

THE NORTH KOREAN “CRIMES AGAINST HUMANITY”:
ESTABLISHING LEGAL JUSTIFICATION FOR INTERNATIONAL
MILITARY ACTION

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North Korea has long been an international concern, not only for the United States, but also for its allies in the Pacific region.¹ These concerns have been elevated in recent years with North Korea’s intentions to become a nuclear power and subsequent rounds of testing.² Most of the recent international focus has been spent attempting to curb North Korea’s nuclear ambitions, yet, there has been little response addressing its human rights issues and the generations-long atrocities against the North Korean people by its rulers.³ The extent of the atrocities were exposed in 2014, when the United Nations Human Rights Council (UNHRC) released a report outlining the lack of human rights in North Korea and noting that “crimes against humanity” (CAH) had been committed.⁴ The same evidence indicates North Korean leadership has also committed genocidal and democidal acts. Democide, a fairly new term, is “[t]he murder of any person or people by a government, including genocide, politicide, and mass murder.”⁵ Given the historical and current treatment of North Korean citizens by its government, this

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¹ See Rex Tillerson, Secretary of State of the U.S., Remarks at the United Nations Security Council Ministerial Session on D.P.R.K., (Apr. 28, 2017) (transcript available at <https://www.state.gov/secretary/remarks/2017/04/270544.html>).

² *North Korea’s Push over the Years to Become a Nuclear Power*, L.A. TIMES (Apr. 14, 2017), <http://www.latimes.com/world/la-fg-north-korea-nuclear-timeline-20170414-htmlstory.html>.

³ Olivia Enos, *What the United States Can Do to Address North Korea’s Human Rights Crisis*, THE FEDERALIST (Apr. 17, 2017), <http://thefederalist.com/2017/04/17/united-states-can-address-north-koreas-human-rights-crisis/>.

⁴ See U.N. Human Rights Council on Its Twenty-Fifth Session, *Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea*, U.N. Doc. A/HRC/25/CRP.1 (2014) [hereinafter U.N. Human Rights Council].

⁵ R.J. RUMMEL, DEATH BY GOVERNMENT Ch. 2 (Transaction Publishers, 1994).

phrase would adequately define those atrocities.⁶ Yet, does it matter if North Korean leadership is committing genocide, democide, or “crimes against humanity,” and if it does, what should be the international response under current international law? No matter what the international response, there are no good options. The international community could choose to do nothing and maintain the status quo, or it could rely on international law to properly address the crimes against humanity (CAH) committed by North Korean leadership. The international community could also use military action to end the crimes against humanity. All options have serious flaws.

The first two parts of this Article will present some brief background information about North Korea, some of the findings of the *UNHRC’s Commission of inquiry on human rights in the Democratic People’s Republic of Korea* (“the Commission”), how those findings fit into the definitions of genocide, democide, and CAH, and why North Korean leadership should be charged with CAH. However, charging is only part of the equation. The third part of this Article will explore why relying on international law to end the North Korean CAH, particularly relying on the International Criminal Court (ICC) and Universal Jurisdiction (UJ), are not viable options. Finally, this Article will discuss the propriety of military action: why state sovereignty is not the issue it used to be, the impact the “Responsibility to Protect” will have on state sovereignty, and how inaction by the United Nations (UN) Security Council to address CAH around the world has weakened its legitimacy. Ultimately, the facts presented will show that rapidly changing international law has eroded the notion of the sanctity of state sovereignty, and because the United Nations Security Council (UNSC) has failed to protect the citizens of North Korea from its own leadership committing crimes against humanity, international military action is the only option to end the long-standing atrocities.

I. NORTH KOREA AND THE COMMISSION’S REPORT

The most reclusive, secretive country on Earth, North Korea is a mystery to most people.⁷ This can most likely be attributed to the policy established by the country’s first leader, Kim il-Sung, who “created the country’s policy of *juche* or self-reliance,” resulting in North Korea cutting itself off from the rest of the world politically, economically, and

⁶ See *id.*; see also Yael Stein and Elihu D. Richter, *Suspected Mass Killings*, GENOCIDE PREVENTION NOW, www.genocidepreventionnow.org (last visited Oct. 4, 2017).

⁷ See Charlotte Alfred, *How North Korea Became So Isolated*, HUFF POST (Oct. 17, 2014, 5:42 PM), http://www.huffingtonpost.com/2014/10/17/north-korea-history-isolation_n_5991000.html.

relying on its own military for protection.⁸ Yet, *juche* is now used as an “ideological weapon to justify its dictatorship and hereditary power succession plan . . . a means to justify its closed-door system externally.”⁹ For nearly 70 years, its Supreme Leaders, Kim il-Sung, his son, Kim Jung-il, and now Kim Jung Un, Kim il-Sung’s grandson,¹⁰ have abused, manipulated, and suppressed the human rights of the North Korean people under the principle of *juche*.¹¹ Little good comes from its political situation, and for the most part, the world only hears about North Korea when it is threatening to obtain and/or use nuclear weapons.

It is estimated that North Korea has a population of just over 25 million people.¹² Despite spending an estimated \$1.3 billion on its missile program in 2012,¹³ North Korea has one of the world’s least open economies, with a gross domestic product of \$1800 per capita, and has an estimated 25.6% unemployment rate.¹⁴ North Korea spends about one third of its income on military spending and has 1.2 million military members, twice as many as South Korea.¹⁵ A portion of North Korea’s citizens do not even have electricity in their homes, and those that do have electricity only receive it “a few hours per day.”¹⁶ There is no independent media, and the state relies on international aid to feed its population.¹⁷ The UN World Food Programme (WFP) estimates that

⁸ *15 Fascinating Facts about Mysterious North Korea*, USA TODAY (July 17, 2017 10:17 AM), <https://www.usatoday.com/story/news/world/2017/03/17/fascinating-facts-north-korea/99296938/>.

⁹ See Columbia University, *Juche Ideology*, http://www2.law.columbia.edu/course_00S_L9436_001/North%20Korea%20materials/3.htm 1 (last visited Sept. 17, 2017); Dae-Kyu Yoon, *The Constitution of North Korea: Its Changes and Implications*, 27 *FORDHAM INT’L L. J.* 1289, 1291 (2004).

¹⁰ See Central Intelligence Agency, *The World Factbook: North Korea*, <https://www.cia.gov/library/publications/the-world-factbook/geos/kn.html> (last updated Sept. 6, 2017).

¹¹ See *15 Fascinating Facts about Mysterious North Korea*, *supra* note 8.

¹² Central Intelligence Agency, *supra* note 10.

¹³ Ramy Inocencio, *North Korea’s Rocket Launches Cost \$1.3 Billion*, CNN (Dec. 12, 2012), <http://www.cnn.com/2012/12/12/business/north-korea-rocket-cost/index.html>.

¹⁴ Central Intelligence Agency, *supra* note 10. See generally *North Korea’s economic growth climbs to 17-year high in 2016 despite sanctions targeting nuclear program*, CNBC (July 20, 2017 11:26 PM), <https://www.cnbc.com/2017/07/20/north-koreas-economic-growth-climbs-to-17-year-high-in-2016-despite-sanctions-targeting-nuclear-program.html> (noting that the North Korean economy is growing, even in light of the sanctions).

¹⁵ *20 Facts about North Korea*, USA TODAY (Apr. 13, 2013), <http://www.usatoday.com/story/news/world/2013/04/13/north-korea-factoids/2078831/>.

¹⁶ See *id.*; Rick Newman, *Here’s How Lousy Life is in North Korea*, U.S. NEWS (Apr. 12, 2013), <https://www.usnews.com/news/blogs/rick-newman/2013/04/12/heres-how-lousy-life-is-in-north-korea>.

¹⁷ *20 Facts about North Korea*, *supra* note 15.

more than 70% of the North Korean population is food insecure, with only about a fifth of its land being arable, and that children in WFP nurseries showed a 25% stunting prevalence due to the lack of food consumption.¹⁸ “In 2015, the U.N. [WFP] asked foreign donors for . . . \$111 million in contributions.”¹⁹ However, donors are reluctant to help North Korea because of restrictions on “humanitarian workers and international fears over its nuclear ambitions.”²⁰ There is no religious freedom in North Korea, nor is there an independent judicial system.²¹ North Korea is considered to be the third most corrupt country on earth.²²

In 2004, the UN Commission on Human Rights (UNHRC) adopted a resolution which expressed its concerns about the human rights issues in North Korea.²³ Ten years later, it was a 2014 groundbreaking United Nations (UN) report that showed how dire the humanitarian situation is in North Korean, putting the statistics into perspective.²⁴ In the UNHRC’s “Report of the detailed findings of the commission of inquiry on human rights in the Democratic People’s Republic of Korea,” after an eleven-month investigation, interviewing

¹⁸ *Democratic People’s Republic of Korea*, WORLD FOOD PROGRAMME, <http://www.wfp.org/countries/korea-democratic-peoples-republic> (last visited Sept. 18, 2017); see also *DPRK Country Brief*, WORLD FOOD PROGRAMME, http://documents.wfp.org/stellent/groups/public/documents/ep/wfp276263.pdf?_ga=2.143296828.840591394.1505785676-1256538179.1505785676 (last visited Sept. 18, 2017). According to the WFP, “81 percent of DPRK’s population do not have acceptable diversity in their diet. People consume 25 percent less protein and 30 percent less fat than required for a healthy life, according to international standards. One in three children under five years of age, and almost half of the children between 12 and 23 months of age, are anemic.” *Id.*

¹⁹ Olivia Enos & Bruce Klinger, *Next Steps for Human Rights in North Korea*, HERITAGE FOUND. (Jan. 12, 2016), <http://www.heritage.org/asia/report/next-steps-human-rights-north-korea>.

²⁰ Magdalena Mis, *U.N. Calls for \$111 Million for Crucial Aid for North Korea*, REUTERS (Apr. 9, 2015), <http://www.reuters.com/article/us-northkorea-aid-un-idUSKBN0N01YK20150409>.

²¹ *20 Facts about North Korea*, *supra* note 15.

²² See *Corruption Perceptions Index 2016*, TRANSPARENCY INT’L, https://www.transparency.org/news/feature/corruption_perceptions_index_2016 (last visited Sept. 20, 2017) (noting Somalia as the most corrupt nation, followed by South Sudan); Aza Wee Sile, *These are the World’s Most Corrupt Countries*, CNBC (Jan. 24, 2017, 11:07 PM), <https://www.cnbc.com/2017/01/24/these-are-the-worlds-most-corrupt-countries.html>.

²³ Young Sok Kim, *Responsibility to Protect, Humanitarian Intervention and North Korea*, 5 J. INT’L BUS. & L. 74, 92 (2006).

²⁴ U.N. Human Rights Council, *supra* note 4, at 5–6.

240 witnesses around the world,²⁵ the Commission found North Korean leadership committed crimes against humanity and made recommendations as to how to address those crimes.²⁶ Shortly after its findings, the Honorable Michael Kirby, the Chair of the Commission, provided *Ten Lessons*, which gave additional insight into the investigation.²⁷ The standard of proof the Commission used was a “reasonable grounds for belief” standard, and the Commission compared the testimony it received against those legal obligations that were binding on North Korea “as a state party to international human rights treaties.”²⁸ He notes that even though there was so much supporting evidence on the North Korean human rights violations and CAH, the report was actually restrained, so as to give a voice to the victims and their testimony.²⁹

The denial of food to the people by the government was highlighted by the Commission as a means of population control.³⁰ The Commission noted how the government impeded the delivery of food aid by imposing non-humanitarian conditions on aid organizations.³¹ Those organizations were then prevented from assessing the needs of the North Korean people and the monitoring of aid, particularly to the most affected regions and groups in North Korea.³² Starvation and its measured use as a means of control over the population and punishment in detention facilities were also addressed by the Commission, resulting in the deaths of political and ordinary prisoners.³³

The North Korean political prison camps received a great amount of attention from the Commission.³⁴ The Commission estimated that there are between 80,000 and 120,000 political prisoners currently detained in four large political prison camps.³⁵ The Commission also estimated that over time, the prison camp population is “gradually

²⁵ See *id.* at 10–11 (referencing North Korea as the Democratic People’s Republic of Korea (DPRK)). For purposes of this paper, DPRK will be replaced by North Korea.

²⁶ *Id.* at 319–20, 365–72.

²⁷ Michael Kirby, *UN Commission of Inquiry on Human Rights Violations in the Democratic People’s Republic of Korea: Ten Lessons*, 15 MELBOURNE J. INT’L L. 291 (2014) (providing suggestions and conclusions that he learned from his role as chair of the inquiry).

²⁸ *Id.* at 298.

²⁹ *Id.*

³⁰ *Life in North Korea: Executions, Starvation and Fear*, CHANNEL 4 NEWS (Feb. 17, 2014), <https://www.channel4.com/news/north-korea-united-nations-report-crimes-against-humanity>; see also U.N. Human Rights Council, *supra* note 4, at 339–40.

³¹ U.N. Human Rights Council, *supra* note 4, at 189.

³² *Id.*

³³ *Id.* at 323, 330–31, 339.

³⁴ See *id.* at 323–28.

³⁵ *Id.* at 226.

eliminated through deliberate starvation, forced labour, executions, torture, sexual violence including rape and the denial of reproductive rights enforced through punishment, forced abortion and infanticide.”³⁶ It is estimated that over the past fifty years, “hundreds of thousands of political prisoners” have died in these camps.³⁷

When it comes to law enforcement, the Commission found that it essentially does not exist.³⁸ The government controls with fear, and the police and security forces are part of the conduit for the creation of fear.³⁹ This essentially makes it impossible for the citizens of North Korea to hold those in authority accountable.⁴⁰ In ruling through fear, the Commission explored the intertwining between the North Korean government agencies; there is a high degree of “centralized coordination” between the different government agencies when it comes to the “detention, execution and disappearances of individuals.”⁴¹ The Commission found that the families of many of these individuals are not informed about the individual’s location or fate.⁴² “Persons accused of political crimes therefore become victims of enforced disappearance. Making the suspect disappear is a deliberate feature of the system that serves to instill fear in the population”⁴³ In relation to enforced disappearance, it is important to note here that human trafficking is another prevalent human rights issue in North Korea, as it was recently

³⁶ *Id.* at 270.

³⁷ *Id.* The Commission noted that prisoners in the “ordinary prison system” are “subjected to deliberate starvation and illegal forced labour. Torture, rape and other arbitrary cruelties at the hands of guards and fellow prisoners are widespread and committed with impunity.” *Id.*; see also Hannah Lee, *A Call for Aggressive Media Campaign Regarding DPRK Prison Camps*, 12 NW. J. INT’L HUM. RTS. 213, 215 (2014) (raising additional discussion on the North Korean prison camps, or *kwan-il-so*).

³⁸ See U.N. Human Rights Council, *supra* note 4, at 269.

³⁹ *Id.*

⁴⁰ *Id.* “[T]he police and security forces of the Democratic People’s Republic of Korea systematically employ violence and punishment that amount to gross human rights violations in order to create a climate of fear that pre-empts any challenges to the current system of government and to the ideology underpinning it The institutions and officials involved are not held accountable. Impunity reigns.” *Id.*

⁴¹ *Id.*

⁴² *Id.* at 269–70.

