

Taking IHI, R2P and Legitimate Defense Seriously: North Korea as the Primary Consideration

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Introduction

North Korea’s human rights issues are not as well known among the world population as they should be, but the trend is moving towards greater awareness. The human rights issues tend to be subsumed under the security issues. Both by themselves are very important, and together, they constitute the most serious pair of crises in the world. Usually, they have been addressed separately. However, addressing both together increases the possibilities of resolving either one—not unlike the Helsinki Process regarding the former Soviet Union.

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The Democratic People's Republic of Korea (DPRK) government's abuse of its own people truly qualifies as egregious. Without any hyperbole, analysis of these violations bears many similarities with the way Hitler treated the German concentration camp population between the 1930s and 40s,¹ Mao's concentration camps in China, Pol Pot's reign of terror in Cambodia, and Stalin's gulags in the former Soviet Union.² Beyond all of these examples, the North Korean government has engaged in gross, systematic violations by punishing through guilt by association three generations of its own populace.³ So grandchildren find themselves punished for their hereditary relationship with a grandparent deemed an enemy of the state.

These concentration camps, as shockingly draconian as those of Mao, Hitler, Pol, and Stalin, perpetrate a panoply of brutality. The DPRK government both neglects and abuses its own people in one large jail of a country, while using its concentration camps particularly for those considered even slightly disloyal to the regime. Current approximations place the concentration camp population at around 80,000 to 120,000 people, with multiple hundreds of thousands (as a low estimate) murdered within its unspeakably cruel confines.⁴

The government abysmally fails to fulfill the rights of the North Korean people. Whether civil, political, economic, social, or cultural, the people of the DPRK remain horribly oppressed.⁵ Yet the gross, systematic abuse of their human rights has turned terribly banal and commonly corrupt.⁶ The regime acts lawlessly, as if domestic and international law do not exist—like a criminal syndicate rather than a legitimate government.

1. Agence France Presse, *North Korean Prison Camps Are "Like Hitler's Auschwitz"*, BUS. INSIDER (Feb. 20, 2013), <http://www.businessinsider.com/survivors-liken-north-korean-prison-camps-to-holocaust-2013-2> [<https://perma.cc/HM4P-VGDX>].

2. Victor Cha, *The Gulags of North Korea*, FOREIGN POL'Y (June 10, 2014, 6:58 PM), <http://foreignpolicy.com/2014/06/10/the-gulags-of-north-korea/> [<https://perma.cc/WK4W-ML4J>]; Jared Sichel, *Holocaust in North Korea*, JEWISH J. (Jan. 23, 2014), http://jewishjournal.com/cover_story/126291/ [<https://perma.cc/X44Y-BYT6>].

3. Jeremy Laurence & Ju-min Park, *Guilty-by-Association: Growing Up in Hell of North Korean Gulag*, REUTERS (May 4, 2011, 3:36 AM), <https://www.reuters.com/article/us-northkorea-prisons/guilty-by-association-growing-up-in-hell-of-north-korean-gulag-id-USTRE74275D20110504> [<https://perma.cc/3LG8-7ULW>]; see *North Korea: Events of 2015*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2016/country-chapters/north-korea> [<https://perma.cc/TP52-RB3M>].

4. David Osborne, *A Land of 'Unspeakable Atrocities': UN Commission Warns North Korean Leader Kim Jong-Un He Could Face Trial for Human Rights Abuses*, INDEPENDENT (Feb. 17, 2014, 4:25 PM), <http://www.independent.co.uk/news/world/asia/a-land-of-unspeakable-atrocities-un-commission-warns-leader-kim-jong-un-he-could-face-trial-for-9134405.html> [<https://perma.cc/TH42-5Y3E>]; see also VICTOR CHA, *THE IMPOSSIBLE STATE: NORTH KOREA, PAST AND FUTURE* 172 (2013).

5. See *Why North Korea?*, LIBERTY N. KOR., <https://www.libertyinnorthkorea.org/why-north-korea/> [<https://perma.cc/N89X-JYS9>].

6. See *North Korea 2016/2017*, AMNESTY INT'L, <https://www.amnesty.org/en/countries/asia-and-the-pacific/north-korea/report-korea-democratic-peoples-republic-of/> [<https://perma.cc/QLN3-VGK3>].

North Korea also commits genocide, a *jus cogens* offence,⁷ against Christians and all who are not completely of Korean descent.⁸ For example, the government murders or forces the abortion of mixed-race, Half-Chinese infants.⁹

Enter the United Nations

There have been several precursor organizations to the United Nations since as early as the middle of the 1800s. The International Telecommunication Union was founded in 1865 as the International Telegraph Union, and the Universal Postal Union was established in 1874.¹⁰ Both are now United Nations specialized agencies, among the UN's over 300 sub-organizations.¹¹ In 1899, the International Peace Conference was held for discussions on how to peacefully settle crises around the world, how to prevent wars and codify rules of warfare.¹² These discussions established the Permanent Court of Arbitration, which began work in 1902.¹³ The League of Nations was the forerunner of the United Nations.¹⁴ This organization was created in 1919 under the Treaty of Versailles to promote international cooperation and to achieve peace and security.¹⁵ The League of Nations ceased its activities after failing to prevent the Second World War.¹⁶

The United Nations (UN) was established on January 1, 1942, during the Second World War, when representatives of twenty-six nations pledged their governments to continue fighting together against the Axis Powers.¹⁷ However the UN was officially brought into existence on October 24, 1945, representing fifty-one countries.¹⁸

The nascent UN Security Council denounced an aggressive war for the first time when North Korea invaded South Korea.¹⁹ The USSR, a permanent member with veto power, could have prevented any resolutions hostile to North Korea and altogether avoided war, but the nation was boycotting

7. A *jus cogens* offence (translation: peremptory law offence) is an "overriding principle of international law" from which "no derogation is ever permitted." *Jus cogens*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/jus_cogens [<https://perma.cc/9K6G-ATCP>].

8. Olivia Enos, *North Korea is the World's Worst Persecutor of Christians*, FORBES, (Jan. 25, 2017), <https://www.forbes.com/sites/oliviaenos/2017/01/25/north-korea-is-the-worlds-worst-persecutor-of-christians/#3424b376318e> [<https://perma.cc/4W3D-LAT2>]; Robert Park, *Genocide in North Korea*, WORLD POL'Y BLOG (Feb. 2, 2012, 5:24 PM), <http://www.worldpolicy.org/blog/2012/02/06/genocide-north-korea> [<https://perma.cc/2C8P-7WM2>].

9. Park, *supra* note 8.

10. *History of United Nations*, UNITED NATIONS, <http://www.un.org/en/sections/history/history-united-nations/index.html> [<https://perma.cc/9K62-V7H4>].

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. See Allan R. Millett, *Korean War: 1950-1953*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Korean-War> [<https://perma.cc/BW35-6NKH>].

the Security Council over an unrelated issue.²⁰ In fact, Joseph Stalin, who negotiated for the division of Korea against the will of the Korean people after WWII, plotted and backed the Korean War from the beginning.²¹ Sadly, two U.S. military Colonels capitulated to this demand.²²

The Soviets trained and planted the initial Supreme Ruler of North Korea, Kim Il-Sung, who awaited Stalin's green light before commencing the Korean War.²³ In response, a U.S. led UN coalition fought to defend South Korea, restoring the original line of demarcation, the 38th parallel.²⁴ Even after the armistice, which North Korea has repeatedly broken and renounced, the so-called Demilitarized Zone ("DMZ") has remained the most militarized border on planet earth.

This work lays a basic doctrinal foundation as well as suggested applications to consider for resolving the dual security and human rights crises of the DPRK. The three doctrines are the doctrines of international humanitarian intervention ("IHI"), the responsibility to protect ("R2P") and legitimate defense. These doctrines arguably apply most urgently to the DPRK's gross, systematic human rights violations and security threats—more than they do anywhere else. R2P, IHI and legitimate defense seriously undergird efforts to resolve the DPRK crises.

I. History of the Democratic People's Republic of Korea

After World War II, North Korea controlled all the remaining industries in the country, and retained all the benefits it received from the Soviet Union in the form of money, food, military weaponry and tactical training.²⁵ The Soviet Union also provided North Korea with advice on how to create a government and a dictatorship as Joseph Stalin had.²⁶ This political advice has been followed by Kim Il-Sung, Kim Jong-Il, and now Kim Jong-Un.²⁷ As the central focus of its social organization, the North Korean government rewards loyalty and punishes perceived disloyalty through dra-

20. *Id.*

21. See Katheryn Weathersby, *Soviet Aims In Korea And The Origins Of The Korean War, 1945-50: New Evidence From Russian Archives* 9, 35-36 (Woodrow Wilson Int'l Center For Scholars, Working Paper No. 8, 1993).

22. *Id.*

23. VICTOR CHA, *THE IMPOSSIBLE STATE: NORTH KOREA, PAST AND FUTURE* 70-71 (2012); Kim Il Sung, *ENCYCLOPEDIA BRITANNICA: BRITANNICA ACADEMIC* (Jan. 13, 2014), <https://academic.eb.com/levels/collegiate/article/Kim-Il-Sung/45457> [<https://perma.cc/G7AM-LGM5>]; Millet, *supra* note 19.

24. Millet, *supra* note 19.

25. See CHARLES K. ARMSTRONG, *THE NORTH KOREAN REVOLUTION, 1945-1950* 153, 156.

26. See CHA, *supra* note 23, at 70-71 (explaining briefly Kim Il Sung's rise to power with Soviet backing).

27. See Charlie Campbell, *The Despotic Dynasty: A Family Tree of North Korea's Kim Clan*, *TIME* (Feb. 24, 2017), <http://time.com/4681304/north-korea-kim-family-album/> [<https://perma.cc/X4NY-5QSY>].

conian and inhumane punishment.²⁸ The official state philosophy is called Juchè.²⁹ Juchè imagines the state as a metaphorical socio-political human body, in which the Supreme Ruler acts as the brain, the party acts as the nerves, and the people act as the arms, legs, and muscles.³⁰ This forms the thought that the people do not need to think because the Supreme Leader (currently Kim Jong-Un) does all the thinking for the entire country. This explains why North Korea considers its population as mere property of little value.³¹

The DPRK demonstrates its power to its citizens in order to bolster its control and legitimacy in the eyes of its people. North Korea constantly feeds the citizens false reports to dupe them into allegiance and false loyalty.³² Kim Jong-Il held the title of Supreme Leader during the worst famine North Korea had ever experienced up to that time, the extermination of large numbers of dissenters, and other dire conditions that motivated refugees to flee the country.³³ These tragic events plummeted the DPRK into below subsistence economic and political levels.³⁴ The DPRK made no adjustments to combat these events, instead asking its people to eat only two paltry meals a day and to tighten their belt two notches to show support for the revolution.³⁵ As the country's outlook became even worse, the government continued to wax corrupt, with government officials using food and resources as leverage to prey on the population.³⁶ The DPRK, even including the most recent studies, ranks as *the* most corrupt country in the world.³⁷ It also now reportedly faces yet another historic famine.³⁸

Victor Cha, a Georgetown scholar who has written extensively on North Korea, has stated that North Korea operates more like an organized crime unit than an actual country caring for its citizens.³⁹ North Korea actively participates in narcotics trafficking, money laundering, fraud, and

28. Phil Robertson, *North Korea's Caste System: The Trouble with Songbun*, HUMAN RIGHTS WATCH (July 5, 2016, 11:18 AM), <https://www.hrw.org/news/2016/07/05/north-koreas-caste-system> [<https://perma.cc/NKG6-GRIT>].

29. CHA, *supra* note 23.

30. *Id.* at 42-43.

31. *See id.* at 136.

32. *See id.* at 78, 136.

33. *See id.* at 88, 92.

34. *Id.* at 92.

35. *Id.* at 126.

36. *Id.* at 127.

37. *The World's Most Corrupt Countries*, N.Y. TIMES (Dec. 9, 2016), <https://www.nytimes.com/interactive/2016/12/09/world/most-corrupt-countries-list.html> [<https://perma.cc/VQ6L-H7ZE>].

38. Jay Akbar, *North Korea Faces Worst Famine in Two Decades While Kim Jong-Un Spends His Time Chasing Nuclear Dream and Criticising 'Weird' Donald Trump*, DAILY MAIL (Aug. 24, 2017, 12:02 PM), <http://www.dailymail.co.uk/news/article-4820220/North-Korea-faces-worst-famine-two-decades.html> [<https://perma.cc/X8XT-ADC3>].

39. CHA, *supra* note 23, at 129-30. Professor Cha has been named in reports as a possible U.S. Ambassador to South Korea, but as of this writing, no official public announcement has been made. Josh Rogin, *Trump Should Name His Asia Team Before His Tour There*, WASH. POST (Oct. 17, 2017), <https://www.washingtonpost.com/news/josh-rogin/wp/2017/10/18/trump-should-name-his-asia-team-before-his-tour-there/> [<https://perma.cc/Q86R-AZR2>].

transactional crime.⁴⁰ North Korea also engages in counterfeiting both currency and pharmaceutical products.⁴¹ Their counterfeit currency is sometimes called a “supernote” because it is convincing enough to fool government officials in other countries.⁴² The North Korean regime also heavily funds heroin labs in order to increase its illegitimate income.⁴³ The regime does not care much about their citizens’ welfare, but more about the Supreme Leader’s and elite’s wealth.⁴⁴ Ironically, in the most extreme of the few remaining Communist regimes, the bourgeoisie still crush the proletariat. Then again, every single Communist regime in history has done so.

North Korea directly participates in carrying out global cyber-attacks, espionage, fraud, blackmail, and money laundering.⁴⁵ North Korea also supplies much of the world’s illicit opium and methamphetamine drug trade.⁴⁶ Yet in 2015, North Korea had a per capita Gross Domestic Product (GDP) of a mere \$1700, with an estimated real growth rate of -1.1%.⁴⁷ In comparison, South Korea in the same year had a per capita GDP of \$37,500, with an estimated real growth rate of three percent.⁴⁸ Meanwhile, Kim Jong-Un has amassed a personal net worth of over five billion U.S. dollars, while most of his population has been deemed food insecure.⁴⁹

North Korea is a prison of a country. The regime does not allow its citizens to move around North Korea, and deems leaving the country high treason.⁵⁰ North Korea orders its border guards to shoot to kill those who

40. CHA, *supra* note 23, at 129.

41. *Id.*

42. *Id.* at 134-35.

43. *Id.* at 133.

44. *See id.* at 81, 138-39.

