

*Understanding the North Korean Human Rights Act of 2004**

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The North Korean Human Rights Act of 2004 introduces new considerations on how the United States should address the problems posed by North Korea. The Act calls for human rights to be a key element in negotiations on the current nuclear weapons crisis. It links non-humanitarian aid to substantial improvements in human rights. It calls for a Special Envoy on Human Rights in North Korea to coordinate and promote human rights efforts. The Act also authorizes \$24,000,000 per year for the next four years to achieve its goals, which are to promote human rights in North Korea, promote a more durable humanitarian solution for North Korean refugees, increase monitoring and access to humanitarian assistance inside North Korea, promote information into and out of North Korea, and promote progress towards

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peaceful reunification under a democratic system of government. The Act emphasizes monitoring of humanitarian assistance inside North Korea to minimize the possibility that it could be diverted to political or military use. It also calls for pressuring China and the UNHCR to more vigorously protect North Korean refugees and recognizes the importance of nongovernmental organizations, UN bodies, and states in addressing the human rights issue. In addition, the Act contemplates a visionary, multilateral solution modeled after the Helsinki process that may allow for a fundamentally improved security situation in northeast Asia.

Introduction

The North Korean Human Rights Act of 2004 (the Act)¹ introduces substantial new considerations on how the United States (US) should address the problems posed by North Korea. Most notably, the Act raises human rights to a level of concern that makes it a key element for negotiations on the current nuclear weapons crisis. It also authorizes substantial funding for humanitarian assistance to North Korean refugees and other human rights-related causes. It links non-humanitarian aid to substantial improvements in human rights and recognizes the need for greater monitoring and access to humanitarian aid. US President George W. Bush signed the Act into law on October 18, 2004, after both the US House of Representatives and the Senate approved it unanimously.

This article first discusses the provisions of the North Korean Human Rights Act. Then it considers its implications beyond North Korean human rights. It concludes that the Act calls for a significantly altered approach in negotiating with North

¹ North Korean Human Rights Act of 2004, Public Law No. 108-333 (October 18, 2004).

Korea, offering a vision for a multilateral regional framework encompassing human and traditional security concerns that may provide greater hope for a fundamentally improved security situation.

The North Korean Human Rights Act of 2004

The Act includes major conceptual changes on how the United States should fashion its relationship with North Korea. Since the revelations in October 2002 of North Korea's pursuit of nuclear capabilities in violation of the Agreed Framework of 1994, the United States has been focused on resolving that issue exclusively, despite several other significant problems. It has steadfastly followed a multilateral approach by working with the Republic of Korea (ROK), China, Japan, and Russia in a series of negotiations aimed at solving the problem. Little progress has been made, however. The six-party talks have lost momentum, with the September 2004 talks canceled by North Korea. The North Koreans stalled to see if the outcome of the 2 November 2004, US Presidential election would perhaps favor them, but their failure to commit to another round has extended well beyond this date.

Significant Features

Without discussing the on-going nuclear crisis, the Act offers major conceptual changes on how to approach North Korea that would affect the issue. It specifically elevates human rights as a major consideration in how the US negotiates with North Korea. Section 101 of the Act states: "It is the sense of Congress that the human rights of North Koreans should remain a key element in future negotiations between the United States, North Korea, and other concerned parties in Northeast Asia." It creates the

position of Special Envoy on Human Rights in North Korea, who is to coordinate and promote human rights efforts and discuss human rights issues with North Korean officials.²

In addition, the Act expresses the sense of Congress that non-humanitarian assistance should be linked to substantial progress in human rights in North Korea. Section 202(b)(2) specifies areas for progress:

- basic human rights, including freedom of religion;
- family reunification between North Koreans and their descendants and relatives in the United States;
- information regarding Japanese and South Koreans abducted by North Korea and allowing them and their families to leave North Korea;
- reform of the North Korean prison and labor camp system and allowing independent monitoring of it; and
- decriminalization of political expression and activity.