⁴³ *Id.* at 269. “Gross human rights violations in the Democratic People’s Republic of Korea in respect of detention, execution and disappearances are characterized by a high degree of centralized coordination between different parts of the extensive security apparatus. The State Security Department, Ministry of People’s Security and the Korean People’s Army Military Security Command regularly subject persons accused of political crimes to arbitrary arrest . . . [and subsequent] incommunicado [detention] for prolonged periods of time.” *Id.*

reported that North Korea has sent 50,000 laborers to Russia in exchange for \$120 million, keeping 90% of the laborers wages.⁴⁴

The use of death is also significant tool used by the North Korean government.⁴⁵ The Commission found there is no standard practice of executions.⁴⁶ Executions may happen with or without a trial, in public or in secret, and particularly disturbing, the crimes are often not very egregious.⁴⁷ Public executions serve “to instil fear in the general population.”⁴⁸ As one could reasonably expect, the Commission found that torture is a feature of the interrogation process in North Korea, especially in cases involving political crimes.⁴⁹

The Commission found that in order to ensure a “pure Korean race,” North Korean women who escape to China, and are repatriated, are forced to have abortions (or infanticide).⁵⁰ “Forced abortions are carried out on the premise that all repatriated pregnant women could be carrying babies conceived by Chinese men.”⁵¹ The Commission also found that, in order to maximize state control and limit the flow of information, the government restricts citizens’ ability to leave their own province or to travel within the country, which came “at the expense of social and familial ties.”⁵²

The Commission’s conclusions were eye opening. The Commission opined that the government’s “monopolization of access to food has been used as an important means to enforce political loyalty” and that food distribution was “prioritized [to] those who [were] useful to the survival of the current political system at the expense of those deemed to be expendable.”⁵³ “Citizens’ complete dependency on the [S]tate led to one of the worst cases of famine in recent history,” and government officials had “only recently come to tolerate the fact that

⁴⁴ Andrew O’Reilly, *Kim Jong Un sends North Korean slaves to Russia to earn cash for regime*, FOX NEWS (July 14, 2017), <http://www.foxnews.com/world/2017/07/14/kim-jong-un-sends-north-korean-laborers-to-russia-to-earn-cash-for-regime.html>.

⁴⁵ See U.N. Human Rights Council, *supra* note 4, at 269–70.

⁴⁶ See *id.* at 262, 265.

⁴⁷ *Id.* at 262–268 (“Many victims were executed for economic crimes such as embezzling goods from state factories or stealing food in order to survive.”).

⁴⁸ *Id.* at 270. See generally Justin McCurry, *North Korea defence chief reportedly executed with anti-aircraft gun*, THE GUARDIAN (May 13, 2015), <https://www.theguardian.com/world/2015/may/13/north-korean-defence-minister-executed-by-anti-aircraft-gun-report> (reporting that in 2015, Kim Jung-un allegedly used anti-aircraft fire to execute his defense chief, Hyon Young-chol, after accusing him of disrespectful behavior).

⁴⁹ See U.N. Human Rights Council, *supra* note 4, at 115.

⁵⁰ *Id.* at 122.

⁵¹ *Id.*

⁵² *Id.* at 143.

⁵³ *Id.* at 366.

markets can no longer be fully suppressed.”⁵⁴ Nonetheless, the Commission felt that instead of “embracing reforms to realize the right to food, [North Korea] maintains a system of inefficient economic production and discriminatory resource allocation that inevitably produces more unnecessary starvation among its citizens.”⁵⁵

The Commission’s conclusions regarding the use of political camps was particularly damning, stating that “[p]ublic executions and enforced disappearance to political prison camps serve as the ultimate means to terrorize the population into submission. The [S]tate’s violence has been externalized through [S]tate-sponsored abductions and enforced disappearances of people from other nations. These international enforced disappearances are unique in their intensity, scale and nature.”⁵⁶ The Commission found there is no escaping North Korea and to do so puts a citizen at grave risk.⁵⁷ “[North Korea] systematically uses violence and punishment to deter its citizens from exercising their human right to leave the country. Persons who are forcibly repatriated from China are commonly subjected to torture, arbitrary detention, summary execution, forced abortions and other sexual violence.”⁵⁸ It is worth noting that in December 2017, the War Crimes Committee of the International Bar Association issued a separate report from the Commission that specifically addressed the North Korean political camps. In this report, the War Crimes Committee concluded that ten of eleven crimes against humanity, as listed in the Rome Statue of the ICC, had been committed by North Korean government officials, including Kim Jong-Un.⁵⁹ The War Crimes Committee also made recommendations, which will be addressed shortly.

Ultimately, the Commission found that the “long-standing and ongoing patterns of systematic and widespread violations . . . [met] the high threshold required for proof of crimes against humanity in

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*; see also Michele Park Sonen, *Without a Trace: The U.N. Commission of Inquiry’s Recognition of North Korea’s Enforced Disappearance of South Korean Citizens*, 37 U. HAW. L. REV. 73, 75 (2015) (citing more information on North Korean state sponsored abductions).

⁵⁷ See U.N. Human Rights Council, *supra* note 4, at 366.

⁵⁸ *Id.*; see also Press Release, Amnesty Int’l, *China Urged to Avoid Forced Repatriation of North Korean Defectors* (Feb. 14, 2012), <https://www.amnesty.org/en/press-releases/2012/02/china-urged-avoid-forced-repatriation-north-korean-defectors/> (noting that China routinely repatriates North Koreans).

⁵⁹ Hogan Lovells, *Report: Inquiry on Crimes Against Humanity in North Korean Political Prisons*, WAR CRIMES COMM. OF THE INT’L BAR ASS’N 2 (Dec. 2017).

international law.”⁶⁰ The Commission indicted North Korean leadership, stating that, “[t]he perpetrators enjoy impunity. [North Korea] is unwilling to implement its international obligation to prosecute and bring the perpetrators to justice, because those perpetrators act in accordance with State policy.”⁶¹

The Commission went further, calling out the international community for its response to the North Korean atrocities, noting (1) that North Korea for decades has pursued an agenda involving crimes that “shock the conscience of humanity,” (2) that the international community’s response was inadequate, and (3) that the international community must accept its “*responsibility to protect* the people of [North Korea] from crimes against humanity, because the government of [North Korea] has manifestly failed to do so.”⁶²

Finding crimes against humanity had been committed, the Commission addressed individual criminal accountability stating the UN “must ensure that those most responsible for the crimes against humanity committed in [North Korea] are held accountable.”⁶³ The Commission felt an appropriate avenue would be a “Security Counsel referral of the situation to the International Criminal Court or the establishment of an ad hoc tribunal by the United Nations,” but in the interim, “[u]rgent accountability measures should be combined with a reinforced human rights dialogue, the promotion of incremental change through more people-to-people contact and an inter-Korean agenda for reconciliation.”⁶⁴

⁶⁰ U.N. Human Rights Council, *supra* note 4, at 366.

⁶¹ *Id.*

⁶² *Id.* (emphasis added). The Commission further states, “In particular, this responsibility must be accepted in the light of the role played by the international community (and by the great powers in particular) in the division of the Korean peninsula and because of the unresolved legacy of the Korean War. These unfortunate legacies help not only to explain the intractability of the human rights situation but also why an effective response is now imperative.” *Id.*

⁶³ *Id.* at 366–67.

⁶⁴ *Id.* “The prohibition of crimes against humanity forms part of the body of peremptory norms (*jus cogens*) that bind the entire international community as a matter of customary international law. Individuals who commit crimes against humanity in [North Korea] may therefore be held responsible on the basis of international customary law, even though [North Korea] has not yet included crimes against humanity in its domestic criminal law and is not a State party to the Rome Statute of the International Criminal Court (Rome Statute). The Commission also recalls the established principle of international law that perpetrators of crimes against humanity are not relieved of criminal responsibility on the basis that they have acted on superior orders, because orders to commit crimes of such gravity are manifestly unlawful.” *Id.* at 359.

Nonetheless, despite its exhaustive findings, the Commission declined to find that the North Korean government committed [political] genocide against its people, stating:

The Commission is sympathetic to the possible expansion of the current understanding of *genocide*. However, in light of finding many instances of crimes against humanity, the Commission does not find it necessary to explore these theoretical possibilities here. The Commission emphasizes that crimes against humanity, in their own right, are crimes of such gravity that they not only trigger the responsibility of the state concerned, but demand a firm response by the international community as a whole to ensure that no further crimes are committed and the perpetrators are held accountable.⁶⁵

The North Korean reaction to the Commission's findings was as expected. The state news called the witnesses who testified "human scum"⁶⁶ and stated that "the international community should 'mind its own business'."⁶⁷

In Mr. Kirby's *Ten Lessons* from the Commission, he acknowledged the international community's "tendency to view 'genocide' as the gold standard of international crime," but while there were some sympathetic views with respect to whether there was actual genocide, the proof of crimes against humanity was ample, and it was not necessary for the Commission to address genocide.⁶⁸ Finding "crimes against humanity" have occurred, the Commission sidestepped the issue of genocide.⁶⁹ But, did the Commission get it right? Is *genocide* the more appropriate term for the atrocities committed by the North Korean leadership?

⁶⁵ *Id.* at 351 (emphasis added).

⁶⁶ Kirby, *supra* note 27, at 296.

⁶⁷ *Id.* at 15. Kirby noted that in response to this comment, the Commission told the UNSC, "[These] crimes are indeed the world's "business" and the world is watching. Respectfully, if this is not a case for action by the Security Council, it is hard to imagine one that ever would be." *Id.*

⁶⁸ *Id.* at 302–03.

⁶⁹ *Id.* at 303–04.

II. CRIMES AGAINST HUMANITY, GENOCIDE, AND
DEMOCIDE: WHY DOES IT MATTER WHAT WE CALL THE
NORTH KOREAN ATROCITIES?

A. *Crimes Against Humanity*

The phrase “Crimes Against Humanity” (CAH) first appeared in international law in the “Charter of the International Military Tribunal,” which was set up to hear the trial at Nuremberg in the aftermath of WWII and to address prosecution and punishment of major war criminals.⁷⁰ Article 6 (c) of the Tribunal defined CAH as,

[N]amely, murder[,] extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds, in furtherance of or in connection with any crime within the jurisdiction of the International Tribunal, whether or not in violation of the domestic law of the country where perpetrated.’

‘Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.’⁷¹

In her article, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, Beth Van Schaack notes that the “notion of crimes against humanity has proven to be the real legacy of Nuremberg”⁷² However, the problem with “crimes against humanity” in the Nuremberg courts is that the tribunal was limited in its jurisdiction to those crimes committed before and during the war, establishing a “war nexus.”⁷³

The evolution of CAH has developed significantly since Nuremberg.⁷⁴ In 1993, the UN Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY), an ad hoc court established in response to “mass atrocities then taking place

⁷⁰ Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT’L L. 787, 789–92 (1999).

⁷¹ *Id.* at 801 & n.53; International Military Tribunal, Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg Germany (Commencing Nov. 20, 1945) (1946).

⁷² Van Schaack, *supra* note 70, at 790–91.

⁷³ *Id.* at 791–93.

⁷⁴ *Id.* at 819.

in Croatia and Bosnia and Herzegovina.”⁷⁵ Article 5 of the ICTY stated, “The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, other inhumane acts.”⁷⁶

Nonetheless, the ICTY still retained a focus on “armed conflict” when it came to CAH.⁷⁷ However, the requirement of a war nexus changed in 2002 with the adoption of the Rome Statute of the International Criminal Court (ICC), which took out a war nexus.⁷⁸ Article 7 of the Rome Statute provides a much more expansive definition of CAH, with a focus on widespread or systematic attacks on any civilian population.⁷⁹

The Rome Statute provides a legal definition, but in layman’s terms, crucial is the notion that CAH’s are generally calculated acts, where “either [through] governmental policy, or of a widespread or systematic practice of atrocities tolerated, condoned, or acquiesced by a government or a de facto authority.”⁸⁰ The relatively quick evolution of the crime of CAH in international law is significant in the case against North Korean officials, as it expanded the scope of crimes prosecutors could charge offenders,⁸¹ and a charge of “crimes against humanity” appears to be the most appropriate charge. Nonetheless, based on the Commission’s findings, why is genocide not the appropriate charge, and, does it really matter?

⁷⁵ ABOUT THE ICTY, *United Nations – International Criminal Tribunal for the Former Yugoslavia*, <http://www.ity.org/en/about> (last visited Feb. 17, 2017).

⁷⁶ *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, UNITED NATIONS (Sept. 2009).

⁷⁷ *Id.*; see Maury D. Shenk et al., *International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 37 INT’L L. 551, 564 (2003) (describing focus of court on war crimes and armed conflict).

⁷⁸ Rome Statute of the International Criminal Court, art 7, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute], https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

⁷⁹ *Id.*

⁸⁰ *Id.*; see also ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 64 (Oxford University Press 2003).

⁸¹ Grace M. Kang, *A Case for the Prosecution of Kim Jong Ill for Crimes Against Humanity, Genocide, and War Crimes*, 38 COLUM. HUM. RTS. L. REV. 51, 114 (2006) (arguing the expanded scope of CAH can be used to prosecute).

B. Genocide v. Democide

In 1948, shortly after the end of World War II, the United Nations General Assembly adopted Resolution 260 (III), known as the Convention on the Prevention and Punishment of the Crime of Genocide, more commonly known as the Genocide Convention.⁸² The Convention defines genocide as to include "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group," such as:⁸³

- a. Killing members of the group;
- b. Causing serious bodily or mental harm to members of the group;
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d. Imposing measures intended to prevent births within the group;
- e. Forcibly transferring children of the group to another group.⁸⁴

The Convention further "declar[ed] that there can be no defense of sovereign immunity, require[d] states to adopt [] legislation so that genocide can be punished by [its] own courts, and oblige[d] countries to extradite genocidal suspects."⁸⁵ Since its inception in 1948, the Convention has been ratified by two thirds of the member states.⁸⁶ It wasn't until November 1988 that the United States signed the Convention.⁸⁷ North Korea acceded to the Convention in 1989.⁸⁸

In July 2002, the Rome Statute entered into force, with a purpose to "investigate and, where warranted, [try] individuals with the gravest crimes of concern to the international community: genocide, war crimes, and crimes against humanity."⁸⁹ As part of the statute, a new

⁸² G.A. Res. 260 (III), ¶ 1 (Dec. 9 1948).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ WILLIAM SCHABAS, SPECIAL REPORT 41: THE GENOCIDE CONVENTION AT FIFTY 2 (United States Institute of Peace ed., Jan. 7, 1999).

⁸⁶ *Id.*

⁸⁷ *See id.*

⁸⁸ Morse Tan, *International Humanitarian Law and North Korea: Another Angle for Accountability*, 98 MARQ. L. REV. 1147, 1185–88 (2015).

⁸⁹ *African Union: Resolution Urges States to Leave ICC*, LIBRARY OF CONG., <http://www.loc.gov/law/foreign-news/article/african-union-resolution-urges-states-to-leave-icc/> (last visited Sep. 1 2017); Dr. Hans Corell, *International Criminal Law – How Long Will Some Miss the Missing Link?* 37 CASE W. RES. J. INT'L L. 11, 11–15 (2005).

text on the crime of genocide was agreed upon.⁹⁰ Article 6, Genocide, was considered an important step in clarifying what genocide is and how it can be identified.⁹¹ The statute splits up Genocide into five categories:

1. Genocide by killing;
2. Genocide by causing serious bodily or mental harm;
3. Genocide by deliberately inflicting conditions of life calculated to bring about destruction;
4. Genocide by imposing measures to prevent births; and
5. Genocide by forcibly transferring children of a group to another group.⁹²

Genocide is recognized “as an international crime that the parties to the convention agreed to ‘undertake to prevent and punish’” and that it “explicitly and implicitly recognized that international actors had a duty to *groups* of any country that were at risk of genocide”⁹³ The Genocide Convention “obligated signatories to prevent and punish the crime.”⁹⁴ From a legal perspective, had the Commission called the North Korean “crimes against humanity,” genocide, there would be an immediate call to act from the international community, an obligation to act.⁹⁵ The Chairman of the Commission recognized this, acknowledging that by taking the position it did, the Commission was demonstrating its preference for “prudence and restraint.”⁹⁶

Of course, the obligation to act has been a long-standing criticism to how the UN (and the U.S.) handled the Rwandan and Bosnian genocides.⁹⁷ Beyond the legalities, there is also the historical perspective: the images that come to mind when talking about well-documented genocide are real. The slaughter of Jews, gypsies, and homosexuals by Nazis and the murder of the Tutsis by the Hutus in Rwanda are two of the best examples of witnessed and documented genocide.⁹⁸ People saw the methods, the calculations, the death, and the horror. However, genocide has been used too often to describe social

⁹⁰ See Rome Statute, *supra* note 78, art 6; see also G.A. Res. 260(III), ¶ 1.