45. *Id.* at 129; Alex Ward, *North Korea’s Kim Jong Un May Have Had His Best Year Yet*, VOX, <https://www.vox.com/world/2017/12/22/16805426/north-korea-trump-missile-kim-threat-2017> (last updated Dec. 28, 2017, 9:01 AM) [<https://perma.cc/CDZ4-UGZ9>].

46. Larry Wortzel, Adjunct Research Professor, U.S. Army War College, Testimony on North Korea’s Connection to International Trade in Drugs, Counterfeiting, and Arms Before the Governmental Affairs Subcommittee on Financial Management, Budget, and International Security (May 20, 2003), <https://www.heritage.org/testimony/north-koreas-connection-international-trade-drugs-counterfeiting-and-arms> [<https://perma.cc/M9PV-ZTZW>].

47. *North Korea GDP - Per Capita (PPP)*, INDEX MUNDI, [https://www.indexmundi.com/north_korea/gdp_per_capita_\(ppp\).html](https://www.indexmundi.com/north_korea/gdp_per_capita_(ppp).html) (last updated Jan. 20, 2018) [<https://perma.cc/J9LN-Z9S5>]; *North Korea GDP - Real Growth Rate*, INDEX MUNDI, https://www.indexmundi.com/north_korea/gdp_real_growth_rate.html (last updated Jan. 20, 2018) [<https://perma.cc/ZJ9U-NVZV>].

48. *South Korea GDP - Per Capita (PPP)*, INDEX MUNDI, [https://www.indexmundi.com/south_korea/gdp_per_capita_\(ppp\).html](https://www.indexmundi.com/south_korea/gdp_per_capita_(ppp).html) (last updated Jan. 20, 2018) [<https://perma.cc/WCS3-NKSM>]; INDEX MUNDI, *South Korea GDP - Real Growth Rate*, https://www.indexmundi.com/south_korea/gdp_real_growth_rate.html (last updated Jan. 20, 2018) [<https://perma.cc/NN3U-T4JL>].

49. CHA, *supra* note 23, at 163; *Kim Jong-un Net Worth*, CELEBRITY NET WORTH, <https://www.celebritynetworth.com/richest-politicians/presidents/kim-jong-un-net-worth/> (last visited Feb. 7, 2018) [<https://perma.cc/9TPS-PR6V>].

50. North Korea Criminal Code, art. 62, Mar. 3, 1950, last amended Oct. 19, 2009.

attempt to leave the country, whether men, women or children.⁵¹ The regime assigns their living location, educational opportunities, work assignments, rations, clothing, and housing arrangements based on perceived loyalty.⁵² The regime allows the most loyal citizens to live in Pyongyang, which has well maintained roads and the best material living environment in the country.⁵³ Outside Pyongyang, the roads are made of dirt, and the citizens have little clothing and shoes.⁵⁴ The government determines where citizens live based on family lineage and loyalty shown towards the DPRK.⁵⁵ North Korea's isolation has proven to be a strategic advantage because the regime's victims are faceless and nameless, they receive no contact with the outside world, and their stories are not shared or known unless they are able to escape and have the courage to divulge the devastating conditions.⁵⁶ Luckily, a stream of defector narratives have emerged over the past decade, giving researchers and other interested readers more stories from which to piece together the reclusive regime and isolated society.

II. North Korea and America

In 2017, North Korea made major news headlines for its continuing missile tests and nuclear development, as well as for its "war of words" with United States President, Donald Trump.⁵⁷ Prior to entering office, President Trump discussed North Korea more than any other presidential candidate. From cautioning President Obama to be careful with the "wack job" in North Korea in 2013,⁵⁸ to vehemently denying Dennis Rodman's claims that President Trump had also wanted to visit North Korea in 2014,⁵⁹ North Korea has been on the president's radar for years. During his presidential campaign, President Trump repeatedly mentioned the nuclear threat North Korea poses to the United States, as well as the control that China would be able to exert over North Korea to "solve the problem."⁶⁰

51. Ryan Pickrell, *North Korea Orders Border Guards to Shoot Defectors on Sight*, DAILY CALLER (Dec. 18, 2017, 4:31PM), <http://dailycaller.com/2017/12/18/north-korea-orders-border-guards-to-shoot-defectors-on-sight/> [<https://perma.cc/UF8X-F9RE>].

52. See CHA, *supra* note 23, at 162-63, 168-70.

53. See GUY DELISLE, *PYONGYANG: A JOURNEY IN NORTH KOREA* 25 (2007).

54. See *id.* at 57.

55. *Id.*

56. Utkarsh Singh, *Inside Under Cover in North Korea—Nat Geo Documentary*, YOUTUBE (Dec. 14, 2013), <https://www.youtube.com/watch?v=ALJUGZpanB8> [<https://perma.cc/4Y7T-TWC9>].

57. Ward, *supra* note 45.

58. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 6, 2013, 3:47 PM), <https://twitter.com/realDonaldTrump/status/320669088525479936> [<https://perma.cc/ZU9L-TF3W>].

59. Saba Hamedy & Joyce Tseng, *All the Times President Trump Has Insulted North Korea*, CNN POL., <https://www.cnn.com/2017/09/22/politics/donald-trump-north-korea-insults-timeline/index.html> (last updated Mar. 9, 2018, 1:59 AM) [<https://perma.cc/HD3W-Z9TB>].

60. *Id.*; Carl Prine, *Could the Unthinkable Happen With North Korea?*, SAN DIEGO UNION-TRIB. (Apr. 15, 2017, 7:35 PM), <http://www.sandiegouniontribune.com/military/sd-me-korea-conflict-20170415-story.html> [<https://perma.cc/9C44-B343>].

Early in 2017, North Korea launched its first ballistic missile test of the Trump presidency, shortly followed by four more missile launches into the Sea of Japan, threatening the United States ally in the region.⁶¹ North Korea has continued to conduct missile launches over Japan and other U.S. allies; some experts believe these missiles are capable of reaching the United States or even over the U.S., or will be capable within 2018. In addition to mastering ballistic missiles, North Korea also claims to have successfully completed an underground hydrogen bomb test, and to have created a hydrogen bomb small enough to fit on a missile.⁶² A hydrogen bomb, if used, would be hundreds or thousands of times more powerful than lesser nuclear weapons.⁶³ However, North Korea has yet to demonstrate that it has precision guidance mastered, the ability to carry a heavy payload, or full re-entry capabilities.

North Korea's military actions earned them a formal condemnation of the country's missile launches from the United Nations Security Council, which called for Pyongyang to "immediately" cease its aggressive actions.⁶⁴ Sanctions were unanimously imposed in August of 2017 against North Korea by the UN Security Council.⁶⁵ These sanctions banned exports of mineral and seafood products (which comprised a third of the country's total exports in the year 2016), and were imposed in direct response to North Korea's tests of intercontinental ballistic missiles and its pursuit of nuclear weapons.⁶⁶ In September of 2017, the UN Security Council once again passed sanctions against North Korea, that limited its oil imports, and banned textile exports from the country.⁶⁷ These sanctions are considered the "toughest ever" against North Korea, and were passed in an

61. Joshua Berlinger et al., *Trump Says 'All Options On Table' After North Korea Fires Missile Over Japan*, CNN, <https://www.cnn.com/2017/08/28/politics/north-korea-launch-identified-projectile/index.html> (last updated Aug. 29, 2017, 8:17 PM) [https://perma.cc/88GS-C54D].

62. David E. Sanger & Choe Sang-Hun, *North Korean Nuclear Test Draws U.S. Warning of 'Massive Military Response'*, N.Y. TIMES (Sept. 2, 2017), <https://www.nytimes.com/2017/09/03/world/asia/north-korea-tremor-possible-6th-nuclear-test.html> [http://perma.cc/8EMW-XDA9].

63. James Griffiths & Angela Dewan, *What is a Hydrogen Bomb and Can North Korea Deliver One?*, CNN, <http://www.cnn.com/2017/09/03/asia/hydrogen-bomb-north-korea-explainer/index.html> (last updated Sept. 22, 2017, 3:15 AM) [https://perma.cc/AZ24-6VBR].

64. Euan McKirdy & Richard Roth, *UN Security Council Condemns North Korean Missile Launch*, CNN, <https://www.cnn.com/2017/04/21/politics/unsc-north-korea-resolution/index.html> (last updated Apr. 21, 2017, 1:36 AM) [https://perma.cc/65CC-BMEK].

65. *UN Security Council Unanimously Adopts New Sanctions on N. Korea Over Missile Tests*, CBS NEWS, <https://www.cbsnews.com/news/u-n-security-council-unanimously-adopts-new-sanctions-on-north-korea-over-missile-tests/> (last updated Aug. 5, 2017, 4:55 PM) [https://perma.cc/ZAX2-4596].

66. *Id.*

67. Carol Morello et al., *U.N. Agrees to Toughest-Ever Sanctions Against North Korea*, WASH. POST (Sept. 11, 2017), https://www.washingtonpost.com/world/in-the-push-for-oil-embargo-on-north-korea-china-is-reluctant-to-sign-off/2017/09/11/3a5b56fe-96e5-11e7-a527-3573bd073e02_story.html?utm_term=.fd34ed1175cd [https://perma.cc/X4UX-EHFY].

effort to deprive North Korea of income so that the country cannot continue its nuclear and ballistic missile program, and pressure North Korea to negotiate a way out of punishing sanctions.⁶⁸ Notably, even China, a long-time ally and supporter of North Korea, voted in favor of the sanctions, and took moves to implement them.⁶⁹

Despite the United Nations' sanctions, and sharp warnings from the United States, North Korea continues to threaten the United States and its allies with intercontinental ballistic missiles and nuclear and hydrogen weapons.

In addition to posing a nuclear threat and demonstrating its potential for chemical weapons, North Korea is also responsible for the likely torture, and death of American student, Otto Warmbier.⁷⁰ Otto Warmbier was an American college student visiting North Korea when he was arrested in January 2016 for "hostile acts against the state" after attempting to remove a poster from his hotel.⁷¹ Warmbier was sentenced to fifteen years of hard labor.⁷² Shortly after his detention began, North Korean officials stated that Warmbier contracted botulism after taking a sleeping pill, which led to him falling into a coma.⁷³ He was detained in North Korea for over a year before being returned home, only to pass away six days later.⁷⁴ Although no autopsy was performed (at the family's request), Warmbier's parents do not believe North Korea's version of what happened to their son, and remained convinced that their son was brutally tortured at the hands of North Korea.⁷⁵

III. The Doctrines of R2P and IHI

The doctrines of "international humanitarian intervention" and "responsibility to protect" justify intervention in countries without the intervened country's permission or consent. These doctrines have been used by the United States and the NATO member states, including the

68. *Id.*

69. Staff & Agencies, *China to Enforce UN Sanctions Against North Korea*, *THE GUARDIAN* (Sept. 23, 2017, 4:42 PM), <https://www.theguardian.com/world/2017/sep/23/china-to-enforce-un-sanctions-against-north-korea> [<https://perma.cc/37U2-QZ8M>].

70. See Kevin Ponniah & Tom Spender, *Otto Warmbier: How Did North Korea Holiday End in Jail, and a Coma?*, *BBC NEWS* (June 20, 2017), <http://www.bbc.com/news/world-us-canada-40308028>. [<https://perma.cc/2RKK-6HX5>]. Kim Jong Un's half-brother, Kim Jong Nam, was assassinated in Malaysia earlier this year by use of a chemical nerve agent, Kim Jong Un is believed to be behind this attack. See Euan McKirdy & Zahra Ullah, *Kim Jong Nam Murder Suspects Taken to Airport for Crime Scene Tour*, *CNN*, <http://www.cnn.com/2017/10/24/asia/kim-jong-nam-trial-airport-visit/index.html> (last updated Oct. 24, 2017, 8:06 AM) [<https://perma.cc/L35G-PYRE>].

71. Ponniah & Spender, *supra* note 70; see also Susan Svrluga & Anna Fifield, *Otto Warmbier Dies Days After Release from North Korean Detention*, *WASH. POST* (June 19, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/06/19/otto-warmbier-dies-days-after-release-from-north-korean-detainment/?utm_term=.683ce1e23773 [<https://perma.cc/5AAG-F3JX>].

72. Ponniah & Spender, *supra* note 70.

73. See *id.*; see also Svrluga & Fifield, *supra* note 71.

74. Ponniah & Spender, *supra* note 70; Svrluga & Fifield, *supra* note 71.

75. Svrluga & Fifield, *supra* note 71.

United Kingdom, to justify just that.⁷⁶ The United Kingdom entered countries such as the former Yugoslavia, Kosovo, Afghanistan, and Iraq for multiple different purposes under the cover of these doctrines.⁷⁷ The following will explicate both doctrines that could support state intervention into North Korea.

A. The Doctrine of International Humanitarian Intervention

In the 1990s, following the horrors in Rwanda and the Balkans, serious debate ensued on how to effectively react to atrocities.⁷⁸ Do other states have the right to intervene in another sovereign country? The Secretary-General Kofi Annan, in his Millennium Report of 2000, challenged Member States: “If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violation of human rights that offend every precept of our common humanity?”⁷⁹

The doctrine of international humanitarian intervention (IHI) is based on the simple concept of: the defense of others. It is similar to the defense of others doctrine in criminal law, but operates on a much larger scale. The two types of IHI are non-forcible and forcible. Non-forcible includes sanctions and diplomatic efforts. The forcible version must satisfy the classic just war principles: just cause, last resort, good over harm, proportionality, right intention and reasonable prospect. The case of the DPRK meets all of these principles, however, there is still much concern about the potentially large cost in lives and resources. Legally, a state of war already persists because the DPRK has disavowed the cease fire (Armistice) both verbally and through its non-verbal, hostile actions.

One working definition of the doctrine of International Humanitarian Intervention is “the use of force to protect people in another State from gross and systematic human rights violations committed against them, or more generally to avert a humanitarian catastrophe, when the target State is unwilling or unable to act.”⁸⁰ A similar definition from Sean Murphy is “the threat or use of force by a state, group of states, or international organizations primarily for the purpose of protecting the nationals of the target

76. See SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 183 (1996); *About R2P*, GLOBAL CTR. FOR RESP. TO PROTECT, http://www.globalr2p.org/about_r2p [https://perma.cc/5R5X-3QXF].

77. See Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 220, 224 (J.L. Holzgrefe & Robert O. Keohane eds., 2003); John Simpson, *Did UK Intervention in Afghanistan Have Any Value?*, BBC NEWS (Oct. 27, 2014), <http://www.bbc.com/news/uk-29788534> [https://perma.cc/V6CL-QTPK].

