

EPILOGUE II

Testing the Protective Reach of UN Sanctions for North Korean Migrant Workers

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Introduction

The practice of North Korean overseas labour has great human rights implications. Yet, it was not thoroughly reported upon by the Commission of Inquiry established by the Human Rights Council or by Special Rapporteurs.¹ The disregard may obviously be informed by political considerations, yet human rights law's reservation to extraterritoriality does not encourage treatment of such transnational practices either. Nonetheless, human rights lenses are not the only optic through which the international community reaches out to North Korea. In its stereo-approach, the international community also engages with North Korea through the hard security lens with a continuing central role for the Security Council. The Security Council sanctions regime on North Korea is probably the most complex and expansive UN sanctions regime ever. In this short chapter, the amplification of the UN sanctions regime on North Korea is discussed with its unprecedented features aimed at curtailing overseas labour. The chapter specifically tests the UN sanctions regime's protective reach for North Korea migrant workers.

1) See e.g. reports of Special Rapporteurs for North Korea. United Nations General Assembly (UNGA), *Situation of human rights in the Democratic People's Republic of Korea*, A/72/394 (18 September 2017), <https://undocs.org/A/72/394> (accessed 31 January 2018); UNGA, *Report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea*, A/HRC/31/70 (19 January 2016), <https://undocs.org/A/HRC/31/70> (accessed 31 January 2018); UNGA, *Situation of human rights in the Democratic People's Republic of Korea*, A/70/362 (8 September 2015), <https://undocs.org/A/70/362> (accessed 31 January 2018); UNGA, *Report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea*, Marzuki Darusman, A/HRC/28/71 (17 March 2015), <https://undocs.org/A/HRC/28/71> (accessed 31 January 2018); UNGA, *Situation of human rights in the Democratic People's Republic of Korea*, A/69/548 (24 October 2014), <https://undocs.org/A/69/548> (accessed 31 January 2018); UNGA, *Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea*, A/HRC/25/63 (7 February 2014), <https://undocs.org/A/HRC/25/63> (accessed 31 January 2018).

To discuss the protective reach of UN sanctions, the chapter is composed of two parts. Part 1 traverses the elaboration of the North Korea sanctions regime, in particular after 2016, and it zeroes in on the inclusion of the clauses related to migrant workers. Part 2 critically discusses the potential human rights dimension of the clauses. It inquires whether the clauses can be seen as articulations of specific human rights concerns or that they have some other unanticipated human rights benefits, or whether, instead, the clauses are purely functional and subjected to security consideration without any genuine human rights effects.

The re-comprehensivisation of the North Korea sanctions regime

The first Security Council sanctions on North Korea were imposed in 2006 with resolution 1718. Well in line with the contemporaneous trends, these sanctions were fairly targeted. The concept of targeted sanctions had emerged in reaction to the comprehensive sanctions that the Security Council had imposed on Iraq in the early 1990s, which had dramatic consequences for the Iraqi population. After these experiences, and similar ones in Haiti and Yugoslavia, the Security Council adopted the concept of targeted sanctions, a concept developed in transnational policy networks with strong input from scholars such as Sue Eckert and Tom Biersteker from the Watson Institute.² The principle idea of targeted sanctions is that – in contrast to comprehensive sanctions – they are not imposed on a state as such, but rather on selected individuals holding the capacity to change state behaviour. Following this trend of imposing targeted, rather than comprehensive sanctions, the Security Council imposed through resolution 1718 asset freezes and travel bans on specified North Korean individuals who were designated because of their direct involvement in North Korean proliferation. Resolution 1718 also included an arms embargo. The novelty of the 1718-sanctions regime was the ban on luxury goods. The spirit underlying the 1718 sanctions was that North Korea be encouraged to make a cost-benefit analysis and that this calculus would lead it to seek denuclearisation in a negotiated setting.³ Over time, when this did not materialise, the regime expanded, mostly in reaction to subsequent nuclear tests in 2009, 2013 and especially twice in 2016, and even further in 2017.⁴ The North Korean sanctions, as they are

2) See for this development and on UN sanctions generally, Larissa van den Herik (ed.), *UN Sanctions and International Law* (Cheltenham, UK: Edward Elgar Publishing, 2017).