⁹¹ Thomas E. Davies, *How the Rome Statute Weakens the International Prohibition on Incitement to Genocide*, 22 HARV. HUM. RTS. J. 245, 245 (2009).

⁹² Rome Statute, *supra* note 78, art 6

⁹³ SCOTT STRAUS, FUNDAMENTALS OF GENOCIDE AND MASS ATROCITY PREVENTION 3 (United States Holocaust Memorial Museum 2016) (emphasis added).

⁹⁴ *Id.*

⁹⁵ See G.A. Res. 60/1, ¶¶ 138, 139 (Oct. 24, 2005).

⁹⁶ Kirby, *supra* note 27, at 13, 14.

⁹⁷ See generally David Scheffer, *Lessons from the Rwanda Genocide*, 5 GEO. J. 125, 127–132 (2004) (describing criticism of US under the Genocide Convention).

⁹⁸ Gregory P. Noone, *How to Prevent Genocide: A Guide For Policymakers, Scholars and the Concerned Citizen*, 48 NAVAL L. REV. 205, 205 (2001).

policies and alleged injuries caused by states, whose acts may not have any resemblance to the crime of genocide, as defined by the Genocide Convention.⁹⁹ Referring to a situation as genocide has become a "catchphrase for the disposed"¹⁰⁰ and "[i]nvoicing the word *genocide*...has unmatched rhetorical power."¹⁰¹ In 1998, Alain Destexhe, the former Secretary General of Doctors Without Borders, noted that genocide has been used synonymously with words such as: oppression, repression, massacre, and, most recently, ethnic cleansing.¹⁰² Dr. Destexhe also opined that, too often, the word genocide has been used to shock people and to get their attention to a situation of violence and injustice, while overlooking the fact that the word genocide was coined and imagined after the attempted annihilation of the Jewish race by Nazi Germany.¹⁰³ Just because there is war, conflict, or natural or man-made disasters, in which there are casualties, this does not mean there is genocidal activity going on. In the case of war, usually the goal in these cases is to win a fight or protect a population, not to annihilate a group.¹⁰⁴ Another problem with the concept of genocide is that the Genocide Convention limits the definition of genocide to "acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group."¹⁰⁵ However, the definition leaves out social, political, and economic groups.¹⁰⁶

Evidence and arguments supporting a North Korean genocide include the massive prison camps holding political prisoners and children, the killing of half-Chinese babies of North Korean women repatriated by China, and the targeting of Christians and their families.¹⁰⁷ The list of categories of atrocities committed against certain groups is arguably much larger than this. Yet, if you look at the indiscriminate ways the North Korean government has imprisoned, enslaved, and killed its own people, it's debatable whether the atrocities committed by North Korean leadership against its people are in fact

⁹⁹ See STRAUS, *supra* note 93, at 31, 32.

¹⁰⁰ HELEN FEIN, *GENOCIDE WATCH* 28 (Yale University Press, 1992).

¹⁰¹ MADELINE K. ALBRIGHT & WILLIAM S. COHEN, *PREVENTING GENOCIDE: A BLUEPRINT FOR U.S. POLICYMAKERS* 75 (U.S. Holocaust Memorial Museum, 2008) [hereinafter *PREVENTING GENOCIDE*].

¹⁰² See Barry Sautman, *Cultural Genocide and Tibet*, 38 *TEX. INT'L L. J.* 173, 241–243 (2003).

¹⁰³ *See id.*

¹⁰⁴ Alain Destexhe, *The Crimes of Genocide*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/rwanda/reports/dsetexhe.html> (last visited July 1, 2017).

¹⁰⁵ G.A. Res. 260 (III), ¶ 1.

¹⁰⁶ FEIN, *supra* note 100, at 18.

¹⁰⁷ *Genocide in North Korea*, WORLD POL'Y BLOG (Feb. 6, 2012), <http://www.worldpolicyblog.org/blog/2012/02/06/genocide-north-korea>.

genocide. An alternative theory is that their acts should be considered *democide*.

Democide is a concept first coined by Professor R. J. Rummel,¹⁰⁸ who defined democide as "[t]he murder of any person or people by a government, including genocide, politicide, and mass murder."¹⁰⁹ Specifically, Professor Rummel opined that "a death constitutes democide if it is the intentional killing of an unarmed or disarmed person by government agents acting in their authoritative capacity and pursuant to government policy or high command," among other forms of democide.¹¹⁰ Professor Rummel stated that,

[U]nlike the concept of genocide, [democide] is restricted to intentional killing and does not extend to attempts to eliminate cultures, races or a people by means other than killing people. Democide is not limited to the killing component of genocide...it includes [it], as long as such killing is a purposive act, policy, process, or institution.¹¹¹

Democide includes actions by the government designed to kill or cause the death of people through instances of forced labor or deaths, massacre, or imposition of lethal living conditions.¹¹² They also include actions caused by government from an intentionally or knowingly, "reckless and depraved disregard for life," including deadly prison, concentration camps, forced labor conditions, torture or beatings, famine or epidemic where government authorities withhold aid.¹¹³ Specifically for North Korea, in 1997, Professor Rummel gave a mid-estimate that 1.6 million North Koreans have been murdered by the state, opining his research was "little more than educated guesses."¹¹⁴ All told twenty-three years ago, Professor Rummel calculated 170 million deaths as a result of democide (in the 20th Century), with the Soviet Union committing 62 million and the Chinese communists committing 38 million murders.¹¹⁵ Professor Rummel also investigated the Holocaust, the Armenian genocide by the Ottoman Empire, and many other state-sponsored mass murders, which have contributed to his concept of democide.¹¹⁶

¹⁰⁸ *R.J. Rummel (1932-2014)*, VICTIMS OF COMMUNISM MEM'L FOUND., <http://victimsofcommunism.org/r-j-rummel-1932-2014/> (last visited Oct. 6 2017).

¹⁰⁹ RUMMEL, *supra* note 5, at 31.

¹¹⁰ *Id.* at 2.

¹¹¹ *Id.* at 36.

¹¹² *Id.* at 36, 37.

¹¹³ *Id.* at 37.

¹¹⁴ *Id.* at 377.

¹¹⁵ *Id.* at 4.

¹¹⁶ *Id.*

The biggest problem with Professor Rummel's democide theory is that there is little consensus or academic recognition supporting his concept.¹¹⁷ There are few scholars who have provided additional validation or support to such research and theories.¹¹⁸ Second, the definition is grossly overbroad. Including "war dead" and prisoners of war, only seems to exaggerate the concept of democide, lessening its meaning.¹¹⁹ Perhaps, it is simpler to define democide as the unsanctioned murder of citizens by their government. Under this definition, the actions by the North Korean government would be rightly classified as democide.

Democide fills a gap left by the stagnancy of genocide, but the concept of democide is not widely known, or even recognized.¹²⁰ Under Professor Rummel's current definition, government failures such as the poisoned water issue in Flint, Michigan, police brutality/death at the hands of police, and perhaps the death penalty could be considered democide. It is unlikely most political scientists consider these issues democide. Another problem is Professor Rummel's research and methods. Given the closed nature of various societies, particularly communist China and North Korea, it's virtually impossible to estimate the degree of murder by various governments, and educated guesses make it harder to support his theories.

The extermination of half-Chinese, half-Korean babies is genocide.¹²¹ The targeting and extermination of Christians in North Korea through the use of prison camps is genocide.¹²² Yet, based on the overall atrocities articulated by the Commission, *democide* (used in a restricted sense) is also an appropriate term for what has happened in North Korea (and is perhaps a stronger term). While numbers certainly highlight the degree of government murder, the evidence and testimony provided to the Commission is the hard proof to justify calling the state-

¹¹⁷ See Richard Schifter, Book Review, *Death by Government by R.J. Rummel*, 35 VA. J. INT'L L. 529, 529-34, 536-37 (1995) (discussing early pushback from the academic community).

¹¹⁸ See *generally Democratic Peace Bibliography*, <http://www.hawaii.edu/powerkills/BIBLIO.HTML> (last visited Sep. 12, 2017) (explaining the listed works expounding on theories).

¹¹⁹ See RUMMEL, *supra* note 5, at 36-37.

¹²⁰ See Winston P. Nagan & Aitza M. Haddad, *The Holocaust and Mass Atrocity: The Continuing Challenge for Decision*, 21 MICH. ST. INT'L L. REV. 337, 355 (2013).

¹²¹ See Michael Sheridan, *Deformed Babies Killed for Super Race*, THE AUSTRALIAN, <http://www.theaustralian.com.au/news/world/deformed-babies-killed-for-super-race/news-story/e35f4918408f63e62b02aa738ae> (last visited Sep. 12, 2017).

¹²² See Robert Park, *Time to End North Korean 'Genocide'*, DIPLOMAT (Feb. 2, 2012), <http://thediplomat.com/2012/02/time-to-end-north-korea-genocide/> (estimating that 50,000 - 70,000 Christians are imprisoned in North Korean prison camps).

sponsored murder, democide; the atrocities are documented.¹²³ It is uncontroverted that the government has prison camps enslaving up to 200,000 “political” prisoners, has engaged in food rations and state sponsored starvation tactics, and killed those who express their religious beliefs, all which have led to the deaths of many of its citizens, deaths attributed to the government.¹²⁴ Key to the acceptance of use of democide is to narrow the parameters as to what is considered “death by government.” The more narrow the definition, the more likely it will gain acceptance. But, even if the concept of democide was widely accepted, calling something democide does not garner the emotion as genocide does. Perhaps it is because the world has accepted dictators and that dictators are going to do terrible things. As long as atrocities are happening within someone else’s own borders, it is not our problem. As Joseph de Maistre once stated, “Every nation has the government it deserves.”¹²⁵

There is overlap between genocide and CAH. However, CAH “are distinguishable from genocide in that they do not require an intent to ‘destroy in whole or in part,’ as cited in the 1948 Genocide Convention, but only target a given group and carry out a policy of ‘widespread or systematic’ violations.”¹²⁶ That is the case with North Korea. The atrocities committed are not discriminate. The atrocities span across all levels of North Korean society. Naming the atrocities democide demonstrates the gravity of acts by the government. By calling the North Korean atrocities democide, it allows more support for the charge of CAH. While democide is not a widely recognized concept, by being able to argue that the government is the primary perpetrator of crimes against humanity against the North Korean citizens, charging CAH is clearly more appropriate, as the overarching crimes that can be charged can go beyond the statutory language of genocide. The Commission’s decision to refer to the acts by the North Korean government as genocide has made “genocide” nothing more than a historic term, and perhaps, that is acceptable. North Korea is not the only instance.¹²⁷ There is also reluctance to address the genocidal acts in Syria and the possible

¹²³ See WORLD REPORT 2017: NORTH KOREA, <https://www.hrw.org/world-report/2017/country-chapters/north-korea> (last visited Oct. 12, 2017).

¹²⁴ See *Images Reveal Scale of North Korean Political Prison Camps*, <https://www.amnesty.org/en/latest/news/2011/05/images-reveal-scale-north-korean-political-prison-camps/> (last visited Oct. 12, 2017).

¹²⁵ *Respectfully Quoted: A Dictionary of Quotations*, <http://www.bartleby.com/73/740.html> (last visited Sept. 8, 2017).

¹²⁶ M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY 109 (Roy Gutman et al. eds., 1999).

¹²⁷ See, e.g., Princeton Lyman & Nancy Lindborg, *We’re ignoring a possible genocide in South Sudan*, CNN (Dec. 15, 2016), <http://www.cnn.com/2016/12/15/opinions/south-sudan-genocide-looming/>.

ongoing genocidal acts in South Sudan.¹²⁸ Furthermore, alleged cases of genocide take years to get to court.¹²⁹ Case in point are the 10 charges levied against Omar al-Bashir, the embattled leader of Sudan, filed in the ICC in July 2008.¹³⁰ Charges were filed against him for genocide, CAH, and war crimes allegedly committed in the Darfur region of Sudan, and to date, as the first public individual (and sitting head of state), he has yet to be tried for genocide.¹³¹ The ICTY has yet to close its mission,¹³² and the International Criminal Tribunal for Rwanda only closed its mission at the end of 2015,¹³³ twenty years after the Rwandan genocide.¹³⁴ When it comes to justice, prosecuting crimes for genocide is a slow process.

“The world agrees that genocide is unacceptable and yet genocide and mass killings continue.”¹³⁵ Genocide is considered to be one of the gravest and greatest crimes against humanity because it implies intent to completely exterminate a chosen group.¹³⁶ Yet, the reluctance to call atrocities genocide (specifically in the case of North Korea by the Commission’s chairman), the lack of justice, and the lack of means for enforcement of judgments, indicates that the Genocide Convention has become obsolete, a treaty to be hailed as a landmark agreement that had little effect.¹³⁷ Again, this is not necessarily a negative. The focus of genocide has always been limited to the specific intent of killing of people in *groups* and the protection of those groups.¹³⁸ The codification of CAH without a military nexus shows how far the international community, and specifically, international law has come in addressing the murder of innocent populations. Charging CAH allows for many options, as it is much more expansive. CAH is not as “legally restrictive,” does not have

¹²⁸ *Id.*

¹²⁹ See Roza Pati, *The ICC and the Case of Sudan’s Omar Al Bashir: Is Plea-Bargaining a Valid Option?* 15 U.C. DAVIS J. INT’L L. & POL’Y 265, 266–304 (discussing the challenges and time to bring genocide cases to court).

¹³⁰ *Id.* at 265.

¹³¹ See Saher Valiani, *Genocide Left Unchecked: Assessing the ICC’s Difficulties Detaining Omar al-Bashir*, 35 BERKELEY J. INT’L L. 150, 168 (2017).

¹³² *United Nations International Criminal Tribunal for the Former Yugoslavia*, UNITED NATIONS, <http://www.icty.org/> (last visited Sept. 13, 2017).

¹³³ *United Nations Mechanism for International Criminal Tribunals*, UNITED NATIONS, <http://unictr.unmict.org/> (last visited Sept. 13, 2017).

¹³⁴ *Id.*

¹³⁵ PREVENTING GENOCIDE, *supra* note 101, at ix.

¹³⁶ Destexhe, *supra* note 104.

¹³⁷ Gabrielle Desarzens, *Failure to Bring IS to Justice Shows UN Genocide Conventions ‘Obsolete’*, WORLD WATCH MONITOR (2016), <https://www.worldwatchmonitor.org/2016/11/failure-to-bring-is-to-justice-shows-un-genocide-conventions-obsolete/>.

¹³⁸ *What is Genocide?* U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007043> (last visited Sep. 13, 2017).

the specific intent necessary in genocide, and the focus is on the killing of populations.¹³⁹ However, it does allow the focus of charging to be on the leaders and individuals.¹⁴⁰ In the case at hand, referring to the North Korean atrocities as CAH makes it easier to justify international action.