78. *Background Information on the Responsibility to Protect*, UNITED NATIONS, <http://www.un.org/en/preventgenocide/rwanda/about/bgresponsibility.shtml> [https://perma.cc/97N5-6TBY].

79. U.N. Secretary-General, *We the Peoples: The Role of the United Nations in the 21st Century*, ¶ 217, U.N. Doc. A/54/2000 (Mar. 27, 2000).

80. Vaughan Lowe & Antonios Tzanakopoulos, *Human Intervention*, OXFORD PUB. INT'L L., <http://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e306> [https://perma.cc/2A56-Q3BH].

state from widespread deprivations of internationally recognized human rights, whether or not the intervention is authorized by the target state or the international community.”⁸¹ Both of these definitions would exclude non-forcible intervention by calling it humanitarian assistance. For the purposes of this Article though, humanitarian assistance falls within IHI as non-forcible intervention.

The International Humanitarian Intervention doctrine utilizes Chapter VII of the United Nations Charter, specifically Articles 41, 42, and 43. The Charter gives the Security Council powers to prevent any threat to or breach of the peace.⁸² Threats to peace include violations against a State’s own citizens, not just threats to other nations.⁸³ Article 41 serves as a gatekeeper to get the intervention process moving towards solving the state’s violations. Article 41 states,

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decision, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.⁸⁴

This is a non-military effort to bring the state back into compliance.

If nothing is solved through article 41, articles 42 and 43 are then allowed to be imposed. Article 42 states,

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockades, and other operations by air, sea, or land forces of Members of the United Nations.⁸⁵

Article 43 builds upon Article 42, giving member states parameters with which to work:

- (1) All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
- (2) Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
- (3) The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the

81. See MURPHY, *supra* note 76, at 3-4.

82. U.N. Charter art. 39.

83. See J.L. Holzgrefe, *The Humanitarian Intervention Debate*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 35, 40-41 (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

84. U.N. Charter art. 41.

85. U.N. Charter art. 42.

Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.⁸⁶

This allows the United Nations Security Council to use military forces to intervene and help cure the human rights violations, but again, this is only allowed if the non-military actions failed under Article 41. These three articles form the basis of the International Humanitarian Intervention doctrine under the UN Charter.

As stated above, the United Nations Security Council has the option to use non-forcible intervention as well as forcible intervention. The non-forcible actions that can be taken include economic sanctions or diplomatic action, taken by an outside Member State or a group of Member States with the intention of getting the noncompliant state to remedy its human rights abuses.⁸⁷ A sub-type of intervention allows a member state to rescue its own citizens that are in the noncompliant state's custody.⁸⁸

Forcible intervention constitutes the threat or use of force by a state or group of states against an offending state without the offending state's permission.⁸⁹ This type of intervention, again, is allowed under Articles 42 and 43. Both non-forcible and forcible intervention allow member states to act within a sovereign state without the permission of that state due to the gross and systematic human rights violations occurring or threatening to occur in the immediate future. The action aims to protect the citizens' human rights and end the violations.⁹⁰

When genocide threatens a large number of lives, and the state cannot or will not act to avert these disasters, then members of the international community have a responsibility to protect those at risk according to the Genocide Convention. Forcible humanitarian intervention must meet six principles.⁹¹ These principles must be weighed before the United Nations will allow intervention in North Korea. The six international humanitarian intervention principles are: *just cause*, *last resort*, *good over harm*, *proportionality*, *right intention*, and *reasonable prospect*.⁹² Sovereign states often argue that what is done within their borders with their citizens is their own business, and the international community should not get involved. How-

86. U.N. Charter art. 43, ¶ 1-3.

87. See Holzgrefe, *supra* note 83, at 18 (specifically rejecting these kinds of interventions in his definition only because the focus of his paper is on using force to protect another country's citizens).

88. See *id.* (again specifically rejecting these kinds of interventions in his definition only because the focus of his paper is on using force to protect another country's citizens).

89. MORSE TAN, NORTH KOREA, INTERNATIONAL LAW AND THE DUAL CRISES: NARRATIVE AND CONSTRUCTIVE ENGAGEMENT 251 (2015).

90. *Id.*

91. See Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, 81 FOREIGN AFF. 99, 103 (2002).

92. Eric A. Heinze, *Humanitarian Intervention and the War in Iraq: Norms, Discourse, and State Practice*, 36 PARAMETERS 20, 22 (2006); Nicholas J. Wheeler, *Legitimizing Humanitarian Intervention: Principles and Procedures*, 2 MELB. J. INT'L., L. 550, 554-60 (2001).

ever, the essence of sovereignty is responsibility, not control, and the international community has agreed that states do not have the absolute right to do whatever they want to do to people within their state boundaries.⁹³ This article will argue that the question to ask is not whether other members of the international community should intervene, but rather, can the state live up to its obligations and responsibilities owed to its own citizens. If the state cannot and the threat is immense, then members of the international community should intervene.⁹⁴

This Article will elaborate upon each of the six international humanitarian intervention principles and how North Korea easily passes the threshold, thus allowing intervention within the state. North Korea finds itself increasingly ripe as a candidate for forcible intervention as a means to stop the gross and systematic human rights violations plaguing the citizens of that state.

The first principle to analyze when deciding if a humanitarian intervention is permissible is *just cause*. Just cause asks whether or not the state is committing actual or anticipated large-scale extermination of life or ethnic cleansing.⁹⁵ The international community must consider the scale of the loss of life and whether the state under consideration can or will act to protect its citizens.⁹⁶ Intervention is not limited to post-war situations. For example, just cause may be justified if a state's collapse risks exposing the citizens to mass starvation, as transpired in Somalia.⁹⁷ Natural disasters for which the state cannot or will not act to protect its own citizens constitute another type of example. The threshold of gross and systematic human rights violations or human suffering to permit intervention seeks to prevent pretextual interventions over minor violations.⁹⁸

The detention camps and mass extermination that have taken place in North Korea for many years would more than satisfy the just cause requirement of forcible humanitarian intervention. On the genocide side of just cause, the original Supreme Ruler (*suryong*) Kim Il-Sung instituted the systematic persecution of Christians, destroying the former center of Christianity in Asia.⁹⁹ The original Supreme Ruler averred:

[We] cannot carry religiously active people along on our march toward a communist society. Therefore, we have tried and executed all religious leaders higher than deacon in the Protestant and Catholic churches. Among other religiously active people, those deemed malignant were all put to trial. Among ordinary religious believers, those who recanted were given jobs

93. See Evans & Sahnoun, *supra* note 91, at 102.

94. See *id.* at 106.

95. See also Wheeler, *supra* note 92, at 554-55 (explaining that protecting victims of cruelty and violence has always been recognized as a legitimate basis for the use of force).

96. See Heinze, *supra* note 92, at 23-25.

97. See *id.* at 25, 31; Wheeler, *supra* note 92, at 552.

98. See TAN, *supra* note 89, at 251.

99. *Id.* at 74-76. Before this persecution, Pyongyang held to sobriquet "the Jerusalem of the East." *Id.* at 68.

while those who did not were held in concentration camps.¹⁰⁰

Every study (whether the United States Commission on International Religious Freedom, Open Doors, or Voice of the Martyrs) of the persecution of Christians worldwide over the past couple of decades has found that North Korea is the worst persecutor, bar none.¹⁰¹ Pyongyang now features two sham churches run by Party members, and only small clusters of underground believers.¹⁰² Due to North Korea's genocide of Christians, the just cause principle for intervention is satisfied.

Last resort is the second principle under the humanitarian intervention doctrine. This principle at its core ties back into Articles 41, 42, and 43. Forcible intervention may be used if economic sanctions and diplomatic measures have not had their intended effects.¹⁰³ Nonmilitary options for prevention or peaceful solutions have to be explored; however, every possible option does not have to be tried and fail.¹⁰⁴ Sometimes the need is so great that there is not enough time to try every conceivable option before forcible intervention is necessary.¹⁰⁵ The last resort requirement is satisfied if, having considered the array of options, there are reasonable grounds to believe that none of the lesser measures will succeed.¹⁰⁶

Here, neither the economic sanctions nor diplomatic actions taken in response to North Korea have substantially improved the human rights landscape. The newest UNSC sanctions put into effect in 2015-2017—most recently in August and September of 2017—would squeeze North Korea more than ever if faithfully implemented.¹⁰⁷ Both China and Russia claim they will implement these sanctions.¹⁰⁸ Their actions, however, speak more loudly than their words. While China has taken steps in this direction,¹⁰⁹ Russia has yet to do so. Enforcement and implementation of the sanctions, especially by these two countries, would be most important towards achieving the desired effect.¹¹⁰ The United States, Japan, and

100. *Id.* at 72.

101. See U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, NORTH KOREA CHAPTER — 2017 ANNUAL REPORT 1, <http://www.uscirf.gov/reports-briefs/annual-report-chapters-and-summaries/north-korea-chapter-2017-annual-report> [<https://perma.cc/C2A9-FWD7>]; North Korea, OPEN DOORS USA: WORLD WATCH LIST 2018, <https://www.opendoorsusa.org/christian-persecution/world-watch-list/?display=list> [<https://perma.cc/JQ4P-GBVD>].

102. See TAN, *supra* note 89, at 70-72, 73-74.

103. See Evans & Sahnoun, *supra* note 91, at 105.

104. *Id.*

105. See *id.* See generally Fernando R. Tesón, *Eight Principles for Humanitarian Intervention*, 5 J. MIL. ETHICS 93 (2006) (discussing eight principles for governing forceful humanitarian intervention).

106. Evans & Sahnoun, *supra* note 91, at 105.

107. See S.C. Res. 2397, ¶¶ 17-22 (Dec. 22, 2017); Morello et al., *supra* note 67.

108. See Press Release, Security Council, Security Council Tightens Sanctions on Democratic People's Republic of Korea, Unanimously Adopting Resolution 2397 (2017), U.N. Press Release SC/13141 (Dec. 22, 2017), <https://www.un.org/press/en/2017/sc13141.doc.htm> [<https://perma.cc/BB2T-BJFS>].

109. Staff & Agencies, *supra* note 69.

110. See Press Release, *supra* note 108.

South Korea can provide a united front towards influencing China and Russia in this direction.

The third principle to analyze for forcible intervention is *good over harm*. This principle calls for creating a better situation within the state than the harm caused by the intervention.¹¹¹ In determining this, the international community must balance the harm that will occur due to the forcible intervention within the state against the good that will likely result.¹¹² This principle is the most unpredictable of the bases for forcible intervention, because it is impossible to predict the future. The most significant concern on the harm side is how North Korea would react to an intervention based on the large-scale human rights violations being committed by and within the state. The three different dictators over North Korea, to be frank, qualify as morally awful, albeit rational to an extent.¹¹³ Kim Jong-Un, the current dictator, might be the most feared, as he is the most extreme of his family line; he has imprisoned and killed high ranking military personnel, some even within his own family.¹¹⁴ Who knows what he would do if the international community tried to step in? However, there are a number of factors in favor of intervention: the extreme gravity of the human rights violations that have taken place for far too long; the increasingly superior military capabilities of the United States, South Korea, and Japan, both in defense and offence; the decreasing supply with which the North Korean military can fight; the prospect of reunification; and the possibility of a minimally surgical use of force. Overall, the situation is inherently complex and uncertain, making definitive analysis and prognostication difficult at best.

The fourth principle for consideration regarding intervention is *proportionality*. This principle relates to the good over harm principle, but weighs issues such as the military action necessary to end the human rights violations, and the cost in human life and suffering from forcible intervention compared to the cost incurred under the current regime.¹¹⁵ Regarding the necessary amount of military action, the scale, duration, and intensity of the intervention should be only as much as needed to resolve the crisis. The intervention should be proportionate with the stated purpose, and in line with the magnitude of the problem.¹¹⁶ Regarding the cost in human life, it is important to ensure that the harm from the force used to eliminate human right violations does not exceed the harm from the

111. See Wheeler, *supra* note 92, at 556-57.

112. See *id.*

113. See Michael Madden, *The Strange History of North Korea's Communists*, BBC NEWS (Oct. 9, 2015), <http://www.bbc.com/news/world-asia-34472080> [<https://perma.cc/8YVM-VSJ4>].

114. See Pamela Engel, *It Turns Out Kim Jong-un's Uncle Was Not Fed To a Pack of Wild Dogs*, BUS. INSIDER (Jan. 30, 2014, 8:49 AM), <http://www.businessinsider.com/kim-jong-uns-uncle-was-shot-not-fed-to-a-pack-of-wild-dogs-2014-1> [<https://perma.cc/6BGG-2ZZ4>].

115. See TAN, *supra* note 89, at 252.

116. Wheeler, *supra* note 92, at 557.

current abuses.¹¹⁷

North Korea has many conventional weapons aimed at Seoul, which is thirty-five miles away from the Korean border, and promises to destroy that city.¹¹⁸ However, Seoul has an extensive network of subterranean bomb shelters connecting with its subway system, providing a ready place for civilians to seek shelter.¹¹⁹ Furthermore, the U.S. military has the ability to destroy units as the first round of projectiles is en route to its target.¹²⁰ North Korea's artillery is reportedly not the most accurate and is limited in its range so that it is doubtful that it can hit the southern side of Seoul.¹²¹ Additionally, North Korea's fuel supply reportedly could only support around five full days of fighting.¹²² North Korea is using more of its precious fuel keeping its planes in the air because of the U.S. and South Korean planes flying in the area.

Additionally, the United States currently helps arm its Asian allies in the area. South Korea procures defense systems from the United States. If it procures the best available technology, it can include systems like Iron Dome, Iron Beam, LaW, PAC-4 (once it is fully developed), high velocity projectiles, and both sea and land-based Aegis systems, as well as other missile defense systems such as THAAD (Terminal High Altitude Area Defense), of which two batteries have been fully installed to date.¹²³ Japan has also been procuring defense systems from the United States, including for example, the land based Aegis system.¹²⁴ The better the defense systems in place, the less damage North Korea can inflict, which can weigh positively in a proportionality estimation.

117. See TAN, *supra* note 89, at 252.

118. David Wood, *North Korea's Simple But Deadly Artillery Holds Seoul And U.S. Hostage*, HUFFINGTON POST (Apr. 18, 2017, 3:15 PM), https://www.huffingtonpost.com/entry/north-korea-artillery_us_58f631a4e4b0b9e9848eb990 [<https://perma.cc/5T24-PQDE>].

119. Alexander Smith, *Seoul's Bomb Shelters Largely Ignored by Locals, Despite North Korea Threat*, NBC NEWS (Oct. 9, 2017, 6:35 AM), <https://www.nbcnews.com/world/seoul-s-bomb-shelters-largely-ignored-locals-despite-north-korea-n807901> [<https://perma.cc/ZM49-USMJ>].

