incomes. The history of globalization demonstrates that foreign direct investments (FDI) contributed to economic development. The SEZ will also provide foreign investors with opportunities to increase interaction and communication with related local officials and people. The KIC served South Korean interests by inducing changes in North Korea. In particular, it helped North Koreans learn more about South Korea, giving them a different perspective than what they had read and heard from their official media.

Investment in the SEZ will naturally require rehabilitating poor infrastructure in North Korea. Without upgrading infrastructure, including railways, roads, airports, and harbors, Kim Jong-un's gran-

diose plans to develop 19 special economic districts are unlikely to succeed. It would not be easy to build up infrastructures under current sanctions, but still it is worth trying to work with interested parties, including China and Russia. Rebuilding the infrastructure could be discussed as part of a grand nuclear deal with the Kim regime. Nurturing market forces and investment in SEZ would promote opportunities to achieve an economic community and ultimately, to achieve unification.

Engagement includes diplomacy, combining pressure and dialogue. Through diplomacy, we can signal to the North a red line for banning proliferation of nuclear materials or weapons or seek to freeze the North's nuclear and missile programs as an interim solution to the long-term goal of verifiable denuclearization. But the Obama administration and Park government have determined to break North Korea's chain of actions by first generating a crisis, then escalating tensions to a near military confrontation, coming to dialogue, and extracting rewards for returning to the status quo. Therefore, they declared they would not sit for "talks for talks' sake" and that they would not buy the same horse twice (or three times).

Having said that however, when tension escalates on the Korean Peninsula or when the North Korean regime feels sanctions biting hard, North Korea may come back to the negotiating table for denuclearization. Though chances look slim at this stage, we should be better prepared for dialogue. The history of dealing with the North has taught us that "periodic setbacks should not be used as an excuse to abandon engagement altogether." Proud North Koreans are sometimes hungry for sustained high-level attention from their enemies.⁵² Even North Korean ruling elites are tempted to raise tensions intentionally for domestic purposes, including power succession.

Unfortunately, the effort to engage the North economically suffered a blow with the shutdown of the KIC, costing South Korea what little leverage it had. Egon Bahr, the architect for *Ostpolitik*, stressed that German unification was accomplished through human-

52 Albright, Higgins, and O'Neill, "Epilogue," accessed September 15, 2016, <http://isis-online.org/puzzle/epilogue>.

itarian efforts and economic incentives for East Germans. West Germany tried to insulate intra-German relations from the East-West Cold War. Particularly, the conservative government under Chancellor Kohl decided to save the East German government from going bankrupt by guaranteeing a big amount of bank loans, 1.95 billion DM in 1983–84. Chancellor Kohl recalled “it was the most difficult decision in his political life.”⁵³ He did it first of all to prevent instability in East Germany, as it might have heightened tensions in Europe, already high because of Soviet nuclear missile deployment, and second, to increase his leverage over the East. He used this opportunity to ease travel between the two Germanys, which increased the number of East German visitors to the West, a key contributor to the peaceful revolution in 1989.

South Korea will have to find ways of increasing its own influence over North Korea. Absolutely, North Korea’s nuclear weapons and its delivery system pose a paramount threat to the South. The Park government and probably the next government would have to leave no stone unturned to halt the North’s nuclear development. However, it will have to reevaluate current policies from long-term strategic perspectives too.

At an opportune time, South Korea should consider resuming nonpolitical relations with the North, first allowing civilian economic, cultural, and social interaction with North Koreans. After serious discussions with his cabinet members, former president Lee Myung-bak decided not to include the KIC in the list of sanctions on the North as punitive actions for the North’s sinking of *Cheonan*. He did not want to “put all nest eggs in one basket,” meaning he wanted to leave some channels open to the North.⁵⁴ Amid tensions after the South Korean sanctions of May 24, 2010, North Korea continued to supply its workers for the KIC.⁵⁵ Expanding markets

53 Helmut Kohl, “Aufarbeitung von Geschichte und Folgen der SED-Diktatur in Deutschland” [Processing of the History and Consequences of the Socialist Unity Party Dictatorship in Germany], in Hearing, Enquete-Kommission, November 3–5, 1993.

54 Lee, *President’s Time*, 322–324.

55 The number of North Korean workers increased from about forty-two thousand before the *Cheonan* sinking to about fifty-three thousand in December 2012.

in North Korea can provide new opportunities for the United States and South Korea to increase leverage over the North Korean regime. They need to invent strategies to play a key role in influencing the North Korean economy, as China has done successfully.

REFERENCES

- Albright, David, Holly Higgins, and Kevin O'Neill. "Epilogue." In *Solving the North Korean Nuclear Puzzle*, edited by David Albright et al. Washington, DC: Institute for Science and International Security Press, 2000. Accessed September 15, 2016. <http://isis-online.org/puzzle/epilogue>.
- Bandow, Doug. "Thanks to Libya, North Korea Might Never Negotiate on Nuclear Weapons." *National Interest*, September 2, 2015. Accessed September 15, 2016. <http://nationalinterest.org/feature/thanks-libya-north-korea-might-never-negotiate-nuclear-13756>.
- Funabashi, Yoichi. *The Peninsula Question: A Chronicle of the Second Korean Nuclear Crisis*. Translated by Young-hwan Oh. Seoul: Joongangilbo Sisamedia, 2007.
- Hill, Christopher. *Outpost: Life on the Frontlines of American Diplomacy*. Translated by Mi-sook Lee. Seoul: Medicibooks, 2015.
- Kartman, Charles, Robert Carlin, and Joel Wit. "A History of KEDO 1994–2006." Stanford Center for International Security and Cooperation, June 2012. Accessed September 14, 2016. https://cisac.fsi.stanford.edu/sites/default/files/A_History_of_KEDO-1.pdf.
- Kim, Jin-cheol, and Seung-joon Lee. "Unification Minister Admits There's No Evidence for Kaesong Diversion Claims." *Hankyoreh*, February 16, 2016. Accessed September 15, 2016. http://english.hani.co.kr/arti/english_edition/e_northkorea/730597.html.
- Kohl, Helmut. "Aufarbeitung von Geschichte und Folgen der SED-Diktatur in Deutschland" [Processing of the History and Consequences of the Socialist Unity Party Dictatorship in Germany]. In Hearing, Enquete-Kommission. November 3–5, 1993.

- Lankov, Andrei. *The Real North Korea: Life and Politics in the Failed Stalinist Utopia*. Oxford: Oxford University Press, 2015.
- Lee, Myung-bak. *President's Time 2008–2013*. Seoul: Random House Korea, 2015.
- Lee, Yong-Joon. *End of Games*. Seoul: Hanul, 2010.
- Lim, Dong-Won. *Peacemaker: Twenty Years of Inter-Korean Relations and the North Korean Nuclear Issue*. Seoul: Joongang Books, 2008.
- Lim, Eul-chul. *The North Korean Economy in the Kim Jong-un Era*. Seoul: Hanul, 2016.
- Oberdorfer, Don, and Robert Carlin. *The Two Koreas: A Contemporary History*. Revised and Updated. 3rd ed. New York: Basic Books, 2014.
- Pollack, Jonathan. *No Exit: North Korea, Nuclear Weapons & International Security*. Translated by Ewha Women's University Center for Interpretation & Translation. Seoul: Asan Institute for Policy Studies.
- Park, Madison, Frances Cha and Evelio Contreras. "How Choco Pie infiltrated North Korea's Sweet Tooth." *CNN*, January 27, 2014. Accessed September 15, 2016. <http://edition.cnn.com/2014/01/27/world/asia/choco-pie-koreas/>.
- Yonhap News*. "S. Korea says N. Korea Used Kaesong Wages to Develop Weapons." February 14, 2016. Accessed September 15, 2016. <http://english.yonhapnews.co.kr/northkorea/2016/02/14/4/0401000000AEN20160214000800315F.html>.

CHAPTER 9

State Succession in the Context of Korean Unification

Ye Joon Rim

Introduction

From the perspective of international law, unification of the Korean Peninsula means that two sovereign states within international society unite to become a single sovereign state, hence their ability to possess rights and bear duties (or “legal personality”¹) as subjects of international law will change. The forms and systems of united sovereign states vary; for instance, the United States and Switzerland are federate states, and the Republic of Korea is a unitary state. Both federate states and unitary states are forms of united states, which have a single international legal personality and differ from confederations of states where the external sovereignty of each state is recognized. Whether a united Korea takes the form of a federate state or a unitary state is contingent on its domestic legal order; therefore, this point is irrelevant to international law,² which does not make

1 Oleg I. Tiunov, “The International Legal Personality of States: Problems and Solutions,” *St. Louis University Law Journal* 37 (1992–1993): 323.

2 In addition, two sovereign states, each of which has its own legal personality, may form a federate state based on a treaty, but more often on *pouvoir constituant*. The issue of whether to take the form of a federate state, therefore, is an internal matter to be decided domestically based on the selection of a structure and system for the state pursuant to its constitutional law.

distinctions as to the form, government structure, or system of a state and regards both federate and unitary states alike, that is, as sovereign states with single legal personalities.

The unification process is performed based on political decisions, but ultimately becoming a unified sovereign state in international society follows the process of *state succession*, which includes the extinction and the formation of a state. This is a process through which two legal personalities converge into one, requiring a review of the change in legal relations. *State succession* means “the replacement of one State by another in the responsibility for the international relations of territory.”³ This is a process where rights and obligations of the existing legal personality are integrated into a new or subsisting legal personality and to which the interests of a third state concerned with the existing rights and obligations are closely related. Therefore, this process needs to proceed in compliance with general international law. Note that the phrase *state succession* in this chapter does not connote any presumption that an automatic transmission of legal rights and duties occurs.⁴

This chapter aims to examine international legal aspects of the Korean unification process. It first attempts to frame the meaning of unification in international law, by examining the notion of “divided states” and their unification. It then reviews the types of state succession that are possible for the unification of the Korean Peninsula, as well as the potential legal consequences of the relevant international legal frameworks. Rights and obligations with regard to treaties, state property, archives, and debts for each type of state succession will be discussed mainly based on the provisions of the two Vienna

3 Art. 2(1)(b) of the Vienna Convention on Succession of States in Respect of Treaties, 17 ILM 1488 (1978); Art. 2(1)(a) of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 22 ILM 298 (1983); Art. 2(a) of the Articles on Nationality of Natural Persons in Relation to the Succession of States, annexed to the General Assembly Resolution 55/153, UN Doc. A/RES/55/153 (January 30, 2001).

4 The term *state succession* is well established in international law despite its misleading suggestion of the municipal law analogy of continuity of legal personality in an individual's property, passing as an inheritance, involving a complete or universal succession. Ian Brownlie, *Principles of Public International Law*, 7th ed. (Cambridge: Cambridge University Press 2008), 649–650.

conventions on state succession.⁵ This chapter will also look at the succession of state responsibility. These discussions are intended as prerequisites for preparing a Korean unification treaty or a unified constitution of the united Korea.

Reframing the Meaning of Unification in International Law

The Notion of Divided States and their Unification in International Law

The Korean Peninsula is the last of the twentieth century's "divided states." The term *divided state* is not a legal term with normatively relevant consequences and does not therefore render any specific legal status. There are also no specific rules of international law that recognize the phenomenon of divided states,⁶ and whether there is any special or separate category of divided states in international law is also doubtful. "Separation of a nation"⁷ is also not a subject of legal consideration, unless it is recognized as a subject entitled to the right of self-determination under international law. In international law, a "state" and a "nation" are two different concepts, and a "state" does not necessarily mean a "nation-state." There is no principle that the Korean nation must form one single sovereign state. The idea of one Korean nation can be a spur to a united Korea but does not guarantee unification. The concept of a nation in our diverse modern society may strengthen internal bonds but cannot act as legal grounds for unification. Nonetheless, much of the pressure behind certain political situations derives from a sense of national identity.⁸ Although there is no legal category of divided states, "they are nonetheless worth separate consideration individually because of their interest and importance."⁹

5 Vienna Convention on Succession of States in Respect of Treaties, 17 ILM 1488 (1978); Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 22 ILM 298 (1983) [hereinafter 1978 Vienna Convention, 1983 Vienna Convention, respectively].

6 Markku Suksi, "Divided States," *MPEPIL*, www.mpepil.com.

7 James Crawford, *Creation of States in International Law* (Oxford: Oxford University Press, 2007), 449–451.

8 *Ibid.*, 449.

9 *Ibid.*, 451.

The question then arises: what does the unification of a “divided state” mean? A divided state (regardless of the political or national context) implies that a single state has been divided into two or more states. And unification is a process through which these separated sovereign states become a single state once more. This raises the additional question of whether unification is an international issue or a bilateral one between the divided states. A look at the special relations between the Republic of Korea and the Democratic People’s Republic of Korea (DPRK or North Korea) is instructive. The Constitution of the Republic of Korea does not recognize North Korea as a separate state, providing in Article 3 that “the territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands.”¹⁰ The DPRK does not have such a provision in its socialist constitution and continues to pursue its Two Korea Policy. However, it remains uncertain whether the DPRK considers South Korea to be a separate sovereign state. Neither Korea has requested or been granted state recognition from the other. In addition, the preamble of the Agreement on Reconciliation, Nonaggression, and Exchanges and Cooperation between South and North Korea, adopted in 1991, describes the relations between the two Koreas as “not a relationship between states, but a special interim relationship stemming from the process towards reunification.”¹¹ This phrase suggests the need for a special review of the relations between South and North Korea, unlike those between other states. In this regard, questions may arise as to whether general principles of international law apply to inter-Korean relations, as well as whether international law applies to the Korean unification process.

Any possible application of international law requires an answer to the question of North Korean statehood. It is difficult to deny the status of North Korea as a state under international law, despite the

10 In respect of the legal status of the DPRK from the perspective of domestic law, discussions are mostly about the relationship between Article 3 and Article 4 of the Constitution. See e.g., Sang-Hoon Lee, “Legal Status of North Korea—from Domestic Legal Aspects,” *International Law Trend & Practice* 10 (2004): 76-94.

11 Preamble of Agreement on Reconciliation, Nonaggression, and Exchanges and Cooperation between South and North Korea (adopted on 13 December 1991, entered into force on 19 February 1992).

provision of the Constitution of South Korea, lack of state recognition,¹² and special inter-Korean relations,¹³ because a state under international law is “a legal fact,” which is objective and not relative.¹⁴ On the world stage, South and North Korea are two independent, sovereign states with their own names, the Republic of Korea and the Democratic People’s Republic of Korea, respectively. Therefore, the relations between the two Koreas can be regarded as those between states, and their own international legal personalities cannot be denied under international law. Apart from the fact that the United Nations approved the establishment of “a lawful government...based on elections which were a valid expression of the free will of the electorate of that part of Korea and which were observed by the Temporary Commission; and that this is the only such government in Korea,”¹⁵ North Korea, for its part, cannot deny South Korea’s status under international law. Therefore, from the perspective of the international community, the Korean nation’s recovery of control over the entire peninsula by breaking down the military demarcation line is not a domestic, inter-Korean issue but rather a process through which two separate states with their own legal personalities are restructured or newly established as a single legal personality. The extinction and creation of a subject of international law’s legal personality is not governed by domestic law but by inter-

12 The State is recognized as a legal person under international law, and thus the existence of the State stands beyond the recognition of third States, which is largely based on political determination, as the State’s legal personality was not previously conferred according to recognition by other States but prescribed under the relevant rules of international law. As Talmon noted: “the creation of a State cannot be undone by nonrecognition alone, and so nonrecognition cannot have status-destroying effect either.” Stefan Talmon, “The Constitutive Versus the Declaratory Theory of Recognition: *Tertium Non Datur?*,” *British Yearbook of International Law* 75 (2004): 101–181, at 180. Recognition is neither required for the creation of a state nor can be considered as a determinative criterion in respect of state extinction.

13 Ye Joon Rim, “A Study on the Legal Status of the Democratic People’s Republic of Korea from the Perspective of International Law,” *Anam Law Review* 46 (2015): 317–43.

14 Regarding the state as “a legal fact,” see Ye Joon Rim, “State Failure: Implications for International Law,” Ph.D. Thesis No. 1041, Graduate Institute of International and Development Studies, Geneva (2014): 430–432.

15 The Problem of the Independence of Korea, GA Res. 195 (III), UN Doc. A/RES/195(III) (December 12, 1948), para. 2.

national law.¹⁶ Neither does the existence of the Armistice Agreement affect either state's international legal status. This is due to the fact that the extinction of the legal personality of a subject of international law leads to a change in its rights and obligations, which inevitably affects the rights and obligations of other states.¹⁷

*Unification and the Change or
Continuity of International Legal Personality*

An entity's legal personality refers to its capacity to participate in legal situations, such as exercising rights, bringing claims, and undertaking obligations, and its competence to act as a person before the law.¹⁸ The essence of this concept is that an entity is considered to be a single person for legal purposes and thus can act and take responsibility under its own name, independent of the individual members who constitute it. This conception, which makes use of the juridical fiction of "moral personality," has been devised to enable the workings of legal systems.¹⁹ This rationale applies to the discourse of legal personality in international law. Thus, a change in the legal personality of a sovereign state implies a change in the rights and obligations in its international relations, and there may exist a third state that has interests in such a change.

Unification involves a change in statehood, which is an issue of a state as a primary subject of international law, hence an issue of international law. The unification of divided states is an issue of state

16 See e.g., Rim, *supra* note 14, at 141–159. Marcelo G. Kohen, "Création d'Etats en droit international contemporain," *Cours Euro-Méditerranéens Bancaja de Droit International* 6 (2002): 546–635. Anne Peters, "Statehood after 1989: 'Effectivités' between Legality and Virtuality," in *Select Proceedings of the European Society of International Law* vol. 3, eds. James Crawford and Sarah Nouwen (Portland, OR: Hart Publishing, 2010), 171–183.

17 Rim, *supra* note 13, 319–320.

18 Hermann Mosler, "Subjects of International Law," in *EPIL*, vol. IV, ed. Rudolf Bernhardt (Amsterdam: North-Holland, 2000), 712.

19 According to Scelle, "the conception or the juridical fiction of 'moral personality' has played and plays an essential role in the juridical technique of the quasi totality of legal systems and that it has, consequently, a *raison d'être*; but it also has its disadvantages and should...be interpreted in a manner which would eliminate those disadvantages by destroying any anthropomorphic illusion." Georges Scelle, "Some Reflections on Juridical Personality in International Law," in *Law and Politics in the World Community*, ed. George A. Lipsky (Berkeley: UC Press, 1953), 49.

succession, which involves the replacement of one state by another in responsibility for international relations. The transference of treaties, related debts, and responsibilities, among others, are not just issues between the two unifying states but also of concern to a third state or the entire international legal community. The specific legal consequences of unification should be considered in the process toward unification, not afterward, because the consequences of the extinction or expansion of a legal personality can affect a third state. Thus reunification is an issue that merits consideration of the surrounding states. Parties to the unification also need to consider these issues, as they should deal with external relations in the unification process. When assuming that the purpose of easing the tension between the two Koreas is to achieve a peaceful unification, consideration of related legal issues is not a result subsequent to unification but a prerequisite.

Principles of International Law Governing “Unification”

The state is a subject of international law, and this means that international law cannot be left out in determining whether an entity becomes its subject. International law has been deeply involved in the creation and extinction of statehood, and standards of legality enshrined in international law can work either to impede or facilitate the acquisition of statehood.²⁰ The legal status of the state has become closely interrelated with the principles of self-determination and the prohibition of the threat or use of force in accordance with the development of international law.²¹

A change in statehood is a change in the international legal subject concerned. It is at the same time a change in an international legal subject that continuously develops international law, suggesting that *pouvoir de fait* can be more powerful in accordance with the principle of *effectivité*. However, this also means that conformity with international law can render legal effect to the facts. It is commonly agreed that the unification process should be carried out in a peaceful man-

20 Peters, *supra* note 16, 175.

21 Kohen, *supra* note 16, 562–563. George Abi-Saab, “Conclusion,” in *Secession: International Law Perspectives*, ed. Marcelo G. Kohen (Cambridge: Cambridge University Press, 2006), 470.

ner. From the standpoint of international law, however, this is not because Article 4 of the Constitution of the Republic of Korea prescribes a peaceful unification but because international law sees the nonuse of force as *jus cogens*.²² The Vietnamese unification is excluded by legal scholars from the consideration of types of state succession because its use of force is not in compliance with the basic principles of international law.²³ In accordance with the principle of *ex injuria jus non-oritur*, the Vietnamese unification cannot be considered as a state practice that can form customary international law.²⁴

Second, among the fundamental principles of international law, the principle of nonintervention is also relevant for the unification process.²⁵ Unification by “absorption” in the event of “sudden change” in North Korea is widely discussed. However, “sudden change,” even if it occurs, does not affect statehood (i.e., the legal status of a sovereign state).²⁶ Even if North Korea suffers temporal absence of government due to “sudden change” associated with the collapse of state authority, the jurisdiction of the Republic of Korea is not expanded, as Article 3 of the Constitution of the Republic of Korea has been interpreted. Moreover, South Korea, on the grounds that it is “a single Korean nation state,” is not entitled to involvement in North Korea’s internal issues. By the principle of nonin-

22 The fundamental principle on the prohibition of use of force is embodied in Article 2(4) of the UN Charter, as well as other legal materials, such as Principle 1 of the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV) (October 24, 1970) and Article 5(3) of the Resolution 3314 (XXIX) on the Definition of Aggression. This principle is recognized as a *jus cogens* norm from which no derogation is permitted.