The Act does not define “non-humanitarian assistance,” but it has been interpreted to mean economic and other assistance that is not humanitarian. “Humanitarian assistance,” as defined by Section 5 of the Act, is “assistance to meet humanitarian needs, including needs for food, medicine, medical supplies, clothing, and shelter.” Although the Act does not mention the nuclear issue, it appears that “non-humanitarian assistance” refers to fuel or other materials that might be part of a negotiated solution to the nuclear problem. (The Act does not link humanitarian assistance to human rights improvements; rather it is to “be provided on a needs basis, and not used as a political reward or tool of coercion.”³ However, it does condition increases in assistance on transparency and opportunity for monitoring.⁴)

² *Ibid.*, Section 107.

³ *Ibid.*, Section 202(b)(1)(B).

⁴ *Ibid.*, Section 202(a)(2).

A third potentially major conceptual change is that the Act calls for consideration of human rights initiatives on a multilateral basis, such as that provided by the Organization for Security and Cooperation in Europe (OSCE). The OSCE developed as a result of the Helsinki process. The Act specifically invokes the OSCE as an example of a regional framework for discussing human rights, scientific and educational cooperation, and economic and trade issues. Section 106(b) states “the United States should explore the possibility of a regional human rights dialogue with North Korea that is modeled on the Helsinki process, engaging all countries in the region in a common commitment to respect human rights and fundamental freedoms.”

These features fundamentally alter the current approach to North Korea. This is no surprise, given the fundamentally different basis for the Act. The human rights prism places the nuclear issue among many problems that require serious attention. These are reflected in the Act’s purposes, stated in Section 4, which in sum are to:

- promote human rights in North Korea;
- promote a more durable humanitarian solution for North Korean refugees;
- increase monitoring and access to humanitarian assistance inside North Korea;
- promote information into and out of North Korea; and
- promote progress towards peaceful reunification under a democratic system of government.

Factual Basis

The Act grounds these purposes in stark findings by Congress as to the conditions suffered inside North Korea and by North Koreans who have fled the country. Section 3 states in effect that:

- North Koreans are subject to a “cult of personality” glorifying

Kim Jong Il “that approaches the level of a state religion;”

- personal religious activities are severely repressed “with penalties that reportedly include arrest, imprisonment, torture and sometimes execution;”
- the “Penal Code is draconian, stipulating capital punishment and confiscation of assets for a wide variety of ‘crimes against the revolution;”
- an estimated 200,000 political prisoners in camps suffer forced labor, beatings, torture, testing of chemical and biological weapons, and executions (including killing of newborn babies), and many die from disease, starvation, and exposure;
- more than 2,000,000 North Koreans have died of starvation since the early 1990s because of the failure of the government distribution systems;
- nearly one out of every ten children in North Korea suffers from acute malnutrition and four out of every ten children in North Korea are chronically malnourished;
- North Korean women and girls, particularly those who have fled into China, are at risk of being kidnapped, trafficked, and sexually exploited inside China, where many are sold as brides or concubines, or forced to work as prostitutes; and
- China and North Korea have been “conducting aggressive campaigns to locate North Koreans who are in China without permission and to forcibly return them to North Korea, where they routinely face torture and imprisonment, and sometimes execution;” and
- China has also imprisoned foreign aid workers attempting to assist North Korean refugees.

Section 3 also notes that since 1995, the United States has provided more than 2,000,000 tons of humanitarian food assistance to the people of North Korea, primarily through the World Food Program, which has been denied the access necessary to properly monitor the delivery of food aid.

These Congressional findings therefore create the factual foundation for the actions stipulated by the Act.

Implementation

The Act seeks to achieve its purposes by specifying actions, including monitoring and reporting requirements, and supporting them financially, under three titles that cover human rights, humanitarian assistance, and North Korean refugees respectively. Provisions of these titles include:

- 1) The Act authorizes US\$2,000,000 for each fiscal year from 2005 to 2008 to support private, nonprofit organizations that promote human rights, democracy, the rule of law, and the development of a market economy in North Korea. Funds may also be used to support educational and cultural exchange programs.⁵

- 2) The Act also authorizes US\$2,000,000 for each fiscal year from 2005 to 2008 to support freedom of information in North Korea by increasing sources of information not controlled by the North Korean government, such as radios capable of receiving broadcasting from outside North Korea.⁶ The Secretary of State is required to submit a classified report on such actions to Congress not later than October 18, 2005 and in 2006, 2007, and 2008. The Act also calls for the Broadcasting Board of Governors to increase broadcasts to North Korea with a goal of providing 12-hour-per-day broadcasting, including broadcasts by Radio Free Asia and Voice of America. It must report to Congress not later than 120 days after the date of the enactment of this Act (which is February 15, 2005) on such broadcasting.⁷

⁵ *Ibid.*, Section 102(b)(1).