120. Kyle Mizokami, *Could North Korea Annihilate Seoul With Its Artillery?*, NAT'L INT.: BUZZ 2, Apr. 25, 2017, <http://nationalinterest.org/blog/the-buzz/could-north-korea-annihilate-seoul-its-artillery-20345?page=2> [<https://perma.cc/SE9T-FN5F>].

121. *But see id.*; Wood, *supra* note 118; Smith, *supra* note 119.

122. Jeremy Laurence, *North Korea Military Has An Edge Over South, But Wouldn't Win A War, Study Finds*, CHRISTIAN SCI. MONITOR (Jan. 4, 2012), <https://www.csmonitor.com/World/Latest-News-Wires/2012/0104/North-Korea-military-has-an-edge-over-South-but-wouldn-t-win-a-war-study-finds> [<https://perma.cc/8655-YVPR>].

123. See Taehoon Lee & James Griffiths, *South Korea Suspends THAAD Deployment*, CNN, <http://www.cnn.com/2017/06/07/asia/south-korea-thaad-suspended/index.html> (last updated June 8, 2017, 4:03 PM) (explaining that South Korea has set up two out of the six proposed THAAD systems and decided to halt deployment of the other four) [<https://perma.cc/8Q3H-T2TN>].

124. Mari Yamaguchi, *Japan Is Buying a New US Missile Defense System Amid Growing Threats from North Korea*, BUS. INSIDER (Dec. 19, 2017, 10:43 AM), <http://www.businessinsider.com/japan-buys-aegis-ashore-us-missile-defense-system-2017-12> [<https://perma.cc/AB4J-SLY7>].

Proportionality also requires us to consider actors other than the Koreans and the United States. Potential attacks upon Japan, nuclear or otherwise, and Japan's available defenses would also factor into the mix.¹²⁵ Furthermore, China is an ally of North Korea and has said many times that it will defend North Korea against any adversary.¹²⁶ However, more recently China stated publicly that it would not defend North Korea if it attacked first, but would defend it if it were attacked first.¹²⁷ Moreover, the relationship between China and North Korea is at a low point: Chinese banks have restricted business with North Korea, some North Korean businesses in China have been closed, and North Korean workers in China have returned to North Korea.¹²⁸ North Korea has also publicly denounced China, while China has publicly complained about North Korea.

China does not want the United States or a U.S. ally to border them.¹²⁹ As such, the U.S. could ask China to help reunify the Koreans, peacefully if possible, in exchange for a removal of U.S. military assets from the unified Korean peninsula. That would appear potentially worthwhile for all countries involved, and could obviate proportionality considerations.

The fifth principle analyzes whether the intervening country has the *right intention*. This principle means that the intervening state or states' primary reason must be to avert human suffering.¹³⁰ An intervening state will most likely have additional reasons to intervene besides the humanitarian purpose, but the rule is that the *main* reason must be humanitarian in order to ensure that states minimize force and focus on ending the human rights abuses.¹³¹ This principle is controversial amongst scholars, because many believe motives are irrelevant while results are supreme.¹³² These scholars believe that as long as the intervention protects human rights, the motive which prompted the intervention is irrelevant.¹³³ However, motives are important regarding the morality and legitimacy of humanitarian intervention.

125. *Id.* (stating the purpose of the purchase of the Aegis system was in anticipation of North Korean aggression).

126. Eleanor Albert & Beina Xu, *The China-North Korea Relationship*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/china/china-north-korea-relationship/p11097> (last updated Sept. 27, 2017) [<https://perma.cc/2DLR-UATE>].

127. *See id.* (containing China's statement that it will protect against "unprovoked aggression").

128. *See id.*; Agence France-Presse, *In China, North Korean Firms Still Trading Despite Shutdown Order*, SOUTH CHINA MORNING POST (Jan. 9, 2018), <http://www.scmp.com/news/china/diplomacy-defence/article/2127530/china-north-korean-firms-still-trading-despite-shutdown> [<https://perma.cc/TCF4-WPRJ>]; Richard Finney, *North Korean Workers Wear 'Brave Face' on Forced Return From China*, RADIO FREE ASIA (Oct. 5, 2017), <https://www.rfa.org/english/news/korea/face-10052017155926.html> [<https://perma.cc/S96Q-36FQ>].

129. *See* Albert & Xu, *supra* note 126; Christopher Green, *Why China Won't Punish North Korea For Its Rocket Launch*, THE GUARDIAN (Feb. 7, 2016), <http://www.theguardian.com/commentisfree/2016/feb/07/why-china-wont-punish-north-korea> [<https://perma.cc/3GGM-J3MW>].

130. Wheeler, *supra* note 92, at 558.

131. TAN, *supra* note 89, at 253.

132. *See, e.g.*, Heinze, *supra* note 92, at 22-24.

133. *See, e.g., id.* at 23-24.

Regarding North Korea, the states that would intervene would likely be concerned with the human rights violations and the passing of weapons and technology to terrorist groups, both of which would satisfy this principle.¹³⁴ The main thing that the intervening states would have in mind is shutting down the concentration and work camps and freeing the hundreds of thousands enslaved therein.¹³⁵ This would overlook the “free” citizens, most of whom have no legal access to knowledge of the outside world or how citizens are to be treated by their government.¹³⁶ The way to help everyone is to put an end to the current regime and replace them with a government that cares for its citizens. A peaceful reunification would prove ideal, in spite of the attendant challenges it would bring.

The last principle of IHI asks about the *reasonable prospects* of success. An intervention is justified when there is a reasonable opportunity for success in halting or averting the gross and systematic violations of human rights.¹³⁷ Intervention in North Korea almost certainly would halt the human right violations; North Korea would most likely overwhelmingly lose a full-blown war.¹³⁸ Also, more surgical uses of force as well as robust defensive measures could markedly decrease casualties below the level of the currently common fears; South Korea has made the training for decapitation attacks targeting the top leadership of North Korea public knowledge.¹³⁹ Because of the legal state of war and because such attacks would be against military leadership, they would not constitute assassinations. The risk of miscalculation, mistakes and/or limited strikes leading to escalation of the fighting exists. However, a quick, surgical operation followed by rapid reunification also could happen. Immediate reunification could prevent nightmare scenarios, such as competing generals increasing the fighting inside and outside the peninsula.

These six principles provide guidance for decisions based on IHI. The UN Security Council has already been employing non-forcible intervention under Article 41 of the Charter, including in the most recent resolutions in August and September of 2017. The original UN Security Council resolution authorizing the use of force to repel the aggressive war by North Korea still stands.¹⁴⁰ Reportedly, all options remain on the table. Ideally, peaceful reunification could yet transpire.

134. See TAN, *supra* note 89, at 251, 253.

135. Joanna Walters, “*They are Intentionally Starved and Worked to Death*”: *The Horrific Conditions in North Korean Labor Camps*, THE GUARDIAN (Mar. 18, 2016), <http://www.businessinsider.com/they-are-intentionally-starved-and-worked-to-death-the-horrific-conditions-in-north-korean-labor-camps-2016-3> [<https://perma.cc/3ZUV-SSVJ>].

136. See 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> [<https://perma.cc/PW3S-7LRT>].

137. Heinze, *supra* note 92, at 27.

138. Laurence, *supra* note 122.

139. Choe Sang-Hun, *South Korea Plans ‘Decapitation Unit’ to Try to Scare North’s Leaders*, N.Y. TIMES (Sept. 12, 2007), <https://www.nytimes.com/2017/09/12/world/asia/north-south-korea-decapitation.html> [<http://perma.cc/C6JK-ZW2Y>].

140. See S.C. Res. 83 (June 27, 1950) (recommending that “Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel

B. Doctrine of Responsibility to Protect

International Humanitarian Intervention doctrine leaves a dearth of specific guidance on how to intervene within a sovereign state and what kind of authority the United Nations and member states have upon intervening.¹⁴¹ The doctrine also lacks a decision-making body and a decision-making process for determining whether either non-forcible or forcible intervention is warranted.¹⁴²

These issues helped create a variation to the doctrine of International Humanitarian Intervention called the Responsibility to Protect. The main focus of the Responsibility to Protect doctrine is to help create a decision-making process while balancing the right to intervene within a sovereign state.

In the beginning of the 1990s, the Responsibility to Protect doctrine started to incorporate the concept of human security.¹⁴³ Human security means “freedom from fear—freedom from these pervasive threats to people’s rights, safety, or lives.”¹⁴⁴

This change in international law had an impact on how the United Nations and individual countries saw the doctrines of the Responsibility to Protect and International Humanitarian Intervention. As discussed *supra*, the international community has collectively started taking responsibility to protect individuals when sovereign governments have proved powerless or unwilling to prevent gross human right violations within their own borders. This change in view was prompted by Canada’s ICISS report,¹⁴⁵ the UN High Level Panel Report,¹⁴⁶ and 2005 World Summit Outcome Report Concerning Responsibility to Protect.¹⁴⁷

These developments allowed the United Nations to authorize forcible humanitarian intervention if the intervention is approved by the United Nations Security Council upon passing the five precautionary principles. These five precautionary principles are: (1) The Principle of the Seriousness of the Threat: is the threat in question serious enough to justify the use of military force? (2) The Proper Purpose Principle: is it clear that the primary purpose of the proposed military action is to stop or avoid the humanitarian catastrophe in question? (3) The Principle of Last Resort: has the range of non-military options been explored? (4) The Proportionality Principle: is the use of force proportionate to the objectives sought to be

the armed attack [from North Korean forces] and to restore international peace and security to the area,” and containing no sunset provision).

141. See TAN, *supra* note 89, at 254.

142. *Id.*

143. Aidan Hehir, *From Human Security to the Responsibility to Protect: The Co-Option of Dissent?*, 23 MICH. ST. INT’L L. REV. 675, 676–79 (2015).

144. See Irwin Cotler, Minister of Justice and Att’y Gen. of Can., Address to the Magna Carta Foundation: Building a New International Law: What Have We Learned, What Must We Do? (Jan. 12, 2005).

145. *Id.*

146. See generally Secretary General’s High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565, 66 (2004).

147. G.A. Res. 60/1, 2005 World Summit Outcome, ¶¶ 138–40 (Sept. 16, 2005).

secured? (5) The Balance of Consequences Principle: is the intervention likely to be successful, and the consequences of action not likely to be worse than the consequences of inaction?¹⁴⁸

The Responsibility to Protect (R2P) doctrine may be summarized by its three pillars as follows: (1) sovereign states have the obligation to protect their own people; (2) the international community should support the sovereign countries efforts to do so; (3) if the sovereign fails or refuses to protect its own people, or worst yet, grossly and systematically violates its own people, then the responsibility to protect devolves to the international community, which must respond in a timely and decisive way.¹⁴⁹ Secretary General Ban Ki-moon, a proponent of this doctrine, has managed to obtain broad support for it.¹⁵⁰ Its application to the DPRK is easy to see yet again, but prudential judgments remain in how to apply it.

The three advantages of looking at an intervention from a responsibility to protect viewpoint are as follows: (1) the focus is on the safety of humans at risk, not exclusively the sovereignty of the state; (2) outside intervention will only take place when the state will not or cannot protect its own citizens; and (3) the responsibility is broad, which would involve the responsibility to react to a crisis, but to act to prevent the crises and aid in rebuilding the affected society as well.¹⁵¹

The Responsibility to Protect doctrine puts a premium on human security. Human security in this context means freedom from pervasive threats to people's rights, safety, or lives.¹⁵² This notion emerges in part from the transformation of International Human Rights Law in general and International Humanitarian Law and Criminal Law in particular. International Law has moved from a state-oriented dimension to a people-oriented dimension, having regard to both the struggle against impunity with respect to the perpetrators, and the responsibility to protect with respect to the victims.¹⁵³ This change in focus within international law includes: (1) the internationalization of human rights and humanization of international law, (2) the protection of civilians in armed conflict and the criminalization of atrocities against civilians, and (3) the emergence of the individual as the subject, and not just the object, of international law.¹⁵⁴

This Responsibility to Protect doctrine crystallized in 2000. Inspired by the UN Secretary General's call to action and the demonstrable consequences of inaction in Bosnia and Rwanda, Canada formed the International Commission on Intervention and State Sovereignty (ICISS).¹⁵⁵

This Commission's report argues that, where states are unable and unwilling to protect their populations from mass atrocities, or where the

148. *A More Secure World*, *supra* note 146, at ¶ 207.

149. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 29 (2001).

150. TAN, *supra* note 89, at 255-58.

151. *Id.*

152. Cotler, *supra* note 108.

153. *Id.*

154. *Id.*

155. See INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 149, at VII.

state is itself the perpetrator, the international community has the responsibility to act.¹⁵⁶ The ICISS Report clearly states that military intervention needs the authorization of the UN Security Council by dictating there is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes.¹⁵⁷ The task is not to find alternatives to the Security Council, but to make the Security Council work better than it has.¹⁵⁸ This clearly creates a central decision making body for when intervention should be allowed, which satisfies one of the big criticisms that plagued the International Humanitarian Intervention doctrine.

Furthermore, the United Nations High Level Panel Report in December 2004, titled “A More Secure World: Our Shared Responsibility,” endorsed a collective international responsibility to protect when sovereign governments have proved powerless or unwilling to prevent as follows:

We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.¹⁵⁹

This Panel Report also gave guidance on exactly what constitutes the need for intervention. It also gave directives through the three pillars that helped define the Responsibility to Protect doctrine. The three pillars are as follows: (1) The protection responsibility of the State, (2) international assistance and capacity building, and (3) timely and decisive response.¹⁶⁰ I discuss each pillar in the following paragraphs.

The first pillar of the R2P doctrine asserts the protection responsibility of the State.¹⁶¹ The State carries the primary responsibility for protecting its populations from genocide, war crimes, and crimes against humanity. North Korea easily fails this initial pillar by having concentration camps in which it cruelly abuses its own citizens.¹⁶² The prevention of human rights violations begins in the State in which these harms take place. The State’s sovereignty holds them responsible for preventing human rights violations against their own population.¹⁶³ Again, North Korea has taken no steps towards protecting its population or creating equal enjoyment of rights. North Korea utterly fails the initial pillar by running concentration

156. *See id.* at 49.

157. *Id.* at XII, 49 ¶ 6.14.

158. *Id.* at 49 ¶ 6.14.

159. *A More Secure World*, *supra* note 146, ¶ 203.