III. THE COMMISSION'S OPINIONS AND RECOMMENDATIONS: NOW WHAT?

As a part of its findings, the Commission, citing to the 2005 Responsibility to Protect (to be discussed shortly), acknowledged its obligations under Chapters VI and VIII of the UN Charter to protect populations from crimes against humanity and that it was prepared to take collective action through the Security Council “should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”¹⁴¹ The Commission found that because of North Korea’s “manifest failure” to protect its own population from CAH, the international community, through the UN, bore the responsibility to protect the North Korean population from CAH using “first and foremost appropriate diplomatic, humanitarian and other peaceful means.”¹⁴² The Commission further stated that despite the “peaceful efforts” made towards engaging with North Korean leadership to end the “human rights violations that are at the root of crimes against humanity in [North Korea],” those efforts had failed.¹⁴³

The Commission chastised the Security Council, noting it had limited its engagement with the Korean peninsula to issues concerning North Korea’s nuclear ambitions and military incidents, without “fully appreciating that a meaningful improvement of the internal human rights situation would also reduce North Korea’s propensity to assume a bellicose external stance.”¹⁴⁴ The Commission then reminded the UN General Assembly (UNGA) that for nine straight years, the UNGA passed resolutions urging North Korea to end their human rights

¹³⁹ *Confronting Crimes Against Humanity*, U.S. INST. OF PEACE 7 (2008).

¹⁴⁰ Robert Coalson, *What's the Difference Between Crimes Against Humanity and Genocide*, THE ATLANTIC (Mar. 19, 2013), <https://www.theatlantic.com/international/archive/2013/03/whats-the-difference-between-crimes-against-humanity-and-genocide/274167/>.

¹⁴¹ Rep. of the Detailed Findings of the Comm'n of Inquiry on Human Rights in the Democratic People's Republic of Kor., ¶ 1204, U.N. Human Rights Office of the High Comm'r on Its Twenty-Fifth Session, U.N. Doc. A/HRC/25/CRP.1 (2014) [hereinafter Rep. on DPRK].

¹⁴² *Id.* ¶ 1205.

¹⁴³ *Id.* ¶¶ 1206, 1208.

¹⁴⁴ *Id.* ¶ 1206.

violations, with recent UNGA resolutions passing without a vote taken, an unprecedented act.¹⁴⁵

Finally, the Commission went after the North Korean leadership, stating,

[North Korea] has rejected the General Assembly and Human Rights Council resolutions variably as “*a ridiculous attempt to infringe upon the sovereignty of [North Korea] and do harm to its dignified socialist system by abusing human rights for a sinister political purpose*” and as “*a political chicanery which does not deserve even a passing note.*”¹⁴⁶

The Commission expressed its frustration with North Korea, noting its refusal to cooperate.¹⁴⁷ The Commission opined that in light of North Korea’s “open defiance” of the UN, the UNSC should take “carefully targeted action.”¹⁴⁸ Finally, acknowledging the suffering of the North Korean people and the responsibility of the international community to protect the North Korean people from their own government, the Commission stated it was time for the international community to:

[D]ischarge its responsibility to protect by pursuing a multi-faceted strategy that combines strong accountability measures targeting those most responsible for crimes against humanity, reinforced human rights engagement with the authorities of the Democratic People’s Republic and support for incremental change based on people-to-people dialogue and an agenda for inter-Korean reconciliation.¹⁴⁹

The Commission opined the world must *do something*, but what, and how?¹⁵⁰

Sanctions have been repeatedly used against North Korea. In November 2016, after its fifth nuclear missile test, the UNSC passed Resolution 2321. Deemed the “toughest UN sanctions yet,” the resolution focused on capping North Korean total exports, preventing North Korea from exporting various minerals, and ultimately hitting North Korea with an estimated overall \$700 million loss of exports each

¹⁴⁵ *Id.* ¶ 1207.

¹⁴⁶ *Id.* ¶ 1208.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* ¶ 1210.

¹⁵⁰ *Id.*

year.¹⁵¹ The decision of the UNSC on this round of sanctions was unanimous, with the Chinese assisting on the resolution.¹⁵² On July 4, 2017, North Korea was still testing nuclear weapons, firing off an “intercontinental ballistic missile,” considered a “Fourth of July ‘gift’ to the Trump administration.”¹⁵³ On September 11, 2017, after another nuclear test on September 2, 2017 by North Korea, the UNSC issued another round of sanctions, again referred to as the “strongest sanctions ever imposed on North Korea.”¹⁵⁴ Resolution 2375 reduced oil exports to North Korea, to a cap of 2 million barrels per year, banned all North Korean textile exports (estimated at \$800 million per year), and sought to prevent overseas workers from earning wages for the North Korean regime (estimated at \$500 million per year). In December 2017, after an intercontinental ballistic launch by North Korea, the UNSC issued yet another round of sanctions. Resolution 2397 imposed additional sanctions on North Korea energy, export, and import sectors, including a cap of only 500,000 barrels/yr of exported refined petroleum products to North Korea.¹⁵⁵

In light of its nuclear testing, sanctions have shown little effectiveness in altering North Korean behavior. Sanctions have been documented to have little effect on oppressive regimes, succeeding only at harming the citizens.¹⁵⁶ A good example of how sanctions have little effect can be seen in the aftermath of the first Iraqi War, where the sanctions levied by the UN resulted in widespread starvation and denial of safe drinking water, among other key denials, to the Iraqi citizens, violating Protocol 1 of the Geneva Convention (using starvation as a method of warfare), reducing the country to third world status, and ensuring its reliance on the support of humanitarian groups.¹⁵⁷

¹⁵¹ S.C. Res. 2321 (Nov. 30, 2016).

¹⁵² See Laura Smith-Spark & Richard Roth, *Toughest UN Sanctions yet to Cost North Korea \$800 Million*, CNN (Nov. 30, 2016, 10:32 PM), <http://www.cnn.com/2016/11/30/asia/un-north-korea-nuclear-sanctions/index.html>.

¹⁵³ Choe Sang-Hun, *U.S. Confirms North Korea Fired Intercontinental Ballistic Missile*, N.Y. TIMES (July 4, 2017), <https://www.nytimes.com/2017/07/04/world/asia/north-korea-missile-test-icbm.html>.

¹⁵⁴ *Fact Sheet: Resolution 2375 (2017) Strengthening Sanctions on North Korea*, U.S. MISSION TO THE UNITED NATIONS (Sept. 11, 2017), <https://usun.state.gov/remarks/7969>.

¹⁵⁵ Sec. Res 2397 (Dec. 22, 2017).

¹⁵⁶ *Iraq Sanctions: Humanitarian Implications and Options for the Future*, GLOB. POL'Y F. (Aug. 6, 2002), <https://www.globalpolicy.org/component/content/article/170-sanctions/41947.html> [hereinafter *Iraq Sanctions*].

¹⁵⁷ *Id.*; see also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 54(1).

Economic efforts with regard to North Korea have failed.¹⁵⁸ Diplomatic efforts have failed.¹⁵⁹ What about informational campaigns? In 2014, Hannah Lee wrote *A Call for Aggressive Media Campaign Regarding DPRK Prison Camps*, which argued that a well-organized media campaign was needed to properly address the atrocities of the North Korean prison camps and would “serve as a catalyst for action.”¹⁶⁰ Her theory being that pressure from the international community would apply pressure on North Korea in its prosecutions, as well as to comply with human rights laws.¹⁶¹ Ms. Lee outlined some reasonable courses of action on how to get North Korea to change its ways, and suggested a tactful, politically sensitive UN-backed campaign could be the start of change.¹⁶² In 2015, Mr. Kirby on the other hand, suggested “shaming” the North Korean leadership is an effective punishment, as North Korea valued its reputation as much as any other country.¹⁶³ Yet, a scathing report, a number nuclear tests, and two to three years later, media and government outlets have accomplished little to shame North Korea into changing its ways.¹⁶⁴ The informational handling of the North Korean atrocities has failed, as most of the focus has been on its nuclear ambitions.

The CAH in North Korea have taken a back seat to North Korea’s nuclear programs, and arguably, it is a fair question to ask whether the international community has actually done enough to press North Korea on its humanitarian crimes versus its nuclear ambitions. The primary focus of economic, diplomatic, and informational answers of the international community to North Korea’s actions in recent years has almost exclusively been on nuclear issues.¹⁶⁵ Yet, when the international community has addressed the CAH, the responses have been polarizing, either for or against a response.¹⁶⁶ The responses from the Chinese and Russian delegations speak volumes about their commitment to changing the status quo in North Korea.¹⁶⁷ Referring a case to the ICC for prosecution is needed from all of the UN Security Council’s permanent members, including China, and yet, the Chinese criticized the UN

¹⁵⁸ *Iraq Sanctions*, *supra* note 156.

¹⁵⁹ *Id.*

¹⁶⁰ Lee, *supra* note 37, at 214.

¹⁶¹ *Id.*

¹⁶² *Id.* at 224–25.

¹⁶³ Michael Kirby & Sandeep Gopalan, ‘Recalcitrant’ States and International Law: The Role of the UN Commission of Inquiry on Human Rights Violations in the Democratic People’s Republic of Korea, 37 U. PA. J. INT’L L. 229, 292 (2015).

¹⁶⁴ See S.C. Res. 2356 (June 2, 2017); Sang-Hun, *supra* note 153.

¹⁶⁵ See Rep. on DPRK, *supra* note 141, ¶ 1206.

¹⁶⁶ *North Korea: UN Condemns Crimes Against Humanity*, HUM. RTS. WATCH (Nov. 18, 2014, 4:18 PM), <https://www.hrw.org/print/264645>.

¹⁶⁷ *Id.*

Commission's report, saying that "taking human rights issues to the [ICC] is not helpful to improving a country's human rights situation."¹⁶⁸ The Russian delegation stated, "The current situation should not be a pretext for increasing foreign military capacity," calling on all sides "to step back from militarist rhetoric."¹⁶⁹ These responses, are a stark contrast to the UN General Assembly vote of 116 to 20 in favor of referring North Korea to the ICC in December 2014.¹⁷⁰ To date, there has been no movement on the possible referral to the ICC.¹⁷¹ In December 2016, the Security Council voted in favor of discussing the North Korean human rights issue; however, the Chinese delegation again deflected the issue, noting it was "against the Council deliberating on human rights situations, emphasizing that its primary responsibility was the maintenance of international peace and security."¹⁷²

The UNSC is right to focus on the nuclear ambitions of North Korea, given the apocalyptic ramifications that could occur in the event of a nuclear strike by North Korea. Given the failure of sanctions, and the unwillingness of the Russian and Chinese satrapies to modify their client state's conduct, the only options on the table to handle the North Korean atrocities are either through judicial action or military action. Yet, the reality is that the North Korean CAH's have a taken a back seat to the nuclear concerns.

A. Judicial Action

1. International Criminal Court (ICC)

In the aftermath of Rwanda and Yugoslavia and the establishment of the ad hoc tribunals, there was a growing movement to establish an international court which would have jurisdiction over CAH.¹⁷³ In the mid-1990's this led to the Rome Conference, and subsequently the creation of the ICC.¹⁷⁴ 160 countries participated, and

¹⁶⁸ Gerry Mullany & Nick Cumming-Bruce, *China Faults Report Blaming North Korean Leader for Atrocities*, N.Y. TIMES (Feb. 18, 2014), <https://www.nytimes.com/2014/02/19/world/asia/china-faults-report-citing-north-korean-leader-in-atrocities.html>.

¹⁶⁹ Press Release, Security Council, Sec. Council Narrowly Adopts Procedural Vote to Authorize Discussion on Human Rights Situation in Democratic People's Republic of Korea, U.N. Press Release SC/12615 (Dec. 9, 2016) [hereinafter Press Release SC/12615].

¹⁷⁰ *UN General Assembly seeks North Korea ICC charges*, BBC (Dec. 18, 2014), <http://www.bbc.com/news/world-asia-30540379>.

¹⁷¹ Brian Padden, *South Korea Urges UN to Refer DPRK Leaders to ICC*, VOA News (Feb. 28, 2017, 5:39 AM), <https://www.voanews.com/a/south-korea-icc-north-korea-crimes-against-humanity/3743144.html>.

¹⁷² Press Release SC/12615, *supra* note 169.

¹⁷³ *History of the ICC*, COALITION FOR INT'L CRIM. CT., <http://iccnw.org/?mod=icchistory> (last visited Oct. 4, 2017).

¹⁷⁴ *Id.*

at the end of the negotiations, 120 nations voted in favor of the adoption of the Rome Statute of the ICC.¹⁷⁵ Seven nations voted against the Rome Statute, including the United States, Israel, and China.¹⁷⁶ The Rome Statute took effect in July 2002, after 60 nations ratified the treaty.¹⁷⁷ There are currently 124 state parties to the treaty.¹⁷⁸ Although the U.S. was a signatory, in 2002, the Bush Administration suspended the U.S. signature.¹⁷⁹ North Korea is a non-state party, non-signatory.¹⁸⁰

Article 5 of the ICC states that its jurisdiction “shall be limited to the most serious crimes of concern to the international community as a whole,” which includes genocide, war crimes and crimes against humanity.¹⁸¹ Investigations can begin when an ICC State Party refers a situation to the Court, the UN Security Council refers a situation to the Court, or when the Pre-Trial Chamber authorizes a prosecutor to commence an investigation.¹⁸² Unlike the ad hoc tribunals of Yugoslavia and Rwanda (which were limited in scope), the ICC is a permanent court.¹⁸³ The ICC is “designed as a court of last resort. The Court must defer to national proceedings, whether or not they lead to prosecution, except if there is no functioning judicial system or the national proceedings are intended to shield a suspect from prosecution.”¹⁸⁴ Considered benefits of the ICC are its independence and impartiality (from the UN Security Council and governments), its victim-centered approach, and investment in peace.¹⁸⁵ A specific recommendation made by the Commission was the referral of the allegations against the North Korean government by the UNSC to the International Criminal Court.¹⁸⁶

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *The States Parties to the Rome Statute*, INT’L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Oct. 4, 2017) [hereinafter *State Parties*].

¹⁷⁹ *The United States and the International Criminal Court: The Bush Administration’s Approach and a Way Forward Under the Obama Adm.*, HUM. RTS. WATCH (Aug. 2, 2009, 8:45 AM), <https://www.hrw.org/print/238375>.

¹⁸⁰ Corrie Hulse, *North Korea: The ICC’s Problem with Jurisdiction*, MANTLE (Apr. 6, 2012), <http://www.mantlethought.org/international-affairs/north-korea-iccs-problem-jurisdiction>.

¹⁸¹ Rome Statute, *supra* note 78, art. 5.

¹⁸² *Id.* arts. 13, 15.

¹⁸³ *History of the ICC*, *supra* note 173.

¹⁸⁴ *About the ICC*, COALITION FOR INT’L CRIM. CT., <http://www.amicc.org/icc/about> (last visited Feb. 18, 2017).

¹⁸⁵ *20 ICC benefits*, COALITION FOR INT’L CRIM. CT., <http://coalitionfortheicc.org/explore/20-icc-benefits> (last visited Oct. 4, 2017).

¹⁸⁶ Kirby, *supra* note 27, at 314.