23 Ki-Gab Park, “Possible Types of State Succession between North and South Korea in light of General International Law Principles,” *Hanlim Law Forum* 5 (1996): 101, 119.

24 As the statehood of Vietnam after the current state of facts is continued needs a more in depth discussion, it is not discussed in this chapter.

25 The fundamental principle of nonintervention is embodied in Article 2 (7) of the UN Charter as well as other legal materials, including Principle 3 of the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV) (October 24, 1970), which denotes “[t]he duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter,” and is a corollary principle derived from the principle of sovereign equality of states.

26 Rim, *supra* note 13, 328.

tervention under Article 2, Paragraph 7, of the UN Charter, South Korea can become involved in a North Korean issue only if the latter requests it; as a member state of the United Nations, in accordance with a resolution of the UN Security Council; or by deploying a peacekeeping force—although certain requests by the UN to support the peacekeeping operations are expected, since the international community recognizes the interests of South Korea in the issue of Korean peninsula.

The third relevant principle of international law is that of self-determination. Self-determination is “the need to pay regard to the freely expressed will of peoples.”²⁷ The unification of the Korean Peninsula depends on the freely expressed will of its peoples. In the case of unification by incorporation, North Koreans would make the decision, just as East Germans selected the government that insisted on unifying with West Germany. The right to change the statehood belongs to the people and is exercised through a referendum.²⁸ Thus the key to Korean unification is in the hands of the North Korean people. To be achieved in accordance with international law, unification must be peaceful and in compliance with the principle of self-determination.

State Succession and Korean Unification

When state succession arises, a number of legal questions also arise. Will the successor state be bound by its predecessor’s treaties and will inhabitants of the territory concerned automatically become nationals of the successor? Will the successor state be affected by international claims involving the predecessor, including the predecessor’s national debt? What about responsibility for wrongful international acts committed by the predecessor? Issues related to succession of international treaties and the responsibility for the predecessor’s debts and other obligations are integral to the unification process.

²⁷ Western Sahara, Advisory Opinion, *ICJ Reports* 1975, 12, at 33, para 59.

²⁸ Rim, *supra* note 14, 109–185.

Forms of State Succession

Succession of states means responsibility regarding the international relations of the territories being transferred from one state to another. State succession generally involves a change of sovereignty, but not always.²⁹ So-called “partial succession” (i.e., “the transfer of part of the territory of a State, secession and the creation of a newly independent State”) does not terminate the state’s international legal personality.³⁰ It does not discontinue the legal relations of the predecessor state. State succession is distinguished from state continuity, where a state undergoes significant changes without change of title to territory.³¹ Thus temporary changes resulting from belligerent occupation or grants of exclusive possession of territory by treaty are excluded from the definition of state succession.³² Nor do “changes in the structure, name, form of government, territory and population of the State”³³ change the state’s international legal personality. In practice, state succession occurs under many different circumstances and in different forms.³⁴ It may take place through the cession of territory, the separation of part or parts of a state’s territory to form one or more states, the complete dismemberment or dissolution of a state, or the uniting of states, which includes the incorporation of one state into another or the merger of two or more states, leading to the creation of a new state.³⁵

29 Marcelo G. Kohen (rapporteur), *State Succession in Matters of State Responsibility*, Final Report, 14ème Commission, Institut de Droit International (2015), para 37 [hereinafter “IDI Final Report”].

30 International Law Association (ILA), *Aspects of the Law of State Succession*, Rio de Janeiro Conference (2008), Draft Final Report, at 64, www.ilahq.org/en/committees/index.cfm/cid/11.

31 Andreas Zimmermann, “State Succession in Treaties,” *MPEPIL*, www.mpepil.com.

32 Brownlie, *supra* note 4, 649.

33 ILA, Resolution No 3/2008, *Aspect of the Law on State Succession*, the 73rd Conference of the International Law Association, held in Rio de Janeiro, Brazil, August 17–21, 2008, Annex. Crawford also noted that “a State is not necessarily extinguished by substantial changes in territory, population or government, or even, in some cases, by a combination of all three.” Crawford, *supra* note 7, at 700.

34 Kay Hailbronner, “Legal Aspects of the Unification of the Two German States,” *European Journal of International Law* 2 (1991): 18, 33.

35 Zimmermann, *supra* note 31, para 1.

- *Categories of State Succession*

The four basic categories of state succession provided by the two Vienna Conventions are

1. cession, that is, the transfer of part of the territory of one state to another state (Art. 15 of the 1978 Vienna Convention, Art. 14 (1) of the 1983 Vienna Convention)
2. separation of a part of the state's territory, that is, secession, devolution, dismemberment, or disintegration of the state (Art 34 (1) of the 1978 Vienna Convention, Art. 30 (1) of the 1983 Vienna Convention)
3. a uniting of two or more existing states (Art 31 (1) of the 1978 Vienna Convention, Art. 16 of the 1983 Vienna Convention)
4. succession in the context of decolonization, that is, newly independent state.³⁶ Some criticize the Vienna Conventions' classifications for "not fully or accurately depict[ing] the different hypotheses of state succession,"³⁷ and thus consider that the Conventions' efforts to develop a common theoretical basis for all categories of state succession have failed.³⁸ In particular, critics called out the lack of distinction between secession and dissolution in the 1978 Vienna Convention, leading to revision in the 1983 Vienna Convention.

Among basic types of state succession, the third category, "a uniting of two or more existing States" best fits the case of the Korean Peninsula. When the two Vienna Conventions on State Succession were first codified, "uniting of States" was used in a broad sense, covering all the possible scenarios of "State succession arising from the uniting in one State of two or more States, which had separate international personalities at the date of the succession."³⁹ However,

36 IDI Final Report, *supra* note 30, para 39. See e.g., R. Y. Jennings and A. Watts, *Oppenheim's International Law* 1 (1992): 210.

37 IDI Final Report, *supra* note 30, para 39.

38 Hailbronner, *supra* note 34, 33.

39 ILC, *Yearbook of the International Law Commission*, 1974, vol. II, Part One, UN Doc. A/CN.4/SER.A/1974/Add. 1 (Part One), at 253, para 1. It follows to say, "They cover the case where one State merges with another State even if the international personality of the other continues after they have united."

in the Articles on Nationality of Natural Persons in relation to the Succession of States, drafted by the ILC in 1999, the term “uniting of States” employed in the 1978 and 1984 conventions was changed to “unification of States.” According to Article 21 of the ILC’s 1999 Article on Nationality, “unification of States” refers to the situation “when two or more States unite and so form one successor State, irrespective of whether the successor State is a new State or whether its personality is identical to that of one of the States which have united.”⁴⁰ The commentary for Article 21 specifies that it covers the same situations as described in the commentaries of the Vienna conventions,⁴¹ but the article itself spells out the two possible scenarios: the case when a new state is created and the case when its personality is identical to that of one of the states that have united.⁴² Reflecting state practice, the commentary provides clearer distinction between cases where unification creates a new state and cases where unification incorporates one state into another, which maintains its international personality.⁴³

Meanwhile, a study on state succession in matters of state responsibility, the draft resolution adopted at the Institut de Droit International (IDI) in 2015, distinguished between “unification of States” and “incorporation of one State into another,” clarifying the scope of the term “unification of States” as referring only to merger. According to the final report, prepared by Special Rapporteur Professor Marcelo G. Kohen, “unification of States” refers to instances where both predecessor states cease to exist, whereas “incorporation of one State into another” refers to instances where the incorporated state ceases to exist while the enlarged successor state continues its prior legal per-

40 Article 21 of the Articles on Nationality of Natural Persons in Relation to the Succession of States, annexed to the General Assembly Resolution 55/153, UN Doc. A/RES/55/153 (January 30, 2001).

41 ILC, *Yearbook of the International Law Commission*, 1974, Vol. II, Part One, UN Doc. A/CN.4/SER.A/1974/Add. 1 (Part One), at 253–260, commentary to draft articles 30 to 32 ILC, *Yearbook of the International Law Commission*, 1981, Vol. II, Part Two, UN Doc. A/CN.4/SER.1/1981/Add.1 (Part Two), at 43, commentary to draft article 15.

42 ILC, *Yearbook of the International Law Commission* 1999, Vol. II, Part Two, UN Doc. A/CN.4/SER.A/1999/Add. 1 (Part Two), at 42, commentary to article 21, para 1.

43 *Ibid.*, para 5.

sonality.⁴⁴ Although the draft resolution is not binding, this analysis is worth noting since the term *unification of states*, employed in reference to the Korean Peninsula, may lead to certain assumptions.

The IDI's draft resolution adopted six different categories (see table 1), wherein the previous "uniting of States" and "unification of States" were divided into "merger of States" and "incorporation of a State into another existing State." In fact, these two scenarios need to be distinguished because of the consequences for the predecessor states' international legal personalities. The former type of unification aims to create a new legal personality as a result of the extinction of two legal personalities, whereas the latter corresponds to so-called absorption, whereby one legal personality remains while the other legal personality ceases to exist.

Table 1. Categories of State Succession

Vienna Convention on Succession of States in Respect of Treaties (1978)	Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts (1983)	Articles on Nationality of Natural Persons in Relation to the Succession of States (1999)	IDI Draft Resolution, State Succession in Matters of State Responsibility (2015)
succession in respect to part of a territory	transfer of part of the territory of a state	transfer of part of the territory of a state	transfer of part of the territory of a state
newly independent states	newly independent states		newly independent states
uniting of states	uniting of states	unification of states	merger of states
			incorporation of a state into another existing state
separation of parts of a state	separation of part or parts of the territory of a state	separation of part or parts of the territory of a state	separation of parts of a state
	dissolution of a state	dissolution of a state	dissolution of a state

⁴⁴ IDI Final Report, *supra* note 30, para 41.

- *Unification through Merger or Incorporation*

Unification of states generally refers to two or more states uniting to form a single successor state, whether the successor state is a new state or maintains the personality of one of the uniting states. In terms of the categories of state succession as of 2015, a legal Korean unification would have to be either a merger of states or the incorporation of one state into another. In the first case, two states would merge as equals, whereupon the predecessor states would cease to exist. Merger of states (or fusion of states) without continuity of both predecessor States is also categorized as a form of state extinction, “extinction by merger,” as in the case of Yemen.⁴⁵ On April 22, 1990, the Agreement of the Establishment of the Republic of Yemen provided for a merger of the two states, involving their extinction and the emergence of a single successor.⁴⁶ In this “double succession” neither North nor South Yemen absorbed or annexed the other.⁴⁷

The second possible form of Korean unification is for one state to be incorporated into another. The incorporated state ceases to exist, becoming the predecessor state, while the existing state continues its international legal personality with extended territory encompassing the incorporated state. State succession occurs in respect of the predecessor state’s responsibility regarding the international relations of the territory. This situation is often called “absorption.”⁴⁸ The legal community assumes it to mean voluntary absorption, since involuntary absorption would not yield the extinction of statehood under the current international legal framework. However, in the context of state succession, the term *absorption* seems inappropriate, and it would be preferable to use the term *incorporation*. The German unification is an example of state suc-

⁴⁵ Crawford, *supra* note 7, 705–706.

⁴⁶ *Ibid.*, “On the 26th of May 1990...there shall be established between the State of the Yemen Arab Republic and the State of the People’s Democratic Republic of Yemen (both parts of the Yemeni Homeland) a full and complete union, based on a merger, in which the international personality of each of them shall be integrated in a single international person called the ‘Republic of Yemen.’” *ILM* 30 (1991): 820, 822.

⁴⁷ Crawford, *supra* note 7, 706.

⁴⁸ Crawford also regards the unification of Germany as falling into the category of “voluntary absorption” in dealing with the case under “extinction.” Crawford, *supra* note 7, 705.

cession through incorporation.⁴⁹ The existing state's legal personality continued, and it naturally followed that all rights and obligations attached to West Germany continued. The international legal framework leaves in question whether the predecessor state's rights and obligations succeed to the successor state. In the case of Germany, the unification treaty dealt with some of these problems.⁵⁰

• *Federate State, Unitary State, and Confederation of States*

It must be stressed that either “uniting of states” or “unification of states” vis-à-vis merger or incorporation does not concern the internal constitutional structure of the successor state. Neither of these, as envisaged in the relevant provisions of the two Vienna conventions and the 1999 ILC draft articles, “[take] into account the particular form of the internal constitutional organization adopted by the successor State.”⁵¹ This has been confirmed since the codification process of the 1974 Vienna Convention. In practice, unification may lead to a wholly unitary state, to a federation, or to any other form of constitutional arrangement. The degree of separate identity retained by the original states within the constitution of the successor state is irrelevant to the provisions set forth in these articles.⁵² Furthermore, the establishment of an association of states that does not have the attributes of a successor state, such as the European Union, lies outside the parameters of merger or incorporation.⁵³

A federal state is a union of states in which both the federation and the member states embody the constitutive elements of a state.⁵⁴

49 See e.g., Frans G. von der Dunk and Peter H. Kooijmans, “The Unification of Germany and International Law,” *Michigan Journal of International Law* 12 (1991): 510.

50 Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands, BullBRreg. 104 (1990): 877.

51 ILC, *Yearbook of the International Law Commission*, 1974, vol. II, Part One, UN Doc. A/CN.4/SER.A/1974/Add. 1 (Part One), at 253, commentary to article 32, para 2.

52 This was also the view expressed by the ILC in relation to draft articles 30 to 32 on the succession of states in respect of treaties. See paragraph (2) of the commentary to those articles, *Yearbook* 1974, vol. II (Part One), 253–260.

53 ILC, *Yearbook of the International Law Commission*, 1999, vol. II, Part Two, at 42, commentary to article 21, para 2.

54 Walter Rudolf, “Federal States,” in *MPEPIL*, available at www.mpepil.com.

Internally, state authority is divided between the federation and the member state, each of which possesses certain assigned competences and functions.⁵⁵ The creation of a federal state ought to be based on the member states transferring competences to the federation and submitting to the constitution of the federation (i.e., an act of the *pouvoir constituant*). A federal state could also take the form of an international treaty concluded by the member states. Thus, this implies that the federal state could also be the possible form in the context of unification. However, the federal state is distinct from a confederation, which does not possess the character of “a State.”⁵⁶ A confederation of states consists of different international legal personalities with a shared political and administrative system. Confederation could be one step toward Korean unification, but it would not constitute unification *per se*, as there would still be two distinct legal personalities having independent relations with other states.

Applicable Laws of State Succession: The Two Vienna Conventions

State succession has long been an important and controversial subject of international law. It has been generally regarded as “an area of great uncertainty and controversy...due partly to the fact that much of the State practice is equivocal and could be explained on the basis of special agreement and various rules distinct from the category of State succession.”⁵⁷ As a result, not many settled legal rules have emerged as yet.⁵⁸ Although the most learned writers on international law have made several attempts to deduce principles of state succession, most of these efforts have been stymied by the great variety of state practice.⁵⁹

In 1962, the General Assembly recommended that the ILC include the topic of succession of states and governments on its priority list,⁶⁰ and the ILC set up a subcommittee to study the scope and the methods of the subject. The subcommittee suggested giving

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Brownlie, *supra* note 4, 650.

⁵⁸ Oeter described the situation as “the chaotic status of the law of State succession.”

Stefan Oeter, “German Unification and State Succession,” *ZaöRV* 51 (1991): 349, 352.

⁵⁹ *Ibid.*, 352–353.

⁶⁰ GA Res. 1686 (XVI), UN Doc. A/RES/16/1686(XVI) (December 18, 1961).

priority to the issue of state succession, excluding the issue of government succession, and divided the topic into succession in respect of treaties and succession in respect of matters other than treaties. The ILC approved the subcommittee's recommendations and starting in 1967 began to discuss the issue of state succession.⁶¹ Their work resulted in the two Vienna Conventions on State Succession: the 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1983 Vienna Convention on State Succession in Respect of State Property, Archives, and Debts.

More than half a century after the original proposal, it is generally assessed that an overall theory of state succession has not been established, owing to the political complexity involved, as well as the particularity of each case. The ILC's attempts to codify the major parts of the laws of state succession have failed, which is not surprising given that such an ambitious codification lacked a common theoretical basis.⁶² The Vienna Conventions lack general applicability, and actual practice is often inconsistent with their rules because of the particularities of respective circumstances; however, the two conventions have provided a basic legal framework for state succession.⁶³ Therefore, this section examines the legal consequences of applying the conventions' rules concerning treaties and state property, archives, and debt.

- *Succession to Treaty*

When state succession occurs no question is more compelling than that of succession to treaty rights and obligations.⁶⁴ Regarding treaties, it is necessary to first look at the aforementioned 1978 Vienna Convention.⁶⁵ First, in the case of merger, the 1978 Vienna Convention in

61 In respect to specific background of discussion, see http://legal.un.org/ilc/summaries/3_1.shtml.

62 Oeter, *supra* note 58, 353.

63 ILA, *Aspects of the Law of State Succession*, Rio De Janeiro Conference (2008), Final Report, at 2.

64 Edwin D. Williamson, "Treaty Succession and Related Issues in the Wake of the Breakup of the USSR," in *State Succession and Relations with Federal States*, ASIL, April 1, 1992.

65 Vienna Convention on Succession of States in Respect of Treaties has entered into force on November 6, 1996. As of September 8, 2016, there are twenty-two parties to the convention. See <http://untreaty.un.org>.

principle adopts “the continuity rule” in Article 31 which is based on past state practice.⁶⁶ Therefore, existing treaties remain effective for the successor state within the territory where the treaties were in force, with some exceptions. Multilateral treaties are categorized into universal and limited in Article 31, Paragraph 2, and Article 17 (succession of multilateral treaties of a newly independent state) applies analogically. Whereas universal treaties require agreement only of the unified states, treaties with limited nature require agreement not only of the unified states but also of all signatories. The successor state has a choice regarding the succession of multilateral treaties that are not yet in force and signed treaties subject to ratification, acceptance, or approval (Articles 32 and 33). In the case of bilateral treaties, besides Article 31, the Convention also recognizes the succession of a treaty establishing a boundary (Article 11) and a treaty establishing rights and obligations related to the territory (Article 12).

As discussed earlier, the 1978 Vienna Convention does not distinguish between merger and incorporation. It considers that the relevant provisions apply to both scenarios.⁶⁷ However, most scholars take the opposite position. They argue that the provisions from Article 31 of the 1978 Vienna Convention do not take into consideration the unification by incorporation, causing legal deficiencies, and that customary international law should therefore apply.⁶⁸ What customary international law exists? The likeliest answer is the “moving treaty frontiers rule.” Under the rule, upon a change in sovereignty, the successor state’s treaty automatically applies for the territory in question and the predecessor state’s treaty automatically ceases to apply.⁶⁹ This rule validates the claim that Article 15 (concerning the case of a partial cession of the territory and advocating the moving treaty frontiers rule), not Article 31, of the 1978 Vienna Convention should apply analogically in the case of incorporation.⁷⁰

66 Park, *supra* note 23, 114–118.

67 ILC, *Yearbook of the International Law Commission*, 1974, vol. II, Part One, UN Doc. A/CN.4/SER.A/1974/Add. 1 (Part One). See e.g., Ronald J. Klein, “Consensual Merger as a Means of State Succession and Its Relation to Treaty Obligations,” *Case Western Reserve Journal of International Law* 13 (1981): 413.

68 Oeter, *supra* note 58, 353–355.

69 *Ibid.*, 357.

70 Park, *supra* note 23, 121.

In practice, the same applies to the German case.⁷¹ The treaty of August 31, 1990, between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity (the Second State Treaty) provides that treaties concluded by the Federal Republic of Germany remain in force (Article 11), while those concluded by the German Democratic Republic are subject to consultations with other party states for adjustment, adoption, or expiry (Article 12).⁷² Of course, the related provisions of the German Unification Treaty do not reflect customary international law. For example, Article 12, regarding treaties concluded by East Germany, does not provide for termination in whole or automatic termination but rather invokes the principle of change of circumstances (*rebus sic stantibus*). Therefore, treaties concluded by East Germany are declared terminated by the successor state only after consultations with other states concerned, in order to maintain and protect the legal stability of the other states.

- *Succession to State Property, Archives, and Debts*

The 1983 Vienna Convention contains general provisions in Section 1⁷³ and provisions regarding state property, archives, and debts in Sections 2, 3, and 4, respectively. After the introduction in Section 1, each of these sections includes provisions concerning specific categories of succession of states.