160. U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶ 11, U.N. Doc. A/63/677 (Jan. 12, 2009).

161. U.N. Secretary-General, *supra* note 160, ¶ 11.

162. Joanna Walters, *North Korean Labour Camps: A Harrowing Reality But US Student Could Be Spared*, THE GUARDIAN (Mar. 18, 2016), <http://www.theguardian.com/world/2016/mar/18/us-student-north-korea-hard-labor-camp-otto-warmbier> [https://perma.cc/YF4S-QPGW].

163. U.N. Secretary-General, *supra* note 160, ¶ 13.

and hard labor camps in which they imprison their own citizens and force them to work backbreaking days.¹⁶⁴

If the State fails to meet the initial pillar, it brings pillar number two into discussion. This pillar provides international assistance and capacity building.¹⁶⁵ The pillar allows the international community to take responsibility to encourage and assist the State in fulfilling pillar one, protecting its own citizens against human right violations.¹⁶⁶ This pillar analogizes this assistance with an ally assisting a state in a natural disaster. Moreover, it looks to equip a state that simply lacks the technical support or material means to protect its population sufficiently to meet its responsibility with this support and these means, thereby preventing human right violations which could trigger forcible intervention. The noncompliant State is given a say in developing the policies and programs necessary to bring it back into compliance with its responsibilities on the human rights front.¹⁶⁷

North Korea has refused to allow United Nations officials investigating their human rights violations into the country.¹⁶⁸ North Korea refuses to come to the table to help create policies or programs to bring them in compliance with pillar number one. North Korea has removed monitoring equipment and personnel from the International Atomic Energy Association, it seeks to hide and deny the existence of its concentration camps, and even limits what visitors of the country may view by keeping them strictly on a propaganda tour.¹⁶⁹ North Korea even goes to such extremes as building movie-set-type buildings in which only the store front appears in order to give the impression that the population is well taken care of.¹⁷⁰ North Korea has essentially spat on pillar number two, giving it zero respect, by rejecting efforts of the international community in remedying its astonishing human right violations.

While pillars one and two focus on the prevention of human right violations, pillar three tilts towards early action against human rights violations in progress.¹⁷¹ Pillar three calls for timely and decisive responses to human right violations after the unsuccessful use of pillars one and two. It states that the international community has a responsibility to use appropriate diplomatic, humanitarian, or other means to protect populations

164. Shin Dong-hyuk, *Prison Camp Escapee: North Korea Won't Change Its Repressive Ways*, CNN (Oct. 27, 2014), <http://www.cnn.com/2014/10/27/opinion/north-korea-prisoner-human-rights/> [http://perma.cc/EP25-MJV7].

165. 127a U.N. Secretary-General, *supra* note 160, ¶ 11.

166. *Id.* ¶¶ 11, 28.

167. *Id.*

168. Comm'n of Inquiry on Hum. Rts. in DPRK, Rep. of Detailed Findings, ¶¶ 21-27, U.N. Doc. A/HRC/25/CRP.1 (Feb. 7, 2014).

169. See Charlotte Alter, *What It's Like to Be a Western Tourist in North Korea*, TIME (Jan. 22, 2016), <http://time.com/4191028/north-korea-tourist/> [https://perma.cc/2GQU-TER9].

170. TAN, *supra* note 89, at 257.

171. See *An Introduction to the Responsibility to Protect*, INTERNATIONAL COALITION FOR THE RESPONSIBILITY TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/about-rtoip> [https://perma.cc/A8BU-8M2N].

from these crimes.¹⁷² If a State manifestly fails to protect its population, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.¹⁷³

Pillar three must swing into timely action through an array of possible options. These options include on site investigations, fact finding missions, and diplomatic sanctions. Regrettably, North Korea has not allowed fact finding missions or on-site investigations.¹⁷⁴ Diplomatic sanctions include sanctions against travel, luxury goods, financial transfers, and military goods, all of which have been enacted against North Korea, albeit with serious deficiencies in implementation to date.¹⁷⁵ In the event of the exhaustion of non-forcible options, forcible intervention options remain.¹⁷⁶

However, the United Nations lacks a rapid-response force, meaning it cannot meet pillar three with timely and decisive military action.¹⁷⁷ The United Nations must therefore rely on the militaries of states under the Responsibility to Protect doctrine if it wants to take forcible measures to end North Korea's egregious human rights violations.

The Responsibility to Protect doctrine provides the basis for forceful intervention within another sovereign state when measures taken under the first two pillars of the doctrine have failed. However, the doctrine is a new wrinkle on the longer standing international humanitarian doctrine, and does not yet have extensive explication within the legal precedent. Still, the combination of the International Humanitarian Intervention doctrine together with the Responsibility to Protect could provide a double basis for contemplating even forcible intervention into North Korea. The United States, in conjunction with South Korea and Japan, and together with the acquiescence or cooperation of China and Russia, has been stepping forward to resolve the human rights and security crises posed by North Korea.¹⁷⁸ No countries are better suited to implement pillar three of R2P together with IHI.

The International Humanitarian Intervention doctrine and the Responsibility to Protect doctrine lay the ground work for the United Nations and member states to effectively put an end to these violations. Turning the wheels on both these doctrines may provide motivation for the aforementioned countries to stop the human rights violations. The cry of the North Korean people for their liberation from massive injustices must ring out for all the world to hear. Peace and justice must replace the ongoing war between the Koreas as well as the lesser-known war North Korea

172. U.N. Secretary-General, *supra* note 160, ¶ 11.

173. *Id.* ¶¶ 49-50.

174. Comm'n of Inquiry on Hum. Rts. in DPRK, *supra* note 168, ¶¶ 21-27.

175. See Morello et al., *supra* note 67.

176. See TAN, *supra* note 89, at 258.

177. See *Military*, UNITED NATIONS PEACEKEEPING, <https://peacekeeping.un.org/en/military> [<https://perma.cc/TU2T-5YUD>].

178. See Morello et al., *supra* note 67.

wages against its own people. IHI and R2P, if we take them seriously, provide a foundation for pursuing a better future for the Korean peninsula, the region and the world.

IV. The Problem of Unilateral Intervention

Various scholars object to unilateral intervention, and place the UN Security Council in a privileged place to authorize interventions. But given the already-existing authorization of the UN Security Council, would not a coalition of countries moving under the UN's banner have the ability to intervene in the DPRK? Or would a fresh authorization by the UNSC have to be issued again?

A. The Opinion of Antoine Rougier

The first comprehensive study of humanitarian intervention was published by Antoine Rougier in 1910.¹⁷⁹ He concluded that the pretextual utilization of IHI looks like an ingenious technique to enter a state and take their independence:

The conclusion which emerges from this study is that it is neither possible to separate the humanitarian from the political grounds for intervention nor to assume the complete disinterestedness for the intervening States . . . Whenever one power intervenes in the name of humanity in the domain of another power, it cannot but impose its concept of just and public policy on the other State, by force if necessary. Its intervention tends definitely to draw the State into its moral and social sphere of influence. It will control the other State while preparing to dominate it. Humanitarian intervention consequently looks like an ingenious juridical technique to encroach little by little upon the independence of a State in order to reduce it progressively to the status of semi-sovereignty.¹⁸⁰

While IHI can function along these lines, it does not necessarily apply in this way. Pretextual usage should not vitiate the legitimate use of the doctrine itself. The application of the doctrine can be compatible with an approximation of justice. While mixed motives may be common, the self-interested aspects do not automatically outweigh or cancel out the humanitarian ones.

B. The Opinion of Francis A. Boyle

Francis A. Boyle, professor of international law at the University of Illinois, delved into the history of U.S. military intervention from the Spanish American War of 1898 up to the Good Neighbor Policy of President Franklin Roosevelt's administration starting in 1932.¹⁸¹ All of these Amer-

179. See FRANCIS A. BOYLE, *DESTROYING WORLD ORDER: U.S. IMPERIALISM IN THE MIDDLE EAST BEFORE AND AFTER SEPTEMBER 11*, at 107 (2004) (citing A. Rougier, *La Theorie De L'intervention D' Humanity*, 17 *REVUE GENERAL DE DROIT INTERNATIONAL PUBLIC* 468).

180. *Id.*

181. Francis A. Boyle, *Twin Swords Of Damocles Over The Heads Of All Humanity*, *WORLD NEWS DAILY* (Dec. 26, 2012), <http://www.informationclearinghouse.info/article33444.htm> [https://perma.cc/N46E-KQ7F].

ican military interventions touted humanitarian grounds, but Professor Boyle interprets this reasoning as propaganda for the purpose of building support for military intervention among the public.¹⁸² Boyle came to the conclusion that “under international law, humanitarian intervention is a joke and a fraud that has been repeatedly manipulated and abused by a small number of very powerful countries in the North in order to justify wanton military aggression against and prolonged military occupation of weak countries of the South.”¹⁸³

Obviously, the case of North Korea would fall outside of this geographic characterization. Additionally, North Korea wields the fourth largest military in the world.¹⁸⁴ The humanitarian crisis within North Korea is very real. Thus, Boyle’s concerns would not necessarily apply to intervention into the DPRK.

C. The Opinion of Ian Brownlie

Ian Brownlie is a professor at Oxford University. He stated that the international humanitarian intervention doctrine was open to abuse due to the fact that only powerful states can undertake police measures of the required scale.¹⁸⁵ However, the fact that a country is powerful does not necessarily mean that the country is abusing its power in a particular instance. Power can serve the cause of justice.¹⁸⁶ Brownlie does acknowledge that the occupation of Syria in 1860 and 1861 was a genuine case that was in need of a humanitarian intervention.¹⁸⁷ One wonders if he would consider the idea of intervention into North Korea as a similarly genuine case.

D. The Opinion of Michael Akehurst

Professor Michael Akehurst has studied humanitarian intervention since 1945, which included the Vietnamese intervention against Cambodia.¹⁸⁸ In 1979, Vietnam overthrew Cambodia’s Pol Pot regime.¹⁸⁹ However, rather than claim that they were engaging in a humanitarian intervention, Vietnam instead denied that its forces had been in Cambodia at all, and that Pol Pot had been overthrown by the Cambodian people.¹⁹⁰

182. See Amir Nakhjavani, *To What Extent Does a Norm Of Humanitarian Intervention Undermine The Theoretical Foundations Upon Which The International Legal Order Was Built*, 17 WINDSOR REV. LEGAL & SOC. ISSUES 35, 36 (2004).

183. See FRANCIS A. BOYLE, TACKLING AMERICA’S TOUGHEST QUESTIONS: ALTERNATIVE MEDIA INTERVIEWS 158 (1st ed. 2009).

184. Jessica Dillinger, *29 Largest Armies in the World*, WORLD ATLAS, <https://www.worldatlas.com/articles/29-largest-armies-in-the-world.html> [http://perma.cc/CL5Y-VSCU].

185. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 338 (7th ed. 1991).

186. *Id.* at 339.

187. *Id.* at 340.

188. Michael Akehurst, *Humanitarian Intervention*, in 95 INTERVENTION IN WORLD POLITICS 95, 97 (Hedley Bull ed., 1984).

189. *Id.* at 97.

190. *Id.*

The United Nations Security Council held a debate in January 1979 to discuss the actions Vietnam took in Cambodia and whether it was legally justified under the International Humanitarian Intervention doctrine.¹⁹¹ Many states thought that Vietnam acted illegally by entering the sovereign state of Cambodia and interfering in their internal affairs.¹⁹² Professor Akehurst observed that, “Several of these states mentioned the Pol Pot regime’s appalling violations of human rights, but nevertheless said that those violations did not entitle Vietnam to overthrow the regime. Not a single state spoke in favor of the existence of a right of humanitarian intervention.”¹⁹³ He stated:

From this brief survey of state practice, it will be seen that the concept of humanitarian intervention has been invoked by states on a surprisingly small number of occasions since 1945, and on each occasion, humanitarian intervention has been condemned as illegal by other states. Moreover, the United Nations debates on Cambodia in 1979 provide some evidence that there is now a consensus among states in favor of treating humanitarian intervention as illegal.¹⁹⁴

Hopefully currents of thought since 1979 allow more room for IHI and R2P, which came about later than the Cambodia debate of 1979. The Extraordinary Chambers in the Courts of Cambodia (ECCC), a hybrid tribunal, has brought court action for the Khmer Rouge violations in Cambodia from 1975-1979.¹⁹⁵ States may be opposed to IHI for their own self-interested reasons, such as fear that the injustices that they perpetrate may someday be subject to intervention under IHI.¹⁹⁶ If Vietnam had stepped in for genuine humanitarian reasons under the auspices of the UNSC, there could have been very different views even at that time.

E. The Opinion of Hedley Bull

Hedley Bull was a former professor of international relations at Oxford University. Professor Bull noticed that the “developments in international law in recent decades, especially in the field of human rights, might . . . provide a wide mandate for legitimate forms of outside involvement in what was previously considered the sphere of jurisdiction of states.”¹⁹⁷ Professor Bull did oppose unilateral humanitarian intervention as follows:

We have a rule of non-intervention because unilateral intervention threatens the harmony and concord of the society of sovereign states. If, however, an intervention itself expresses the collective will of the society of states, it may be carried out without bringing that harmony and concord into

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 99.

195. *The Extraordinary Chambers in the Courts of Cambodia*, INT’L BAR ASS’N, https://www.ibanet.org/Committees/WCC_Cambodia.aspx [<http://perma.cc/SKH5-AGNP>].

196. See Nakhjavani, *supra* note 182.

197. Hedley Bull, *Conclusion* in 181 INTERVENTION IN WORLD POLITICS 189 (1984).

jeopardy.¹⁹⁸

Bull thus notes the increased range of involvement even as he retains a more collective view of intervention.

The original UNSC Resolution condemning North Korea's aggression and authorizing a U.S.-led UN coalition to repel that aggression likely still remains in force, although it is unclear if the resolution has lapsed, as it was enacted in 1950.¹⁹⁹ If it still remains in force, then Bull's criterion for collective action has arguably already been fulfilled. As such, the full range of IHI and R2P could remain viable, subject to the prudential judgments of the parties. This legal state of affairs can enter into robust diplomacy with North Korea, China, and Russia, even as it strengthens the hand of South Korea, the U.S. and Japan—to name the six parties formerly engaged in the Six Party Talks.²⁰⁰ Back channels for diplomacy, such as the UN channel in New York and the Swedish Embassy of North Korea, have been used recently as well, as the Secretary of State has indicated publicly.²⁰¹

F. The Opinion of Sean D. Murphy

Professor Murphy wrote a book on humanitarian intervention while he was a lawyer working for the United States Department of State.²⁰² He concluded against unilateral humanitarian intervention in his book: “In conclusion, unilateral humanitarian intervention finds little support in the rules of the UN Charter and in state practice in the post Charter era.”²⁰³ Professor Murphy also studied the military intervention that took place in countries such as Liberia, Iraq, Bosnia and Herzegovina, Somalia, Rwanda, and Haiti after the Cold War and stated: “Recent events show a striking willingness of states to forego unilateral humanitarian intervention in favor of Security Council authorization, thereby reinforcing the views of those that regard unilateral humanitarian intervention as unlawful.”²⁰⁴ Professor Murphy shows that throughout recent history, member states have decided not to use the unilateral intervention scheme. Member states seem to favor using the Security Council in order to be in full compliance with the UN Charter.