The ICC isn't without its faults. "It has no arrest authority, relying on countries to make arrests."¹⁸⁷ Further, there are no mechanisms to enforce countries to carry out legal obligations.¹⁸⁸ Also, the ICC has its detractors. In suspending its signature for the ICC in 2002, the U.S., in a State Department brief, noted several flaws.¹⁸⁹ The jurisdiction of the ICC was a major concern for the U.S., as the ICC purportedly would have:

[J]urisdiction over certain crimes committed in the territory of a state party, including by nationals of a non-party. Thus the Court would have jurisdiction for enumerated crimes alleged against U.S. nationals, including U.S. service members, in the territory of a party (Article 12), even though the U.S. is not a party.¹⁹⁰

The State Department also noted that when it comes to "new crimes," "[a] state party to the Treaty can opt out of crimes added by amendment to the Statute, thereby exempting its nationals from the ICC's jurisdiction for these crimes. A non-party cannot opt out (Article 121)."¹⁹¹

Other issues include the ICC's jurisdiction over the "crime of aggression," given that crime had not even been defined,¹⁹² the amount of power prosecutors have,¹⁹³ and the failure of the ICC to permit reservations.¹⁹⁴ Finally, the State Department was troubled by the issue of complementarity, arguing that the

¹⁸⁷ Camila Domonoske, *South Africa Announces Withdrawal From International Criminal Court*, NPR (Oct. 21, 2016, 9:32 AM), <http://www.npr.org/sections/thetwo-way/2016/10/21/498817513/south-africa-announces-withdrawal-from-international-criminal-court>.

¹⁸⁸ *Id.*

¹⁸⁹ *The International Criminal Court*, U.S. DEP'T OF STATE (Aug. 2, 2002), <https://2001-2009.state.gov/t/pm/rls/fs/23426.htm>.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* With respect to the "crime of aggression," the State Department argues that, "The parties to the treaty will amend it to define this crime and specify the conditions for exercise of jurisdiction over it (Article 5). Only parties to the Treaty can opt out of the jurisdiction of the Court over the crime of aggression per Article 121. In addition, many states advocate conditions for the exercise of jurisdiction by the ICC that could bring the court into conflict with the Security Council and the UN charter." *Id.*

¹⁹³ *Id.* With respect to the power of the prosecutor, the State Department has opined that a prosecutor could "proceed with an investigation on his or her own initiative with the agreement of two judges of a three-judge panel (Article 15)" and was not "responsible to an elected body or to the UN Security Council." *Id.*

¹⁹⁴ *Id.* The State Department noted that the "Treaty does not permit states to take reservations (Article 120)," deemed a "serious departure from common practice." *Id.*

ICC is required to defer to the national prosecution unless the court finds that the state is unwilling or unable to carry out the investigation or prosecution (Article 17). By leaving this decision ultimately to the ICC, the Treaty would allow the ICC to review and possibly reject a sovereign State's decisions not to prosecute, or a sovereign State's court decisions of not guilty or dismissal with prejudice in specific cases.¹⁹⁵

The U.S. has entered into workarounds and bilateral “non-surrender” agreements (Article 98 agreements) with many countries to prevent U.S. citizens from ICC jurisdiction, further demonstrating its commitment to non-participation in the ICC.¹⁹⁶

The U.S. does not stand alone in objecting to the ICC.¹⁹⁷ In 2016, South Africa, Burundi, and Gambia all declared their intentions to withdraw from the ICC due to emphasis being placed on African countries.¹⁹⁸ Other reasons for displeasure with the ICC stem from the failed prosecution of Kenyan President, Uhuru Kenyatta, and South Africa’s declination to arrest Sudanese President, Omar al-Bashir (who is facing ICC prosecution), despite having an obligation to do so.¹⁹⁹ In November 2016, Russia announced it was withdrawing its signature, after an ICC report called Russia’s “annexation of Crimea an occupation.”²⁰⁰ Notably, in March 2018, the Philippines, led by President Rodrigo Duterte, is moving to withdraw as a signatory to the Rome

¹⁹⁵ *Id.*

¹⁹⁶ *Factsheet: US Bilateral Immunity Agreements or So-Called "Article 98 Agreements"*, COALITION FOR INT'L CRIM. CT., http://eradicatingecocide.com/wp-content/uploads/2012/06/CICC-BLAs_QA_current.pdf (last visited Sept. 30, 2017); *see also* Rome Statute, *supra* note 78, art. 98 (discussing cooperation with respect to waiver of immunity and consent to surrender).

¹⁹⁷ Nick Robins-Early, *What Russia Leaving The International Criminal Court Really Means*, HUFFINGTON POST (Nov. 17, 2016, 6:20 PM), http://www.huffingtonpost.com/entry/russia-international-criminal-court_us_582c6ea5e4b0e39c1fa7312f.

¹⁹⁸ South Africa’s “High Court” recently ruled South Africa’s intent to withdraw from the ICC as invalid. *See South Africa's decision to leave ICC ruled 'invalid,'* BBC (Feb. 22, 2017), <http://www.bbc.com/news/world-africa-39050408>.

¹⁹⁹ Domonoske, *supra* note 187 (stating that Gambia has since opted not to leave the ICC).

²⁰⁰ Curt Mills, *Russia Leaves International Criminal Court*, U.S. NEWS (Nov. 16, 2016, 12:15 PM), <https://www.usnews.com/news/world/articles/2016-11-16/russia-leaves-international-criminal-court>.

Statute, with President Duterte stating that the ICC is being used against him due to his war on illegal drugs.²⁰¹

It is a reasonable expectation that countries will always take issue with the ICC. The grievance levied by some African countries that the ICC has focused on the African continent is not without merit, though ICC has preliminary examinations in Afghanistan, Colombia, Iraq, and Ukraine.²⁰² The ICC does not have an open case against North Korea, in part because North Korea is not a signatory, but also because of the UNSC's failure to refer the case to the ICC.²⁰³

Although the ICC has its issues, the ICC is an example of how states were willing to give up *some* of their sovereignty in the name of human rights. Arguably, Russia's and Burundi's withdrawal from the ICC are examples of taking back that sovereignty. However, if sovereigns are to recognize that "certain acts 'undermine the international community's interest in peace and security and, by their exceptional gravity, 'shock the conscience of mankind,'" and are not the concern of one state alone," there is going to be a concession of sovereignty.²⁰⁴ The notion that the UN Security Council can refer cases to the ICC supports the notion that the North Korean CAH's *could be* punished, despite the fact that North Korea is a non-party to the statute.

The recent report issued by the War Crimes Committee examining the CAH's at North Korean political camps found "reasonable grounds" that North Korean leaders committed ten crimes against humanity under the Rome Statute, including murder, extermination, enslavement, torture, and sexual violence.²⁰⁵ But, even if the UNSC referred the case of North Korea to the ICC, it will probably take years for an investigation to occur, not to mention the challenge of ensuring a fair trial takes place, the enforcement of a judgment, if any, and how the whole process will change North Korean leadership. The ICC's own track record indicates that an expeditious prosecution is not very promising.²⁰⁶

²⁰¹ Sara Shayanian, *Duterte Moves to Withdraw Philippines from International Criminal Court*, UPI (March 14, 2018, 7:43AM), https://www.upi.com/Top_News/World-News/2018/03/14/Duterte-moves-to-withdraw-Philippines-from-International-Criminal-Court/6541521023436/

²⁰² See *Preliminary Examinations*, ICC, <https://www.icc-cpi.int/Pages/Preliminary-Examinations.aspx> (last visited Sept. 30, 2017).

²⁰³ See *infra* Part V.

²⁰⁴ Robert Cryer, *International Criminal Law vs State Sovereignty: Another Round?* 16 EUROPEAN J. INT'L L. 979, 985 (2006).

²⁰⁵ Lovells, *supra* note 59, at 5.

²⁰⁶ See Kai Ambos, *The ICC's Disappointing Track Record*, SPIEGEL ONLINE (Dec. 14, 2011, 6:39 PM), <http://www.spiegel.de/international/world/slow-wheels-of-justice-the-icc-s-disappointing-track-record-a-803796.html>.

2. International Case Law

In the recent past, international law supported the notion of staying out of the business of a country's domestic affairs (referencing North Korea's response to the Commission's report), particularly when it came to intervention.²⁰⁷ In 1949, the International Court of Justice (I.C.J.) rejected British arguments justifying its military intervention in Albanian waters after three British ships were struck by mines within the territorial sovereignty of Albania.²⁰⁸ The I.C.J. affirmed settled international law that there was no right to intervene in the affairs of another country, nor was there a right of self-protection or self-help when intervening in the affairs of another state.²⁰⁹ Nearly forty years later, the I.C.J. addressed another international incident.²¹⁰ In *Nicaragua v. United States*, Nicaragua claimed the United States violated international law by mining its ports and supporting the "contra force," a mercenary army challenging the government.²¹¹ The United States argued that violations of human rights committed by the government of Nicaragua justified its involvement into Nicaraguan affairs.²¹² However, the I.C.J. disagreed, holding that although

[T]he United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras.²¹³

Additionally, the I.C.J. stated that Nicaragua's right to sovereignty and political independence, "should be fully respected and should not in any way be jeopardized by any military or paramilitary activities which are prohibited by the principles of international law."²¹⁴ "The I.C.J. rebuked the United States and warned nations that there was no duty [to]

²⁰⁷ See generally Philip Kunig, *Prohibition of Intervention*, MAX PLANCK ENCYC. OF PUBL. INT'L L. (April 2008).

²⁰⁸ *Corfu Channel Case (Merits) (U.K. v. Alb.)*, 1949 I.C.J. 4 (Apr. 9) [115].

²⁰⁹ Sok Kim, *supra* note 23, at 82–84.

²¹⁰ *Id.*

²¹¹ *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, Judgement, 1986 I.C.J. 14, ¶¶ 80, 102 (June 27).

²¹² *Id.* at 34.

²¹³ *Id.* ¶ 268.

²¹⁴ *Id.* ¶ 288.

intervene in the domestic matters of another state, even if it was for humanitarian intervention.”²¹⁵

Yet, changing international norms and attitudes have rendered the Nicaragua opinion virtually obsolete, as the scale of this case is vastly different as it relates to human rights. While reading the *Nicaragua* opinion one could argue that the United States used the alleged human rights violations as a ruse to justify its involvement in Nicaraguan affairs.²¹⁶ But, the end of the Cold War and humanitarian crises in Bosnia and Rwanda (and Syria) means that invoking state sovereignty to justify domestic affairs decisions is no longer an absolute defense against military intervention.²¹⁷ The international community views human rights crimes differently since the *Nicaragua* case and is becoming less tolerant of such crimes. The sanctity of state sovereignty is changing. UN Secretary-General, Ban Ki-moon, stated in February 2015, “Sovereignty remains a bedrock of international order. But in today’s world, the less sovereignty is viewed as a wall or a shield, the better our prospects will be for protecting people and solving our shared problems.”²¹⁸

3. Universal Jurisdiction

“Universal jurisdiction (UJ)” is that idea that:

A national court may prosecute individuals for any serious crime against international law — such as crimes against humanity, war crimes, genocide, and torture — based on the principle that such crimes harm the international community or international order itself, which individual States may act to protect. Generally, universal jurisdiction is invoked when other, traditional bases of criminal jurisdiction do not exist, for example: the defendant is not a national of the State, the defendant did not commit a crime in that State’s territory or against its nationals, or the State’s own national interests are not adversely affected.²¹⁹

²¹⁵ *Id.*; see also Sok Kim, *supra* note 23, at 82–84.

²¹⁶ See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), at 96.

²¹⁷ See generally Keith A. Petty, *Humanity and National Security: The Law of Mass Atrocity Response Operations*, 34 MICH. J. INT’L L. 745, 746 (2013).

²¹⁸ *Prospects for Protecting People Improve When Sovereignty Not Viewed as ‘Wall or Shield’, Secretary-General Tells Security Council in Ministerial Debate*, UNITED NATIONS (FEB. 23, 2015), <http://www.un.org/press/en/2015/sc11793.doc.htm>.

²¹⁹ *Universal Jurisdiction*, INT’L JUST. RESOURCE CTR., <http://www.ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/> (last visited Feb. 16, 2017).

“The Center for Constitutional Rights (CCR) states that there are two reasons why UJ may be an avenue to justice: [1] to provide victims of international crimes with access to justice, or [2] to bridge the impunity gap.”²²⁰ The CCR states that courts are often inaccessible to victims “including the availability of domestic immunities or self-imposed amnesties and de facto impunity and security risks, especially when the crimes were state-sponsored,” and the ICC or mandated courts (ad-hoc tribunals, i.e. Rwanda) may be constrained or lack sufficient resources.²²¹ The International Justice Resource Center notes that “163 of the 193 UN Member States can exercise universal jurisdiction over one or more crimes under international law, either as such crimes or as ordinary crimes under national law.”²²²

As for CAH and its relation to UJ, CAH are crimes:

[D]eemed to be part of jus cogens—the highest standing in international legal norms. Thus, they constitute a non-derogable rule of international law. The implication of this standing is that they are subject to universal jurisdiction, meaning that all States can exercise their jurisdiction in prosecuting a perpetrator irrespective of where the crime was committed. It also means that all States have the duty to prosecute or extradite, that no person charged with that crime can claim the “political offense exception” to extradition, and that States have the duty to assist each other in securing evidence needed to prosecute. But of greater importance is the fact that no perpetrator can claim the “defense of obedience to superior orders” and that no statute of limitation contained in the laws of any State can apply. Lastly, no one is immune from prosecution for such crimes, even a head of State.²²³

Perhaps the seminal use of UJ came in 1998, when Spain requested the United Kingdom to extradite Chilean President, Augusto Pinochet, for his crimes against the Chilean people.²²⁴ The UK agreed,

²²⁰ *Factsheet: Universal Jurisdiction*, CTR. FOR CONST. RTS. (Dec. 7, 2015), <https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/factsheet-universal-jurisdiction>.

²²¹ *Id.*

²²² *Universal Jurisdiction*, supra note 219 (citing Amnesty International).

²²³ BASSIOUNI, supra note 126, at 108.

²²⁴ Robert J. Lundin, III, Note, *International Justice: Who Should be Held Responsible for the Kidnapping of Thirteen Japanese Citizens?* 13 TRANSNAT'L L. & CONTEMP. PROBS. 699, 712 (2003).

and the legitimacy of UJ was recognized.²²⁵ While UJ appears to be settled international law, the parameters or protections in place for those accused of “crimes” are not, and arguably, the exercising of jurisdiction by either international actors like the ICC or UJ being exercised by national courts raises many questions. An example would be Belgium’s exercising of UJ, through its “*Act of 1999 Concerning the Punishment of Grave Breaches of International Humanitarian Law*.”²²⁶ Under this law, Belgium has charged political figures outside of Belgium, including Ariel Sharon (who was the sitting head of Israel) in 2001 for the massacre of Palestinians in Beirut.²²⁷ However, the law appears to carry little weight in the international arena, as the ability to remove those indicted is dependent on the accused surrendering himself or the government seizing the accused upon entry into Belgium.²²⁸

The problems of Belgium’s exercise of UJ can best be summed up by Henry Kissinger, who wrote that,

The unprecedented and sweeping interpretation of international law . . . would arm any magistrate anywhere in the world with the power to demand extradition, substituting the magistrate's own judgment for the reconciliation procedures of even incontestably democratic societies where alleged violations of human rights may have occurred. It would also subject the accused to the criminal procedures of the magistrate's country, with a legal system that many be unfamiliar to the defendant and that would force the defendant to bring evidence and witnesses from long distance . . . Perhaps the most important issue is the relationship of universal jurisdiction to national reconciliation procedures set up by new democratic governments to deal with their countries' questionable past.²²⁹

Mr. Kissinger recognized that those individuals who commit crimes related to war or violate human rights should be held accountable, yet, he also noted that the “instinct to punish must be related, as in every constitutional democratic political structure, to a system of checks and balances that includes other elements critical to the survival and expansion of democracy.”²³⁰ For instance, public opinion about President

²²⁵ *Id.*

²²⁶ *Id.* at 713.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Henry Kissinger, “*The Pitfalls of Universal Jurisdiction*,” FOREIGN AFF. (Sept. 19, 2017) <https://www.globalpolicy.org/component/content/article/163/28174.html>.