The convention's substantive provisions can be divided into two groups: general provisions concerning all the types of succession,

⁷¹ Hailbronner, *supra* note 34, 29–31. (“The unification of the two German States is considered as a case of universal succession. The GDR has ceased to exist as a sovereign State; its territory has been integrated into the Federal Republic. Therefore, it is clear that with respect to the Federal Republic’s treaties only an enlargement of territory has taken place. In this case, the ‘principle of moving treaty frontiers’ is applicable, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.”)

⁷² Article 11 and Article 12.

⁷³ General provisions of the convention in the first section, concerning all the types of succession (Articles 1 to 6 regarding definition, nonretroactivity of the convention, requirement of conformity of succession with international law, general clauses concerning guarantees of rights of third parties and individuals, and so on) correspond with the respective provisions of the 1978 Vienna Convention.

and specific regulations dealing with particular types of succession.⁷⁴ The convention confirms transfer of an immobile property to the successor in all types of state succession.⁷⁵ Thus, in the case of the uniting states, the successor state acquires the whole property of the predecessor state or states.

Regulations specific to unification prescribe that:

“When two or more States unite and so form one successor State, the State property, archives, debts of the predecessor States shall pass to the successor State (Article 16, State Property)”;

“When two or more States unite and so form one successor State, the State archives of the predecessor States shall pass to the successor State (Article 29, State archives); and

“When two or more States unite and so form one successor State, the State debt of the predecessor States shall pass to the successor State (Article 39, State debts).”

The uniting of States here is understood in a broad sense, so these provisions apply to both mergers and incorporations. Either way, a united Korea would succeed the debts, property, and other considerations of both Koreas.

The problem here is that this convention has yet to enter into force, and both North and South Korea are not party thereto.⁷⁶ Besides the convention being unenforceable, it is highly controversial whether its specific provisions reflect customary international law. More controversies are expected regarding universal succession of debts, not property, when states are united according to this convention. In practice, the only successor states that refused the predecessor state's debts are decolonized newly independent states.⁷⁷ In certain

⁷⁴ ILA, “Aspects of the Law of State Succession,” Berlin Conference (2004), 3.

⁷⁵ Ibid.

⁷⁶ The Convention on the Succession of States in Respect of State Property, Archives, and State Debt was opened for signature in Vienna on April 8, 1983. The convention was adopted with fifty-four votes in favor with eleven votes against and eleven abstentions. It has not entered into force, as it obtained only seven accessions out of the fifteen required. Seven other states have signed the convention. Status as of September 8 2016, available at <http://untreaty.un.org>.

⁷⁷ Cf. Tai-Heng Cheng, “Why New States Accept Old Obligations,” *University of Illinois Law Review* 1 (2010): 1-51.

cases, adjustment was made pursuant to the municipal law. However, what about debt owed to third-party states? Brownlie noted that “[m]uch more a matter of controversy is that fate of the public debts of the replaced State” and added that “[i]t may be that there is no rule of succession established.”⁷⁸ This debate suggests that before the Koreans draft a unified constitution, they need to draft a treaty incorporating provisions related to the succession of debts as Germany did.⁷⁹ Those provisions should of course be in compliance with international legal principles of the time. Based on state practice, theories, related international and national cases, and ILC opinions, it will be the territorial successor state that succeeds both financial debts and debts in a narrow sense.

Succession to State Responsibility

Is state responsibility for an international wrongful act of the predecessor state succeeded? In other words, are successor states obligated to pay reparations owed for their predecessors' actions?⁸⁰ The Vienna conventions have not dealt with this issue. The 1978 Vienna Convention explicitly excludes the issue of succession of state responsibility by providing in Article 39, “The provisions of the present Convention shall not prejudice any question that may arise in regard to the effects of a succession of States in respect of a treaty from the international responsibility of a State or from the outbreak of hostilities between States.” The general provision of Article 5 of the 1983 Vienna Convention can also be interpreted as excluding the issue of succession of state responsibility by putting a limit on the scope of the convention. Discussion on state responsibility for international wrongful acts did not deal with the issue of succession either. In this regard, Crawford noted, “there has long been an aver-

⁷⁸ Brownlie, *supra* note 4, 653.

⁷⁹ Yong-Ho Shin, “Succession of State Debts in Practice,” *Korean Journal of International and Comparative Law* 52, no. 2 (2009): 143. Myung-Sub Han, “A Study on the Succession of External Debt of North Korea after Korean Unification,” *Kyunghee Law Review* 47, no. 4 (2012): 161, 181–182.

⁸⁰ James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013), 435.

⁸¹ *Ibid.*, 436.

sion to investigating this topic on an institutional level.”⁸¹ Traditionally, the theory under which responsibility for delict is not succeeded has prevailed.⁸² This theory emphasizes the personal character of responsibility and takes the position that such responsibility is not transferred as domestic criminal responsibility.⁸³ However, this theory did not clearly distinguish between torts in municipal law and international wrongful acts. With the development of a view that state responsibility, when established, consists of the rights of the injured state and the obligations of the state that perpetrated international wrongful acts, discussion that responsibility can also be succeeded has increased. In particular, the development of related cases and practice has further spurred such discussion.⁸⁴ In this regard, the Institut de Droit International (IDI) adopted the final report and draft resolution on this issue in 2015.⁸⁵ Although such a discussion is not legally binding, succession of responsibility is nonetheless an imperative issue that should also be considered in the process toward Korean unification.

As we have seen, unlike the Vienna Conventions, the IDI distinguishes between unification by incorporation or merger. The IDI takes the view that the rights or obligations arising from an interna-

82 *Robert E. Brown (US) v. Great Britain* (1923), 6 R.I.A.A. 120. Sir Cecil J. B. Hurst, State Succession in Matters of Tort, *British Yearbook of International Law* 5 (1924): 163-178. *F. H. Redward (Great Britain) v. US* (1925), 6 R.I.A.A. 157. (“[t]he legal unit which did the wrong no longer exists, and legal liability for the wrong has been extinguished with it.”). D. P. O’Connell, *State Succession in Municipal Law and International Law*, vol. 1 (New York: Cambridge University Press, 1967), 482.

83 Marcelo G. Kohen, “Succession of States in the Field of International Responsibility: The Case for Codification,” in *Perspectives of International Law in the 21st Century*, ed. Marcelo Kohen et al. (Leiden/Boston: Martinus Nijhoff Publishers, 2012), 165.

84 *Lighthouses Arbitration between France and Greece*, Claims No. 11 and 4, July 24, 1956, 12 RIAA 155, 23 ILR 81, 92. *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, para 51. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, paras 107–115.

85 IDI Final Report, *supra* note 30.

tional wrongful act are all transferred to the successor state whether states merge⁸⁶ or incorporate.⁸⁷ However, there still remains much controversy and discussion on this issue. No doubt the rights and obligations stemming from the commission of an international wrongful act by the state that continues to exist clearly belong to that state. But in the case of a predecessor state that ceases to exist, it could also be argued that a successor state's consent is a prerequisite. For now which outcome corresponds to the principle of State responsibility and leads to equitable consequence need further debate and examination. In 2016, the ILC decided to include a topic of "Succession of States in respect of State Responsibility" in its long-term program of work.⁸⁸ Consideration by the ILC would help to fill gaps that remain after the completion of the codification of the two Vienna Conventions and State responsibility, and find answers on specific questions that may arise.

Conclusion

Legal consequences arise and follow from the emergence or disappearance of a state, and such changes are governed by international law. The unification of states is a process of state succession, which involves the transfer of rights and obligations that have specific legal consequences. Perhaps one may wonder whether these "legal" or "technical" issues should be examined in the context of searching for pathways to a peaceful Korean Peninsula, in that peace itself may be achieved in maintaining the status quo. The ultimate purpose of a discussion of a peaceful Korean Peninsula would nonetheless be directed toward the issue of unification. Thus if we consider the

⁸⁶ Article 13: Merger of States. When two or more states unite and form a new successor state and no predecessor state continues to exist, the rights or obligations arising from an internationally wrongful act of which a predecessor state has been either the author or the injured state pass to the successor state.

⁸⁷ Article 14: Incorporation of a State into another existing State. When a state is incorporated into another existing state and ceases to exist, the rights or obligations arising from an internationally wrongful act of which the predecessor state has been the author or the injured state pass to the successor state.

⁸⁸ Report of the International Law Commission, UNGAOR, 71st Sess., Supp. No. 10, UN Doc. A/71/10 (2016), para 36.

external aspects of unification, then the answer could be positive. Creating an international environment favorable to unification is critical to a peaceful transition and indeed as important as fostering internal consensus. Although the concerns or roles of great powers might be considered critical in the political context, consistency with international law is also important for unification to be legitimate and legal. A unified Korea can be established only when it is consistent with international law.

Unification is not strictly an internal matter or one concerning the Korean nation only. The implications of unification for the third parties arising from legal aspects are also at stake. Such issues include how to resolve predecessor states' treaty relations, property, and debts, as well as responsibility for international wrongful acts committed by predecessor states. Other issues, not examined in this chapter, such as the nationality of natural persons or membership within international organizations, must also be considered. Considering and framing the issue of unification in the legal parlance of state succession enhances an objective assessment of the situation and also allows for better preparation for an ultimate unification.

REFERENCES

- Abi-Saab, George. "Conclusion." In *Secession: International Law Perspectives*, edited by Marcelo G. Kohen, 470-476. Cambridge: Cambridge University Press, 2006.
- Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, ICJ Reports 2015.*
- Articles on Nationality of Natural Persons in Relation to the Succession of States, annexed to the General Assembly Resolution 55/153, UN Doc. A/RES/55/153 (January 30, 2001).
- Brownlie, Ian. *Principles of Public International Law*. 7th ed. Cambridge: Cambridge University Press, 2008.
- Cheng, Tai-Heng "Why New States Accept Old Obligations." *University of Illinois Law Review* 1 (2010): 1-51.
- Crawford, James. *Creation of States in International Law*. Oxford: Oxford University Press, 2007.
- . *State Responsibility: The General Part*. Cambridge: Cambridge University Press, 2013.
- F. H. Redward (Great Britain) v. US (1925), 6 R.I.A.A. 157.*
- GA Res. 1686 (XVI), UN Doc. A/RES/16/1686 (XVI) (December 18, 1961).
- Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997.*
- Hailbronner, Kay. "Legal Aspects of the Unification of the Two German States." *European Journal of International Law* 2 (1991): 18-44.
- Han, Myung-sub. "A Study on the Succession of External Debt of North Korea after Korean Unification." *Kyunghee Law Review* 47, no. 4 (2012): 161-198.

- Hurst, Sir Cecil J. B. "State Succession in Matters of Tort." *British Yearbook of International Law* 5 (1924): 163-178.
- International Law Association (ILA), "Aspects of the Law of State Succession," Rio de Janeiro Conference (2008), Draft Final Report.
- ILC. *Yearbook of the International Law Commission 1974, Vol. II, Part One*, UN Doc. A/CN.4/SER.A/1974/Add. 1 (Part One).
- . *Yearbook of the International Law Commission 1981, Vol. II, Part Two*, UN Doc. A/CN.4/SER.1/1981/Add.1 (Part Two).
- . *Yearbook of the International Law Commission 1999, Vol. II, Part Two*, UN Doc. A/CN.4/SER.A/199/Add. 1 (Part Two).
- Klein, Ronald J. "Consensual Merger as a Means of State Succession and Its Relation to Treaty Obligations." *Case Western Reserve Journal of International Law* 13 (1981): 413-432.
- Kohen, Marcelo G. "Création d'Etats en droit international contemporain." *Cours Euro-Méditerranéens Bancaja de Droit International* 6 (2002): 545-636.
- . "Succession of States in the Field of International Responsibility: The Case for Codification." In *Perspectives of International Law in the 21st Century*, edited by Marcelo Kohen et al., 161-174. Leiden/Boston: Martinus Nijhoff Publishers, 2012.
- . (Rapporteur). *State Succession in Matters of State Responsibility*. Final Report, 14ème Commission, Institut de Droit International (2015).
- Lee, Sang-Hoon. "Legal Status of North Korea—from Domestic Legal Aspects." *International Law Trend & Practice* 10 (2004): 76-94.
- Lighthouses Arbitration between France and Greece*, Claims No. 11 and 4, July 24, 1956, 12 RIAA 155, 23 ILR 81.

- Mosler, Hermann. "Subjects of International Law." In *EPIL Vol. IV*, edited by Rudolf Bernhardt, 710-727. Amsterdam: North-Holland, 2000.
- O'Connell, Daniel Patrick. *State Succession in Municipal Law and International Law*, Vol. 1. New York: Cambridge University Press, 1967.
- Oeter, Stefan. "German Unification and State Succession." *ZaöRV* 51 (1991): 349-383.
- Park, Ki-gab. "Possible Types of State Succession between North and South Korea in Light of General International Law Principles." *Hanlim Law Forum* 5 (1996): 101-127.
- Peters, Anne. "Statehood after 1989: 'Effectivités' between Legality and Virtuality." In *Select Proceedings of the European Society of International Law Vol. 3*, edited by James Crawford and Sarah Nouwen, 171-183. (Portland, OR: Hart Publishing, 2010).
- Report of the International Law Commission*, UNGAOR, 71st Sess., Supp. No. 10, UN Doc. A/71/10 (2016).
- Rim, Ye Joon. "A Study on the Legal Status of the Democratic People's Republic of Korea from the Perspective of International Law." *Anam Law Review* 46 (2015): 317-350.
- . "State Failure': Implications for International Law." Ph.D. Thesis No. 1041. Graduate Institute of International and Development Studies. Geneva, 2014.
- Robert E. Brown (US) v. Great Britain (1923)*, 6 R.I.A.A. 120.
- Scelle, Georges. "Some Reflections on Juridical Personality in International Law." In *Law and Politics in the World Community*, edited by George A. Lipsky, 49-58. Berkeley: University of California Press, 1953.
- Shin, Yong-Ho, "Succession of State Debts in Practice." *Korea Journal of International Law* 52, no. 2 (2009): 143-181.

- Suksi, Markku. *Max Planck Encyclopedia of Public International Law*. "Divided States." Accessed September 15, 2016. <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1031?prd=EPIL>.
- Talmon, Stefan. "The Constitutive Versus the Declaratory Theory of Recognition: *Tertium Non Datur?*" *British YBIL* 75 (2004): 101-181.
- Tiunov, Oleg I., "The International Legal Personality of States: Problems and Solutions." *St. Louis University Law Journal* 37 (1992–1993): 323-336.
- Vienna Convention on Succession of States in Respect of Treaties, 17 *ILM* 1488 (1978).
- Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 22 *ILM* 298 (1983).
- Von der Dunk, Frans G., and Peter H. Kooijmans. "The Unification of Germany and International Law." *Michigan Journal of International Law* 12 (1991): 510-557.
- Western Sahara Advisory Opinion, *ICJ Reports* 1975.
- Williamson, Edwin D. "State Succession and Relations with Federal States." *American Society of International Law* (April 1, 1992): 1-13.
- Zimmermann, Andreas. *Max Planck Encyclopedia of Public International Law*. "State Succession in Treaties." Accessed September 15, 2016. <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1108>.

CHAPTER 10

Proposing a Model of Reunification to Solve the Korean Nuclear Crisis

Henri Féron

The Korean nuclear crisis is a consequence of the failure to solve the decades-old problem of Korean division, and reunification represents the best hope for stopping today's dramatic escalation of tensions and durably assuring peace on the Korean Peninsula. There have recently been unprecedented increases in the frequency of North Korean ballistic missile and nuclear weapons tests, in the size of the South Korean military budget,¹ and in the scale of joint military exercises with the United States.² This confrontation would not exist if the southern Republic of Korea and the northern Democratic People's Republic of Korea were a single country with a single

- 1 Ankit Panda, "South Korea Is Planning a Huge Increase in Defense Spending," *The Diplomat*, April 22, 2015, accessed November 1, 2016, <http://thediplomat.com/2015/04/south-korea-is-planning-a-huge-increase-in-defense-spending/>; Jon Grevatt, "South Korea Allocates Record Defence Budget For 2017," *IHS Jane's Defence Industry*, September 6, 2016, accessed November 1, 2016, www.janes.com/article/63451/south-korea-allocates-record-defence-budget-for-2017.
- 2 Ivan Watson and K.J. Kwon, "South Korea, U.S. deter North Korea with 'Largest Ever' Military Drill," *CNN*, March 12, 2016, accessed November 1, 2016, <http://edition.cnn.com/2016/03/12/asia/south-korea-us-military-drill/>.

army. It is because they are divided that they risk nuclear war.³

To say that the nuclear crisis is a consequence of Korean division is not to say that the Koreans have only themselves to blame. It is foreign powers that forcibly divided Korea as a way to ensure a balance of power,⁴ and then sealed that division through the Cold War's first major proxy war. Today's nuclear crisis is also at its core a balance-of-power problem: since the Soviet collapse the involved parties have failed to agree on a new equilibrium, leaving each side wrestling the other for a more advantageous position. The DPRK reacted to the collapse of its Soviet military ally by developing its own nuclear weapons, officially to deter US intervention.⁵ In turn, South Koreans worried that North Korean nuclear weapons posed a threat to their own national security, so Seoul eventually stepped up cooperation with the US, hoping to force the DPRK to choose between disarmament or collapse.⁶ Beijing, on its side, determined that a North Korean collapse could shift the balance of power on the Peninsula against Chinese interests. It hence provided Pyongyang with enough diplomatic and economic support to prevent such an outcome, notably preventing UN sanctions from ever becoming

3 Alexandre Mansourov has detailed earlier in this volume the risk of nuclear war brought by the pursuit of today's confrontational policies. See Alexandre Mansourov, "The Endgame Question: Where is Escalation Leading Us and Is It Worth It?," in *Pathways to a Peaceful Korean Peninsula: Denuclearization, Reconciliation and Cooperation*, eds. Kyung-ok Do, Jeong-Ho Roh, and Henri Féron (Seoul: Korea Institute for National Unification, 2016), 77-117.

4 Korea was divided at the thirty-eighth parallel following a US suggestion that aimed at preventing Soviet troops from occupying the whole Korean Peninsula as they rushed to disarm Japanese troops after Tokyo's World War II surrender. It appears Moscow accepted the division to prevent a conflict with the United States over Korea. See, e.g., Michael J. Seth, *A Concise History of Modern Korea: From the Late Nineteenth Century to the Present* (Lanham, MD: Rowman & Littlefield, 2010), 84-85.

5 On the DPRK's self-defense rationale, see, e.g., "DPRK FM Urges US Not to Groundlessly Shun Conclusion of Peace Treaty," *Korean Central News Agency*, October 20, 2015, accessed November 1, 2016, www.bommin.net/Eng/Eng050.htm.

6 ROK President Park Geun-hye has explicitly warned the DPRK it would face collapse if it didn't denuclearize. "'Regime Collapse' Awaits North Korea, Says South's Leader in Nuclear Warning," *Guardian*, February 15, 2016, accessed November 1, 2016, www.theguardian.com/world/2016/feb/16/regime-collapse-awaits-north-korea-says-souths-leader-in-nuclear-warning.

existentially threatening to the DPRK.⁷ Beijing's support visibly made Pyongyang confident it could continue developing its nuclear arsenal regardless of sanctions.⁸ As a result, Seoul and Washington's efforts appear so far to have been ineffective in preventing the nuclearization of the Korean Peninsula.⁹ There can be no resolution of this crisis as long as any side fears losing ground. The only realistic way to achieve a durable peace on the Korean Peninsula is to reunify the two Koreas in a manner that establishes a balance of power acceptable by all sides. Let us try to identify what sort of reunification this would entail.

As surprising as it may seem, given the extreme military tensions on the Korean Peninsula, all parties claim to want peace and reunification. One key reason war and division persist is that there are different understandings of what peace and reunification entail: the ROK and the US envision a "free" and "democratic" reunification, whereas the DPRK and the PRC (People's Republic of China) officially focus on the "independence" and "sovereignty" of Korea.

The South Korean constitution requires the ROK to seek and carry out "a peaceful unification based on the principles of freedom and democracy."¹⁰ An ideologically liberal interpretation of the words *freedom* and *democracy* was reflected in the joint ROK-US statements on the question, as they called for a "peaceful unification

7 Beijing has insisted after the DPRK's fourth and fifth nuclear test that ultimately the solution be resolved not by sanctions but by negotiations. "China Opposes Unilateral Sanctions against N. Korea," *Global Times*, February 14, 2016, accessed November 1, 2016, <http://en.people.cn/n3/2016/0214/c90883-9016167.html>; Elizabeth Shim, "More North Korea Sanctions Not the Solution, China Says," *UPI*, September 12, 2016, accessed November 1, 2016, www.upi.com/Top_News/World-News/2016/09/12/More-North-Korea-sanctions-not-the-solution-China-says/8251473685582/.

8 Funakoshi Minami and Ju-min Park, "North Korea Says Sanctions Push after Nuclear Test 'Laughable,'" *Reuters*, September 11, 2016, accessed November 1, 2016, www.reuters.com/article/us-northkorea-nuclear-sanctions-idUSKCN11H05D.