The recent string of UNSC resolutions against North Korea have used Article 41 for increasingly stringent yet non-forcible intervention purposes. These resolutions have authorized the interdictment of North Korean vessels, forbidden North Korea's export of seafood, and have deemed over

198. *Id.* at 195.

199. Security Council Resolution 84 - UNSCR, unscr.com/en/resolutions/84 [<https://perma.cc/2SN3-KGDG>].

200. See S.C. Res.82 (June 25, 1950), [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/82\(1950\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/82(1950)) [<https://perma.cc/L4FN-PBYT>].

201. See Joel S. Wit, *Back Channels to North Korea*, ATLANTIC (Aug. 13, 2017), <https://www.theatlantic.com/international/archive/2017/08/back-channel-to-north-korea/536721/> [<https://perma.cc/XYU9-VH5P>].

202. Young Sok Kim, *Responsibility to Protect, Humanitarian Intervention and North Korea*, 5 J. INT'L BUS. L. 74, 81 (2006).

203. MURPHY, *supra* note 76, at 387.

204. *Id.* at 393.

ninety percent of North Korea's exports to be contraband.²⁰⁵

If the UNSC were to authorize a full-blown blockade of North Korea, it would be considered an act of war.²⁰⁶ Up to this point, the UNSC resolutions have slowly moved in that direction, though have not come close as yet.

The U.S. has taken a "maximum pressure and engagement" policy in the midst of resolutions not only by the UNSC, but also the European Union and individual countries such as South Korea, Australia, and Japan.²⁰⁷ The aggregate of actions by other countries has a collective impact when taken together. Should this aggregate of actions have an impact on the analysis?

G. The Sum of the Opinions of Highly Qualified Scholars

The bulk of the highly qualified scholars reviewed here opine that unilateral humanitarian intervention should not be permitted under current international law.²⁰⁸ Additional scholars including Philip C. Jessup,²⁰⁹ Louis Henkin,²¹⁰ Noam Chomsky,²¹¹ and Oscar Schachter²¹² have also written against unilateral humanitarian intervention, considering it a violation of international law. Even the UN High Level Panel on Threats, Challenges, and Change did not recognize unilateral humanitarian intervention as lawful in its 2004 report.²¹³

However, my interlocutor in this Symposium, Professor Jens David Ohlin, together with his co-author Professor George P. Fletcher, present a persuasive case for legitimate defense, which allows for defense of others in instances where self-defense by that nation is permitted. This doctrine receives attention in the next section.

205. Security Council Strengthens Sanctions on Democratic Republic of Korea, Unanimously Adopting Resolution 2321 (Nov. 30, 2016), <https://www.un.org/press/en/2016/sc12603.doc.htm> [<https://perma.cc/SK2N-C5YA>].

206. See *Fact Sheet: Resolution 2375 (2017) Strengthening Sanctions on North Korea*, U.S. MISSION TO U.N. (Sept. 11, 2017), <https://usun.state.gov/remarks/7969> [<https://perma.cc/8VC2-75GN>]; Ben Blanchard & Hyonhee Shin, *North Korea Says New U.N. Sanctions an Act of War*, REUTERS (Dec. 23, 2017), <https://www.reuters.com/article/us-northkorea-missiles/north-korea-says-new-u-n-sanctions-an-act-of-war-idUSKBN1EI03D> [<https://perma.cc/UAL5-3JAS>].

207. Evans J.R. Revere, *The Trump Administration's North Korea Policy: Headed for Success or Failure?*, BROOKINGS (Jul. 10, 2017), <https://www.brookings.edu/blog/order-from-chaos/2017/07/10/the-trump-administrations-north-korea-policy-headed-for-success-or-failure> [<https://perma.cc/R52J-8NLC>].

208. Kim, *supra* note 202, at 81.

209. See PHILIP C. JESSUP, *A MODERN LAW OF NATIONS-AN INTRODUCTION* 172-174 (Archon Books 1968) (1946).

210. See LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 162-64 (Colum. Univ. Press 1979) (1968).

211. See also NOAM CHOMSKY, *ROUGE STATES: THE RULE OF FORCE IN WORLD AFFAIRS* 49-50 (2000) (describing in a dim tone the likely future rise of humanitarian interventions).

212. See OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 125-26 (1991).

213. Kim, *supra* note 202, at 86, 89.

V. Legitimate Defense

Even if the doctrines of IHI and R2P fail, the doctrine of legitimate defense waits in the wings. Due to the UN Charter's odd history, the doctrine is grounded in the French translation of the UN Charter Article 51—which is no less official than the English version.²¹⁴ Ohlin and Fletcher uncover the history of *légitime* defense during the negotiation of the UN Charter.²¹⁵ They also trace this Continental idea from its roots prior to the UN Charter. They find that “[t]he concept supports a much broader range of permissible interventions, not just limited to individual self-defense or mutual defense arrangements. Any nation has the right to intervene when nations fall victim to illegal aggression.”²¹⁶

A rigorous, nuanced and far-ranging book such as “Defending Humanity” cannot be adequately summarized and applied in such a small space. Thus, this section is merely a brief treatment of its doctrine of legitimate defense and ways it may apply to countries attacked or imminently threatened to be attacked by North Korea.

Ohlin and Fletcher discuss six elements of legitimate defense: (1) the attack must be *overt*; (2) the attack must be *unlawful*; (3) the attack must be *imminent*; (4) the defense must be *necessary*; (5) the defense must be *proportionate*; (6) the defense must be an *intentional or knowing response*.²¹⁷ North Korea has recently threatened unlawful and overt attacks around Guam, over the Pacific with a nuclear weapon (which the ICJ deems illegal) and upon U.S. cities, such as Washington D.C.²¹⁸ These threats carry timeframes and are threatened retaliation to actions that North Korea does not like.²¹⁹ North Korea has made these threats while carrying out ballistic missile and ICBM tests, showing off the fact that these weapons can reach cities in North America.²²⁰

Theoretically, if legitimate defense is recognized, then any nation should be able to take necessary and appropriate defensive actions against known attacks, including nations that are not the target.²²¹ For example, if North Korea launched a missile at Japan that defensive calculations confirmed would hit Japan, then that missile may be lawfully destroyed under legitimate defense by not only Japan, but any other defending country.²²²

214. See GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* 77-78 (2008).

215. *Id.*

216. *Id.* at 76.

217. See *id.* at 86-87.

218. See Will Ripley, *North Korea Revives Guam Threat Ahead of US-South Korea Drills*, CNN, <https://www.cnn.com/2017/10/13/asia/north-korea-guam-threat/index.html> (last updated Oct. 15, 2017) [<https://perma.cc/38FJ-5ZXU>].

219. See *id.*

220. See Berlinger et al., *supra* note 61.

221. See FLETCHER & OHLIN, *supra* note 214, at 76.

222. See also Hallie Detrick, *Japan Would Shoot Down A North Korean Missile If It or Its Allies Were Threatened*, FORTUNE (Oct. 3 2017), <http://fortune.com/2017/10/03/japan-would-shoot-down-north-korean-missile/> (noting that the U.S. and Japan have both said that they would shoot down missiles fired at their allies) [<https://perma.cc/HCV9-Q9FD>].

If South Korea, for example, opted to destroy the missile headed towards Japan, it could do so under legitimate defense.

One important element to consider is *imminence*: at what point is an attack considered *imminent*? In the above example, imminence would surely cover the entire time the missile is in flight. Would it cover the pre-launch phase? Defensive cyber-electronic warfare could cause the missile to explode, misfire or go awry prior to an attempted launch.²²³ Given that even test launches have been forbidden by the UNSC resolutions, interfering in the pre-launch phase with a launch determined to be aimed to hit another country could fall within imminence.

Earlier points in time can cause more debate. Was the Israeli air force justified in bombing the Syrian nuclear facility? Does persistent hostility make a difference? Do ongoing aggressive goals change the analysis? North Korea has had the goal of taking over South Korea by force throughout its history.²²⁴ It has repeatedly threatened South Korea, Japan and the United States.²²⁵ For example, North Korea has threatened to turn Seoul into a “sea of fire” many times.²²⁶ What is the earliest point at which imminence is triggered?

Ohlin and Fletcher asseverate that legitimate defense is inherent. As such, the UNSC need not pass a resolution to enable legitimate defense. This aspect of legitimate defense would dispose of the objections in the previous section about unilateral intervention. It allows for unilateral intervention by any and all nations that meet the elements enunciated—whether even members of the UN or not.²²⁷ Thus, Australia could defend South Korea, Japan and/or the United States under legitimate defense if the elements are satisfied. For that matter, so could China.

VI. Contemplating Intervention in North Korea

The major concerns associated with North Korea are its military threats and its gross, systematic human right violations. The United

223. See Joshua Berlinger, *Could the US Take Out North Korea's Missiles Before Launch?*, CNN, July 6, 2017, <https://www.cnn.com/2017/04/18/asia/cyber-missile-defense-north-korea/index.html> [<http://perma.cc/73LU-C5LK>].

224. See Ripley, *supra* note 218.

225. See *id.*

226. Patrick Maguire, *Now North Korea Vows to Turn South into 'SEA OF FIRE' After US Deploys Anti-Missile System*, EXPRESS (Jul. 11, 2016), <https://www.express.co.uk/news/world/688140/north-korea-south-korea-united-states-thaad-anti-missile-sea-of-fire> [<https://perma.cc/5LTP-MGFM>]; CNN Wire Staff, *North Korea Threatens 'A Sea Of Fire' Upon South Korea*, CNN, <https://www.cnn.com/2011/11/24/world/asia/north-korea-sea-of-fire/index.html> [<https://perma.cc/LCC5-6ZXY>]; see also Joshua Nevett, *North Korea Boasts of 'INVINCIBLE Army' and Nukes That Will Turn US Into 'Sea Of Fire'*, DAILY STAR (May 8, 2017), <https://www.dailystar.co.uk/news/latest-news/612348/kim-jong-un-north-korea-news-Invincible-Army-sea-of-fire> (directing the threat at the U.S. rather than South Korea) [<https://perma.cc/KX6S-6R37>].

227. See FLETCHER & OHLIN, *supra* note 214, at 86 (noting that while “no authoritative legal source expresses this consensus, lawyers around the world would readily acknowledge the same basic structural elements of a valid claim of self-defense or legitimate defense).

Nations and many Member States want to solve the security and human rights crises within North Korea, but at the same time, they do not want to see massive bloodshed and the possibility of sparking World War III.²²⁸ The ideal solution is the peaceful reunification of the Korean peninsula, although the desire for rapid reunification without resort to war colors the diplomatic domain as well.

North Korea's nuclear weapons program was first announced by the United States on October 16, 2002, and tensions on the Korean Peninsula have perhaps reached their highest levels after the signing of the Armistice.²²⁹ North Korea itself went on to announce this development in the same month in 2002.²³⁰ Since then, multiple countries (United States, China, Japan, South Korea, and Russia) all convened with North Korea to move to a peaceful use of nuclear energy by which North Korea would in turn receive political and economic support in order to promote mutual trust, stability and peace on the Korean Peninsula and in Northeast Asia.²³¹ However, every negotiation with North Korea through the beginning of 2017 has failed to resolve the dual human rights and security crises.

Along with nuclear weapons, North Korea possesses chemical and biological weapon technology that they could unleash in an invasion.²³² The United States Department of Defense noted that, "North Korea probably has had a longstanding chemical weapons program with the capability to produce nerve, blister, blood, and choking agents and likely possesses a chemical weapons stockpile. North Korea probably could employ chemical weapon agents by modifying a variety of conventional munitions, including artillery and ballistic missiles."²³³

This report further states, "North Korea continues to research bacterial and viral biological agents that could support an offensive biological weapons program. Infrastructure, combined with its weapons industry, gives

228. Roberta Cohen, *A New UN Approach to Human Rights in North Korea: The 2017 Special Rapporteur's Report*. (Dec. 7, 2017) <https://www.38north.org/2017/12/rcohen120717/> [<https://perma.cc/2TTN-APC6>].

229. See International Atomic Energy Agency (IAEA), Fact Sheet on DPRK Nuclear Safeguards, IAEA, <https://www.iaea.org/newscenter/focus/dprk/fact-sheet-on-dprk-nuclear-safeguards> [<https://perma.cc/9WP7-SX9D>].

230. See David E. Sanger, *North Korea Says It Has a Program on Nuclear Arms*, N.Y. TIMES (Oct. 17, 2002), <http://www.nytimes.com/2002/10/17/world/north-korea-says-it-has-a-program-on-nuclear-arms.html> [<https://perma.cc/5BWA-65AL>].

231. See Scott Snyder, *Redouble Efforts on Six-Party Talk*, JOONGANG DAILY (Dec. 21, 2005), <http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=2660600> [<https://perma.cc/7SPN-C7CJ>].

232. See Harry J. Kazianis, *Why Invading North Korea Would Be Insane*, WEEK (Jan. 16, 2015), <http://theweek.com/articles/532678/why-invading-north-korea-insane> [<https://perma.cc/6CT2-28D2>].

233. See *Annual Report to Congress: Military and Security Developments in the Democratic People's Republic of Korea 2012*, U.S. DEPT. OF DEFENSE, https://www.defense.gov/Portals/1/Documents/pubs/Report_to_Congress_on_Military_and_Security_Developments_Involving_the_DPRK.pdf [<https://perma.cc/PR5K-5XJJ>].

North Korea a potentially robust biological warfare capability.”²³⁴ Packaging chemical and biological warfare with the nuclear program that they continue to make more powerful and farther ranging sobers contemplation of forcible intervention.