⁶ *Ibid.*, Section 104(b)(1).

⁷ *Ibid.*, Section 103.

- 3) The Act also recognizes the significant role the United Nations (UN) should play in improving human rights in North Korea and particularly lauds the UN Commission on Human Rights' appointment of a Special Rapporteur on the situation of human rights in North Korea. It also names other UN officials that should give particular attention to North Korea: two UN Working Groups (on Arbitrary Detention and on Enforced and Involuntary Disappearances) and five Special Rapporteurs (on extrajudicial executions; the right to food; freedom of opinion and expression; freedom of religion; and violence against women).⁸

- 4) The Act authorizes an additional US\$20,000,000 for each fiscal year from 2005 to 2008 for humanitarian assistance to North Koreans outside of North Korea.⁹ Such persons include refugees, defectors, migrants, and orphans, and women who are victims of trafficking or are in danger of being trafficked. In addition, the Act emphasizes monitoring of humanitarian assistance inside North Korea to minimize the possibility that it could be diverted to political or military use.¹⁰ It stipulates that significant increases in assistance should be conditioned upon substantial improvements in transparency, monitoring, and access to vulnerable populations throughout the country.¹¹ It also encourages other countries to use monitored, transparent channels, rather than direct, bilateral transfers. The Act requires the US Agency for International Development (USAID) to report to Congress on humanitarian assistance and improvements in transparency, monitoring, and access not later than 180 days after the enactment of the Act (which is April 16, 2005) and in 2006 and 2007.¹²

⁸ *Ibid.*, Section 105.

⁹ *Ibid.*, Section 203(c)(1).

¹⁰ *Ibid.*, Section 202(a)(1).

¹¹ *Ibid.*, Section 202(a)(2).

- 5) In addition to providing humanitarian assistance to North Korean refugees, the Act pressures China and the UN High Commissioner for Refugees (UNHCR) to do more to support them. It takes the legal position that China is obligated to provide UNHCR unimpeded access to North Koreans inside its border to enable the UNHCR to determine whether they are refugees (as opposed to “economic migrants,” as China routinely classifies them).¹³ Furthermore, the UNHCR must be allowed to determine whether these refugees require assistance, pursuant to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees and Article III, paragraph 5 of the 1995 Agreement on the Upgrading of the UNHCR Mission in the People’s Republic of China (PRC) to the UNHCR Branch Office in the PRC.¹⁴

The Act calls on the UNHCR, the United States, and other UNHCR donor governments to persistently urge China to abide by these commitments. It also stipulates actions UNHCR should take to effectively protect refugees. It even states that if China continues to refuse to provide UNHCR with access to North Koreans within its borders, the UNHCR should initiate arbitration proceedings pursuant to Article XVI of the UNHCR Mission Agreement and appoint an arbitrator for the UNHCR. The Act considers that any failure to do this “would constitute a significant abdication by the UNHCR of one of its core responsibilities.”¹⁵ The implication is that US funding to UNHCR may be at risk should UNHCR fail in its responsibilities. The Act states that if China begins fulfilling its obligations to North Korean refugees, the US should

¹² *Ibid.*, Section 201.

¹³ *Ibid.*, Section 3(18).

¹⁴ *Ibid.*, Section 304(a).

¹⁵ *Ibid.*, Section 304(b).

increase humanitarian assistance in China to help defray the costs.¹⁶

- 6) The Act requires that the Secretary of State shall undertake to facilitate applications pursuant to the US Immigration and Nationality Act by North Koreans seeking protection as refugees.¹⁷ The Act clarifies that North Koreans are not barred from refugee status or asylum in the US, including under the Immigration and Nationality Act, because of any right to ROK citizenship under the ROK Constitution.¹⁸