9 Pyongyang conducted four of its five nuclear tests in a period where the US and the ROK had stopped negotiating with it. For a review of the contrasting achievements of cooperative and confrontational approaches to stopping the North Korean nuclear program, see Leon Sigal, "What Have Twenty-Five Years of Diplomacy Achieved?," in *Pathways to a Peaceful Korean Peninsula: Denuclearization, Reconciliation and Cooperation*, eds. Kyung-ok Do, Jeong-Ho Roh, and Henri Féron (Seoul: Korea Institute for National Unification, 2016), 29-56.

10 Constitution of the Republic of Korea, 1988, Art. 4.

on the principles of free democracy and a market economy.”¹¹ It is, however, difficult to see how the DPRK could ever accept a reunification under such terms. The DPRK is not only constitutionally required to seek “the complete victory of socialism *in the northern half of Korea*” (emphasis added),¹² it actually went through tremendous ordeals to maintain this system after the Soviet collapse.

However, it is worth noting that neither the North Korean nor the Chinese *official* vision of reunification suggests the imposition of socialism on the South. What the North Korean constitution mandates is that the DPRK “reunify the country on the principle of independence, peaceful reunification, and great national unity”¹³—a stance that Pyongyang has often reiterated since.¹⁴ The “Democratic Federal Republic of Koryo” (DFRK) plan, which Kim Il-sung proposed in 1980 and which has since remained Pyongyang’s official vision of reunification, proposes to establish an ideologically neutral federal system in which the North would keep a socialist system and

- 11 The statement was jointly made at a US-ROK Presidential Summit in 2009: White House, Office of the Press Secretary, “Joint Vision for the Alliance of the United States of America and the Republic of Korea,” June 16, 2009, accessed November 1, 2016, www.whitehouse.gov/the-press-office/joint-vision-alliance-united-states-america-and-republic-korea. A summit in 2013 reiterated the commitment, adding denuclearization (“peaceful reunification based on the principles of denuclearization, democracy and a free market economy”). White House, Office of the Press Secretary, “Joint Declaration in Commemoration of the 60th Anniversary of the Alliance between the Republic of Korea and the United States of America,” May 7, 2013, accessed November 1, 2016, www.whitehouse.gov/the-press-office/2013/05/07/joint-declaration-commemoration-60th-anniversary-alliance-between-republ.
- 12 “The DPRK shall strive to achieve the complete victory of socialism in the northern half of Korea by strengthening the people’s power and vigorously performing the three revolutions—the ideological, cultural, and technical—and reunify the country on the principle of independence, peaceful reunification, and great national unity.” Constitution of the Democratic People’s Republic of Korea, 1998, Art. 9.
- 13 Constitution of the Democratic People’s Republic of Korea, 1998, Art. 9.
- 14 See, e.g., “Pyongyang Calls for Korea’s Federalization & Reunification without Outside Interference,” *Russia Today*, July 7, 2014, accessed November 1, 2016, www.rt.com/news/170816-korea-federalization-reunification-proposal/.

the South a liberal one.¹⁵ Many suspect that the DFRK plan in fact secretly aims at instituting socialism in the South, though there is little evidence for such an interpretation in the letter of the plan.¹⁶ As for Beijing, its long-stated official position is that it would support an “independent and peaceful reunification” (*zizhu heping tongyi*) of the Korean Peninsula.¹⁷ Unlike Washington, it has not called for Korean reunification to have a particular ideological content. This ideologically neutral stance is consistent with the PRC’s “one country, two systems” approach that let Hong Kong keep an ideologically liberal system upon reunification with the Chinese mainland. Rather

15 “Our Party maintains that the country should be reunified by founding a Federal Republic through the establishment of a unified national government on the condition that the north and the south recognize and tolerate each other’s ideas and social systems, a government in which the two sides are represented on an equal footing and under which they exercise regional autonomy with equal rights and duties.” Kim Il-sung, “Report to the Sixth Congress of the Worker’s Party of Korea on the Work of the Central Committee,” October 10, 1980, accessed November 1, 2016, www.naenara.com.kp/en/one/content.php?charter+2.

16 The DFRK plan explicitly denies that the North has any ambition to impose socialism on the South: “[Our Party] will never force our ideas and social system upon South Korea and will subordinate everything to the interests of national union and reunification.” Kim Il-sung, “Report to the Sixth Congress of the Worker’s Party of Korea on the Work of the Central Committee,” October 10, 1980, accessed November 1, 2016, www.naenara.com.kp/en/one/content.php?charter+2. Nevertheless, the DFRK plan is recurrently accused of socialist ambitions. Victor Cha, for instance, has argued that this plan sought Northern “hegemony” insofar as it demanded “the legalization of communist parties and the establishment of a ‘progressive government’ in the South before a federal system can be implemented.” Victor Cha, “Korean Unification: The Zero-Sum Past and the Precarious Future,” *Asian Perspective* 21, no. 3 (1997): 72, accessed November 1, 2016, http://www2.law.columbia.edu/course_00S_L9436_001/North%20Korea%20materials/210303-Cha.pdf. In fact, the DFRK plan only calls for “freedom to form political parties” in general (If this meant communist parties in the South, wouldn’t it also mean liberal parties in the North?), and it does not pose any conditions on the ideological orientation of the Southern government.

17 See, e.g., Foreign Ministry of the PRC, “Foreign Ministry Spokesperson Hua Chunying’s Regular Press Conference,” September 2, 2015, accessed November 1, 2016, www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1293417.shtml; Han Jeon and Jae-un Limb, “President Xi ‘Korea-China relations better than ever,’” *Korea.net*, July 4, 2014, accessed November 1, 2016, www.korea.net/NewsFocus/Society/view?articleId=120421; “Xi Jinping: Zhongfang zhichi chaohan gaishan guanxi zuihou shixian zizhu heping tongyi” [Xi Jinping: China Supports the Improvement of Inter-Korean Relations and the Ultimate Realization of Independent and Peaceful Reunification], *news.ifeng.com*, June 28, 2013, accessed November 1, 2016, http://news.ifeng.com/mainland/special/pjhfanghua/content-3/detail_2013_06/28/26899403_0.shtml.

than ideology, Pyongyang and Beijing focus on the principle of independence. Rightly or wrongly, they see Seoul as vulnerable to US pressure due to the presence of a large US military base in the heart of the capital and the fact that a US general has the operational control (OPCON) of the ROK Army in case of war, when no similar arrangements exist between the DPRK and the PRC. In sum, reunification would require agreement on two key issues: ideology and sovereignty.

Seoul may or may not be willing to meet Pyongyang in the middle, on a platform of ideological neutrality and geopolitical independence. Its willingness to compromise will affect the sort of reunification it can hope for and the policies that are appropriate in pursuit of this goal.

The more Seoul tries to extend liberalism to the North, the more it will be drawn toward a “German” reunification model: the ROK would absorb the DPRK similarly to how West Germany absorbed East Germany. Needless to say, Pyongyang would oppose any plan it perceives as equivalent to such an “absorptive reunification,”¹⁸ as its hostile reaction to ROK President Park Geun-hye’s “Dresden Speech” made clear.¹⁹ Imposing liberalism on the North would likely succeed only by following hawkish policies, such as sanctions, that ultimately aim at and achieve the DPRK’s submission or collapse.

By contrast, the more Seoul is willing to compromise and work with Pyongyang, the more it will be drawn toward a “consensual reunification” that might join both Koreas under a commonwealth or united federal government. Rather than hawkish policies, this sort of reunification would require reconciliation to close the wounds of the past and establish a relationship of trust between the Koreas. Evidently, Seoul and Pyongyang have overlapping visions of consen-

18 We will not discuss the possibility of the DPRK absorbing the ROK, sometimes referred to as a “Vietnamese” scenario. Any mention of “absorptive reunification” should be understood to refer to a “German” scenario in which the ROK would absorb the DPRK.

19 Oi-hyun Kim, “North Korea Lashes Out at Park’s Unification Declaration,” *Hankyoreh*, April 14, 2014, accessed November 1, 2016, http://english.hani.co.kr/arti/english_edition/e_northkorea/632608.html.

sual reunification. Both sides acknowledged at the first Inter-Korean Summit in 2000 that there was a “common element” between the South’s proposal for reunification as a commonwealth (*yonhap*) and the North’s for reunification as a federation (*yonbang*), and that reunification efforts should hence be promoted in that direction.²⁰ In the end, consensual reunification requires a firm acknowledgment of both South and North Korean interests, and the striking of a reasonable balance between the two.²¹

Hopes for an absorptive reunification may however not be fulfilled, as the prospects for achieving the North’s submission or collapse by pressure and coercion appear increasingly remote today. In the 1990s, there were solid reasons to think the DPRK would crumble, given the disappearance of its Soviet military ally in 1991, the death of its leader Kim Il-sung in 1994, and the profound economic crisis and famine that fully hit the country in the late 1990s. Today, though, the DPRK appears to be in a much stronger position. There is no conclusive evidence of an economic crisis; the DPRK’s trade volumes have risen considerably despite heavy sanctions, thanks mainly to the lifeline provided by its Chinese ally.²² Economic stabilization would help explain why today there is no more humanitarian

20 South-North Joint Declaration, June 15, 2000, accessed November 1, 2016, http://peacemaker.un.org/sites/peacemaker.un.org/files/KP%20KR_000615_SouthNorth%20Joint%20Declaration.pdf.

21 Pyongyang will be particularly sensitive about being treated as an equal at all stages of reunification, given the ordeals that befell former socialist South Yemen upon reunification with North Yemen. After Yemen’s consensual reunification, South Yemen became politically dominated and economically exploited by Northern Yemenis, leading to a civil war in which the DPRK actually helped arm southern separatist forces. Jomana Farhat, “South Yemen: Unification Dream Becomes Nightmare,” *Al-Akhbar*, November 13, 2012, accessed November 1, 2016, <http://english.al-akhbar.com/node/13582>. On the participation of the DPRK in the Yemeni civil war, see, e.g., Samuel Ramani, “Could North Korea Benefit from Middle East Shifts?,” *The Diplomat*, August 24, 2015, accessed November 1, 2016, <http://thediplomat.com/2015/08/could-north-korea-benefit-from-middle-east-shifts/>.

22 Rüdiger Frank, “North Korea’s Foreign Trade,” *38 North*, October 22, 2015, accessed November 1, 2016, <http://38north.org/2015/10/rfrank102215/>.

crisis in the country (see Hazel Smith's chapter).²³ It is also difficult to pinpoint clear evidence of a political crisis; Kim Jong-un has successfully presided over the Seventh Worker's Party Congress,²⁴ visibly eliminated all his main rivals,²⁵ and roughly halved the numbers of defectors to South Korea.²⁶ Finally, the DPRK also appears more self-confident in the field of defense, as it has successfully developed Hiroshima-strength nuclear bombs²⁷ that could attach prohibitive costs to any preemptive attack by the US or the ROK. All this suggests the DPRK is now in a less desperate situation than it was in the mid-1990s.²⁸

On the contrary, it appears increasingly hazardous for Seoul and Washington to insist on Pyongyang's total submission rather than

- 23 Hazel Smith, "Sanctions and North Korea: The Absence of a Humanitarian Emergency and the Crisis of Development," in *Pathways to a Peaceful Korean Peninsula: Denuclearization, Reconciliation and Cooperation*, eds. Kyung-ok Do, Jeong-Ho Roh, and Henri Féron (Seoul: Korea Institute for National Unification, 2016), 119-142.
- 24 Sang-hun Choe, "North Korea's Party Congress Explained: A Coronation for Kim Jong-Un," *New York Times*, May 5, 2016, accessed November 1, 2016, www.nytimes.com/2016/05/06/world/asia/north-korea-congress.html?_r=0.
- 25 Chad O'Carroll, "North Korea Executes 'Traitor' Jang Song Thaek," *NK News*, December 12, 2013, accessed November 1, 2016, www.nknews.org/2013/12/north-korea-executes-jang-song-thaek-for-factionalism/; Yoon Sangwoon, "North Korea Promotes General After Kim Jong Un Fires Army Chief," *Bloomberg*, July 16, 2012, accessed November 1, 2016, www.bloomberg.com/news/articles/2012-07-15/north-korea-relieves-army-chief-ri-yong-ho-of-all-posts.
- 26 ROK Ministry of Unification, "Bukhan ital jumin ibguk inwon hyeonhwang" [Current Situation regarding Immigration of North Korean Defectors], accessed on July 31, 2016, accessed November 1, 2016, www.unikorea.go.kr/content.do?cmsid=1440; Andrei Lankov, "Why have North Korean defections dropped?," *Guardian*, May 7, 2015, accessed November 1, 2016, www.theguardian.com/world/2015/may/07/north-korea-defectors-drop.
- 27 The DPRK latest nuclear test was estimated to have a yield of ten to twenty-five kilotonnes (kt) of TNT, a yield roughly equivalent to the fifteen kt of the Hiroshima nuclear bomb. German Federal Agency for Geoscience and Resources, "Nordkorea: BGR registriert vermutlichen Kernwaffentest" [North Korea: The BGR Registers a Probable Nuclear Test], September 9, 2016, accessed November 1, 2016, www.bgr.bund.de/DE/Gemeinsames/Oeffentlichkeitsarbeit/Pressemitteilungen/BGR/bgr-160909_nordkorea_BGR_kernwaffentest.html?nn=1542132; Wen Lianxing, "North Korea's 9 September 2016 nuclear test location and yield: seismic results from USTC," University of Science and Technology of China, September 10, 2016, accessed November 1, 2016, http://seis.ustc.edu.cn/en/201609/t20160909_253323.html.
- 28 On why commentators continue to hold on to the thesis of collapse, see, e.g., Bruce Cumings, "Why Did So Many Influential Americans Think North Korea Would Collapse?," *North Korean Review* 9, no. 1 (2013): 114.

settling for a compromise.²⁹ When Pyongyang conducted its fourth nuclear weapons test on January 6, 2016, Seoul and Washington initiated a massive response meant to solve the problem once and for all, including the closure of the Kaesong Industrial Complex as a last symbol of inter-Korean cooperation,³⁰ the adoption of the “harshest ever” sanctions against the DPRK,³¹ and the holding of the “largest ever” US-ROK joint military exercises. Pyongyang responded with what US President Barack Obama called an “unprecedented campaign of ballistic missile launches”³³ as well as a fifth nuclear test on September 9, 2016,³⁴ vowing to continue developing its nuclear power as long as it felt threatened by the US³⁵ and mocking the threat of further sanctions as “laughable.”³⁶ US Director of National Intelligence James Clapper concluded later that year that trying to convince Pyongyang to abandon its weapons was a “lost cause,” given how it saw these weapons as its “ticket to survival.”³⁷ Indeed,

29 On the dangers of continuing with the same confrontational policies, see Jong Kun Choi, “The Perils of Strategic Patience with North Korea,” *The Washington Quarterly* 38, no. 4 (2016): 56.

30 Sang-hun Choe, “South Korea to Shut Joint Factory Park, Kaesong, Over Nuclear Test and Rocket,” *New York Times*, February 10, 2016, accessed November 1, 2016, www.nytimes.com/2016/02/11/world/asia/north-south-korea-kaesong.html.

31 Jae-soon Chang, “(4th LD) U.N. Security Council Unanimously Adopts Harshest-Ever Sanctions on North Korea,” *Yonhap News*, March 3, 2016, accessed November 1, 2016, <http://english.yonhapnews.co.kr/northkorea/2016/03/02/0401000000AEN20160302010553315.html>.

32 Ivan Watson and K. J. Kwon, “South Korea, U.S. deter North Korea with ‘Largest Ever’ Military Drill,” *CNN*, March 12, 2016, accessed November 1, 2016, <http://edition.cnn.com/2016/03/12/asia/south-korea-us-military-drill/>.

33 White House, Office of the Press Secretary, “Statement by the President on North Korea’s Nuclear Test,” September 9, 2016, accessed November 1, 2016, www.whitehouse.gov/the-press-office/2016/09/09/statement-president-north-korea-nuclear-test.

34 Sang-hun Choe and Jane Perlez, “North Korea Tests a Mightier Nuclear Bomb, Raising Tensions,” *New York Times*, September 8, 2016, accessed November 1, 2016, www.nytimes.com/2016/09/09/world/asia/north-korea-nuclear-test.html.

35 Minami Funakoshi and Ju-min Park, “North Korea Says Sanctions Push after Nuclear Test ‘Laughable,’” *Reuters*, September 11, 2016, accessed November 1, 2016, www.reuters.com/article/us-northkorea-nuclear-sanctions-idUSKCN11H05D.

36 Ibid.

37 Rick Gladstone, “North Korea Giving Up Nuclear Arms Is a ‘Lost Cause,’ Official Says,” *New York Times*, October 25, 2016, accessed November 1, 2016, www.nytimes.com/2016/10/26/world/asia/north-korea-james-clapper.html.

there appears to be a considerable opportunity cost attached to each year that coercive, sanctions-based policies fail to achieve North Korean submission or collapse. According to Joel Wit, between 2015 and 2020, the DPRK could have expanded its nuclear arsenal from an estimated ten to sixteen warheads to anywhere between fifty and a hundred, as well as develop the technology to make hydrogen bombs, submarine-launched ballistic missiles (SLBMs) and inter-continental ballistic missiles (ICBMs).³⁸

Seoul and Washington might eventually conclude that their national security interests are better served by giving up on their ideal outcome and settling instead for damage mitigation; for instance, they might consider North Korean offers to freeze the nuclear program in exchange for security guarantees such as the suspension of US-ROK joint military exercises.³⁹ Once the growth of the North Korean nuclear arsenal is stopped, the next logical step would be to end hostilities once and for all through a peace treaty and a consensual reunification.

We will attempt here to imagine a realistic and sustainable model for consensual reunification that would end the nuclear crisis and ensure lasting peace on the Korean Peninsula. Insofar as the division is the result of the Cold War balance of power, the first questions to ask are geopolitical. How can Koreans decide their own destiny without interference? Should US troops stay or leave the South? Should the Korean Peninsula be demilitarized? How would a united Korea handle a rising PRC? Ultimately, answers to all these questions depend on the geopolitical alignment of Korea after reunification: pro-US, pro-PRC, or nonaligned. The first part of this chapter

38 Joel S. Wit and Sun Young Ahn, "North Korea's Nuclear Futures: Technology and Strategy," US-Korea Institute at SAIS (2015): 8, accessed November 1, 2016, <http://38north.org/wp-content/uploads/2015/02/NKNF-NK-Nuclear-Futures-Wit-0215.pdf>.

39 Tony Munroe and Hideyuki Sano, "North Korea Says Peace Treaty, Halt to Exercises, Would End Nuclear Tests," *Reuters*, January 16, 2016, accessed November 1, 2016, www.reuters.com/article/us-northkorea-nuclear-usa-idUSKCN0UT201. Eric Talmadge, "AP Exclusive: North Korea to Halt Nuke Tests if United States Stops Drills," *Associated Press*, April 24, 2016, accessed November 1, 2016, <http://bigstory.ap.org/article/e1c5534f2fc34d87bf343f4d2499ee20/ap-exclusive-n-korea-halt-nuke-tests-if-us-stops-drills>.

will suggest that reunification is only realistic and sustainable to the extent that it aims for nonalignment, a position that maximizes Korean sovereignty without upsetting the balance of foreign interests on the Peninsula.

We then turn to the domestic questions. How should power be distributed between North and South? Can reunification be made economically worthwhile for the much more prosperous South? How fast should integration between the two systems be? How will human rights fare in the process? The key to answering all of these questions is ideology: whether it is liberalism or socialism that gets applied in the North after reunification. Given that liberalism is a non-starter for the DPRK, we will evaluate in the second part of our discussion the political, economic, and human rights implications of the persistence of socialism in the North under an ideologically neutral reunification.

The Geopolitics of Reunification: The Case for Nonalignment

Although the South Korean constitution does not require that reunification be “independent,” as the North Korean one does, Koreans both South and North agree that the issue should be decided by Koreans themselves, not by foreign powers. The South-North Joint Communiqué of July 4, 1972 holds that “unification shall be achieved independently, without depending on foreign powers and without foreign interference.”⁴⁰ The South-North Joint Declaration of June 15, 2000 similarly provides that “The South and the North have agreed to resolve the question of reunification on their own initiative and through the joint efforts of the Korean people, who are the masters of the country.”⁴¹ The same sort of formulation can be found in the South-North Joint Declaration of October 4, 2007, which talks of “the Korean people themselves” (*uri minjok kkiri*) resolving the unifi-

⁴⁰ South-North Joint Communiqué, July 4, 1972, accessed November 1, 2016, http://peacemaker.un.org/sites/peacemaker.un.org/files/KR%20KP_720704_The%20July%204%20South-North%20Joint%20Communiqué.pdf.