3) Andrea Berger, 'A House Without Foundations: The North Korea Sanctions Regime and its Implementation', *Whitehall Reports*, 9 June 2017, 5, <https://rusi.org/publication/whitehall-reports/house-without-foundations-north-korea-sanctions-regime-and-its>. (accessed 1 March 2018).

4) United Nations Security Council (UNSC), Committee established pursuant to resolution 1718 (2006), *Resolution 1874*, S/RES/1874(2009) (12 June 2009), <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/NKorea%20SRES%201874.pdf> (accessed 21 March 2018); UNSC, Committee established pursuant to resolution 1718 (2006), *Resolution 2087*, S/RES/2087 (2013) (22 January 2013), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2087.pdf (accessed 21 March 2018); UNSC, Committee established pursuant to resolution 1718 (2006), *Resolution 2094*, S/RES/2094 (2013) (7 March 2013), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2094.pdf (accessed 21 March 2018); UNSC, Committee established pursuant to resolution 1718 (2006), *Resolution 2270*, S/RES/2270 (2016) (2 March 2016), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2270.pdf (accessed 21 March 2018); UNSC, Committee established pursuant to resolution 1718 (2006), *Resolution 2321*, S/RES/2321 (2016) (30 November 2016), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2321.pdf (accessed 21 March 2018).

in place today, are de facto comprehensive sanctions. Or in any event, they are on paper. In practice, there are huge implementation issues, patterns of sanctions evasion, including very sophisticated evasion techniques by North Korea, all of which are eroding the effect of the sanctions.⁵ Despite this divergence of a paper reality versus a more facts-based reality, the re-comprehensivisation of UN sanctions is noteworthy. In fact, this trend can be observed in both non-proliferation regimes. The Iran sanctions, when still in place, had also become very comprehensive, affecting the entire economy and thus the entire Iranian society.⁶ Other UN sanctions regimes do not witness a similar development and they are still very targeted in their design and operation. As regards the re-comprehensivised non-proliferation regimes, one important difference between the Iran and North Korean sanctions must be noted, i.e. in the case of Iran, the most impactful, comprehensive sanctions came from the US and the EU as unilateral measures, while the Security Council sanctions regime was more or less frozen. By contrast, in the case of North Korea, it is the UN Security Council sanctions regime that is comprehensive.⁷ This comprehensiveness evokes human rights questions regarding the humanitarian impact of those sanctions on the population. In its 2013 report, the Commission of Inquiry stated that it did not 'support sanctions imposed by the Security Council or introduced bilaterally that are targeted against the population or the economy as a whole'.⁸ In his 2017 report, the UN Special Rapporteur also expressed concern 'about the possibility that Security Council sanctions may have a detrimental impact on certain vital economic sectors for part of the population, and reiterates the need to give human rights concerns further consideration when drafting and revising sanction resolutions to ensure that they do not affect ordinary people's livelihoods'.⁹

One specific aspect of the comprehensive sanctions regime currently in place concerns the ban on North Korean migrant workers. As of 2016, the UN sanctions regime was steadily intensified, starting with resolution 2270.¹⁰ In addition to expanding the regime in terms of scope, this resolution also aimed at curbing North Korea's access to the international financial system, very much modelled on the Iran sanctions. Also in line with the previous

F96FF9%7D/s_res_2321.pdf (accessed 21 March 2018); UNSC, Committee established pursuant to resolution 1718 (2006), *Resolution 2371*, S/RES/2371 (2017) (5 August 2017), http://www.securitycouncilreport.org/atf/cf/%7B-65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2371.pdf (accessed 21 March 2018); UNSC, Committee established pursuant to resolution 1718 (2006), *Resolution 2375*, S/RES/2375 (2017) (11 September 2017), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2375.pdf (accessed 21 March 2018); UNSC, Committee established pursuant to resolution 1718 (2006), *Resolution 2397*, S/RES/2397 (2017) (22 December 2017), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2397.pdf (accessed 21 March 2018).