The Act requires the Secretary of State to report to Congress on these and other refugee-related issues, such as the circumstances facing North Korean refugees and migrants in hiding, particularly in China, and of the circumstances they face if forcibly returned to North Korea, and whether refugees have unobstructed access to US refugee and asylum processing.¹⁹ Additional reporting requirements include measures taken to assist individuals who have fled countries of particular concern for violations of religious freedom, identified pursuant to the International Religious Freedom Act of 1998.²⁰

Thus the Act sets forth US\$24,000,000 per year for the next four years to achieve its goals, with emphasis on the need for transparency in the use of these funds; requires extensive reporting to Congress to determine progress made; pressures China and the UNHCR to more vigorously protect North Korean refugees; recognizes the importance of nongovernmental organizations (NGOs), other UN bodies, and other states in

¹⁶ *Ibid.*, Section 304(a)(6).

¹⁷ *Ibid.*, Section 303.

¹⁸ *Ibid.*, Section 302.

¹⁹ *Ibid.*, Section 301.

²⁰ *Ibid.*, Section 305.

addressing the human rights issue; highlights this importance and the significance of human rights by appointment of a Special Envoy and by elevating human rights to a “key element” in negotiating with North Korea; and contemplates a visionary, multilateral solution modeled after the Helsinki process.

Implications

The implications of this Act may be monumental. It is a paradigm shift away from the current single-issue approach focusing solely on North Korean nuclear activities. It is a rejection of the 1994 Agreed Framework approach by espousing that no fuel should be provided to North Korea without a substantial improvement in human rights. It also substantially rejects the ROK’s Sunshine Policy and its variants. It seeks a visionary, multilateral security structure for the region that recognizes human security as well as military security.

Given its strong shift from the status quo, it is hardly surprising that it has not been well received by some parties. North Korea, of course, vehemently rejects it as part of a hostile US policy to “realize its wild ambition for regime change.”²¹ The ROK also disapproves, considering it counter-productive. ROK Prime Minister Lee Hae Chan has been quoted in response to the Act, “In no way do we want a collapse of North Korea.”²² In addition, China has been predictably cool, given the Act’s pressure on it. Even the Bush Administration has been less than enthusiastic, as it tries to push for negotiations. Secretary of State Powell has been careful not to say that he would definitely make human rights part of his negotiations with Pyongyang.²³

²¹ “North Korea Says Prospects Gloomy for Nuclear Talks,” *Reuters*, October 21, 2004.

²² James Brooke, “In Koreas, High Hopes for an Industrial Marriage,” *New York Times*, October 20, 2004.

That the Act would necessarily lead to the toppling of the Kim Jong Il regime, however, is a presumption that the Act itself does not make. Considering human rights does not necessarily equal the collapse of North Korea. Others have supported greater human rights considerations with respect to North Korea, most notably the Europeans. Kim Jong Il has been reaching out to Europe and seeking greater ties, demonstrated for example when he ordered that Euros replace US dollars in foreign commerce. North Korea even allowed a British Foreign Office Minister responsible for human rights to visit the country in 2004. European interest is therefore significant, potentially bolstering the notion of a Helsinki-style framework for comprehensively resolving the problems posed by North Korea. European states were invaluable in multilateralizing US-Soviet relations during the Helsinki talks, and they may facilitate the same effect in overcoming the US-North Korean impasse.

The Helsinki talks, the informal name for the Conference on Security and Cooperation in Europe (CSCE), which is the predecessor to the Organization on Security and Cooperation in Europe (OSCE), took place from 1973 to 1975.²⁴ In the Final Act, the participating states agreed to continue the multilateral process with periodic meetings. The CSCE offered a comprehensive view at a time when most negotiations and security organizations took a piecemeal approach to security. It was able to make progress by linking different elements of security. It gave participating states a stable channel of communication and created norms of conduct in addition to long-term cooperation. This was significant particularly given the climate of the times. During the Cold War,

²³ Steven R. Weisman, "Powell and Japan Ask North Korea to Resume Talks," *New York Times*, October 24, 2004.

²⁴ *The OSCE Handbook*, at <http://www.osce.org/publications/handbook/files/handbook.pdf> (last visited November 30, 2004). Follow-up meetings took place in Belgrade (October 4, 1977 - March 8, 1978), Madrid (November 11, 1980 - September 9, 1983) and Vienna (November 4, 1986 - January 19, 1989).

the CSCE multilateralized aspects of East-West relations by bringing neutral countries into the European security system on an equal basis with the members of NATO and the Warsaw Pact and thus changed the relations qualitatively. It broadened the scope of relations by introducing new fields of cooperation - most significantly, human rights.