⁴¹ South-North Joint Declaration, June 15, 2000, accessed November 1, 2016, http://peacemaker.un.org/sites/peacemaker.un.org/files/KP%20KR_000615_SouthNorth%20Joint%20Declaration.pdf.

cation issue.⁴² The repetition of this desire for Korean sovereignty in every major inter-Korean document on reunification is a testament to the difficulty of realizing this ideal. The strategic location of the Korean Peninsula has made it a nexus of foreign ambitions through the ages, be they Chinese, Mongolian, Japanese, Manchurian, Russian, or American. As the Korean division is a product of contradictory foreign interests on the Peninsula, it will not be possible to reunify Korea without taking these interests into account.

The challenge that Koreans are really facing is to find a reunification model that maximizes Korean sovereignty by catering to foreign interests in a way that does not sacrifice Korean ones. From a realist perspective, the chief criterion by which foreign powers will evaluate Korean reunification plans is their impact on the regional balance of power. The most straightforward way for Korea to address these concerns without sacrificing its sovereignty over the reunification process is to declare that it will not align with anyone. Nonalignment would remove the main incentive for interference in the reunification process and it would ensure Korean sovereignty over a host of related topics, such as the size of the Korean armed forces.

Nonalignment is increasingly necessary to keep the two Koreas from falling victim to the growing rivalry between Washington and Beijing. As Henry Kissinger pointed out in his 2011 book *On China*, there are dangerous parallels between the relationship of the US and PRC today and that between the UK and Germany on the eve of the World War I.⁴³ A zero-sum mentality may lead either the established or the rising power to conclude that the two cannot peacefully coexist and must resolve the challenge on the battlefield. Sino-American rivalry is likely to manifest itself in Korea, insofar as it has already been the battleground of a proxy war between the US and the PRC. Although Korea does not hold existential interests for the US, its military presence has been a key asset in extending and strengthen-

42 Declaration on the Advancement of South–North Korean Relations, Peace and Prosperity, October 4, 2007, accessed November 1, 2016, http://peacemaker.un.org/sites/peacemaker.un.org/files/KP%20KR_071004_Declaration%20on%20Advancement%20of%20South-North%20Korean%20Relations.pdf. Henry Kissinger, *On China* (Toronto: Penguin Books: 2011), 514.

43 Henry Kissinger, *On China* (Toronto: Penguin Books: 2011), 514.

ing US influence in East Asia, because it gives a concrete assurance of US military alliance commitments to the ROK and Japan. (Note, though, that some Americans argue that US interests are better served by leaving, given the cost and the risk to national security that staying creates.⁴⁴) By contrast, the proximity of Beijing to the Korean Peninsula means the PRC has existential interests there; the presence of US troops in Korea is about as threatening to Chinese national security as Chinese troops in Canada would be to the US. Indeed, the readiness of Beijing to fight over Korea can be measured by the hundreds of thousands of lives it sacrificed in the “War to Resist the United States and Aid Korea” (*kangmei yuanchao zhanzheng*), as the Korean War is known in mainland China. The more the PRC catches up militarily and economically to the US, the less it will tolerate the American military presence in the ROK. The most straightforward way for Beijing to defend its interests there is to leverage its economic clout. This leaves Seoul trapped between its military dependence on the US and its economic dependence on the PRC, increasingly forced into situations where it cannot avoid displeasing one or the other side. For instance, ROK President Park Geun-hye’s attendance at a Chinese military parade in September 2015 may have been useful for ROK-PRC ties, but it raised fears in Washington that Seoul was considering “switching” to the Chinese side.⁴⁵ Not even a year later, perhaps under pressure, the Park administration backtracked on its initial refusal of the US request to install a THAAD missile defense system in Korea.⁴⁶ This move greatly angered Beijing, which made its displeasure felt by veiled economic

⁴⁴ See, e.g., Doug Bandow, “The U.S.–South Korea Alliance: Outdated, Unnecessary and Dangerous,” CATO Institute Foreign Policy Briefing No. 90, July 14, 2010, accessed November 1, 2016, <https://object.cato.org/sites/cato.org/files/pubs/pdf/fpb90.pdf>.

⁴⁵ Shannon Tiezzi, “South Korea’s President and China’s Military Parade,” *The Diplomat*, September 3, 2015, accessed November 1, 2016, <http://thediplomat.com/2015/09/south-koreas-president-and-chinas-military-parade/>.

⁴⁶ Sang-hun Choe, “South Korea and U.S. Agree to Deploy Missile Defense System,” *New York Times*, July 7, 2016, accessed November 1, 2016, www.nytimes.com/2016/07/08/world/asia/south-korea-and-us-agree-to-deploy-missile-defense-system.html.

sanctions against the ROK.⁴⁷ The ROK is likely to get caught up in more and more such dilemmas as the US tries to bring it into a trilateral alliance with Japan, a worrisome arrangement to the PRC.⁴⁸ In these circumstances, if tensions continue to escalate and a military confrontation eventually breaks out, it won't happen on Chinese or Japanese or American soil, but on the Korean Peninsula. It would be prudent for the Koreans to remove themselves from the chessboard of Sino-American rivalry, and the most straightforward way of doing that is by forming a nonaligned union.

The term *nonalignment* does not have a precise definition in international law, and so it will be necessary to determine what sort of nonalignment would suit the purposes of Korean reunification. Nonalignment could describe something as simple as joining the Non-Aligned Movement (NAM), a group formed during the Cold War by countries that did not want to have to choose sides between the US and Soviet superpowers. However, the NAM is essentially an interest and lobbying group, and it offers in practice little to no protection against foreign intervention. The fact that the DPRK has been a NAM member since 1976 suggests that NAM membership by itself would be grossly insufficient to shield the Koreans from foreign pressures. Nonalignment could, however, also describe something as weighty as making the country permanently neutral, like Switzerland or Austria. The concept of “neutrality” originally denotes, in the context of an armed conflict, the legal status of a country that is not a belligerent, implying precise rights and obliga-

47 See, e.g., “Could Chinese Anger over US Missile Deployment Bring Down South Korea’s Tourism Industry?,” *South China Morning Post*, July 15, 2016, accessed November 1, 2016, www.scmp.com/news/asia/east-asia/article/1989804/could-chinese-anger-over-us-missile-deployment-bring-down-south; “China ‘tightening up on use of South Korean stars in TV dramas,’ sources say, in wake of missile shield row,” *South China Morning Post*, August 2, 2016, accessed November 1, 2016, www.scmp.com/news/china/society/article/1998090/china-tightening-use-south-korean-stars-tv-dramas-sources-say.

48 Laura Zhou, “Seoul’s Tilt toward Tokyo Could Lead to Worst-Case Scenario for Beijing,” *South China Morning Post*, August 5, 2016, accessed November 1, 2016, www.scmp.com/news/china/diplomacy-defence/article/1999331/seouls-tilt-towards-tokyo-could-lead-worst-case.

tions vis-à-vis the actual belligerents.⁴⁹ By extension, the term “permanent neutrality” describes the stance of a country that declares it will always be neutral in any sort of armed conflict, except in cases where it is directly attacked. Hence, permanently neutral countries do not accept foreign troops on their soil and do not enter into military alliances with other countries, lest they be drawn into conflicts that are not theirs. For instance, the relevant provisions for the permanent neutrality of Austria (*immerwährende Neutralität*) are as follows:

1. For the purpose of the permanent maintenance of her external independence and for the purpose of the inviolability of her territory, Austria of her own free will declares herewith her permanent neutrality, which she is resolved to maintain and defend with all the means at her disposal.
2. In order to secure these purposes, Austria will never in the future accede to any military alliances nor permit the establishment of military bases of foreign States on her territory.⁵⁰

The adoption of a principle of permanent neutrality is a strong symbol that could in the Korean context effectively reassure the US and the PRC that Korean reunification would not disturb the regional balance of power. Indeed there have been recurrent proposals to make Korea a neutral country, in Korea,⁵¹ China,⁵² and else-

⁴⁹ For the rights and obligations of neutrals, see Section V of the Hague Convention of 1907, accessed November 1, 2016, http://avalon.law.yale.edu/20th_century/hague05.asp; Section XIII of the Hague Convention of 1907, accessed November 1, 2016, http://avalon.law.yale.edu/20th_century/hague13.asp. Federal Constitutional Law on the Neutrality of Austria, 1955, Art.1.

⁵⁰ Federal Constitutional Law on the Neutrality of Austria, 1955, Art.1.

⁵¹ See, e.g., Tae-hwan Kwak, “Peace through Neutrality: Unification through a Nonaligned Korea,” *NK News*, October 4, 2016, accessed November 1, 2016, www.nknews.org/2016/10/peace-through-neutrality-unification-through-a-non-aligned-korea/; Tae-ryong Yoon, “Neutralize or Die: Reshuffling South Korea’s Grand Strategy Cards and the Neutralization of South Korea Alone,” *Pacific Focus* 30, no. 2 (2015): 270–295, accessed November 1, 2016, doi:10.1111/pafo.12050.

⁵² See, e.g., Shiping Tang, “A Neutral Reunified Korea: A Chinese View,” *The Journal of East Asian Affairs*, vol. 13, No. 2, 1999: 464–483; Xiaoxiong Yi, “A Neutralized Korea? The North-South Rapprochement and China’s Korea Policy,” *Korean Journal of Defense Analysis* 12, no. 2 (2011): 71–118.

where. In the US alone, James Moltz notes that such proposals have been made by General Albert Wedemeyer in 1947, by Secretary of State John Foster Dulles in 1953, by Senator William F. Knowland in 1953, and Senator Mike Mansfield in 1960, as well as by a number of senior academics in the 1970s and 1980s.⁵³ That being said, adopting a concept of permanent neutrality could limit Korean foreign policy in ways that Koreans might find uncomfortable. In answering these concerns, one could also imagine a long-term neutrality of, say, fifty years—or however long is deemed necessary to consolidate a unified Korean identity and escape the dangerous era of Sino-American rivalry.

The results of German and Austrian neutrality proposals are instructive in this context. After the German surrender in 1945, the victors divided Germany and Austria into American, British, French, and Soviet occupation zones. As in the Korean case, the contradictory geopolitical interests of the Allies initially prevented an agreement on the lifting of the occupation and reunification of those countries; each side feared the countries would then flip to the other side. In early 1948, the US, UK and France agreed at the London Six-Powers Conference to form a West German state by unifying their occupation zones, prompting the Soviet Union to leave the Allied Control Council that governed occupied Germany as a whole. The West German Federal Republic of Germany (FRG) was created on May 23, 1949, soon followed by its East German counterpart, the German Democratic Republic (GDR), on October 7, 1949. As the division began to crystallize, Moscow proposed to reunify Germany as a neutral country with guaranteed civil and political rights.⁵⁴ FRG Chancellor Konrad Adenauer opposed the plan, as he sought to integrate the FRG into Western military alliances such as NATO. The negotiations on German neutrality led nowhere, and so the Germanys stayed divided. Although many Western historians argue that Moscow had been bluffing and really sought to bring Germany

53 James Clay Moltz, "US Policy Interests and the Concept of North Korean Neutrality," in *The Future of North Korea*, ed. Tsuneo Akaha (New York, NY: Routledge, 2001),

65. Through the so-called "Stalin Note" of March 10, 1952.

54 Through the so-called "Stalin Note" of March 10, 1952.

into the socialist fold, others such as Rolf Steininger⁵⁵ have suggested that the episode represented a missed opportunity. Indeed, the fact that Moscow also proposed a neutral reunification for Austria in 1954 and held its promise by agreeing to the Austrian State Treaty in 1955 appears to confirm Steininger's thesis. That Austria reunified thirty-five years before Germany strongly suggests that the Korean reunification process could also be considerably hastened by the adoption of permanent neutrality.

How would Korea concretely declare its nonalignment or neutrality? First of all, Seoul and Pyongyang must agree on the degree of nonalignment—from a declaration that a united Korea would not enter into a military alliance with either the US or the PRC to a declaration of universal permanent neutrality. Despite the DPRK's current military alliance with the PRC,⁵⁶ it seems according to the Democratic Federal Republic plan that it would be willing to go as far as permanent neutrality to reunify:

The DFRK should be a neutral country which does not join any political-military alliance or bloc. Since the two parts of the country, north and south, with different ideas and social systems are to be united to form a single federal state, it is necessary and most reasonable for the DFRK to be a neutral state...The DFRK should be a fully independent and sovereign state and a non-aligned nation which is not a satellite of any other nation and does not depend on any foreign forces.⁵⁷

Once Seoul and Pyongyang agreed on the degree of nonalign-

55 Rolf Steininger, *Eine Chance zur Wiedervereinigung? Die Stalin-Note vom 10 März 1952* [A Chance for Reunification? The Stalin Note of March 10, 1952] (Bonn: Verlag Neue Gesellschaft, 1985). Treaty of Friendship, Cooperation, and Mutual Assistance between the People's Republic of China and the Democratic People's Republic of Korea, July 11, 1961, accessed November 1, 2016, www.marxists.org/subject/china/documents/china_dprk.htm.

56 Treaty of Friendship, Cooperation, and Mutual Assistance between the People's Republic of China and the Democratic People's Republic of Korea, July 11, 1961, accessed November 1, 2016, www.marxists.org/subject/china/documents/china_dprk.htm.

57 Kim Il-sung, "Report to the Sixth Congress of the Worker's Party of Korea on the Work of the Central Committee," October 10, 1980, accessed November 1, 2016, www.naenara.com.kp/en/one/content.php?charter+2.

ment, they would have to announce their choice to the world. The simplest method would be unilateral political declarations by Pyongyang and Seoul, preferably made at a joint summit. Yet because political declarations are easily made and rescinded, they would carry little persuasive power and probably not avert foreign pressure on the Koreans. The commitment to nonalignment could be buttressed by legislation in both Koreas and later inscription into the constitution of the united Korea—similarly to how Austria constitutionally entrenched its commitment to permanent neutrality in 1955. A self-declared commitment could additionally be recognized and acknowledged by a United Nations General Assembly resolution comparable to the one that acknowledged the permanent neutrality of Turkmenistan in 1995.⁵⁸ The Koreans could also conclude bilateral treaties to give each relevant power individual assurances of nonalignment upon reunification. This treaty-making process could be consolidated toward a multilateral treaty involving both Koreas, the US and the PRC, as well as possibly Japan and Russia. Most solidly, Korean commitment to nonalignment could follow the example of the act on Swiss neutrality affixed to the Treaty of Paris that ended the Napoleonic Wars in 1815⁵⁹ by an act affixed to a peace treaty involving the two Koreas, the US and the PRC as the main belligerents in the Korean War.

What would be the security implications of a Korean declaration of nonalignment or neutrality? First of all, to the extent that nonalignment implies a dissolution of military alliances and the repatriation of foreign troops, both Koreas would have to have autonomous armed forces before making any declaration. This would not be a problem for Pyongyang, which does not have Chinese troops on its soil and appears to have an autonomous military,

58 United Nations General Assembly, Resolution 50/80, A/RES/50/80, December 12, 1995, accessed November 1, 2016, www.un.org/documents/ga/res/50/a50r080.htm. International Institute for Strategic Studies, *The Military Balance 2014* (London: Routledge, 2014), 76-77.

59 Act of Acknowledgment and Guarantee of the perpetual Neutrality of Switzerland, and of the Inviolability of its Territory, November 20, 1815, accessed November 1, 2016, [https://en.wikisource.org/wiki/Treaty_of_Paris_\(1815\)/Act_on_the_neutrality_of_Switzerland](https://en.wikisource.org/wiki/Treaty_of_Paris_(1815)/Act_on_the_neutrality_of_Switzerland).

but it would require adjustments for Seoul, which depends on US military capabilities and has surrendered wartime OPCON of its troops to the US. Seoul would have to remove these dependencies, especially by developing its own “C⁴ISR” capabilities (Command, Control, Communications, Computers, Intelligence, Surveillance, and Reconnaissance), so as to safely recover full OPCON over its troops and thereby restore its military sovereignty.

Next, the Koreas would also have to decide whether to pursue demilitarization or armed nonalignment for a united Korea. The persuasive power of a commitment to nonalignment is maximized by demilitarization, leaving either no armed forces—like Costa Rica or Liechtenstein—or just enough to ensure defense of the territory without appearing threatening to neighboring countries—like Austria, which maintained about twenty-three thousand active personnel,⁶⁰ with a military budget of about \$2.5 billion in 2015 for a population of 8.7 million people.⁶¹ The alternative to demilitarization is an armed nonalignment. Switzerland follows this deterrence model, maintaining a much larger army than Austria despite having almost the same population: about 130,000 active personnel⁶² with a military budget of about \$4.8 billion in 2015 for a population of about 8.3 million.⁶³ Even this is only a pale shadow of the army size that Switzerland used to maintain in Cold War times: up to more than 800,000 troops (including reserve) in the

60 Swiss Confederate Department for Defense, Popular Protection and Sport, “Die Armee in Zahlen” [The army in numbers], accessed November 1, 2016, www.vbs.admin.ch/de/vbs/zahlen-fakten/armee.html.

61 Stockholm International Peace Research Institute, “SIPRI Military Expenditure Database,” accessed November 1, 2016, www.sipri.org/databases/milex.

62 Swiss Confederate Department for Defense, Popular Protection and Sport, “Die Armee in Zahlen” [The army in numbers], accessed November 1, 2016, www.vbs.admin.ch/de/vbs/zahlen-fakten/armee.html.

63 Stockholm International Peace Research Institute, “SIPRI Military Expenditure Database,” accessed November 1, 2016, www.sipri.org/databases/milex.

late 1980s.⁶⁴ Armed nonalignment may lead neighbors such as Japan to worry about opportunistic use of the supposedly non-aligned forces. On the other hand, there may be concerns that demilitarization is risky for a country the size of Korea, especially given its location in a conflict-prone region and its history of invasion by neighboring countries. The Koreans have in fact discussed partial demilitarization; in 1987, for instance, the DPRK proposed to the ROK to reduce armed forces on each side to one hundred thousand, so as to lessen military tensions and thereby facilitate reunification talks.⁶⁵ The ROK's armed forces counted in 2015 about 630,000 active personnel⁶⁶ with a budget of \$36 billion for a population of fifty million.⁶⁷ The DPRK's military is the subject of much speculation—with active personnel estimates varying between five hundred thousand and 1.2 million⁶⁸ and military budget estimates between \$1.2 billion and \$10 billion for a population

- 64 Swiss Confederate Department for Defense, Popular Protection and Sport, "Armeeauszählung 2016: Kurzfassung" [Army count 2016: summary], accessed November 1, 2016, www.vtg.admin.ch/content/vtg-internet/de/media/publikationen/download/vtg-internet/de/publications/verwaltung/organisation/fsta/Kurzfassung_ARMA_2016_d.pdf.
- 65 Clyde Haberman, "North Koreans Propose Reduction of Troops in the North and South," *New York Times*, July 24, 1987, accessed November 1, 2016, www.nytimes.com/1987/07/24/world/north-koreans-propose-reduction-of-troops-in-the-north-and-south.html. A similar troop reduction proposal can be found in the DPRK plan: "The federal state should reduce the military strength of the two sides to 100,000-150,000 men each in order to end the state of military confrontation between north and south and bring fratricidal strife to an end once and for all." See Kim Il-sung, "Report to the Sixth Congress of the Worker's Party of Korea on the Work of the Central Committee," October 10, 1980, accessed November 1, 2016, www.naenara.com.kp/en/one/content.php?charter+2.
- 66 ROK Ministry of National Defense, "Gukbang baekseo" [Defense White Paper], 2014, 238, accessed November 1, 2016, www.mnd.go.kr/user/mnd/upload/pblicitn/PBLICTNEBOOK_201501060619270840.pdf.
- 67 Stockholm International Peace Research Institute, "SIPRI Military Expenditure Database," accessed November 1, 2016, www.sipri.org/databases/milex.
- 68 Kim Il-sung, "Report to the Sixth Congress of the Worker's Party of Korea on the Work of the Central Committee," October 10, 1980, accessed November 1, 2016, www.naenara.com.kp/en/one/content.php?charter+2.

of twenty-five million.⁶⁹ Whether 100,000 troops on each side would be a sufficient level of troops to protect Korean sovereignty while convincing neighbors of the good faith behind nonalignment is beyond the scope of this chapter.

Consider, finally, that any proposal of nonalignment would have to contend with the issue of the DPRK's nuclear weapons; should they be dismantled or maintained after reunification? While those weapons would represent a highly effective deterrent to protect the sovereignty of a united Korea, maintaining them might lead neighbors to doubt the credibility of commitments to nonalignment. Whether Koreans kept those weapons would depend to a large extent on the strength of their joint resolve to see nonaligned reunification through.

A nonaligned reunified Korea directly addresses the balance-of-power dynamic that is at the root of the Peninsula's division and thereby represents Korea's best shot at a sovereign reunification free from foreign interference. Indeed, declaring nonalignment is also increasingly necessary to prevent the Koreas from becoming a Sino-American battleground. The example of Austrian reunification shows the power that nonalignment can have in solving balance-of-power conundrums. The Koreas would have to agree on the degree of nonalignment (anything from a declaration not to side with the US or the PRC to one of permanent neutrality), the instrument (anything from a unilateral political declaration to a constitutional amendment or an act affixed to a peace treaty), and the military strength to keep after reunification (opting either for demilitarization or armed nonalignment).