5) Berger, 'A House Without Foundations'.

6) As discussed by Daniel H. Joyner, 'UN counter-proliferation sanctions and international law', in *UN Sanctions and International Law*, ed. Larissa van den Herik (Cheltenham, UK: Edward Elgar Publishing, 2017), ch. 5.

7) As also discussed here: Larissa van den Herik, 'The Individualization and Formalization of UN Sanctions', in *UN Sanctions and International Law*, ed. Larissa van den Herik (Cheltenham, UK: Edward Elgar Publishing, 2017), ch. 1.

8) UNSC, A/HRC/25/CRP.1, § 1225 (or UNSC, A/HRC/25/63, § 94(a)). This conclusion was referenced in support in the Report of the Group of Independent Experts on Accountability, United Nations General Assembly, *Report of the group of independent experts on accountability*, A/HRC/34/66/Add.1 (24 February 2017), § 65, <https://undocs.org/A/HRC/34/66/Add.1> (accessed 31 January 2018).

9) UNGA. A/72/394, § 6.

10) UNGA. S/RES/2270.

Iran sanctions, access to specialised teaching was restricted in Resolution 2321 of 2016.¹¹ Subsequently, Resolution 2371 of 5 August 2017 is of special relevance.¹² In this resolution, in para. 11, the Security Council,

Expresses concern that DPRK nationals frequently work in other States for the purpose of generating foreign export earnings that the DPRK uses to support its prohibited nuclear and ballistic missile programs, decides that all Member States shall not exceed on any date after the date of adoption of this resolution the total number of work authorizations for DPRK nationals provided in their jurisdictions at the time of the adoption of this resolution unless approved by the Committee.

Going one step further, in Resolution 2375, the Council decided that States should not provide new work authorisations at all, regardless of numbers, but still leaving previously issued authorisations untouched.¹³ Finally, Resolution 2397 scaled up further with the Security Council deciding that all DPRK nationals earning income in Member State's jurisdiction had to be repatriated, including the DPRK government safety oversight attachés monitoring DPRK workers abroad.¹⁴ While adopted under Chapter VII and part of a UN sanctions regime, the repatriation obligation was not hard in nature given the incremental approach in temporal respect. The Resolution stipulated that the repatriation had to be done immediately and no later than 24 months from the date of adoption of the Resolution. The Council also specified that states had to provide a midterm report to show how many DPRK nationals had been repatriated over the 12-month period starting from the date of adoption of this resolution, with a requirement to justify if less than half had been repatriated. After 27 months, states had to report on repatriation of all workers. This timeline thus offered considerable loopholes to avoid direct implementation.

The aspect of the North Korea sanctions aimed at repatriating North Korean workers is unique. While, as indicated, many of the new comprehensive sanctions post 2016 were modelled on the previous Iran sanctions scheme, this feature was specifically designed to deal with the North Korea situation and particularly to counter North Korea's sophisticated sanctions evasion techniques. US ambassador Haley stated that this particular ban would eventually starve the regime of an additional 500 million USD or more in annual revenues. Hence, the sanctions regime's main architect was not inspired by pure human rights considerations in its design of the migrant workers ban. Instead, the ban was rather functional in nature aimed at curbing evasion techniques and geared towards limiting financial flows. Nonetheless, the migrant workers ban could still have a certain protective reach.

11) UNGA. S/RES/2321, § 10.

12) UNGA. S/RES/2371.

13) UNGA. S/RES/2375, § 17.

14) UNSC. S/RES/2397, § 8.

Do sanctions offer human rights protection to migrant workers?