²³⁰ *Id.*

George W. Bush's decision to invade Iraq still lingers and many have called for him to answer for his actions.²³¹ In theory, if enough evidence was presented, he could face criminal action under UJ.²³² Perhaps the resettlement issues in Israel could qualify for action under UJ.²³³ The point is that the limits of UJ appear limitless. Yet, the fact that so many countries subscribe to universal jurisdiction indicates how many of those countries are willing to sacrifice some of its own sovereignty.²³⁴ In the case of North Korea, UJ could be used to justify trying North Korean leadership for its crimes against humanity. Unlike the concerns of politicization and overreaching for other countries, the evidence supporting UJ for North Korea is substantial.²³⁵ In fact, the War Crimes Committee investigating the CAH's at the North Korean political camps have recommended that third-party states, who find North Korean officials who are known or suspected to have committed CAH's, exercise UJ over those individuals²³⁶ The North Korean CAH trials would almost certainly be done in abstentia, but the international message would be clear. However, while this is an admirable concept, for the same reasons as the ICC, declaring UJ over the North Korean CAH is simply not a viable option. It only pays lip service to the CAH in North Korea but doesn't actually do anything to resolve them.

IV. MILITARY ACTION AND OVERCOMING THE LEGALITIES OF STATE SOVEREIGNTY

The likely result of prosecuting a CAH case against North Korea is that it would be time consuming, cumbersome, and, more importantly, ineffective in light of the practical impediments to enforcing jurisdiction. Reviewing some of the current open cases on the ICC website, these are the situations currently under investigation:

²³¹ See Marie Chevrier & Paul Jargowsky, *Time to Stop the War Crimes*, HUFFINGTON POST (Sept. 12, 2013, 11:59 AM), http://www.huffingtonpost.com/marie-isabelle-chevrier/time-to-stop-the-war-crim_b_3914465.html.

²³² *Factsheet: Universal Jurisdiction*, *supra* note 220.

²³³ *Experts Suggest Invoking Universal Jurisdiction among Legal Options to Address Israeli Settlements, as International Meeting on Palestine Question Continues*, UNITED NATIONS (Sept. 8, 2015), <http://www.un.org/press/en/2015/gapal1346.doc.htm>.

²³⁴ See *Universal Jurisdiction: A Preliminary Survey Of Legislation Around The World – 2012 Update*, AMNESTY INT'L (2012), <https://www.amnesty.org/download/Documents/24000/ior530192012en.pdf>.

²³⁵ See Paul Chevigny, *The Limitations of Universal Jurisdiction*, GLOB. POL'Y F. (March 2006), <https://www.globalpolicy.org/component/content/article/97/32133.html>.

²³⁶ Lovells, *supra* note 59, at 8.

- Kenya – ICC opened a case in March 2010 for CAH that occurred in 2007-2008²³⁷
- Congo – ICC opened a case in 2004 for CAH and war crimes that have occurred since 2002²³⁸
- Darfur, Sudan – ICC opened a case in March 2005 for CAH and war crimes that occurred in 2002 to the present²³⁹
- Ivory Coast – ICC opened a case in October 2011 for crimes under ICC jurisdiction that occurred in 2002 to present²⁴⁰
- Mali – ICC opened a case in January 2013 for war crimes that occurred in January 2012²⁴¹
- Georgia – ICC opened a case in January 2016 for CAH and war crimes that occurred in 2008²⁴²

There are ten situations under investigation, with all but one situation occurring on the continent of Africa.²⁴³ There are ten cases under preliminary examination.²⁴⁴ The ICC has prosecuted war criminals or those persons who have committed CAH.²⁴⁵ However, reviewing the ICC's own website, many of these cases have taken numerous years to prosecute.²⁴⁶ These cases show that there is no such thing as speedy justice, and given the atrocities carried out by the North Korean regime are well documented, speed is a critical factor to be considered.

This is not to say that military action will make the situation any better. By all accounts, the ramifications of any military action would be devastating to the region. Secretary of Defense, James Mattis, acknowledged that war with North Korea would be “catastrophic” and “probably the worst kind of fighting [seen] in most people’s lifetimes.”²⁴⁷ Unquestionably, war against North Korea would come with a tremendous human and economic cost. War certainly is not a desired

²³⁷ *Kenya*, INT'L CRIM. CT., <https://www.icc-cpi.int/kenya> (last visited Sept. 20, 2017).

²³⁸ *Democratic Republic of Congo*, INT'L CRIM. CT., <https://www.icc-cpi.int/drc> (last visited Sept 20, 2017).

²³⁹ *Darfur, Sudan*, INT'L CRIM. CT., <https://www.icc-cpi.int/darfur> (Sept. 20, 2017).

²⁴⁰ *Ivory Coast*, INT'L CRIM. CT., <https://www.icc-cpi.int/cdi> (last visited Sept 20, 2017).

²⁴¹ *Mali*, INT'L CRIM. CT., <https://www.icc-cpi.int/mali> (last visited Sept. 20, 2017).

²⁴² *Georgia*, Int'l Crim. Ct., <https://www.icc-cpi.int/georgia> (last visited Sept. 20, 2017).

²⁴³ See *Situations under Investigation*, INT'L CRIM. CT., <https://www.icc-cpi.int/pages/situations.aspx> (last visited Sept 20, 2017).

²⁴⁴ See *Preliminary Examinations*, INT'L CRIM. CT., <https://www.icc-cpi.int/Pages/Preliminary-Examinations.aspx>, (last visited Sept. 20, 2017).

²⁴⁵ See *About*, INT'L CRIM. CT., <https://www.icc-cpi.int/about> (last visited Sept. 20, 2017).

²⁴⁶ See *Situations under Investigation*, *supra* note 243.

²⁴⁷ Kathryn Watson, *War with North Korea would be 'catastrophic,' Defense Secretary Mattis says*, CBS NEWS (May 28, 2017, 10:35 AM), <http://www.cbsnews.com/news/war-with-north-korea-would-be-catastrophic-mattis-says/>.

result. The lessons from the failed nation buildings of Iraq and Afghanistan are still fresh, and given the current state of affairs in North Korea, it is expected there would be extensive nation building.²⁴⁸ There is the question of the Chinese – what would be their involvement? Would China come to North Korea's defense? As for South Korea, is it willing to accept war? Is South Korean willing to reunify with North Korea? What about the economic ramifications, humanitarian aid/relief, and new government? These are just a few issues that must be addressed before any military action. Again, laying out a plan for military action is not the purpose of this Article, but given the long-standing history of the North Korean government's crimes against its people, international military action is the only option if the world is to give the North Korean people meaningful relief. The biggest issue of military action is a perceived violation of North Korean's sovereignty. However, the logistics and politics of piercing state sovereignty is not as daunting and is specifically contemplated under the UN Charter.²⁴⁹

Respect for state sovereignty is enshrined in the United Nations' founding documents, and is something the UN has been hesitant to usurp.²⁵⁰ This is clear from the first two articles of the UN Charter:

Under Article 1 of the UN Charter, the purposes of the UN include:

- (1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
- (2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;²⁵¹

However, under Article 2 of the UN Charter:

²⁴⁸ See *North Korea Profile – Overview*, BBC (May 6, 2016), <http://www.bbc.com/news/world-asia-pacific-15258878>.

²⁴⁹ U.N. Charter art. 1.

²⁵⁰ See *Speakers in Security Council Urge Balance*, UNITED NATIONS (Feb. 15, 2016), <https://www.un.org/press/en/2016/sc12241.doc.html>.

²⁵¹ U.N. Charter art. 1, ¶¶ 1–3

- (1) The Organization is based on the *principle of the sovereign equality* of all its Members; and,
- (7) Nothing contained in the present Charter *shall authorize* the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.²⁵²

The UN Charter has always held sovereignty to be sacrosanct.²⁵³ This is why the passage of the Genocide Convention was so important. Article 1 to the Genocide Convention makes it clear that “genocide . . . is a crime under international law.”²⁵⁴ Yet, even if it is concluded that the North Korean atrocities were actual genocide, the Genocide Convention “weakly specifies [a] mechanism[] for *how* to prevent and punish the crime.”²⁵⁵ How does the Convention get enforced? Who enforces the Convention? What are the true ramifications of violations of the Convention? The inability to answer these questions are why the Rwandan and Bosnian genocides lasted as long as they did – because the international community didn’t know how to react, and the inability to answer these questions are part of the reason why the Genocide Convention is obsolete. From its very beginning, the UN considered state sovereignty sacred, but without a specific way to enforce the Genocide Convention, it remains nothing more than a historic document, highlighting that genocide is a horrific crime against people. With that, military intervention was effective in one specific case: Kosovo.

V. KOSOVO AND NATO INTERVENTION

When NATO intervened in Kosovo in 1999, in a bombing campaign against the Federal Republic of Yugoslavia, it was a watershed moment for NATO, as it was the first time in its history that it used force in a conflict without UNSC authorization.²⁵⁶ At that time, there was debate on the legality of such a bombing campaign, as the case for military action centered on two primary arguments: 1) the UNSC resolutions and 2) general international law.²⁵⁷ With respect to the UNSC resolutions, Resolution 1199 “demanded that Yugoslavia *inter*

²⁵² U.N. Charter art. 2, ¶¶ 1, 7.

²⁵³ *See id.*

²⁵⁴ Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 11, 1946, 78 U.N.T.S. 277.

²⁵⁵ STRAUS, *supra* note 93, at 4.

²⁵⁶ *See* Adam Roberts, *NATO’s ‘Humanitarian War’ Over Kosovo*, 41 SURVIVAL 102, 102 (1999).

²⁵⁷ *Id.* at 105.

alta ‘cease all actions by the security forces affecting the civilian population’, and had referred to possible ‘further action’ if measures demanded in the resolution were not taken.”²⁵⁸ Resolution 1203 demanded Serb compliance adhering to provisions in the October 1998 Belgrade Accords.²⁵⁹ It was argued that these two resolutions provided “some legal basis for military action.”²⁶⁰ As for general international law, a case was made given the “overwhelming humanitarian necessity,” wherein there was a reliance on “convincing evidence” “of an extreme humanitarian distress,” no other practical alternative, and the proposed force was “necessary and proportional”, international law provided a basis for military action.²⁶¹ A third argument made in support of military intervention was that Kosovo was a “threat to international peace and security,” as refugees from Kosovo “could destabilize neighboring countries and lead to an expansion of war.”²⁶²

Nonetheless, the Independent International Commission on Kosovo concluded that

NATO military intervention [in Kosovo] was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission consider[ed] . . . the intervention . . . justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.²⁶³

Nearly 20 years later, with international law quickly changing, a stronger argument for military action (than that of Kosovo) can be made in the case of North Korea based on its documented atrocities. The Kosovo Commission opined that while the number of actual deaths were around 11,000, from March 1999 to June 1999, approximately 863,000 civilians were forced outside of Kosovo, and another 590,000 Kosovars were internally displaced.²⁶⁴ The Kosovo Commission also noted “widespread rape and torture, as well as looting, pillaging, and extortion.”²⁶⁵ Yet, over the course of a 70-year regime, the evidence is

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 106.

²⁶² *Id.* at 107.

²⁶³ INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT 4 (2000).

²⁶⁴ *Id.* at 2.

²⁶⁵ *Id.* at 2–3

substantial supporting a claim that the atrocities in North Korea are far greater than that of Kosovo. Although the Council on Foreign Relations (CFR) has stated that “given that the UNGA has no authority under the UN Charter to authorize military ‘action,’ the legality of any intervention based on this resolution is questionable at best.”²⁶⁶ Kosovo is a stark reminder that if the international community wants to take action over UNSC inaction, there are ways. Further, there is precedence that if enough UNGA members were to challenge the UNSC’s failure to authorize military action and voted as a whole to override the Security Council, the legitimacy of that vote would arguably legitimize action against North Korea.

VI. RESURRECTING RESOLUTION 377 A (V)

Changing views on human rights laws and the piercing of the shield of sovereignty supports legal justification of military action against North Korea. Yet, the UNSC remains the biggest obstacle to international military action, and while there is a precedent for military action without the blessing of the UNSC (Operation Allied Force, where NATO conducted strikes in Kosovo in 1999), states and organizations are still hesitant to declare war.²⁶⁷ Additionally, one can reasonably expect vetoes by Russia and China in support of any action against North Korea. This raises the question – how legitimate is the UNSC, when the permanent members have unfettered power to veto resolutions?²⁶⁸ According to *The Guardian*, “[t]he US has used its veto three times in the past decade, to shield Israel from rebuke for its actions in the Palestinian territories,” and, “China has used six vetoes, each time in tandem with Russia, while Moscow has used [its] veto 10 times over [the same period].”²⁶⁹ *The Guardian* also stated that “[s]ince 1991, when Russia took over the Soviet seat on the council, it is the US that has been more prolific with its veto, using it 14 times (almost always to defend Israel from censure), compared to 13 Russian vetoes, and eight used by China.”²⁷⁰

²⁶⁶ Matthew Waxman, *International Norms and U.S. Policy Council Special Report No. 49*, COUNCIL ON FOREIGN REL. (Oct. 2009), <http://www.cfr.org/genocide/intervention-stop-genocide-mass-atrocities/p20379>.

²⁶⁷ See Hanspeter Neuhold, *Collective Security after Operation Allied Force*, 4 MAX PLANCK Y.B. U.N. L. 73, 95 (2000).

²⁶⁸ See generally U.N. Charter art. 27, ¶¶ 1–3.

²⁶⁹ Julian Borger & Bastien Inzaurrealde, *Russian Vetoes are Putting UN Security Council’s Legitimacy at Risk, Says US*, THE GUARDIAN (Sept. 23, 2015, 6:16 PM) <https://www.theguardian.com/world/2015/sep/23/russian-vetoes-putting-un-security-council-legitimacy-at-risk-says-us>.

²⁷⁰ *Id.*

The unfettered use of veto power by five out of almost 200 countries represented at the UN calls into question the UNSC's ability to address humanitarian crises and government abuse. The interests of one country can supplant the interests of another with little checks and balances. For instance, in 2011, the UNSC recommended force in Libya.²⁷¹ Resolution 1973 authorized “[m]ember States . . . acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack.”²⁷² Although China and Russia could have vetoed this action, neither did so, presumably because their interest in Libya was outweighed by other reasons.²⁷³ In the case at hand, where China accounts for 90% of North Korea's economic activity, China has a clear interest, so much so, that it was opined that China “acted like North Korea's lawyer at the UN Security Council.”²⁷⁴ “They deny evidence of North Korea wrongdoing, they insist on loopholes, [and] they insist on watering down what would otherwise be more effective resolutions [at the UN].”²⁷⁵ However, the Commission's Chairman, Mr. Kirby, acknowledged that China's veto could be about more than just politics, stating that perhaps China did not feel safe having a country like North Korea “as presently governed,” which is “extremely dangerous to Chinese citizens but also potentially turbulent because of human rights violations” and “the risk of starvation and the unrest that this can cause.”²⁷⁶

Notwithstanding the grave humanitarian disaster in Syria, China and Russia have also continued to resist any action in that country, vetoing new sanctions against the Syria government for using chemical weapons on its own citizens.²⁷⁷ In response to this veto, U.S.

²⁷¹ S.C. Res. 1973, ¶ 4 (Mar. 17, 2011).

²⁷² *Id.* There were 10 votes in favor of the resolution and five abstentions, including China and Russia. See *Security Council Approves ‘No-Fly Zone’ over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions*, UNITED NATIONS (Mar. 17, 2011), <http://www.un.org/press/en/2011/sc10200.doc.htm#Resolution>.