⁶⁹ Elizabeth Shim, "North Korea Underreporting Defense Spending, Analyst Says," *UPI*, March 31, 2016, accessed November 1, 2016, www.upi.com/Top_News/World-News/2016/03/31/North-Korea-underreporting-defense-spending-analyst-says/2811459437466/; "North Korean military Spending Nearly 30 Percent of South Korea's," *Dong-a Ilbo*, May 5, 2016, accessed November 1, 2016, <http://english.donga.com/Home/3/all/26/533532/1>; "North Korea Spends Quarter of GDP on Military from 2002–2012: US data," *Korea Times*, January 4, 2016, accessed November 1, 2016, www.koreatimes.co.kr/www/news/nation/2016/01/485_194556.html.⁶⁹ On the notion of a "marketplace of ideas," see John Stuart Mill, *On Liberty*, Ch. II (1859); Justice Oliver Wendell Holmes in *Abrams v. United States*, 250 U.S. 616, 630 (1919). As quoted in Henri Féron, "The Chinese Model of Human Rights," (Ph.D. Dissertation, Tsinghua University, 2015), Chapter 1.

The Politics of Reunification: The Case for Ideological Neutrality

The key concern for the domestic aspect of reunification is ideology, and notably whether North Korean socialism should be retained or abolished. This decision matters beyond the classical dichotomies that differentiate liberal from socialist systems—market economy versus planned economy, separation of powers versus “democratic centralism,” or “representative democracy” versus “dictatorship of the proletariat.” The issue of ideology also affects the feasibility of reunification, the speed of integration, the fate of the current leadership, and the balance of political power between North and South. As noted above, Pyongyang fundamentally opposes reunification models that would abolish North Korean socialism—such plans can only be realized by coercing the DPRK into submission or collapse. In other words, ideologically liberal reunification models belong to the realm of absorptive reunification; they are incompatible with the spirit of a consensual one. Consensus can only be built on ideologically neutral reunification models that allow each Korea to retain its system, whether through the North Korean federalist formula or the South Korean commonwealth one discussed below. An ideologically neutral model prioritizes national unity without divisive ideological objectives that might postpone reunification. The key distinction here, then, is between reunification models that follow a liberal imperative—ensuring the complete victory of liberalism on the whole Korean Peninsula—and those that follow a nationalist one—achieving national unity beyond ideological differences. Given the uncertainty that the DPRK will soon collapse, and the urgency of resolving tensions on the Korean Peninsula before the North Korean nuclear arsenal grows even more, it appears imprudent to continue pursuing a liberal imperative.

Before we address liberal and nationalist reunification models, it is necessary to clarify why the ideological dilemma cannot be solved by simply basing reunification on the principle of “democracy” pro-

posed by Article 4 of the ROK constitution.⁷⁰ It may seem that the most straightforward solution is to ask Koreans to vote on what ideological system they want. Unfortunately, this solution is made impracticable by the population gap between North and South, as well as the radically different meanings of “democracy” in liberal and socialist ideology. Since about fifty million people live in the South and only about twenty-five million in the North, the North is susceptible to being outvoted two-to-one on all nationwide votes. As a result, Pyongyang would most likely refuse any nationwide vote purporting to elect a single ideological system for the whole peninsula. Alternatively, North and South could vote separately on what ideological system they want to retain locally. Yet even if Pyongyang somehow accepted voluntarily putting its authority in question like that, it would certainly use all tools available to the state to get an overwhelming vote in favor of socialism to preserve its stature. South Korean liberals would probably see the resulting outcome as meaningless. It is in this context that the differences between the liberal and socialist understandings of democracy come to bear.

Liberalism has a process-oriented understanding of democracy. Based on the assumption that we are rational and free-willed beings who will naturally choose what is best for us, the political ideal of liberalism is to create a “marketplace of ideas” in which voters can choose the policies they favor.⁷¹ In this system, the role of the government is simply to apply the most voted-for policies; it may not use state power to direct the choice of its constituents, because that would skew the marketplace of ideas. From a liberal perspective, then, the legitimacy of an election is measured by the absence of

70 “The Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the principles of freedom and democracy.” Constitution of the Republic of Korea, 1988, Art. 4. “The Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the principles of freedom and democracy.” Constitution of the Republic of Korea, 1988, Art. 4.

71 On the notion of a “marketplace of ideas,” see John Stuart Mill, *On Liberty*, Ch. II (1859); Justice Oliver Wendell Holmes in *Abrams v. United States*, 250 U.S. 616, 630 (1919). As quoted in Henri Féron, “The Chinese Model of Human Rights,” (Ph.D. Dissertation, Tsinghua University, 2015), Chapter 1.

state intervention in the voting process.

By contrast, socialism—at least in its Marxist-Leninist form—has an outcome-oriented understanding of democracy. Socialist constitutions generally provide at least nominally many of the same civil and political rights as liberal ones, and indeed even Pyongyang's DFRK proposal seems to provide all the necessary panoply for “democracy” in the liberal sense:

The federal state should guarantee freedom to form political parties and social organizations and their freedom of action, freedom of religious belief, speech, the press, assembly, and demonstration, and guarantee the rights of the people in the north and south to travel freely across the country and to conduct political, economic, and cultural activities freely in any area.⁷²

However, the socialist context may give those rights meanings and nuances different from those that are expected in a liberal context. Socialists are skeptical that liberal political systems successfully identify and apply policies that are in the best interests of the greatest number, as opposed to those in the interests of the ruling socio-economic class. In order to counter the “dictatorship of capital” seen to prevail in liberal societies, socialism—again in its Marxist-Leninist form—proposes a “dictatorship of the proletariat,” a *de facto* one-party system that entrenches the rule of a political vanguard committed to defending the interests of the working class. In this system, the government is expected to intervene in the choice of its constituents to steer it toward socialist policies felt to benefit the greatest number. From a socialist perspective, then, the legitimacy of an election is measured by how strongly the outcome favors socialist ideals, and deviations might be perceived as the result of capitalist manipulation. Given this ideological background, Pyongyang would insist it is not only legitimate but even necessary for it to encourage

72 Kim Il-sung, “Report to the Sixth Congress of the Worker’s Party of Korea on the Work of the Central Committee,” October 10, 1980, accessed November 1, 2016, www.naenara.com.kp/en/one/content.php?charter+2.

its constituents to choose socialism in case of a nationwide vote on ideology. Pyongyang would no doubt take the use of liberal arguments to question this conclusion as an ideological challenge, and that would block the consensual reunification process.

As we can see, then, we cannot avoid the question of ideology by simply subordinating the reunification process to a “democratic” principle. This complication certainly does not mean that Seoul should go against the constitutional requirement that it seek a reunification based on the principle of “democracy.”⁷³ After all, even the DFRK proposal insists that the reunified Korea “should develop a full democratic social and political system that opposes dictatorship and intelligence politics and firmly guarantees and defends the freedoms and rights of the people.”⁷⁴ Nevertheless, it should appear clearly that “democracy” is an ideologically ambiguous term that cannot by itself solve the fundamental dilemma between a liberal reunification, implying confrontation, or a nationalist reunification, implying compromise.

The DPRK and the ROK have been able to find common ground on reunification only when emphasizing nationalist rather than liberal principles. The South-North Joint Communiqué of July 4, 1972, a product of the first high-level conciliatory meeting between the DPRK and ROK, is rooted in the nationalist principle that “a great national unity as one people should be sought first, transcending differences in ideas, ideologies, and systems.”⁷⁵ The DPRK has indeed had a purely nationalist understanding of this principle, consistently advocating its realization through the federation (*yonbang*) DFRK proposal laid out by Kim Il-sung at the Sixth Plenum of the Worker’s Party on October 10, 1980.⁷⁶ Based on the principle “one

73 Constitution of the Republic of Korea, 1988, Art. 4.

74 Kim Il-sung, “Report to the Sixth Congress of the Worker’s Party of Korea on the Work of the Central Committee,” October 10, 1980, accessed November 1, 2016, www.naenara.com.kp/en/one/content.php?charter+2.

75 South-North Joint Communiqué, July 4, 1972, accessed November 1, 2016, http://peacemaker.un.org/sites/peacemaker.un.org/files/KR%20KP_720704_The%20July%204%20South-North%20Joint%20Communiqué.pdf.

76 Kim Il-sung, “Report to the Sixth Congress of the Worker’s Party of Korea on the Work of the Central Committee,” October 10, 1980, accessed November 1, 2016, www.naenara.com.kp/en/one/content.php?charter+2.

nation, one unified state, two local governments, and two systems,” this model is nationalist insofar as (1) it ensures national unity through a unified central government in charge of military and foreign affairs, and (2) it does not require ideological reform from either side, leaving full jurisdiction on socioeconomic matters to local governments in the North and South.⁷⁷ By contrast, it cannot be definitively said that the ROK’s model of a commonwealth or confederation (*yonhap*) is either nationalist or liberal, because each president has interpreted it differently.

The ROK’s commonwealth model is basically premised on the principle of “one nation, two states, two governments, and two systems.” Rather than unify the two Koreas under a single state straight away, it seeks to integrate in stages, starting with a Korean union perhaps similar to the European Union or the Commonwealth of Independent States.⁷⁸ However, the model can be given more nationalist or more liberal content depending on the demands that are made on the DPRK as prerequisites for forming such a commonwealth. ROK President Roh Tae-woo’s North-South Union (*nam-buk yonhap*) project highlighted nonideological measures and thus tended toward the nationalist insofar as it simply focused on measures to reduce military tensions, promote cooperation, and build common-governance institutions.⁷⁹ DPRK President Kim Il-sung showed himself ready to work with that commonwealth proposal by agreeing that his proposed federation might start off as “loose”, with greater prerogatives for the local governments that would be trans-

⁷⁷ Ibid.

⁷⁸ Chung-in Moon and Jeong-Ho Roh, “Designing Constitutional Foundation for Korean Unification: An Overview,” in *Constitutional Handbook on Korean Unification*, vol. 1, eds. Sung-hee Jwa, Chung-in Moon, and Jeong-Ho Roh (Seoul: Korea Economic Research Institute, 2002), 25.

⁷⁹ On Roh Tae-woo’s proposal, see *National Unification Board, Theoretical Foundation, and Policy Directions of the Commonwealth Model of Unification*, Seoul: National Unification Board, 1990 (in Korean). As cited in Chung-in Moon and Jeong-Ho Roh, “Designing Constitutional Foundation for Korean Unification: An Overview,” in *Constitutional Handbook on Korean Unification*, vol. 1, eds. Sung-hee Jwa, Chung-in Moon, and Jeong-Ho Roh (Seoul: Korea Economic Research Institute, 2002), 25.

ferred gradually to a unified central government.⁸⁰ ROK President Kim Dae-jung's Union of Republics project (*gonghwaguk yonhap*), however, seemed more liberal than his predecessor's proposal since it required a free market system and pluralist political system as pre-conditions for a commonwealth.⁸¹ Although this liberal content made it more difficult to accept, Pyongyang still presented a common front with Seoul at the first Inter-Korean Summit in 2000: both agreed to promote reunification along the lines of the "common element" between their respective proposals, which reflected a nationalist position.⁸² As the DPRK developed its nuclear program, however, South Korean support for rapprochement ebbed. Starting with President Lee Myung-bak and continuing with President Park Geun-hye, the ROK's inter-Korean policy became less and less nationalist and focused instead on the twin goals of achieving the DPRK's denuclearization and liberalization.⁸³ Theoretically, the ROK's commonwealth proposal still seems to stand, but before any union can occur, the DPRK is among other things expected to insti-

80 On the project of loose confederation, see, e.g., Frank J. Prial, "North Korean Asks Confederation with South," *New York Times*, June 2, 1991, accessed November 1, 2016, www.nytimes.com/1991/06/02/world/north-korean-asks-confederation-with-south.html.

81 On Kim Dae-jung's proposal, see Kim Dae-jung, *Three Stages' Approach to Unification*, Seoul: The Kim Dae-jung Foundation (in Korean). As cited in Chung-in Moon and Jeong-Ho Roh, "Designing Constitutional Foundation for Korean Unification: An Overview," in *Constitutional Handbook on Korean Unification*, vol. 1, eds. Sung-hee Jwa, Chung-in Moon, and Jeong-Ho Roh (Seoul: Korea Economic Research Institute, 2002), 25.

82 "Acknowledging that there is a common element in the South's proposal for a confederation [*yonhap*, commonwealth] and the North's proposal for a loose form of federation [*yonbang*] as the formula for achievement of unification, the South and the North agreed to promote reunification in that direction." South-North Joint Declaration, June 15, 2000, accessed November 1, 2016, http://peacemaker.un.org/sites/peacemaker.un.org/files/KP%20KR_000615_SouthNorth%20Joint%20Declaration.pdf.

83 Lee Myung-bak's signature policy vis-à-vis the North was literally called "Vision 3000 through Denuclearization and Openness." The plan basically promised that the DPRK would attain a GDP per capita of \$3000 if it denuclearized and integrated into the international community by liberalizing. The theoretical foundation of the plan was a form of historical determinism according to which socialist countries such as North Korea would inevitably have to embrace liberalism in the end. See Jae Jean Suh, *The Lee Myung-bak Government's North Korea Policy: A Study on Its Historical and Theoretical Foundation* (Seoul: Korea Institute for National Unification, 2009), 32.

tute market reforms and ensure a liberal form of civil and political rights protection.⁸⁴ These liberalizing demands, coupled with South Korean diplomatic activity against the DPRK in the fields of disarmament and human rights, have led Pyongyang to equate Seoul's inter-Korean policy with a pursuit of absorptive reunification.⁸⁵ Whether the DPRK's perception of the ROK's intentions is right or wrong, it is readily apparent that consensual reunification talks make progress only when their guiding principle is nationalist rather than liberal. Note that Pyongyang has reiterated under Kim Jong-un its desire to "achieve reunification through a federal formula in Korea where differing ideologies and social systems exist," as well as its nationalist calls for both Koreas to "solve all issues by their own efforts in the common interests of the nation from the stand of putting the nation above all, attaching importance to the nation and achieving national unity."⁸⁶

Reuniting the country under a nationalist principle has implications for its form of government, the economic system, and the pro-

84 According to Suh Jae Jean, the basic logic of Lee Myung-bak's approach to reunification is that it is only once the North liberalizes and integrates into the international economy that inter-Korean relations can start progressing and talks about a commonwealth reunification will make sense. Jae Jean Suh, *The Lee Myung-bak Government's North Korea Policy: A Study on Its Historical and Theoretical Foundation* (Seoul: Korea Institute for National Unification, 2009), 87.

85 See, e.g., "Ten Major Crimes Committed by Lee Myung Bak against Reunification in Four Years of His Office," *Korean Central News Agency*, February 21, 2012, accessed November 1, 2016, www.kcna.co.jp/item/2012/201202/news21/20120221-07ee.html; "Rodong Sinmun decries Lee Myung Bak's ambition for 'unification of social systems,'" *Korean Central News Agency*, May 4, 2012, accessed November 1, 2016, www.kcna.co.jp/item/2012/201205/news04/20120504-07ee.html; "NDC Spokesman Blasts Park Geun Hye's 'Dresden Declaration,'" *Korean Central News Agency*, April 12, 2014, accessed November 1, 2016, www.kcna.co.jp/item/2014/201404/news12/20140412-01ee.html; Oi-Hyun Kim, "North Korea Lashes Out at Park's Unification Declaration," *Hankyoreh*, April 14, 2014, accessed November 1, 2016, http://english.hani.co.kr/arti/english_edition/e_northkorea/632608.html; "CPRK Statement Denounces Park Geun Hye for Resorting to Acts of Sycophantic Treachery," *Korean Central News Agency*, October 2, 2014, accessed November 1, 2016, www.kcna.co.jp/item/2014/201410/news02/20141002-18ee.html.

86 "Pyongyang Calls for Koreas' Federalization and Reunification without Outside Interference," *Russia Today*, July 7, 2014, accessed November 1, 2016, www.rt.com/news/170816-korea-federalization-reunification-proposal/.

tection of human rights. The pursuit of a consensual reunification based on a principle of national unity certainly does not mean that Seoul should agree to everything Pyongyang proposes. It simply means recognizing that certain demands are likely to block the consensus-building process. The 1972 agreement that reunification is to transcend ideological differences suggests that neither Pyongyang nor Seoul should pose ideological conditions for reunification to each other.⁸⁷ Beyond that, however, it goes without saying that Seoul must represent South Korean interests just as Pyongyang will represent North Korean interests. In particular, there may be important reasons for Seoul to insist on a more gradual unification on its commonwealth model rather than agree to Pyongyang's federation formula.

Pyongyang's expectation to wield as much political power as the South in inter-Korean institutions will be at issue. This expectation is evident in the DFRK proposal for an equally weighted supreme federal assembly: "It will be reasonable if, in the unified state of a federal type, a supreme national federal assembly is formed with an equal number of representatives from the north and south and an appropriate number of representatives of overseas nationals..."⁸⁸ This equilibrium may run counter to understandable South Korean expectations that the distribution of power reflect the distribution of the population, which would give the South twice the political power of the North. Yet Pyongyang would predictably refuse such a distribution of power, insofar as the resulting Southern domination of inter-Korean institutions could condemn the DPRK to a similar fate as the former South Yemen.⁸⁹

Accordingly, it will be difficult to achieve a consensual reunification without adopting checks and balances that guarantee each side's

87 South-North Joint Communiqué, July 4, 1972, accessed November 1, 2016, http://peacemaker.un.org/sites/peacemaker.un.org/files/KR%20KP_720704_The%20July%204%20South-North%20Joint%20Communiqué.pdf.

88 Kim Il-sung, "Report to the Sixth Congress of the Worker's Party of Korea on the Work of the Central Committee," October 10, 1980, accessed November 1, 2016, www.naenara.com.kp/en/one/content.php?charter+2.

89 Jomana Farhat, "South Yemen: Unification Dream Becomes Nightmare," *Al-Akhbar*, November 13, 2012, accessed November 1, 2016, <http://english.al-akhbar.com/node/13582>.

ability to defend the interests of its respective constituents and maintain its respective ideological system. The most straightforward way to ensure fairness would be to institute a strong principle of subsidiarity whereby inter-Korean institutions are strictly limited to adopting decisions in their agreed-upon fields of jurisdiction, such as military and foreign affairs, with local Southern and Northern governments having residual jurisdiction over everything else. Of course there is always the risk that inter-Korean institutions will encroach on the jurisdiction of local governments. Parity of votes in these institutions would be a strong check against encroachment, but it is also prone to causing gridlock⁹⁰ and so it should probably be only considered as a temporary solution. The DFRK proposal of an equally weighted supreme federal assembly relies on representatives of overseas nationals to resolve any gridlock, but it does not define how the representatives would be chosen or how many there would be. Ultimately, as inter-Korean institutions mature North and South would probably need to discuss how to make the distribution of power increasingly representative of population discrepancy, but with more sophisticated, less gridlock-prone checks and balances to reassure each side that its voice will be heard. The solution may be a two-chamber legislature:⁹¹ a lower chamber with representatives chosen by popular election would reflect the population discrepancy, while a higher chamber with representatives nominated by region would offer parity and grant veto power to the disadvantaged side. This arrangement could then be reflected in the inter-Korean executive by the adoption of a parliamentary system rather than a presidential one.

Time and space constraints limit our exploration of the many other possible ways a united Korea could be organized constitution-

90 On the gridlock problem with Pyongyang's proposal, see also Byung-chul Koh, "Korean Reunification Formulae: A Synthesis," *Asian Perspective* 11, no. 2 (1987): 286.

91 On the solution of a two-chamber legislature, see e.g. Myung-bong Chang and Jeong-Ho Roh, "Formulating a Unified Constitution for Unification," in *Constitutional Handbook on Korean Unification*, vol. 1, eds. Sung-hee Jwa, Chung-in Moon, and Jeong-Ho Roh (Seoul: Korea Economic Research Institute, 2002), 159.

ally.⁹² Suffice it to say that an initially even distribution of power would maximize the chances for a consensual reunification. A more population-weighted distribution could probably not be implemented until trust between the Koreas has been restored and a common Korean identity has been rebuilt. By insisting on a commonwealth framework for the initial parity stage, Seoul can preserve its leverage to protect Southern interests: it could make population-weighted distribution of power a condition for progressing to a federal framework.

Pyongyang's expectation to maintain its planned economy⁹³ will also be at issue, given the widespread assumption that this system has caused the country to be an economic basket case. Despite the extraordinary economic benefits that a reunification could bring—a Goldman Sachs study from 2009 predicted a united Korea could economically surpass France, Germany, and possibly even Japan in thirty to forty years⁹⁴—South Korean enthusiasm for reunification has been considerably dampened by the fear that the much more prosperous South would have to foot a tremendous bill to bring the North economically up to speed.⁹⁵ The same Goldman Sachs study, penned by Kwon Goocheon, reviewed various cost estimates going

92 On possible constitutional structures for a unified Korea, see, e.g., Myung-bong Chang and Jeong-Ho Roh, "Formulating a Unified Constitution for Unification," in *Constitutional Handbook on Korean Unification*, vol. 1, eds. Sung-hee Jwa, Chung-in Moon, and Jeong-Ho Roh (Seoul: Korea Economic Research Institute, 2002), 135.