Not only does North Korea have nuclear, chemical, and biological warfare means, but it also has a massive military—the fourth largest on the planet in number of units.²³⁵ However, the units are typically not on the cutting edge of military technology. For examples, North Korea still has old Soviet MiGs and tanks.²³⁶ The North Korean government claims that the DPRK suffers from the worst famine in its history—so much so, that even members of the military, who are prioritized over civilians, do not have enough to eat.²³⁷

Less visible, but still dangerous, is North Korea’s cyber war tactics. North Korea, through cyberattacks, has stolen over 80 million dollars from a bank in Bangladesh, one of the poorest countries in the world.²³⁸ It also stole over 40 million dollars from a Taiwanese bank, but almost all the money was recovered.²³⁹ The international banking system appropriately has cut North Korea off from its SWIFT code system.²⁴⁰ More ominously, however, North Korea has hacked into South Korean computers to steal military operation plans.²⁴¹

The three largest militaries on Earth—the U.S., Russia, and China—have prepared forces and are engaged in military exercises around Korea

234. *Id.*

235. Dillinger, *supra* note 184.

236. *Annual Report to Congress, supra* note 233.

237. Thomas Mackie, *North Korean Soldiers ‘STARVING As Kim Orders Them Into World War 3 Training With No Food’*, EXPRESS (Dec. 9, 2017), <https://www.express.co.uk/news/world/890108/north-korea-kim-jong-un-world-war-3-soldiers-communist-dictator-kim-jong-il-famine> [http://perma.cc/V4XY-PPEL]; Sara Malm & Charlie Bayliss, *North Korean Villagers Clash With Authorities In Rare Sign Of Rebellion Against Kim Jong-Un’s Rule As Officials Ransack Farms For Food To Feed The State’s Starving Soldiers*, DAILY MAIL (Jan. 22, 2018), <http://www.dailymail.co.uk/news/article-5298445/North-Korean-villagers-clash-authorities-food.html#ixzz59V5H0SU2> [https://perma.cc/V4QN-HJ8P]; Sofia Lotto Persio, *North Korea Has 1.2 Million Troops But Cannot Feed Them*, NEWSWEEK (Aug. 24, 2017, 12:31 P.M.), <http://www.newsweek.com/north-korea-cant-feed-all-its-12-million-soldiers-654732> [https://perma.cc/F7EB-3A3U].

238. See Jim Finkle, *Cyber Security Firm: More Evidence North Korea Linked to Bangladesh Heist*, REUTERS (Apr. 3, 2017, 5:28 PM), <https://www.reuters.com/article/us-cyber-heist-bangladesh-northkorea/cyber-security-firm-more-evidence-north-korea-linked-to-bangladesh-heist-idUSKBN175214> [https://perma.cc/5YYN-PRE7].

239. Darren Boey, *North Korean Hacker Group Linked to Taiwan Bank Cyberheist*, BLOOMBERG (Oct. 17, 2017, 12:57 AM), <https://www.bloomberg.com/news/articles/2017-10-17/north-korean-hacker-group-linked-to-taiwanese-bank-cyberheist> [https://perma.cc/54GR-PXPW].

240. See Don Weinland, *North Korean Banks Barred from Swift Transaction System*, FINANCIAL TIMES (Mar. 8, 2017), <https://www.ft.com/content/69dd9512-03d9-11e7-ace0-1ce02ef0def9> [https://perma.cc/CDM7-MGW7].

241. See Choe Sang-Hun, *North Korean Hackers Stole U.S.-South Korean Military Plans, Lawmaker Says*, N.Y. TIMES (Oct. 10, 2017), <https://www.nytimes.com/2017/10/10/world/asia/north-korea-hack-war-plans.html> [https://perma.cc/6R2T-U3EC].

more than ever.²⁴² Japan and South Korea have also joined in military exercises with the U.S., even as they procure more high technology equipment from the U.S.²⁴³ Multi-valent missile defense systems that can potentially target a missile at every stage, is in ongoing development.²⁴⁴ There have been successful tests even recently, but the state of the science keeps improving.

Many South Koreans, even more so among younger and middle-aged generations, do not believe they should make a huge sacrifice for the North Korean citizens and do not view North Korea as a huge threat to their country.²⁴⁵ Furthermore, these polls have shown that South Koreans dislike Japan almost as much as North Korea, and believe that the United States might provoke a war with North Korea.²⁴⁶ South Korea is willing to wait for the North to change on its own. South Koreans envision the two Koreas growing slowly together in the future.²⁴⁷ However, the Korean War generations favor a more assertive approach.²⁴⁸ President Moon of South Korea has moved in a more realistic and pragmatic direction, and has sought to project a unified front with the United States and Japan, even as he pokes at issues with Japan.²⁴⁹

As large as North Korea's military is, it should not be overestimated. It is true that North Korea has many conventional howitzers on railroad

242. Dan Lamothe, *U.S.-South Korea Military Exercises Are On, Despite Trump's Planned Meeting With Kim. Here's What Will Happen*, WASH. POST (Mar. 9, 2018), https://www.washingtonpost.com/news/checkpoint/wp/2018/03/09/u-s-south-korea-military-exercises-are-on-despite-trumps-planned-meeting-with-kim-heres-what-will-happen/?utm_term=.Fed509a65384 [<https://perma.cc/8QTC-AE8Z>]; Tom O'Connor, *China and Russia Train for War with U.S. If Trump Invades North Korea*, NEWSWEEK (Dec. 18, 2017, 5:57 P.M.), <http://www.newsweek.com/china-could-fight-us-war-north-korea-breaks-out-751779> [<https://perma.cc/W76W-3F54>]; *In Pictures: US-South Korea Training Exercises*, TELEGRAPH, <https://www.telegraph.co.uk/news/picturegalleries/worldnews/10734565/In-pictures-US-South-Korea-training-exercises.html> [<https://perma.cc/5LR5-RXW6>].

243. Lamothe, *supra* note 242; *In Pictures*, *supra* note 242.

244. See Sofia Lotto Persio, *South Korea's Missile Defense System Is Bigger, Better And Ready For North Korea*, NEWSWEEK (Oct. 23, 2017, 7:15 A.M.), <http://www.newsweek.com/us-missile-defense-shield-thaad-ready-north-korea-690426> [<http://perma.cc/HF36-RA6R>].

245. See KIM JIYUN ET AL., *SOUTH KOREAN ATTITUDES TOWARD NORTH KOREA AND REUNIFICATION* 30, 37 (2015).

246. See *id.* at 15; Reuters Staff, *Most South Koreans Doubt the North Will Start a War: Poll*, REUTERS (Sept. 8, 2017, 1:35 AM), <https://www.reuters.com/article/us-northkorea-missiles-southkorea-poll/most-south-koreans-doubt-the-north-will-start-a-war-poll-idUSKCN1BJ0HF> [<https://perma.cc/B59T-9H8J>].

247. See KIM ET AL., *supra* note 245, at 31.

248. See *id.* at 32-33 (51.3% of South Koreans in their sixties and older view reunification as necessary for ethnic reasons).

249. See Hyunmin Michael Kang, *Moon's March 1 Address Pokes Sensitive Issues With Japan*, DIPLOMAT (Mar. 1, 2018), <https://thediplomat.com/2018/03/moons-march-1-address-pokes-sensitive-issues-with-japan/> [<https://perma.cc/B95T-JGQ6>]; Matt Stiles, *South Korea's President Appears To Be Threading The Needle Between Kim Jong Un And Trump*, L.A. TIMES (Jan. 11, 2018, 1:15 P.M.), <http://www.latimes.com/world/asia/la-fg-south-korea-moon-20180111-story.html> []. But see Jacqueline Alemany, *North Korea: Cracks In U.S.-Japan-South Korea Alliance Start To Show*, CBS NEWS (Feb. 9, 2018), <https://www.cbsnews.com/news/north-korea-cracks-in-u-s-japan-south-korea-alliance-start-to-show/> [<https://perma.cc/PGK4-ZHV5>].

tracks that retract into the mountains on their side of the border.²⁵⁰ Those guns are aimed at and can easily fire into Seoul and hide from pre-emptive attack.²⁵¹ However, new military technologies, such as laser defenses and high velocity projectiles may be able to defend Seoul much better than before.²⁵² Seoul is about thirty-five miles from the Korean border.²⁵³ Reportedly, North Korean artillery would fail to reach the southern side of Seoul and has questionable accuracy.²⁵⁴ If worst comes to worst, the subway system of Seoul provides a strong shelter to North Korean attacks in the event that the populace is not evacuated elsewhere.²⁵⁵

South Korea should prepare the best possible defenses, whether against cyberattacks, missiles, artillery, or any other type of attack from North Korea. The military aspects can also have a direct impact on diplomatic efforts, which may yet succeed in bringing about the peaceful reunification of the Koreans. If China, the U.S., Russia, South Korea, and Japan all agree that they will bring about the reunification of North and South, could Kim Jong-Un withstand a determination along these lines?

Reunification could bring many benefits to all parties involved. Already, South Korea's trade with China doubles what it trades with the United States, and far exceeds China's trade with North Korea.²⁵⁶ Reunification could also ease tensions enough to expand the Trans-Siberian railroad, allowing it to run down the whole Korean peninsula, accelerating and facilitating the movement of people and goods.²⁵⁷ Furthermore, the companies in a reunified Korea could much more efficiently and productively extract the natural resources in the North. The building of infrastructure in the North would multiply returns economically. In this scholar's estimation, it would be more than worthwhile for the U.S. to withdraw its military assets from a unified Korea. China would likely insist upon it. The U.S., unless it plans a land invasion of China, would theoretically not need military assets in Korea after North Korea is subsumed in the new Korea. The U.S. has the Seventh Wing and Seventh Fleet in the Pacific as well as major bases in Japan.²⁵⁸ The U.S. also has rapid mobilization abilities and

250. See Wood, *supra* note 118.

251. *Id.*

252. See CNN, *Watch the U.S. Navy's Laser Weapon in Action*, YOUTUBE (July 17, 2017), https://www.youtube.com/watch?v=TYUH_xSjvXQ [<https://perma.cc/WRZ5-F95Z>].

253. Wood, *supra* note 118.

254. See Prakash Menon & PR Shankar, *North Korea Can't Destroy Seoul With Artillery*, NAT'L INT. (Jan. 5, 2018), <http://nationalinterest.org/feature/north-korea-cant-destroy-seoul-artillery-23964> [<https://perma.cc/N64K-4944>].

255. Smith, *supra* note 119.

256. See Paul Blustein, *China Passes U.S. in Trade with Japan*, WASH. POST (Jan. 27, 2005), <http://www.washingtonpost.com/wp-dyn/articles/A40192-2005Jan26.html> [<https://perma.cc/92FE-XQ58>].

257. See *Korea and the Trans-Siberian Railway*, SEOUL TRIB. (July 29, 2014), <http://www.seoultribune.com/20140729/korea-and-the-trans-siberian-railway/> [<https://perma.cc/UUB3-A8DB>].

258. See Oliver Holmes, *What is the US Military's Presence Near North Korea?*, THE GUARDIAN (Aug. 9, 2017, 4:18 AM), <https://www.theguardian.com/us-news/2017/aug/09/what-is-the-us-militarys-presence-in-south-east-asia> [<https://perma.cc/7M37-S34Q>].

long-range strike capabilities.²⁵⁹ If this concession is necessary to win China's cooperation to reunify the peninsula, it could be well worth it.

Also, an implosion within North Korea is distinctly possible. Anti-regime graffiti, completely illegal in North Korea, has emerged at record levels.²⁶⁰ Kim Jong-Un's reign of terror leaves no one secure—not even his half-brother, uncle, nephew or his Army Chief-of-Staff, whom he executed with anti-aircraft fire.²⁶¹ As economic and diplomatic pressure rises, the regime may implode, the Kim Dynasty may end, and reunification would ideally follow quickly on its heels.

VII. Ideas and Applications

One type of limited forcible intervention would be a decapitation strike that would attack the top military leadership of the country. This type of military action might involve Special Forces acting in unison as rapidly and effectively as possible.²⁶² This action would cut the head off the figurative snake by striking Kim Jong-Un and North Korea's top leadership, as well as quickly taking control of all weapons within North Korea, and then unifying the Koreas.

Does any military in the world have Special Forces able to accomplish this mission? There were rumors that the United States had troops touch down in North Korea to do reconnaissance.²⁶³ Brigadier General Neil Tolley was said to be quoted saying:

U.S. special forces parachute into North Korea in order to spy on Pyongyang's underground military facilities. The U.S. military cannot see North Korea's extensive tunnel infrastructure, which include 20 partially subterranean airfields, thousands of underground artillery positions and at least four tunnels underneath the De-Militarized [sic] Zone that separates the two Koreas, so we send [Republic of Korea] soldiers and U.S. soldiers to the North to do special reconnaissance.²⁶⁴

However, after this story was published, the U.S. military aggressively denied it and Tolley himself said he was accurately quoted, but he was

259. *Id.*

260. Roseanne Gerin, *North Korean Authorities Step Up Probes of Anti-Kim Leaflets and Graffiti*, RADIO FREE ASIA (Mar. 25, 2016), <https://www.rfa.org/english/news/korea/north-korean-authorities-step-up-probes-of-anti-kim-leaflets-and-graffiti-03252016112241.html> [<https://perma.cc/RR3Y-BXPK>].

261. See Choe Sang-Hun, *In Hail of Bullets and Fire, North Korea Killed Official Who Wanted Reform*, N.Y. TIMES (Mar. 12, 2016), <https://www.nytimes.com/2016/03/13/world/asia/north-korea-executions-jang-song-thaek.html> [<http://perma.cc/H63X-7WP6>].

262. See Alex Lockie, *SEAL Team 6 is Reportedly Training for a Decapitation Strike Against North Korea's Kim Regime*, BUS. INSIDER (Mar. 14, 2017, 11:35 AM), <https://nordic.businessinsider.com/seal-team-6-is-reportedly-training-for-a-decapitation-strike-against-north-koreas-kim-regime-2017-3/> [<http://perma.cc/KB29-TLGN>].

263. See Isaac Stone Fish, *Are There U.S. Special Ops Inside North Korea?*, PASSPORT (May 30, 2012, 10:03 PM), <http://foreignpolicy.com/2012/05/30/are-there-u-s-special-ops-inside-north-korea/> [<https://perma.cc/C92S-K24Y>].