²⁷³ Hannah VanHoose, *Understanding the Russian Response to the Intervention in Libya*, American Progress (Apr. 12, 2011, 9:00 AM), <https://www.americanprogress.org/issues/security/news/2011/04/12/9529/understanding-the-russian-response-to-the-intervention-in-libya/>.

²⁷⁴ Nicole Gaouette & Elise Labott, *Tillerson to warn China of sanctions over North Korea*, CNN (Mar. 16, 2017), <http://www.cnn.com/2017/03/15/politics/tillerson-china-sanctions-north-korea/index.html>.

²⁷⁵ *Id.*

²⁷⁶ Kirby, *supra* note 27, at 21.

²⁷⁷ *Syria war: Russia and China veto sanctions*, BBC NEWS (Feb. 28, 2017), <http://www.bbc.com/news/world-middle-east-39116854>.

Ambassador Nikki Haley stated, "It is a sad day on the Security Council when members start making excuses for other member states killing their own people."²⁷⁸ Despite the clear CAH documented in Syria, Russia has continued to support the Syrian leadership, which prompted Matthew Rycroft, the British UN ambassador, to say that "Syria is a stain on the conscience of the security council. I think it is the biggest failure in recent years, and it undoubtedly has consequences for the standing of the Security Council and indeed the United Nations as a whole."²⁷⁹

Russia's annexation of Crimea, China's own human rights issues, and to be fair, the United States' actions in Iraq, gives ammunition to those proponents who argue that there should not be permanent members on the Council. The more the permanent members use their veto, particularly in cases like Syria, and assuming North Korea (if the case makes it to a vote), the less legitimate it will be viewed. Nonetheless, Security Council approval may not be necessary for action against North Korea. United Nations General Assembly (UNGA) Resolution 377 A (V), also known as the "Uniting for Peace" resolution, states that, in cases where the "UN Security Council fails to act in order to maintain international peace and security because of disagreement between its five permanent members, the matter shall be addressed by the general assembly,"²⁸⁰ affirming that the General Assembly "may, if deemed appropriate by it, recommend collective action, including the use of force."²⁸¹ Since its adoption in 1950, Resolution 377 A (V) has only been used once to recommend collective and enforcement action: finding

²⁷⁸ Karen De Young, *Russia, China veto at U.N. on Syria chemical weapons is 'outrageous,' U.S. says*, WASHINGTON POST, (Feb. 28, 2017), https://www.washingtonpost.com/world/national-security/russia-china-veto-at-un-on-syria-chemical-weapons-is-outrageous-us-says/2017/02/28/c69adcf4-fdeb-11e6-99b4-9e613afeb09f_story.html?utm_term=.ef1753bd98f2.

²⁷⁹ Borger & Inzaurrealde, *supra* note 269.

²⁸⁰ Waxman, *supra* note 266.

²⁸¹ CHRISTIAN TOMUSCHAT, UNITING FOR PEACE 3 (UN Audiovisual Library of International Law 2008). Mr. Tomuschat notes the Resolution came about "as a response to the strategy of the Union of Soviet Socialist Republics (USSR) to block any determination by the Security Council on measures to be taken in order to protect the Republic of Korea against the aggression launched against it by military forces from North Korea." *Id.* After the USSR casted "a negative vote on a United States draft resolution condemning the continued defiance of the United Nations by the North Korean authorities. In order to overcome this impasse, the United States, under the leadership of its Foreign Secretary Dean Acheson, succeeded in persuading the General Assembly that it should claim for itself a subsidiary responsibility with regard to international peace and security, as enunciated by Article 14 of the Charter. The result of these efforts was resolution 377 A (V)." *Id.*

the Chinese “engaged in aggression in Korea, the UN passed Resolution 498 (V) and ‘call[ed] upon all States and authorities to continue to lend every assistance to the United Nations action in Korea,’ which of course meant military assistance.”²⁸² However, as of 2013 the “Uniting for Peace” resolution has been invoked to make recommendations of international crises by the UNSC on 7 occasions and by the UNGA on 4 occasions.²⁸³

In order for the UNGA to consider a resolution under the guise of a “Uniting for Peace” resolution, there would need to be a “1) threat to the peace, breach of the peace, or act of aggression; 2) lack of unanimity among the UNSC; and 3) failure of the UNSC to exercise its primary responsibility to maintain international peace and security.”²⁸⁴ If two-thirds of member states voted in favor of a recommendation, the UNSC would not be able to override the recommendation.²⁸⁵

Invoking the “Uniting for Peace” Resolution by the UNGA would be akin to using a diplomatic nuclear option (on a nuclear ambitious state). In his article, *Invoking the ‘Uniting for Peace Resolution’ of 1950 to Authorize the Use of Humanitarian Military Intervention and Prevent Mass Atrocities in Syria*, Mr. Asian Udoh acknowledges the concerns about the legality of invoking “Uniting for Peace,” with the primary issues focusing on “the legitimacy and legality of Uniting for Peace recommendations, which are not legally binding,” and assuming a Uniting for Peace resolution actually passed, it would have no effect, as it would not usurp the UNSC’s authority on recommendations of force.²⁸⁶ A more problematic issue is that the Uniting for Peace Resolution has yet to be invoked as a basis for international military action, particularly concerning “mass atrocities.”²⁸⁷ However, as Mr. Udoh correctly points out, the preamble of the Uniting for Peace Resolution recognizes, in instances where UNSC fails to discharge its responsibilities, the remaining members are not relieved of their obligations when it comes to maintaining international peace and security.²⁸⁸ Mr. Udoh argues that

²⁸² *Id.*

²⁸³ *Security Council Deadlocks and Uniting for Peace: An Abridged History*, U.N. SECURITY COUNCIL (2013), http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Security_Council_Deadlocks_and_Uniting_for_Peace.pdf.

²⁸⁴ Asian Udoh, *Invoking the ‘Uniting for Peace Resolution’ of 1950 to Authorize the Use of Humanitarian Military Intervention and Prevent Mass Atrocities in Syria*, 23 WILLAMETTE J. INT’L & DISPUTE RES. 187, 212 (2015).

²⁸⁵ *Id.* at 196.

²⁸⁶ *Id.* at 215.

²⁸⁷ *Id.* at 217.

²⁸⁸ *Id.* at 215.

this language suggests that UNSC does not have sole authority to authorize use of force.²⁸⁹

VII. THE “RESPONSIBILITY TO PROTECT (R2P)” AND A NEW CHALLENGE TO STATE SOVEREIGNTY

After Rwanda and the NATO intervention in Yugoslavia, the legality of intervention began to be explored.²⁹⁰ “In late 2001, the Canadian government created the International Commission on Intervention and State Sovereignty (ICISS).”²⁹¹ This Commission’s report on the “*Responsibility to Protect*, . . . advocated that state sovereignty is a responsibility, and that the international community could, as a last resort use military intervention to prevent mass atrocities.”²⁹² At the United Nations 2005 World Summit, “world leaders made a historic commitment to protect populations from genocide, war crimes . . . and crimes against humanity.”²⁹³ It was declared that:

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, *we are prepared to take collective action, in a timely and decisive manner, through the Security*

²⁸⁹ *Id.*

²⁹⁰ See INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 1–2, 4 (2001).

²⁹¹ *R2P-A Short History*, U.N. REG’L INFO. CTR. FOR W. EUR., <http://www.unric.org/en/responsibility-to-protect/26981-r2p-a-short-history> (last visited August 29, 2017).

²⁹² *Id.*

²⁹³ *An Introduction to the Responsibility to Protect*, INT’L COAL. FOR THE RESPONSIBILITY TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/about-rtop> (last visited August 29, 2017).

*Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.*²⁹⁴

In 2009, the UN released its report, “Implementing the Responsibility to Protect.”²⁹⁵ In this report, the UN addressed and clarified that actions under the aforementioned Paragraphs 138 and 139 were

to be undertaken only in conformity with the provisions, purposes and principles of the Charter of the United Nations. In that regard, the responsibility to protect does not alter, indeed it reinforces, the legal obligations of Member States to refrain from the use of force except in conformity with the Charter.²⁹⁶

In addressing state sovereignty, the UN noted that world leaders made it

absolutely clear, the responsibility to protect is an ally of sovereignty, not an adversary. It grows from the positive and affirmative notion of sovereignty as responsibility, rather than from the narrower idea of humanitarian intervention. By helping States to meet their core protection responsibilities, the responsibility to protect seeks to strengthen sovereignty, not weaken it. It seeks to help States to succeed, not just to react when they fail.²⁹⁷

²⁹⁴ G.A. Res. 60/138-39 (Sept. 15, 2005) (2005 World Summit Outcome)

²⁹⁵ See generally U.N Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 (Jan. 12, 2009).

²⁹⁶ *Id.* at 5.

²⁹⁷ *Id.* at 7.

The UN reiterated that the state “remains the bedrock of the responsibility to protect, the purpose of which is to build responsible sovereignty, not to undermine it.”²⁹⁸

Further, the 2009 UN R2P implementation report addresses the use of force.²⁹⁹ The UN stated “use of force should be considered a measure of last resort,” recognizing in those cases, that international military assistance may be the “surest way” in supporting those “non-state actors, as well as states” who commit crimes related to the parameters of the R2P.³⁰⁰

There is an inherent expectation in the R2P that resolution of humanitarian issues will be resolved through peaceful means.³⁰¹ In its final report, ICISS recognized that under the R2P, military action was not necessarily required and that “coercive measures” should be considered, including various types of sanctions.³⁰² Yet, at the point that non-military options are no longer viable, ICISS endorses military intervention “in only extreme and exceptional cases” and when certain factors are met.³⁰³ Those factors include whether there is (1) just cause for military intervention, (2) whether the military intervention is for the right intentions, (3) military intervention is being used as a last resort, (4) whether it will be used in proportion in relation to the magnitude of the situation, and (5) prospects of ending those humanitarian issues are reasonable.³⁰⁴

Admittedly, under the five factors listed by ICISS, it is debatable whether the threshold for military action against North Korea for its CAH, under the R2P, is met. Just cause is satisfied in those cases where military intervention is needed to (1) to halt or avert “large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation;” or (2) to halt or avert “large scale ‘ethnic cleansing,’ actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.”³⁰⁵ The ICISS report addressed the evidence requirement of just cause, noting in an ideal situation, there

²⁹⁸ *Id.* at 10.

²⁹⁹ *Id.* at 5, 7, 18.

³⁰⁰ *Id.* at 18.

³⁰¹ *Id.* at 4, 23.

³⁰² INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 290, at VII-IX, 29; see Peter Stockburger, *The Responsibility to Protect Doctrine: Customary International Law, An Emerging Legal Norm, or Just Wishful Thinking?* 5 INTERCULTURAL HUM. RTS. L. REV. 365, 382–83 (2010).

³⁰³ Stockburger, *supra* note 302, at 383–84.

³⁰⁴ *Id.* at 383

³⁰⁵ *Id.* at 384.

would be a "report as to the gravity of the situation, and the inability or unwillingness of the state in question to manage it satisfactorily, from a universally respected and impartial non-governmental source"³⁰⁶ For the reasons already addressed, the Commission's findings of the North Korean CAH unquestionably meets this criteria. The second factor, right intention, requires military intervention to halt or avert human suffering, with the expectation that intervention will be on a collective or multilateral basis.³⁰⁷ Based on the Commission's report, this factor is met, with the assumption that the United States would unilaterally engage in military action.

The third factor, last resort, envisions that "every diplomatic and non-military avenue for the prevention or peaceful resolution of the humanitarian crisis must have been explored."³⁰⁸ ICISS does not necessarily say that every option has to be explored, just that "there must be reasonable grounds for believing that, in all the circumstances, if the measure had been attempted it would not have succeeded."³⁰⁹ Unfortunately, the UNSC sanctions against North Korea have primarily focused on North Korea's nuclear ambitions and not on the humanitarian aspects.³¹⁰ Sanctions and threats have not deterred North Korea and diplomacy has seen little success.³¹¹ This third factor is met.

The fourth factor, proportional means, proposes that the scale of any military intervention, "be the minimum necessary to secure the humanitarian objective in question," and the means must be "commensurate with the ends and in line with the magnitude of the original provocation."³¹² Meeting this parameter would take significant planning and would involve a lot of guesswork, especially given the unknowns about North Korea and its budding nuclear program.

However, it is the fifth factor under the ICISS model, reasonable prospects, which could prevent R2P's justification. "Reasonable prospects" states that "military action can only be justified if it stands a reasonable chance of success."³¹³ If the intervention cannot "actually halt or avert the atrocities or suffering that triggered the intervention in the first place," then military action cannot be justified pursuant to the R2P

³⁰⁶ INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 290, ¶ 4.29.

³⁰⁷ Stockburger, *supra* note 302, at 386.

³⁰⁸ INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 290, ¶ 4.37.

³⁰⁹ *Id.*

³¹⁰ Richard Roth, *UN Security Council Imposes New Sanctions on North Korea*, CNN (Aug. 6, 2017, 10:09 AM), <http://www.cnn.com/2017/08/05/asia/north-korea-un-sanctions/index.html>.

³¹¹ *Id.*

³¹² INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 290, ¶ 4.39.

³¹³ *Id.* ¶ 4.41.

doctrine.³¹⁴ ICISS also opines that if military action for “limited human protection purposes” triggers a larger conflict, action cannot be justified.³¹⁵ There is no doubt that this would be the most difficult factor to meet. The Commission’s report highlights the suffering of the North Korean people.³¹⁶ Professor Rummel has his own estimates of democidal deaths at the hands of North Korean leaders.³¹⁷ In 2011, it was estimated that since 1995, four million North Koreans have died of starvation, and six million were at risk of dying from starvation.³¹⁸ Further, the atrocities committed by the North Korean leadership have been ongoing for 70 years.³¹⁹ Yet, as Secretary Mattis has opined, war with North Korea would be catastrophic.³²⁰ The fatalities estimates for Seoul alone are projected to be 60,000 in the first day alone and 300,000 civilians in the population centers of South Korea in the opening days.³²¹ In 1994, it was estimated there would be one million deaths and a \$1 trillion dollar economic impact.³²² Twenty-four years later, one would expect those numbers to be higher. While it is reasonable to expect that the United States and its allies would win a war against North Korea, unlike the first Gulf War in 1991 where there was a quick resolution against Saddam Hussein and Iraq, there most likely would not be a quick resolution with a second Korean War, with the expectation that conflict would last four to six months.³²³ War with North Korea would undoubtedly trigger a larger conflict, involving the United States, China, Russia, and Japan. Under the ICISS model of the R2P, this would be a tough parameter to meet. Also, this analysis does not take into

³¹⁴ *Id.*

³¹⁵ *Id.*; see also Ido Kilovaty, *Report of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea: Green Light for Humanitarian Intervention*, 6 CREIGHTON INT’L & COMP. L.J. 1, 18–19 (2015), for an additional analysis on application of these five factors.

³¹⁶ See Kilovaty, *supra* note 315, at 1–9, 18.

³¹⁷ R.J. RUMMEL, STATISTICS OF DEMOCIDE ESTIMATES, CALCULATIONS, & SOURCES Ch. 10 (2002).

³¹⁸ Robert Park, *Responsibility to Protect in North Korea*, HARV. INT’L. REV. (Dec. 7, 2011), <http://hir.harvard.edu/article/?a=2859>.

³¹⁹ See *North Korea Profile – Timeline*, BBC NEWS (Aug. 17, 2017), <http://www.bbc.com/news/world-asia-pacific-15278612>.