In contrast to the US approach, the migrant workers ban was conceptualised in human rights terms by one other permanent 'P5' member of the Security Council, namely the United Kingdom. Prior to adoption of Resolution 2371, the UK representative stated,

Every year, the Democratic People's Republic of Korea sends thousands of ordinary workers overseas. They often endure poor conditions and long hours, and their toil serves to provide critical foreign currency for North Korean Government coffers. This is undoubtedly a form of modern slavery, and today we have taken the first step to ending it. The world will now monitor and curtail work authorizations for these desperate expatriates. And those who are already victims of this abusive system can trust that the United Kingdom will continue to work towards a complete end to North Korea's institutionalized modern slavery.¹⁵

At the meeting in which Resolution 2375 was adopted, the UK spoke of 'a sickening industry built on modern slavery'.¹⁶ While many other states at the Security Council welcomed the respective migrant worker sanctions as a means to limit the Pyongyang's ability to earn foreign currency, they did not make similar human rights oriented statements, let alone use the word slavery. Only Venezuela expressed concern about the repercussion for workers and the possible non-observance of their specific human rights as migrant workers.¹⁷ To address such concerns, Resolution 2397 provides general caveats for persons with dual nationality and DPRK nationals whose repatriation was prohibited, subject to applicable national and international law, including international refugee law and international human rights law.¹⁸ Yet, there are no concrete references to applicable ILO Conventions and specifically the application of rights to remedies and the obligation of payment of full remuneration directly to the workers. Nor was the question explored in more detail as to the human rights implications of repatriation to a State whose populations was suffering under comprehensive sanctions.

The panel of experts that reports on implementation of the UN sanctions and which offers recommendations to the Security Council has so far not address the phenomenon of migrant workers extensively. Other panels of experts, related to other UN sanctions regimes have been more explicit about extraterritorial practices. For instance, the panel of experts for the Eritrea regime, has been very explicit about techniques used by the Eritrean regime to engage with its diaspora and to use diaspora taxes as an additional means of income.¹⁹ The

15) UNSC, *Non-proliferation/Democratic People's Republic of Korea*, S/PV.8019 (5 Augustus 2017), 3, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_8019.pdf (accessed 31 January 2018).

16) UNSC, *Non-proliferation/Democratic People's Republic of Korea*, S/PV.8042 (11 September 2017), 5, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_8042.pdf (accessed 31 January 2018).

17) UNSC, *Non-proliferation/Democratic People's Republic of Korea*, S/PV.8151 (22 December 2017), 9, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_8151.pdf (accessed 31 January 2018).

18) UNSC. S/RES/2397, § 8.

19) See e.g., Reports of the Monitoring Group on Somalia and Eritrea. UNSC, *Letter dated 18 July 2011 from the Chairman of the Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea addressed to the President of the Security Council*, S/2011/433 (18 July 2011), <http://undocs.org/S/2011/433>

inclusion of the migrant clauses in the latest DPRK sanctions regimes may offer renewed opportunity to discuss the migrant worker practices in next reports. Such reporting might have a certain protective value in itself and it may also inform other (domestic) accountability processes.²⁰

Conclusion

The conclusion of this essay is that the protective reach of UN sanctions for North Korean migrant workers is limited. The obligation to repatriate is, so far, unique to the North Korea sanctions regime. It is, however, not primarily inspired by human rights concerns, but rather functional in nature, aimed at curbing financial flows to Pyongyang. Given the temporal flexibility for implementation, the strength of the obligation is also rather tenuous. Moreover, specific concerns for the migration workers in question, concerning their workers' rights under ILO conventions, or the implications of their return from a human rights perspective, have not been considered at any great length. Nonetheless, the fact that the phenomenon is addressed at Security Council level may still have a certain stigmatising effect that radiates beyond the sanctions regime as such. If the practices are detailed by the panels of experts, their reports may buttress academic and civil society findings, thus contributing to a web of exposure and accountability, which may eventually lead to more formal process in particular at the domestic level.

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20) See for instance, possibilities of domestic redress as discussed by Cedric Ryngaert in this volume.

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