93 The economic vision of the DFRK proposal is as follows: "Economic cooperation and exchange between north and south should be realized on the basis of recognizing the different economic systems and diverse economic activities of enterprises in the two parts of the country. The federal government should recognize and protect state, cooperative, and private property in the north and south as well as personal effects and refrain from restricting or encroaching upon the property of capitalists and their business activities as long as they help develop the national economy and do not engage in monopolist or comprador activities." Kim Il-sung, "Report to the Sixth Congress of the Worker's Party of Korea on the Work of the Central Committee," October 10, 1980, accessed November 1, 2016, www.naenara.com.kp/en/one/content.php?charter+2.

94 Goocheon Kwon, "A United Korea? Reassessing North Korea Risks (Part I)," Goldman Sachs, Global Economics Paper No: 188, September 21, 2009, 3, accessed November 1, 2016, www.nkeconwatch.com/nk-uploads/global_economics_paper_no_188_final.pdf.

95 Jiyeon Kim et al., "South Korean Attitudes toward North Korea and Reunification," The Asan Institute for Policy Studies, 2014, 22, accessed November 1, 2016, http://thediplomat.com/wp-content/uploads/2015/01/thediplomat_2015-01-29_13-53-09.pdf.

from the easily affordable to the prohibitively expensive: “[c]ost estimates for inter-Korean integration vary widely from 2% to 25% of GDP per annum, depending on the speed of integration and policy assumptions.”⁹⁶

Upon closer examination, though, it appears that a nationalist reunification letting the North keep its planned economy would cost less than a liberal one imposing a capitalist “shock therapy.” According to Kwon, “[t]he most expensive option for South Korea would be the German style of unification, where South Korea would need to provide large income subsidies to North Korea,” while “the least expensive option would be a China/Hong Kong–style integration, which allows two economic and political systems to coexist in a country with limited inter-Korean migration.”⁹⁷ Indeed, a number of political decisions were taken during the German unification process that made no economic sense. In particular, allowing a 1:1 exchange rate for the West and East German currencies not only forced Westerners to pay income subsidies for decades to Easterners but also technically bankrupted Eastern companies that might otherwise have been relatively competitive.⁹⁸

In any case, Pyongyang would likely refuse to agree to the sort of liberalizing economic shock therapy that was applied in East Germany and throughout the European socialist bloc, if only because the political consequences would draw it away from socialism. It would hence be advisable for Seoul not to insist on economically liberalizing reforms by Pyongyang, lest these demands block the reunification process. Indeed, the DPRK may not be doing as badly economically as the South’s Bank of Korea estimates: the claims that the Northern economy is stagnating, for instance, are difficult to reconcile with the unprecedented development of DPRK-PRC

⁹⁶ Ibid., 19.

⁹⁷ Ibid.

⁹⁸ See, generally, Wolfgang Seibel, *Verwaltete Illusionen: Die Privatisierung der DDR-Wirtschaft durch die Treuhandanstalt und ihre Nachfolger 1990–2000* [Administered illusions: the privatization of the GDR economy through the Treuhandanstalt and its successors 1990-2000] (Frankfurt am Main: Campus Verlag, 2005).

trade.⁹⁹ The lifting of sanctions and the integration of the North in the world economy could also be game changers. If Seoul wants consensual reunification to succeed, it would be best to adopt an open-minded attitude that looks to economic results rather than ideology. Seoul could protect the South Korean taxpayer from the risk of high costs of reunification by insisting that reunification occur first in a commonwealth format and advance to a federal one only when it is clear that Pyongyang has found a way to deliver economically, for instance through Chinese-style reforms.

Last but certainly not least of the potential implications of a nationalist reunification are its human rights consequences, especially given the damning conclusions of an investigation into North Korean human rights mandated by the UN Human Rights Council in 2013.¹⁰⁰ The Commission of Inquiry responsible for the final report accused the DPRK and its institutions and officials of committing “systematic, widespread, and gross human rights violations” amounting in certain cases to crimes against humanity.¹⁰¹ It charged Pyongyang with violations of the freedoms of thought, expression, religion, movement, and residence, as well as violations of the right to food, the right to personal integrity, and the prohibition of torture. The Commission argued that these occurrences were “not mere excesses of the state” but “essential components of a political system that has moved far from the ideals on which it claims to be founded.”¹⁰² If these accusations are true, the maintenance of the

99 Henri Féron, “Doom and Gloom or Economic Boom? The Myth of the ‘North Korean Collapse,’” *The Asia-Pacific Journal* 12, iss. 18, no. 3 (May 5, 2014), accessed November 1, 2016, <http://apjff.org/2014/12/18/Henri-Feron/4113/article.html>.

100 United Nations Human Rights Council, Resolution 22/13, A/HRC/22/13, 9 April 2013.

101 Report of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, A/HRC/25/63, 2014, para. 80, accessed November 1, 2016, www.ohchr.org/Documents/HRBodies/HRCouncil/CoIDPRK/Report/A.HRC.25.63.doc. See also Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, A/HRC/25/CRP.1, 2014, accessed November 1, 2016, www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/Documents.aspx.

102 Report of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, A/HRC/25/63, 2014, para. 80, accessed November 1, 2016, www.ohchr.org/Documents/HRBodies/HRCouncil/CoIDPRK/Report/A.HRC.25.63.doc.

DPRK's socialist system in the North after a nationalist reunification could draw criticism as an abandonment of the North Korean people to their fate. Indeed, the Commission has made recommendations that amount in all but name to dismantling the socialist system and replacing it with a liberal one with separation of powers, a multiparty system, and market reforms.¹⁰³

Admittedly, there are certain issues with the report. From a socialist perspective, ideologically liberal recommendations may appear difficult to reconcile with the international legal principle of self-determination and the ensuing right of a country to adopt a socialist system.¹⁰⁴ The report also does not clearly respond to arguments claiming that countries that sanction the DPRK and refuse its peace offers are co-responsible for creating siege-like conditions deleteri-

¹⁰³ The Report recommends that the DPRK “[u]ndertake profound political and institutional reforms without delay to introduce genuine checks and balances upon the powers of the Supreme Leader and the Worker’s Party of Korea.” It considers the changes should include an “independent and impartial judiciary” and a “multiparty political system.” *Ibid.*, para. 89(a). It also calls for the DPRK to “legalize and support free market activities, internal and external trade and other independent economic conduct that provides citizens with a livelihood.” *Ibid.*, para. 89(j).

¹⁰⁴ In the *Military and Paramilitary Activities in and against Nicaragua* case, the International Court of Justice flatly rejected US arguments that Nicaragua’s alleged “significant steps toward establishing a totalitarian communist dictatorship” would justify unilateral US intervention in the country: “However the regime in Nicaragua be defined, adherence by a State to a particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State.” *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 133. Certainly, the DPRK has agreed to certain human rights obligations by its ratification of the International Covenant on Civil and Political Rights in 1990, but the letter of that Covenant does not require State Parties to adopt a multiparty political system or a market economy, and even whether it requires separation of powers is subject to interpretation. This was done on purpose, so as not to discourage socialist countries from adhering to it. For a human rights commission to now require those elements from the DPRK will therefore seem to Pyongyang like an ideological challenge incongruent with the principle of self-determination. Socialist countries such as the DPRK typically consider that their systems provide the rights required by the Covenant, only in a form that reconciles them with the principles of democratic centralism (art. 5 of the DPRK’s Constitution) and people’s democratic dictatorship (art. 12).

ous to human rights.¹⁰⁵ Finally, the report seems vulnerable to criticism on the quality of its evidence. The Commission was denied access to the DPRK and could therefore not base its report on first-hand evidence.¹⁰⁶ Instead, it had to depend mainly on the testimony of refugee witnesses,¹⁰⁷ a method criticized as unreliable given that such witnesses may receive instant cash and fame in exchange for sensationalist stories. Professor and UN consultant Song Jiyoung, who has researched North Korean refugees for sixteen years, has pointed out that “[c]ash payments for interviewing North Korean refugees have been standard practice in the field,” with rates said to go between \$50 and \$500 per hour in the ROK, depending on the “quality” of the information.¹⁰⁸ The point is not to denigrate or min-

105 Although the mandate of the Commission was to investigate human rights violations in the territory of the DPRK, its conclusions only cover violations committed by the government of the DPRK, without investigating possible violations by other countries inside that territory. The Commission did acknowledge factors beyond state control in the case of violations of the right to food, but did not seem to recognize the military situation as a proper justification for failures of the State to provide food to its citizens. Report of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, A/HRC/25/63, 2014, paras. 51, 53, accessed November 1, 2016, www.ohchr.org/Documents/HRBodies/HRCouncil/CoIDPRK/Report/A.HRC.25.63.doc. Note that the findings of the Commission on food violation have been accused of being incongruent with the findings by humanitarian agencies on the food situation in the DPRK. Hazel Smith, “Crimes Against Humanity?: Unpacking the North Korean Human Rights Debate,” *Critical Asian Studies* 46, iss. 1 (2014): 127-143, accessed November 1, 2016, <http://dx.doi.org/10.1080/14672715.2014.863581>. The Commission also did not discuss the impact of military necessity on civil and political rights—the extent to which siege-like conditions foster a militarization of the political system. On this topic, see e.g. Bo-hyuk Suh, “The Militarization of Korean Human Rights: A Peninsular Perspective,” *Critical Asian Studies* 46, iss. 1 (2014): 3-14, accessed November 1, 2016, <http://dx.doi.org/10.1080/14672715.2014.863575>.

106 Report of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, A/HRC/25/63, 2014, para. 9, accessed November 1, 2016, www.ohchr.org/Documents/HRBodies/HRCouncil/CoIDPRK/Report/A.HRC.25.63.doc.

107 *Ibid.*, paras. 12, 14.

108 Jiyoung Song, “Unreliable Witnesses,” *Asia & The Pacific Policy Society: Policy Forum*, August 2, 2015, accessed November 1, 2016, www.policyforum.net/unreliable-witnesses/.

imize in any way the suffering of honest witnesses but to highlight a systemic problem that affects the reliability of information and that can lead to cases such as that of Shin Dong-hyuk, a key witness for the UN report who admitted to exaggerating his story.¹⁰⁹

Wherever the truth may lie, a nationalist reunification plan does imply the maintenance of the socioeconomic system that the report accuses of causing human rights violations. Socialist systems interpret and practice human rights differently from liberal ones. For ideological reasons, they prioritize social and economic rights such as the rights to health, education, and housing, albeit often to the detriment of civil and political rights such as freedom of expression, thought, and association.¹¹⁰ It seems nevertheless questionable to oppose nationalist reunification on the grounds that it would condemn North Koreans to a worse human rights situation. Maintain-

109 Sang-hun Choe, "Prominent North Korean Defector Recants Part of His Story of Captivity," *New York Times*, January 18, 2015, accessed November 1, 2016, www.nytimes.com/2015/01/19/world/asia/prominent-north-korean-defector-shin-dong-hyuk-recants-parts-of-his-story.html?_r=0. Jacques Maritain, a leading figure in the UNESCO committee responsible for clarifying the philosophical principles at the basis of the Universal Declaration of Human Rights, has argued that both socialist and liberal understandings of human rights were ultimately ideological and that neither could claim to represent the absolute truth: "[i]t remains to be decided which [worldview] has a true and which a distorted vision of Man." Jacques Maritain, "Introduction," in *Human Rights: Comments and Interpretation*, UN Doc. UNESCO/PHS/3 (rev.), at VIII (1948), accessed November 1, 2016, <http://unesdoc.unesco.org/images/0015/001550/155042eb.pdf>. See also, generally, Henri Féron, "The Chinese Model of Human Rights," (Ph.D. Dissertation, Tsinghua University, 2015).

110 In a speech explaining his normalization policy vis-à-vis Cuba, Obama argued that human rights suffered more from maintaining sanctions than lifting them, a reasoning that can also be applied to the DPRK: "To those who oppose the steps I'm announcing today, let me say that I respect your passion and share your commitment to liberty and democracy. The question is how we uphold that commitment. I do not believe we can keep doing the same thing for over five decades and expect a different result. Moreover, it does not serve America's interests, or the Cuban people, to try to push Cuba toward collapse. Even if that worked—and it hasn't for 50 years—we know from hard-earned experience that countries are more likely to enjoy lasting transformation if their people are not subjected to chaos. We are calling on Cuba to unleash the potential of 11 million Cubans by ending unnecessary restrictions on their political, social, and economic activities. In that spirit, we should not allow U.S. sanctions to add to the burden of Cuban citizens that we seek to help." White House, Office of the Press Secretary, "Statement by the President on Cuba Policy Changes," December 17, 2014, accessed November 1, 2016, <https://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes>.

ing a system that North Koreans have lived with for decades cannot be said to worsen their rights. If anything, nationalist reunification would improve those rights by bringing economic development, removing the crushing influence of militarism, and opening the country to outside influence. The human rights rationale for nationalist reunification would be comparable to the one that motivated the US rapprochement with Cuba: a recognition that pressure and regime-change strategies have failed for too long to improve lives and have perhaps even worsened them.¹¹¹

Summing up, reunification talks appear to fail when the South requires that the North adopt liberal principles, and so the only realistic way of achieving consensual reunification is to give national unity precedence over ideological differences, at least initially. Giving the North an equal voice with the more populous South in the early stages would maximize chances for a successful consensus; a more population-weighted system with checks and balances would evolve as inter-Korean institutions mature. In order to keep the necessary leverage to put such a system on track, the South should insist that reunification should in its initial stage follow a commonwealth formula rather than a federal one. As far as the economy is concerned, the South should not demand liberalizing reforms; the focus should be on economic results rather than ideology. Here too, the South can better protect its interests by initially opting for a commonwealth reunification rather than a federation; once it has enough data on the North's economic performance in an unsanctioned environment it can decide whether to move to the federation stage. Then, as far as human rights are concerned, it should be recognized that allowing the North to keep its system would probably

111 Jacques Maritain, a leading figure in the UNESCO committee responsible for clarifying the philosophical principles at the basis of the Universal Declaration of Human Rights, has argued that both socialist and liberal understandings of human rights were ultimately ideological and that neither could claim to represent the absolute truth: “[i]t remains to be decided which [worldview] has a true and which a distorted vision of Man.” Jacques Maritain, “Introduction,” in *Human Rights: Comments and Interpretation*, UN Doc. UNESCO/PHS/3 (rev.), at VIII (1948), accessed November 1, 2016, <http://unesdoc.unesco.org/images/0015/001550/155042eb.pdf>. See also, generally, Henri Féron, “The Chinese Model of Human Rights,” (Ph.D. Dissertation, Tsinghua University, 2015).

not worsen the situation of North Koreans, but rather improve it thanks to the positive influence of reunification.

Conclusion

This demonstration has attempted to clarify why reunification requires a consensus with Pyongyang and to explain the regional and global benefits of pursuing a nonaligned and nationalist reunification. Seoul and Washington cannot resolve the Korean nuclear crisis by remaining dependent on Beijing's assent for tougher DPRK sanctions every time Pyongyang tests a nuclear weapon. The DPRK is already a proven nuclear power with a rapidly expanding arsenal. Furthermore, in view of the fate that befell countries such as Iraq and Libya once they abandoned their WMD programs, Pyongyang views denuclearization as a death sentence, and no sanction will be strong enough to outweigh that.¹¹² Pyongyang will continue to arm as long as Seoul and Washington fail to negotiate with it, however harsh the sanctions. Beijing theoretically has the power to push the DPRK toward collapse, but Chinese interests in Korea are too contradictory to American ones for Beijing to benefit from such an outcome—at least as long as the ROK remains a US ally. The only way out is an arrangement that preserves the balance of power. Consensual reunification not only has the power to end the nuclear crisis but also to achieve durable peace on the Korean Peninsula.

In our search for a realistic and viable model of reunification, we started with an examination of each side's vision for it. This revealed that the two main points of contention were sovereignty and ideology, and so those two issues have been at the core of our inquiry. Given the lack of conclusive evidence for an imminent North Korean collapse, we focused on consensual rather than absorptive reunification. The question of reaching an agreement on reunification between Seoul and Pyongyang had to be discussed both from a geopolitical perspective, with reference to the theme of sovereignty, and from a domestic one, with reference to the theme of ideology.

112 Mark McDonald, "North Korea Suggests Libya Should Have Kept Nuclear Program," *New York Times*, March 24, 2011, accessed November 1, 2016, www.nytimes.com/2011/03/25/world/asia/25korea.html?_r=0.

In the geopolitical context, the challenge is to ensure Korean sovereignty in and through reunification by maintaining a balance between foreign interests on the Peninsula to prevent their interference. The only realistic way to do so at this stage, as argued in the first part of our discussion, is to declare that a reunified Korea would be nonaligned. Any other mechanism would turn Korea into a collateral victim of growing Sino-American rivalry. That being said, the parameters of nonalignment are flexible and could entail anything from a simple declaration not to ally with either side to the adoption of a full-fledged principle of permanent neutrality.

No consensus can be established on reunification if either side conditions its participation on ideological reforms by the other side. Reunification talks can progress only by pursuing national unity beyond ideological differences—what we call a nationalist principle. In practice, this nationalist principle would lead to a reunification in which Pyongyang would keep socialism in the North and Seoul would keep liberalism in the South. Based on the political and economic implications of such a system, it may be advisable to initially insist on a commonwealth reunification in which the DPRK and the ROK maintain separate states, as opposed to a federalist reunification that would join them in one.

Time is of the essence. Pyongyang's bargaining powers vis-à-vis Seoul and Washington grows with each year it develops its nuclear arsenal. Meanwhile, Beijing is steadily strengthening its grip on the Peninsula through its economic dominance. What can Washington do to prevent Korea from slowly but surely slipping away? What can Seoul do to prevent the ROK being ripped apart by contradictory Chinese and American interests? A nonaligned and ideologically neutral reunification would stop proliferation, avert war and preserve everybody's interests. It would also give Koreans a unique opportunity to finally put behind it a century of humiliation and march with restored dignity and sovereignty into the twenty-first century.

REFERENCES

- Act of Acknowledgment and Guarantee of the Perpetual Neutrality of Switzerland, and of the Inviolability of Its Territory. November 20, 1815. Accessed November 1, 2016. [https://en.wikisource.org/wiki/Treaty_of_Paris_\(1815\)/Act_on_the_neutrality_of_Switzerland](https://en.wikisource.org/wiki/Treaty_of_Paris_(1815)/Act_on_the_neutrality_of_Switzerland).
- Bandow, Doug. “The U.S.–South Korea Alliance: Outdated, Unnecessary, and Dangerous.” CATO Institute Foreign Policy Briefing No. 90. July 14, 2010. Accessed November 1, 2016. <https://object.cato.org/sites/cato.org/files/pubs/pdf/fpb90.pdf>.
- Cha, Victor. “Korean Unification: The Zero-Sum Past and the Precarious Future.” *Asian Perspective* 21, no. 3 (1997): 63–92. Accessed November 1, 2016. http://www2.law.columbia.edu/course_00S_L9436_001/North%20Korea%20materials/210303-Cha.pdf.
- Chang, Jae-soon. “(4th LD) U.N. Security Council Unanimously Adopts Harshes- Ever Sanctions on North Korea.” *Yonhap News*, March 3, 2016. Accessed November 1, 2016. <http://english.yonhapnews.co.kr/northkorea/2016/03/02/0401000000AEN20160302010553315.html>.
- Chang, Myung-bong, and Jeong-Ho Roh. “Formulating a Unified Constitution for Unification.” *In Constitutional Handbook on Korean Unification*, Vol. 1, edited by Sung-hee Jwa, Chung-in Moon, and Jeong-Ho Roh, 135-174. Seoul: Korea Economic Research Institute, 2002.
- Choe, Sang-hun. “Prominent North Korean Defector Recants Part of His Story of Captivity.” *New York Times*, January 18, 2015. Accessed November 1, 2016. www.nytimes.com/2015/01/19/world/asia/prominent-north-korean-defector-shin-dong-hyuk-recants-parts-of-his-story.html?_r=0.