³²⁰ Kathryn Watson, *War with North Korea Would Be “Catastrophic” Defense Secretary Mattis Says*, CBSNEWS.COM (May 28, 2017), <https://www.cbsnews.com/news/war-with-north-korea-would-be-catastrophic-mattis-says/>.

³²¹ Motoko Rich, *First Strike is Option Few Can Stomach*, N.Y. TIMES (July 6, 2017), <https://www.nytimes.com/2017/07/05/world/asia/north-korea-south-us-nuclear-war.html>.

³²² Bill Powell, *What War with North Korea Looks Like: One Million Dead*, NEWSWEEK (Apr. 25, 2017, 7:23 AM), <http://www.newsweek.com/2017/05/05/what-war-north-korea-looks-588861.html>.

³²³ *Id.*

consideration other factors, including the reach of North Korean nuclear weapons on Japan and the mainland United States and the potential casualties of a possible strike.

With that said, the R2P in its current form does not focus on these parameters, leaving room for governments to decide what is best when it comes to enforcing international law and issues of sovereignty.³²⁴ Regardless, the evolution of the R2P pulls a significant thread at the notion of absolute sovereignty. Yet, has R2P become international law? The Global Centre for the Responsibility to Protect (GCRP) has stated that the R2P does not create any new international obligations, and although it builds on the Genocide Convention, it is not considered customary law.³²⁵ The CFR notes that for those regimes that “perpetuate mass atrocities or allow them to occur within their borders” the R2P “rejects powerfully the argument that sovereignty shields those regimes that might perpetrate mass atrocities or allow them to occur within their borders from international concern respects,” and “to the international community, it emphasizes a responsibility to act when a regime is in major breach of certain duties, thereby providing political momentum for action.”³²⁶ Yet, while “the concept of the ‘responsibility to protect’ may signal a shift away from the absolute conception of sovereignty,” “the principle of nonintervention still carries significant weight internationally.”³²⁷

The CFR argues that the R2P “reinforces the view that only the Security Council should administer collective action to enforce it. To many responsibility-to-protect proponents, this was seen as watering down the concept.”³²⁸ Yet, what if a country (or organization, i.e., NATO) invoked R2P as justification for military action – could it instantly become customary international law? NATO commenced Operation Allied Force in 1999 in Kosovo without UN Security Council blessing.³²⁹

³²⁴ INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 290, at 12, 35, 37, 47.

³²⁵ *The Responsibility to Protect: A Background Briefing*, GLOB. CTR. FOR THE RESPONSIBILITY TO PROTECT (Oct. 2015), <http://www.globalr2p.org/media/files/r2p-backgrounder.pdf>. The Global Centre goes further, stating “[a] norm of international conduct is one that has gained wide acceptance among states and there could be no better demonstration of that acceptance in the case of R2P than the unanimously adopted language of the 2005 World Summit Outcome Document. Once a norm has gained not only formal acceptance but widespread usage, it can become part of ‘customary international law.’” *Id.*

³²⁶ MATTHEW WAXMAN, INTERVENTION TO STOP GENOCIDE AND MASS ATROCITIES 10 (Council on Foreign Relations 2009).

³²⁷ PREVENTING GENOCIDE, *supra* note 101, at 75.

³²⁸ See Roberts, *supra* note 256, at 103–04, 107.

³²⁹ See *id.*

If the R2P concept had been in place, and been invoked, would that have strengthened the legal justifications for Allied Force?

In his piece, Stockburger noted for a practice to become customary international law, two elements must be satisfied: 1) a “long-term, widespread compliance by many States,” and 2) “states must believe that conformance with the practice is not merely desired, but mandatory and required by international law.”³³⁰ Stockburger states “once a practice meets these two requirements, it is generally considered binding on all states as a rule of customary international law.”³³¹ The requirement of a long-term development of a practice is no longer required.³³² With this in mind, conceivably, the UNSC has itself, made R2P international law. Going to back to UNSC Resolution 1973, where the UNSC authorized member states to “*take all necessary measures...to protect civilians and civilian populated areas under threat of attack*” in parts of Libya, it appears that the UN invoked the R2P.³³³ Coincidentally, while the GCRP says the R2P isn’t customary international law, it also notes that the R2P “has been formally invoked by the UN Human Rights Council, UNGA and the UNSC, including more than 35 resolutions regarding situations such as Central African Republic, Côte d’Ivoire, Libya, Mali, South Sudan and Syria.”³³⁴ But most important, the Commission itself invokes R2P in its report, stating the wrongs committed by North Korean leadership “include crimes against humanity that invoke obligations of prompt and effective action which includes the responsibility to protect to people of [North Korea] whose government manifestly fails to do so.”³³⁵ Although the recognition of R2P has happened in a short time, does repeated recognition and invocation of the R2P not make it customary international law, particularly when R2P was built on existing international law? In only eleven years since its inception, R2P has become international law.³³⁶ One other thought is this: while this Article has focused on the CAH issue, at what point does R2P apply to the nuclear ambitions of North Korean leadership?

Predictably, R2P has its supporters and detractors. It has been argued that “R2P should be the primary avenue for all humanitarian intervention” and “is already the foundation for both multilateral and unilateral military force intervention in the modern era,” but, “to avoid

³³⁰ Stockburger, *supra* note 302, at 388–89.

³³¹ *Id.* at 389.

³³² *Id.*

³³³ S.C. Res. 1973, ¶4 (Mar. 17, 2011) (emphasis added).

³³⁴ *The Responsibility to Protect: A Background Briefing*, *supra* note 334.

³³⁵ Kirby, *supra* note 27, at 26.

³³⁶ Nico Smit, *Evolution of the Responsibility to Protect* (Jan. 7, 2013), <http://www.e-ir.info/2013/01/07/evolution-of-the-responsibility-to-protect/>.

dilution of its usefulness should be limited to major violations of human rights.”³³⁷ Detractors have argued that “Responsibility to Protect represents a shift from the concept of sovereignty to the idea of protection” and “in the absence of a sovereign community, such as an international order, there cannot be any authority to provide protection.”³³⁸ Another authority has opined that an attempt for a humanitarian doctrine is a charter for imperial occupation. “There may be cases in which the imperial rule is the lesser of two evils, perhaps to end genocide . . . or to end slavery . . . but philanthropic imperialism is imperial nonetheless.”³³⁹ Finally, other authors have stated R2P as “broad and unclear, raising the possibility of multiple interpretations informed by a complex political dimensions and accompanied by little oversight.”³⁴⁰ In 2006, Young Sok Kim, who wrote *Responsibility to Protect, Humanitarian Intervention, and North Korea*, stated that unilateral military intervention, in the name of R2P, was a violation of international law. While he argued that the only way to prevent the disaster that would come with military intervention was through diplomacy, Mr. Kim predicted in the post-Cold War era, that invoking “humanitarian intervention” and R2P would likely be used more frequently to justify interventions.³⁴¹

While diplomacy is always preferred, twelve years after Mr. Kim’s article, the landscape of North Korea has dramatically changed.³⁴² If the R2P declaration is to have any teeth, and is to be more than a doctrine which makes world leaders feel good, military options must always be on the table. The Chairman of the Commission stated, “[I]f [the North Korean CAH] is not a case for action by the Security Council, it is hard to imagine one that ever would be.”³⁴³ The atrocities committed by North Korean leadership are well known, well documented, and have occurred over generations, and the North Korean people can do little to defend themselves.³⁴⁴ The will of the people is not represented by its

³³⁷ Amir Seyedfarshi, *French Intervention in the Age of R2P: A Critical Examination of the Case of Mali*, 7 CREIGHTON INT’L & COMP. L.J. 2, 25 (2016).

³³⁸ *Id.* at 25–26.

³³⁹ Alex De Waal, *No Such Thing as Humanitarian Intervention*, HARVARD INT’L REV. (Mar. 21, 2007), <http://hir.harvard.edu/article/?a=1482>.

³⁴⁰ Seyedfarshi, *supra* note 337, at 27.

³⁴¹ Sok Kim, *supra* note 23, at 93–94.

³⁴² See Richard Haass, *Flashback: Try Diplomacy First on North Korea, Even Though It Probably Won’t Work*, USA TODAY (July 11, 2017, 3:15 AM), <https://www.usatoday.com/story/opinion/2017/07/11/try-diplomacy-first-north-korea-richard-haass-column/460538001/>.

³⁴³ Kirby, *supra* note 27, at 15.

³⁴⁴ See Sarah Son et. al., *Mapping Crimes Against Humanity in North Korea*, TRANSITIONAL JUST. WORKING GRP. (Seoul) 8, 10, 12-13, 28-29 (2017),

current leadership.³⁴⁵ The documented CAH in North Korea presents this situation, as North Korea compromised its integrity to the point it is no longer a legitimate sovereign. In light of the Commission's findings about North Korea, if a country, organization (NATO), or UNSC, or even the UNGA, under Resolution 377 A, authorized military action under the R2P concept, R2P could arguably become customary international law and military intervention will be justified.

CONCLUSION

This Article has focused on the evolving area of human rights law and justifications for military action against North Korean leadership. The unknown of this analysis are North Korean nuclear ambitions, which has become such a significant concern, that Chinese influence over North Korea, has become weak.³⁴⁶ Nonetheless, one only need to turn on the television or review mainstream news articles to see the ongoing atrocities happening in North Korea.³⁴⁷ Yet, responses to the human rights violations have been muted since the Commission's February 2014 findings of long-term crimes against humanities, with much of the focus being on North Korea's nuclear ambitions.³⁴⁸ But does the world owe a response?

While the Genocide Convention obligates nations to confront genocidal acts, the fact that world leaders have been hesitant to respond to genocidal instances since its inception has made this landmark treaty nothing more than a historical document.³⁴⁹ Even in light of the Commission's own findings, it deferred on calling the North Korean acts

[https://en.tjwg.org/TJWG_Report-Mapping_Crimes_Against_Humanity_in_North_Korea\(July2017\)-Eng_Final.pdf](https://en.tjwg.org/TJWG_Report-Mapping_Crimes_Against_Humanity_in_North_Korea(July2017)-Eng_Final.pdf)

³⁴⁵ See Tania Branigan, *Hope, Pride, Fear: How North Koreans Feel About Their Homeland*, THE GUARDIAN (Aug. 10, 2017, 12:00 AM), <https://www.theguardian.com/world/2017/aug/10/hope-pride-fear-how-north-koreans-feel-about-their-homeland>.

³⁴⁶ Simon Denyer, *China Watches in Frustration as North Korea Crisis Enters Dangerous Spiral*, WASHINGTON POST (Sept. 24, 2017), https://www.washingtonpost.com/world/china-watches-in-frustration-as-north-korea-crisis-enters-dangerous-spiral/2017/09/24/33ec15c2-a119-11e7-8c37-e1d99ad6aa22_story.html?utm_term=.f0b8908f674e.

³⁴⁷ See Kyle Atwood, *North Korean Prison Camps Exposed by State Dept.*, CBS NEWS (Aug. 30, 2017, 6:00 AM), <https://www.cbsnews.com/news/state-department-report-exposes-north-korean-prison-camps/>.

³⁴⁸ See Anthony Ruggiero, *Don't Let North Korea's Nukes Overshadow Human Rights Abuses*, THE HILL (Apr. 28, 2017, 12:40 PM), <http://thehill.com/blogs/pundits-blog/foreign-policy/331061-dont-let-north-koreas-nukes-overshadow-human-rights-abuses>.

³⁴⁹ See *The Genocide Convention in Int'l Law*, HOLOCAUST MEM'L MUSEUM, <https://www.ushmm.org/confront-genocide/justice-and-accountability/introduction-to-the-definition-of-genocide> (last visited Sept. 24, 2017).

genocide, referring to the acts as “crimes against humanity.”³⁵⁰ This is not all negative. The elements of CAH, as listed in Article 7 of the Rome Statute, allow for easier prosecution of world leaders who perpetuate these crimes.³⁵¹ CAH is how the UN and international courts will handle human rights violations in the future.

While there is justification for military action, sovereignty is the primary issue. Yet, under quickly evolving international law, North Korean leadership has compromised its sovereignty. No longer can the illegal and immoral actions of a world leader remain within its borders, even within the most closed society in the world. If human rights laws are to have any effect, the notion of absolute sovereignty must change:

Sovereignty as such is a changing notion which adjusts to the developing nature of international law . . . in the end the debate turns on what one chooses to understand by the term sovereignty and who should be protected . . . the rule that there should be no interference in state sovereignty simply begs the question: what are the rights and duties associated with sovereignty?³⁵²

The eroding of state sovereignty isn't all positive. What should trouble world leaders are the cases where alleged human rights claims are illegitimate claims. An international court system is not the place, nor does it have the capabilities or resources, to hear every case where an individual feels aggrieved, and the political nature of the court is something that cannot and should not be dismissed. The United States' concerns about the parameters of the ICC are not unfounded, but the ICC is a significant step in addressing human rights violations.

In its R2P implementation policy, the UN acknowledged that:

Genocide and other crimes relating to the responsibility to protect do not just happen. They are, more often than not, the result of a deliberate and calculated political choice, and of the decisions and actions of political leaders who are all too ready to take advantage of existing social divisions and institutional failures.³⁵³

In no case is this more correct than what has and is occurring in North Korea. Individually, the ICC, UJ, and R2P could make it difficult to

³⁵⁰ See Kilovaty, *supra* note 315, at 8, 18, 21.

³⁵¹ See Rome Statute, *supra* note 78, art. 7.

³⁵² Cryer, *supra* note 204, at 982.

³⁵³ *Implementing the Responsibility to Protect*, *supra* note 295, at 12.

justify military action, but together, the R2P, the ICC, the UJ, international case law, and the UN General Assembly can support the legality of military action against North Korea:

There is a growing understanding, however, that sovereignty implies rights and obligations, and that states have a basic responsibility to protect their citizens from genocide and mass atrocities. No government has the right to use national sovereignty as a shield behind which it can murder its own people. The challenge for the world community is not only to state this principle, but to implement it.³⁵⁴

Military action against North Korea implements this principle and is justified under quickly evolving international law. With the UNSC's legitimacy being questioned, no longer can its state leaders violate its citizen's human rights and expect to be immune from an international response. However, for new, progressive international law to have any effect, world leaders must understand that coalitions must form, militaries must act, and oppressive regimes must fall. While not all military efforts in the name of human rights have succeeded, the lessons learned from Kosovo are a solid start in bringing to justice those who have perpetrated the CAH's in North Korea.

“Never Again.”³⁵⁵ The unforgettable words at Station 13 in the Dachau concentration camp ring hollow in all five languages in which they are written.³⁵⁶ Despite President Clinton echoing “never again” after the Rwandan genocide in 1998 and similar sentiments from world leaders after similar genocides in Bosnia, Darfur, Syria, and others, the North Korean atrocities are another instance of the international community's unwillingness to address these crimes.³⁵⁷ The legal justification for military action against North Korea based on the documented crimes against humanity has been established. The law is rapidly changing and challenging new boundaries. But at what point will governments be willing to test these boundaries? The time is now. Either we say “never again” and mean it, or we say “never mind.”

³⁵⁴ PREVENTING GENOCIDE, *supra* note 101, at xxi.

³⁵⁵ STATION 13: INT'L MEMORIAL - DACHAU CONCENTRATION CAMP MEMORIAL, <https://www.kz-gedenkstaette-dachau.de/stop13.html> (last visited Sept. 20, 2017).

³⁵⁶ *Id.*

³⁵⁷ See Samantha Power, *Bystanders to Genocide*, THE ATLANTIC (Sept. 2001), <https://www.theatlantic.com/magazine/archive/2001/09/bystanders-to-genocide/304571/>.