The Helsinki Final Act encompassed three main sets of recommendations, known as “baskets.” Basket 1 related to the politico-military aspects of security, including a “Decalogue” of principles for guiding relations among participating states. Basket 2 concerned cooperation in several fields, including economics, science and technology, and the environment. Basket 3 dealt with “cooperation in humanitarian and other fields,” including human rights. The Decalogue consisted of:

1. Sovereign equality, respect for the rights inherent in sovereignty;
2. Refraining from the threat or use of force;
3. Inviolability of frontiers;
4. Territorial integrity of States;
5. Peaceful settlement of disputes;
6. Non-intervention in internal affairs;
7. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief;
8. Equal rights and self-determination of peoples;
9. Cooperation among States; and
10. Fulfillment in good faith of obligations under international law.

Achieving a similar list of norms for East Asia would admittedly be a challenge. The long-standing internal human rights problems of China would once again raise a potential obstacle. But applying some of the Helsinki concepts to North Korea may well lead to a solution that is more durable than a piecemeal agreement addressing the nuclear issue in isolation. Bringing in additional issues allows more opportunities for linkage, a key

factor in the success gained during the Helsinki process. Indeed, the North Korean Human Rights Act may not broaden the scope far enough, given that North Korea may possess one of the world's largest chemical weapons arsenals as well as some biological weapons capability. It also does not address missile proliferation, nor does it consider North Korea's trade in criminal wares, such as illegal drugs. Indeed the Act does not exhaust all of the human rights remedies that may be pursued against Kim Jong Il, such as prosecuting him for crimes against humanity.

Nonetheless, the North Korean Human Rights Act holds the seeds of potentially monumental change for the Korean peninsula. In addition to its legal requirements, it is a political statement; a manifesto for no longer tolerating the Kim Jong Il regime's horrendous excesses. The firm political grounding of the Act is evident in its legislative history. The version of the Act that passed the Senate on September 28, 2004 added two provisions to the version that had passed the House of Representatives on July 21, 2004. The Senate version added the notion of a regional OSCE-style framework as well as a Special Envoy on Human Rights in North Korea. The Special Envoy was based on the "Danforth model" for Sudan. As Special Envoy for Peace in Sudan, former Senator John Danforth became the focus of US policy for Sudan and was therefore able to raise Sudan to a much higher priority than it otherwise would have had.²⁵

The Act was able to pass both the House and Senate with unanimous, bipartisan support a mere five weeks before a highly divisive American presidential election. This remarkable action was due primarily to the mobilization of evangelical Christians. The Korean-American Church Coalition (KCC), for example, gave the North Korean human rights issue momentum. Some

²⁵ Stan Guthrie, *North Korean Human Rights Act a 'Miracle,' interview of Michael Horowitz*, at <http://www.christianitytoday.com> (October 4, 2004).

1500 Korean-American pastors met in Los Angeles to create a powerful force that Congress heeded. In addition, Senators Sam Brownback and Evan Bayh worked with evangelicals on the issue, as did Jewish groups.²⁶ The religion-related provisions of the Act thus have added meaning, considering the Act's very existence is due to evangelical support. The result of these efforts has been overwhelming support for the Act and the sense that if a politician failed to support it, a member of the evangelical coalition would appear in his home town to air a film on the gulags of North Korea. That heart-felt support and the unanimous passage of the Act in both houses of Congress bodes well for the effectiveness of the Act. Time will likely prove that principle trumps diplomatic expediency in making true progress on North Korea.

Conclusion

The North Korean Human Rights Act of 2004 elevates human rights to its rightful place in negotiations with North Korea as a serious issue that must be addressed in addition to the nuclear problem. It calls for a Special Envoy on Human Rights in North Korea and calls for consideration of a regional framework based on the Helsinki process model. It authorizes substantial funding for humanitarian assistance and promotion of human rights. Its vision for a multilateral solution that addresses North Korea's problems comprehensively has the potential to improve fundamentally the security situation of East Asia.

²⁶ *Ibid.*