- . “South Korea to Shut Joint Factory Park, Kaesong, Over Nuclear Test and Rocket.” *New York Times*, Feb. 10, 2016. Accessed November 1, 2016. www.nytimes.com/2016/02/11/world/asia/north-south-korea-kaesong.html.
- . “North Korea’s Party Congress Explained: A Coronation for Kim Jong-Un.” *New York Times*, May 5, 2016. Accessed November 1, 2016. www.nytimes.com/2016/05/06/world/asia/north-korea-congress.html?_r=0.
- . “South Korea and U.S. Agree to Deploy Missile Defense System.” *New York Times*, July 7, 2016. Accessed November 1, 2016. www.nytimes.com/2016/07/08/world/asia/south-korea-and-us-agree-to-deploy-missile-defense-system.html.
- Choe, Sang-hun, and Jane Perlez. “North Korea Tests a Mightier Nuclear Bomb, Raising Tensions.” *New York Times*, September 8, 2016. Accessed November 1, 2016. www.nytimes.com/2016/09/09/world/asia/north-korea-nuclear-test.html.
- Choi, Jong Kun, “The Perils of Strategic Patience with North Korea.” *The Washington Quarterly* 38, no. 4 (2016): 56–72.
- Constitution of the Republic of Korea, 1988.
- Constitution of the Democratic People’s Republic of Korea, 1998.
- Cummings, Bruce. “Why Did So Many Influential Americans Think North Korea Would Collapse?” *North Korean Review* 9, no. 1 (2013): 114-120.
- Declaration on the Advancement of South–North Korean Relations, Peace and Prosperity. October 4, 2007. Accessed November 1, 2016. http://peacemaker.un.org/sites/peacemaker.un.org/files/KP%20KR_071004_Declaration%20on%20Advancement%20of%20South-North%20Korean%20Relations.pdf.

Dong-a Ilbo. "N. Korean Military Spending Nearly 30% of South Korea's." May 5, 2016. Accessed November 1, 2016. <http://english.donga.com/Home/3/all/26/533532/1>.

Féron, Henri. "Doom and Gloom or Economic Boom? The Myth of the 'North Korean Collapse.'" *The Asia-Pacific Journal* 12, Issue 18, No. 3 (May 5, 2014). Accessed November 1, 2016. <http://apjjf.org/2014/12/18/Henri-Feron/4113/article.html>.

———. "The Chinese Model of Human Rights." Ph.D. Dissertation, Tsinghua University, 2015.

Frank, Rüdiger. "North Korea's Foreign Trade." *38 North*. October 22, 2015. Accessed November 1, 2016. <http://38north.org/2015/10/rfrank102215/>.

Funakoshi, Minami, and Ju-min Park. "North Korea Says Sanctions Push after Nuclear Test 'Laughable.'" *Reuters*, September 11, 2016. Accessed November 1, 2016. www.reuters.com/article/us-northkorea-nuclear-sanctions-idUSKCN11H05D.

Farhat, Jomana. "South Yemen: Unification Dream Becomes Nightmare." *Al-Akhbar*, November 13, 2012. Accessed November 1, 2016. <http://english.al-akhbar.com/node/13582>.

Federal Constitutional Law on the Neutrality of Austria, 1955.

German Federal Agency for Geoscience and Resources. "Nordkorea: BGR Registriert Vermutlichen Kernwaffentest" [North Korea: the BGR Registers a Probable Nuclear Test]. September 9, 2016. Accessed November 1, 2016. www.bgr.bund.de/DE/Gemeinsames/Oeffentlichkeitsarbeit/Pressemitteilungen/BGR/bgr-160909_nordkorea_BGR_kernwaffentest.html?nn=1542132.

Gladstone, Rick. "North Korea Giving Up Nuclear Arms Is a 'Lost Cause,' Official Says." *New York Times*, October 25, 2016. Accessed November 1, 2016. www.nytimes.com/2016/10/26/world/asia/north-korea-james-clapper.html.

- Global Times*. “China Opposes Unilateral Sanctions against North Korea.” February 14, 2016. Accessed November 1, 2016. <http://en.people.cn/n3/2016/0214/c90883-9016167.html>.
- Grevatt, Jon. “South Korea Allocates Record Defence Budget for 2017.” *IHS Jane’s Defence Industry*, September 6, 2016. Accessed November 1, 2016. www.janes.com/article/63451/south-korea-allocates-record-defence-budget-for-2017.
- Guardian*. “‘Regime Collapse’ Awaits North Korea, Says South’s Leader in Nuclear Warning.” February 15, 2016. Accessed November 1, 2016. www.theguardian.com/world/2016/feb/16/regime-collapse-awaits-north-korea-says-souths-leader-in-nuclear-warning.
- Haberman, Clyde. “North Koreans Propose Reduction of Troops in the North and South.” *New York Times*, July 24, 1987. Accessed November 1, 2016. www.nytimes.com/1987/07/24/world/north-koreans-propose-reduction-of-troops-in-the-north-and-south.html.
- Hague Conventions of 1907. Accessed November 1, 2016. http://avalon.law.yale.edu/subject_menus/lawwar.asp.
- International Institute for Strategic Studies. *The Military Balance 2014*. London: Routledge, 2014.
- Jeon, Han, and Jae-un Limb. “President Xi ‘Korea-China Relations Better Than Ever.’” *Korea.net*, July 4, 2014. Accessed November 1, 2016. www.korea.net/NewsFocus/Society/view?articleId=120421.
- Kim, Il-sung. “Report to the Sixth Congress of the Worker’s Party of Korea on the Work of the Central Committee.” October 10, 1980. Accessed November 1, 2016. www.naenara.com.kp/en/one/content.php?charter+2.

- Kim, Jiyoona, et al. "South Korean Attitudes toward North Korea and Reunification." The Asan Institute for Policy Studies. 2014. Accessed November 1, 2016. http://thediplomat.com/wp-content/uploads/2015/01/thediplomat_2015-01-29_13-53-09.pdf.
- Kim, Oi-hyun. "North Korea Lashes Out at Park's Unification Declaration." *Hankyoreh*, April 14, 2014. Accessed November 1, 2016. http://english.hani.co.kr/arti/english_edition/e_northkorea/632608.html.
- Kissinger, Henry. *On China*. Toronto: Penguin Books, 2011.
- Koh, Byung-chul. "Korean Reunification Formulae: A Synthesis." *Asian Perspective* 11, no. 2 (1987): 285–300.
- Korea Times*. "N. Korea Spends Quarter of GDP on Military from 2002–2012: US Data." January 4, 2016. Accessed November 1, 2016. www.koreatimes.co.kr/www/news/nation/2016/01/485_194556.html.
- Korean Central News Agency*. "Ten Major Crimes Committed by Lee Myung Bak against Reunification in Four Years of His Office." February 21, 2012. Accessed November 1, 2016. www.kcna.co.jp/item/2012/201202/news21/20120221-07ee.html.
- . "Rodong Sinmun Decries Lee Myung Bak's Ambition for 'Unification of Social Systems.'" May 4, 2012. Accessed November 1, 2016. www.kcna.co.jp/item/2012/201205/news04/20120504-07ee.html.
- . "NDC Spokesman Blasts Park Geun Hye's 'Dresden Declaration.'" April 12, 2014. Accessed November 1, 2016. www.kcna.co.jp/item/2014/201404/news12/20140412-01ee.html.

- . “Committee for the Peaceful Reunification of Korea Statement Denounces Park Geun Hye for Resorting to Acts of Sycophantic Treachery.” October 2, 2014. Accessed November 1, 2016. www.kcna.co.jp/item/2014/201410/news02/20141002-18ee.html.
- . “DPRK FM Urges United States Not to Groundlessly Shun Conclusion of Peace Treaty.” October 17, 2015. Accessed November 1, 2016. www.bommin.net/Eng/Eng050.htm.
- Kwak, Tae-hwan. “Peace through Neutrality: Unification through a Nonaligned Korea.” *NK News*, October 4, 2016. Accessed November 1, 2016. www.nknews.org/2016/10/peace-through-neutrality-unification-through-a-non-aligned-korea/.
- Kwon, Goohoon. “A United Korea? Reassessing North Korea Risks (Part I).” Goldman Sachs, Global Economics Paper No: 188. September 21, 2009. Accessed November 1, 2016. www.nkeconwatch.com/nk-uploads/global_economics_paper_no_188_final.pdf.
- Lankov, Andrei. “Why Have North Korean Defections Dropped?” *Guardian*, May 7, 2015. Accessed November 1, 2016. www.theguardian.com/world/2015/may/07/north-korea-defectors-drop.
- Lee, Je-hun. “Debate over Size of North Korea’s Army Reignites.” *Hankyoreh*, December 25, 2015. Accessed November 1, 2016. http://english.hani.co.kr/arti/english_edition/e_northkorea/723487.html.
- Maritain, Jacques. “Introduction.” In *Human Rights: Comments and Interpretation*. UN Doc. UNESCO/PHS/3 (rev.). 1948. Accessed November 1, 2016. <http://unesdoc.unesco.org/images/0015/001550/155042eb.pdf>.

- Mansourov, Alexandre. "The Endgame Question: Where is Escalation Leading Us and Is It Worth It?" In *Pathways to a Peaceful Korean Peninsula: Denuclearization, Reconciliation and Cooperation*, edited by Kyung-ok Do, Jeong-Ho Roh, and Henri Féron, 77-117. Seoul: Korea Institute for National Unification, 2016.
- McDonald, Mark. "North Korea Suggests Libya Should Have Kept Nuclear Program." *New York Times*, March 24, 2011. Accessed November 1, 2016. www.nytimes.com/2011/03/25/world/asia/25korea.html?_r=0.
- Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14.
- Moltz, James Clay. "US Policy Interests and the Concept of North Korean Neutrality." In *The Future of North Korea*, edited by Tsuneo Akaha, 64-76. New York, NY: Routledge, 2001.
- Moon, Chung-in, and Jeong-Ho Roh. "Designing Constitutional Foundation for Korean Unification: An Overview." In *Constitutional Handbook on Korean Unification*, Vol. 1, edited by Sung-hee Jwa, Chung-in Moon, and Jeong-Ho Roh, 5-67. Seoul: Korea Economic Research Institute, 2002.
- Munroe, Tony, and Hideyuki Sano. "North Korea Says Peace Treaty, Halt to Exercises, Would End Nuclear Tests." *Reuters*, January 16, 2016. Accessed November 1, 2016. www.reuters.com/article/us-northkorea-nuclear-usa-idUSKCN0UT201.
- news.ifeng.com*. "Xi Jinping: Zhongfang zhichi chaohan gaishan guanxi zuihou shixian zizhu heping tongyi" [Xi Jinping: China Supports the Improvement of Inter-Korean Relations and the Ultimate Realization of Independent and Peaceful Reunification]. June 28, 2013. Accessed November 1, 2016. http://news.ifeng.com/mainland/special/pjhfanghua/content-3/detail_2013_06/28/26899403_0.shtml.

- O'Carroll, Chad. "North Korea Executes 'Traitor' Jang Song Thaek." *NK News*, December 12, 2013. Accessed November 1, 2016. www.nknews.org/2013/12/north-korea-executes-jang-song-thaek-for-factionalism/.
- Panda, Ankit. "South Korea Is Planning a Huge Increase in Defense Spending." *The Diplomat*, April 22, 2015. Accessed November 1, 2016. <http://thediplomat.com/2015/04/south-korea-is-planning-a-huge-increase-in-defense-spending/>.
- PRC Foreign Ministry. "Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference." September 2, 2015. Accessed November 1, 2016. www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1293417.shtml.
- Prial, Frank J. "North Korean Asks Confederation with South." *New York Times*, June 2, 1991. Accessed November 1, 2016. www.nytimes.com/1991/06/02/world/north-korean-asks-confederation-with-south.html.
- Ramani, Samuel. "Could North Korea Benefit from Middle East Shifts?" *The Diplomat*, August 24, 2015. Accessed November 1, 2016. <http://thediplomat.com/2015/08/could-north-korea-benefit-from-middle-east-shifts/>.
- Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea. A/HRC/25/63. 2014. Accessed November 1, 2016. www.ohchr.org/Documents/HRBodies/HRCouncil/CoIDPRK/Report/A.HRC.25.63.doc.
- Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea. A/HRC/25/CRP.1. 2014. Accessed November 1, 2016. www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/Documents.aspx.
- ROK Ministry of National Defense. "Gukbang baekseo" [Defense White Paper]. 2014. Accessed November 1, 2016. www.mnd.go.kr/user/mnd/upload/pblicitn/PBLICTNEBOOK_201501060619270840.pdf.

- ROK Ministry of Unification. "Bukhan ita! jumin ibguk inwon hyeonhwang" [Current Situation regarding Immigration of North Korean Defectors]. Accessed November 1, 2016. www.unikorea.go.kr/content.do?cmsid=1440.
- Russia Today*. "Pyongyang Calls for Korea's Federalization and Reunification without Outside Interference." July 7, 2014. Accessed November 1, 2016. www.rt.com/news/170816-korea-federalization-reunification-proposal/.
- Seth, Michael J. *A Concise History of Modern Korea: From the Late Nineteenth Century to the Present*. Lanham, MD: Rowman & Littlefield, 2010.
- Seibel, Wolfgang. *Verwaltete Illusionen: Die Privatisierung der DDR-Wirtschaft durch die Treuhandanstalt und ihre Nachfolger 1990–2000* [Administered illusions: the privatization of the GDR economy through the Treuhandanstalt and its successors 1990-2000]. Frankfurt am Main: Campus Verlag, 2005.
- Shim, Elizabeth. "North Korea Underreporting Defense Spending, Analyst Says." *UPI*, March 31, 2016. Accessed November 1, 2016. www.upi.com/Top_News/World-News/2016/03/31/North-Korea-underreporting-defense-spending-analyst-says/2811459437466/.
- . "More North Korea Sanctions Not the Solution, China Says." *UPI*, September 12, 2016. Accessed November 1, 2016. www.upi.com/Top_News/World-News/2016/09/12/More-North-Korea-sanctions-not-the-solution-China-says/8251473685582/.
- Sigal, Leon. "What Have Twenty-Five Years of Diplomacy Achieved?" In *Pathways to a Peaceful Korean Peninsula: Denuclearization, Reconciliation, and Cooperation*, edited by Kyung-ok Do, Jeong-Ho Roh, and Henri Féron, 29-56. Seoul: Korea Institute for National Unification, 2016.

Smith, Hazel. "Crimes Against Humanity?: Unpacking the North Korean Human Rights Debate." *Critical Asian Studies* 46, iss. 1 (2014): 127-143. Accessed November 1, 2016. <http://dx.doi.org/10.1080/14672715.2014.863581>.

———. "Sanctions and North Korea: The Absence of a Humanitarian Emergency and the Crisis of Development." In *Pathways to a Peaceful Korean Peninsula: Denuclearization, Reconciliation, and Cooperation*, edited by Kyung-ok Do, Jeong-Ho Roh, and Henri Féron, 119-142. Seoul: Korea Institute for National Unification, 2016.

Song, Jiyoung. "Unreliable Witnesses." Asia & The Pacific Policy Society: Policy Forum, August 2, 2015. Accessed November 1, 2016. www.policyforum.net/unreliable-witnesses/.

South China Morning Post. "Could Chinese Anger over US Missile Deployment Bring Down South Korea's Tourism Industry?" July 15, 2016. Accessed November 1, 2016. www.scmp.com/news/asia/east-asia/article/1989804/could-chinese-anger-over-us-missile-deployment-bring-down-south.

———. "China 'Tightening Up on Use of South Korean Stars in TV Dramas,' Sources Say, in Wake of Missile Shield Row." August 2, 2016. Accessed November 1, 2016. www.scmp.com/news/china/society/article/1998090/china-tightening-use-south-korean-stars-tv-dramas-sources-say.

South-North Joint Communiqué. July 4, 1972. Accessed November 1, 2016. <http://peacemaker.un.org/sites/peacemaker.un.org/files/KR>.

South-North Joint Declaration. June 15, 2000. Accessed November 1, 2016. http://peacemaker.un.org/sites/peacemaker.un.org/files/KP%20KR_000615_SouthNorth%20Joint%20Declaration.pdf.

- Steininger, Rolf. *Eine Chance zur Wiedervereinigung? Die Stalin-Note vom 10 März 1952*. [A Chance for Reunification? The Stalin Note of March 10, 1952]. Bonn: Verlag Neue Gesellschaft, 1985.
- Stockholm International Peace Research Institute. "SIPRI Military Expenditure Database." Accessed November 1, 2016. www.sipri.org/databases/milex.
- Suh, Bo-hyuk. "The Militarization of Korean Human Rights: A Peninsular Perspective." *Critical Asian Studies* 46, iss. 1 (2014): 3-14. Accessed November 1, 2016. <http://dx.doi.org/10.1080/14672715.2014.863575>.
- Suh, Jae Jean. *The Lee Myung-bak Government's North Korea Policy: A Study on its Historical and Theoretical Foundation*. Seoul: Korea Institute for National Unification, 2009.
- Swiss Confederate Department for Defense, Popular Protection and Sport. "Armeeauszählung 2016: Kurzfassung" [Army count 2016: summary]. Accessed November 1, 2016. www.vtg.admin.ch/content/vtg-internet/de/media/publikationen.download/vtg-internet/de/publications/verwaltung/organisation/fsta/Kurzfassung_ARMA_2016_d.pdf.
- . "Die Armee in Zahlen" [The Army in Numbers]. Accessed November 1, 2016. www.vbs.admin.ch/de/vbs/zahlen-fakten/armee.html.
- Tang, Shiping. "A Neutral Reunified Korea: A Chinese View." *The Journal of East Asian Affairs* 13, no. 2 (1999): 464–483.
- Talmadge, Eric. "AP Exclusive: North Korea to Halt Nuke Tests if US Stops Drills." *Associated Press*, April 24, 2016. Accessed November 1, 2016. <http://bigstory.ap.org/article/e1c5534f2fc34d87bf343f4d2499ee20/ap-exclusive-n-korea-halt-nuke-tests-if-us-stops-drills>.

Tiezzi, Shannon. "South Korea's President and China's Military Parade." *The Diplomat*, September 3, 2015. Accessed November 1, 2016. <http://thediplomat.com/2015/09/south-koreas-president-and-chinas-military-parade/>.

Treaty of Friendship, Cooperation, and Mutual Assistance between the People's Republic of China and the Democratic People's Republic of Korea. July 11, 1961. Accessed November 1, 2016. www.marxists.org/subject/china/documents/china_dprk.htm.

United Nations General Assembly. Resolution A/RES/50/80. December 12, 1995. Accessed November 1, 2016. www.un.org/documents/ga/res/50/a50r080.htm.

United Nations Human Rights Council. Resolution 22/13. A/HRC/22/13. April 9, 2013.

Watson, Ivan, and K. J. Kwon. "South Korea, U.S. Deter North Korea with 'Largest Ever' Military Drill." *CNN*, March 12, 2016. Accessed November 1, 2016. <http://edition.cnn.com/2016/03/12/asia/south-korea-us-military-drill/>.

Wen Lianxing. "North Korea's 9 September 2016 Nuclear Test Location and Yield: Seismic Results from USTC." University of Science and Technology of China. September 10, 2016. Accessed November 1, 2016. http://seis.ustc.edu.cn/en/201609/t20160909_253323.html.

White House, Office of the Press Secretary. "Joint Declaration in Commemoration of the 60th Anniversary of the Alliance between the Republic of Korea and the United States of America." May 7, 2013. Accessed November 1, 2016. www.whitehouse.gov/thewhitehouse-press-office/2013/05/07/joint-declaration-commemoration-60th-anniversary-alliancebetween-republ.

———. "Joint Vision for the Alliance of the United States of America and the Republic of Korea." June 16, 2009. Accessed November 1, 2016. www.whitehouse.gov/the-press-office/2009/06/16/joint-vision-alliance-united-states-america-and-republic-korea.

- . “Statement by the President on Cuba Policy Changes.” December 17, 2014. Accessed November 1, 2016. www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes.
- . “Statement by the President on North Korea’s Nuclear Test.” September 9, 2016. Accessed November 1, 2016. www.whitehouse.gov/the-press-office/2016/09/09/statement-president-north-koreas-nuclear-test.
- Wit, Joel S., and Sun Young Ahn. “North Korea’s Nuclear Futures: Technology and Strategy.” US-Korea Institute at SAIS, 2015. Accessed November 1, 2016. <http://38north.org/wp-content/uploads/2015/02/NKNF-NK-Nuclear-Futures-Wit-0215.pdf>.
- Yi, Xiaoxiong. “A Neutralized Korea? The North-South Rapprochement and China’s Korea Policy.” *Korean Journal of Defense Analysis* 12, no. 2 (2011): 71–118.
- Yoon, Sangwoon. “North Korea Promotes General after Kim Jong Un Fires Army Chief.” *Bloomberg*, July 16, 2012. Accessed November 1, 2016. www.bloomberg.com/news/articles/2012-07-15/north-korea-relieves-army-chief-ri-yong-ho-of-all-posts.
- Yoon, Tae-ryong. “Neutralize or Die: Reshuffling South Korea’s Grand Strategy Cards and the Neutralization of South Korea Alone.” *Pacific Focus* 30, no. 2 (2015): 270–295. Accessed November 1, 2016. <doi:10.1111/pafo.12050>.
- Zhou, Laura. “Seoul’s Tilt toward Tokyo Could Lead to Worst-Case Scenario for Beijing.” *South China Morning Post*, August 5, 2016. Accessed November 1, 2016. www.scmp.com/news/china/diplomacy-defence/article/1999331/seouls-tilt-toward-tokyo-could-lead-worst-case.

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