264. *Id.*

speaking hypothetically about what could be helpful in the future.²⁶⁵ “To be clear,” he said, “at no time have we sent special operations forces into North Korea.”²⁶⁶

Both the United States Special Forces and the South Korean special forces brigade train together during the annual springtime exercises for this specific scenario.²⁶⁷ Various news reports state that “U.S. Special Forces have been training alongside Republic of South Korea Special Forces in mock scenarios in which they would be inserted into North Korea.”²⁶⁸ Their exclusive mission would be to help launch, grow and lead a partisan movement of North Korean citizens that they rescue and free from the concentration camps.²⁶⁹

North Korea has countered all this Special Forces talk by developing and establishing their own special forces.²⁷⁰ The North Korea Special Operations forces, according to North Korea, are “[a]mong the most highly trained, well-equipped, best fed and highly motivated forces in North Korean leader Kim Jong-Un’s military.”²⁷¹

Such a limited forcible intervention would work legally because North Korea has continued to perpetuate the Korean conflict through disavowal of the Armistice as well as hostilities and belligerent behavior, which have perpetuated a state of war, which allows attacks on military targets.²⁷² A strike on military personnel during war is considered a war-time operation, and is legal, as opposed to a civilian assassination, which is illegal.²⁷³ Quickly and overwhelmingly taking over the command and control structure of North Korea and reuniting it with South Korea could prevent escalation.

The Korean War began in 1950 as a result of North Korean forces invading South Korea by crossing the 38th parallel in an attempt to forcefully take over the entire Korean peninsula. Only after years of bloodshed and negotiations did the North Korean forces, backed by China, and the U.S.-led coalition on behalf of the United Nations and South Korea, come to an Armistice Agreement that effectively created a cease-fire between the two sides.²⁷⁴ However, because no permanent peace treaty ever came into

265. *Id.*

266. *Id.*

267. See Anthony C. Lobaido, *U.S. Special Forces Train for North Korea Mission*, WND (Nov. 23, 2014, 8:54 PM), <http://www.wnd.com/2014/11/u-s-special-forces-train-for-north-korea-mission/> [<https://perma.cc/8EPM-DVC6>].

268. *Id.*

269. *Id.*

270. See Barbara Starr, *Pentagon: North Korean Special Forces ‘Highly Trained, Well-Equipped,’* CNN (Feb. 13, 2016), <https://www.cnn.com/2016/02/12/politics/pentagon-north-korean-special-forces-highly-trained-well-equipped/> [<http://perma.cc/2SPT-G6TL>].

271. *See id.*

272. See generally Morse Tan, *International Humanitarian Law and North Korea: Another Angle for Accountability*, 98 MARQ. L. REV. 1147, 1148 (2015).

273. *See id.* at 1182.

274. See Brandon K. Gauthier, *What It was Like to Negotiate with North Koreans 60 Years Ago*, THE ATLANTIC (July 26, 2013), <https://www.theatlantic.com/international/>

fruition, and because North Korea has repeatedly violated the terms of the Armistice Agreement by their actions and their words, there has not been a formalized end to the Korean War.²⁷⁵

The Korean Armistice Agreement (“Agreement”) is one of the longest, most violated military armistice in modern history. North Korea, or The Democratic People’s Republic of Korea (DPRK) has repeatedly, by its words and its actions, violated the provisions of the Agreement. The Agreement required that its provisions apply to all ground, naval, and air forces on both sides of the Demilitarized Zone, a two-and-a-half-mile area that separates North and South Korea.²⁷⁶ Additionally, commanders on each side are to insure complete compliance with these provisions by “adequately punishing” all subordinates who violate the provisions of the Agreement.²⁷⁷ Each side of this conflict was also required to actively cooperate with one another and with the Military Armistice Commission and the Neutral Nations Supervisory Commission in order to ensure the spirit of the provisions of the Armistice Agreement were being met.²⁷⁸ No such cooperation has transpired from North Korea.

Additionally, the Agreement prohibits any acts of war, or hostile acts within, from, or against the Demilitarized Zone.²⁷⁹ North Korea has violated the Agreement by continuing its nuclear program, its missile and nuclear tests, and its constant threats against the United States, as well as its allies.²⁸⁰ North Korea has repeatedly, purposely, and systematically engaged in various acts of war, as well as acts of hostility within the ironically named demilitarized zone—the most militarized border on planet earth.

Recently, the DPRK has announced that it would no longer adhere to the Agreement, as it considers the Agreement to be void.²⁸¹ Such an announcement is prohibited by the Agreement, which states that the Agreement shall remain in effect until it is superseded by mutually acceptable amendments and additions or by a peaceful settlement that is agreed to by both sides of the conflict.²⁸² On its face, a unilateral withdrawal breaks

archive/2013/07/what-it-was-like-to-negotiate-with-north-koreans-60-years-ago/278130/ [https://perma.cc/GBJ4-8W53].

275. *The Korean War Armistice*, BBC NEWS (Mar. 5, 2015), <http://www.bbc.com/news/10165796> [https://perma.cc/J78W-RBGH].

276. Agreement Between the Commander-in-Chief, United Nations Command, on the One Hand, and the Supreme Commander of the Korean People’s Army and the Commander of the Chinese People’s Volunteers, on the Other Hand, Concerning a Military Armistice in Korea, art. II ¶¶ 14-16, July 27, 1953, 4 U.S.T. 234 [hereinafter *The Agreement*].

277. *Id.* ¶ 13(e).

278. *Id.* ¶ 17.

279. See *The Korean War Armistice*, *supra* note 275.

280. Tan, *supra* note 272, at 1167-69.

281. Hyung-Jin Kim & Foster Klug, *North Korea Says It Cancels 1953 Armistice*, THE SAN DIEGO UNION-TRIBUNE, (March 11, 2013), <http://www.sandiegouniontribune.com/sdut-north-korea-says-it-cancels-1953-armistice-2013mar11-story.html> [https://perma.cc/RA5R-VSN2].

282. *The Agreement*, *supra* note 276.

the terms of the Agreement, which can only be “undone” by a supersession or peace treaty (not by a unilateral declaration “voiding” the Agreement).

Scholars generally agree that traditionally an armistice agreement does not end the condition of war between the parties: it is merely a way for both parties at war to mutually suspend military operations for a fixed period of time.²⁸³ Additionally, Article 36 of the Hague Convention expressly states “[a]n armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not fixed, the belligerent parties can resume operations at any time, provided always the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.”²⁸⁴ The Korean Armistice Agreement does not contain a provision for recommencing hostilities because of a serious and intentional breach of the Agreement; however, the Hague Convention does permit a belligerent party to denounce a serious violation of an armistice agreement by another party and recommence hostilities immediately in urgent situations.²⁸⁵ The DPRK’s continuous violations, including their refusal to cease their nuclear proliferation activity and testing, could easily be considered an immediate and urgent situation to the United States and its allies.

Although North Korea has shown their contempt for the Armistice Agreement through their words and actions, neither a new full-blown war, nor a true peace treaty has emerged to supersede the Agreement; only additional agreements and concessions have been signed. North Korea has repeatedly violated all subsequent agreements as well by their continuous hostile actions, nuclear proliferation activity, and their ongoing threats.²⁸⁶ The legal significance of North Korea’s contempt for the Armistice Agreement is that an international armed conflict still exists, the legal state of war continues, and under the Hague Convention guidelines, the United States could legally recommence hostilities towards North Korea at any time.²⁸⁷

Even if such a limited forcible intervention is never attempted, the possibility in the background can enable more progress on the diplomatic front. Only strong, robust diplomacy has a chance to prevail. The prior attempts at diplomacy were all too weak to make actual headway. They did not interrupt the cycle of saber-rattling brinkmanship, but instead rewarded it. Ideally, the current military buildup and options in the back-

283. Charles J. Dunlap, Jr. *No, cease-fires and armistices are not “outdated.”* January 22, 2018 <https://www.justsecurity.org/51285/no-ceasefires-armistices-outdated/> [<https://perma.cc/6JR2-BSSJ>].

284. *Treaties, State Parties and Commentaries*, INTERNATIONAL COMMITTEE OF THE RED CROSS, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/WebART/150-110042?OpenDocument> [<https://perma.cc/HT4X-JNRR>].

285. Convention (II) with Respect to the Laws and Customs of War on Land (Hague, II) (29 Jul 1899), ORGANISATION FOR THE PROHIBITION OF CHEMICAL WEAPONS, <https://www.opcw.org/chemical-weapons-convention/related-international-agreements/chemical-warfare-and-chemical-weapons/hague-convention-of-1899/> [<https://perma.cc/ASC4-KE3L>].

286. Tan, *supra* note 272, at 1176.

287. *See id.*, at 1156-69.

ground will not lead to World War III, but resolutions of the human rights and security crises by bolstering the diplomatic efforts.

The more recent robust diplomacy has interrupted the cycle of brinkmanship. North Korea's threat to encircle Guam in a ring of fire received a very strong response.²⁸⁸ North Korea backed off.²⁸⁹ North Korea threatened to shoot down U.S. planes in international airspace.²⁹⁰ Not long after it issued this threat, U.S. planes zoomed past North Korea in international airspace, successfully calling North Korea's bluff and diminishing its already scant credibility.²⁹¹ The DPRK has recently talked about achieving an equilibrium of force with the U.S., a weaker sort of posture than they have usually communicated.²⁹² The question is whether technical reasons predominate or if the strong stance of the U.S. has deterred further tests during this time.

Secretary of Defense Mattis has made public statements indicating that though the U.S. would rather not have to do so, it has many ways to annihilate North Korea.²⁹³ North Korea has threatened to detonate a nuclear weapon over the Pacific, potentially launching an Electromagnetic Pulse (EMP) attack, which could devastate Hawaii or Guam.²⁹⁴ The U.S. in turn has expressed its determination to defend its territory and people, as well as to protect its allies like South Korea and Japan.²⁹⁵

288. Brad Lendon & Joshua Berlinger, *Next Target Guam, North Korea Says*, CNN (Aug. 20, 2017), <https://www.cnn.com/2017/08/29/asia/north-korea-missile-launch-guam-threat/index.html> [<https://perma.cc/H9W4-2F9S>].

289. Chun Han Wong et al. *North Korea Backs Off Threat to Hit Guam* (Aug. 14, 2017), <https://www.wsj.com/articles/china-bans-key-north-korean-imports-1502703030> [<https://perma.cc/M229-TUVN>].

290. Carol Morello, *North Korea threatens to shoot down U.S. warplanes* (Sept. 25, 2017), https://www.washingtonpost.com/world/national-security/north-korea-asserts-its-right-to-shoot-down-us-bombers/2017/09/25/74da66c4-a204-11e7-8cfe-d5b912fab99_story [<https://perma.cc/JE45-KRU3>].

291. See Phil Stewart & Idrees Ali, *U.S. Bombers Fly Off North Korea's Coast in Show of Force*, REUTERS (Sept. 23, 2017), <https://www.reuters.com/article/us-northkorea-missiles-pentagon/u-s-bombers-fly-off-north-koreas-coast-in-show-of-force-idUSKCN1BY0UY> [<https://perma.cc/A9JH-M3TS>].

292. Christine Kim & Michelle Nichols, *North Korea says seeking military 'equilibrium' with U.S.* (Sept. 14, 2017), <https://www.reuters.com/article/us-northkorea-missiles/north-korea-says-seeking-military-equilibrium-with-u-s-idUSKCN1BP35B> [<https://perma.cc/2CYB-7EP5>].

293. See Cathleen Decker, *Defense Secretary Mattis Warns North Korea It Risks 'Total Annihilation'*, L.A. TIMES (Sept. 3, 2017, 1:16 P.M.), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-defense-secretary-mattis-raises-stakes-1504468426-htmlstory.html#nt=card> [<https://perma.cc/TG4M-AEMX>].

294. See Rachael Revesz, *North Korea EMP Attack Could "Shut Down US Power Grid and Kill 90% of Americans"*, INDEPENDENT (Oct. 16, 2017), <http://www.independent.co.uk/news/world/americas/north-korea-us-attack-emp-power-grid-kill-90-per-cent-american-population-electromagnetic-pulse-a8002756.html> [<https://perma.cc/CSF4-QZZG>]; see also Malia Zimmerman, *Electromagnetic Pulse Attack On Hawaii Would Devastate The State*, FOX NEWS (May 12, 2017), <http://www.foxnews.com/us/2017/05/12/electromagnetic-pulse-attack-on-hawaii-would-devastate-state.html> [<https://perma.cc/T43C-5DJJ>].

295. See Jon Sharman, *Donald Trump Says US Will Defend Allies From North Korea With 'Full Range of Unmatched Military Capability'*, INDEPENDENT (Nov. 7, 2017), <http://www.independent.co.uk/news/world/asia/donald-trump-us-south-korea-north-military->

Ignoring the gross human rights problem within North Korea will not make it go away, and living at the mercy of a merciless regime will only further devastate the North Korean people. North Korea's missiles already can hit parts of the United States, if not all of it. The world, galvanized by North Korea's trampling of its own people as well as the proliferation and direct threats that North Korea poses, should arise to defuse these crises before they wax worse.

China, which has accounted for some ninety percent of trade with North Korea, holds more cards to impact the DPRK than any other country.²⁹⁶ China does not agree with how North Korea conducts itself, but China has a few other reasons to keep North Korea around.²⁹⁷ China has long opposed the collapse of a fellow Communist regime.²⁹⁸ Another reason is that China dreads the prospect of a powerful pro-Western Korea that would share borders with them.²⁹⁹ Yet another reason is the stream of Korean refugees seen as taxing the resources Beijing has for the citizens of the less economically prosperous northeastern region of China, which shares most of North Korea's northern border.³⁰⁰ China has invested much into the DPRK, most of which would be more accurately considered aid rather than trade. North Korea reportedly has trillions of dollars' worth of rare earth minerals, and is wealthier in natural resources than South Korea.³⁰¹

At the same time, the relationship with China and North Korea has fallen to a low point. North Korea has publicly denounced and threatened China, which explains why even China sets up anti-missile batteries along their shared border against North Korea's launches of missiles.³⁰² China has cut off North Korean access to its banking and financial system, and China has shut down North Korean businesses in China.³⁰³ China expelled North Korean laborers.³⁰⁴ China pledged to implement the UNSC Resolutions against North Korea starting from September 5, 2017.³⁰⁵

capability-pyongyang-nuclear-war-asia-trip-a8041376.html [https://perma.cc/8JM5-Z655].

296. Albert & Xu, *supra* note 126.

297. See Staff & Agencies, *supra* note 69.

298. Benny Avni, Opinion, *The Only Real Solution to the Endless North Korea Crisis*, N.Y. POST (Jan. 13, 2016), <http://nypost.com/2016/01/13/the-only-real-solution-to-the-endless-north-korea-crisis/> [https://perma.cc/2KAL-4QSN].

299. *Id.*

300. *Id.*

301. TAN, *supra* note 89, at 81, 85.

302. Liu Zhen, *China Carries Out Anti-Missile Test Amid Tension Over North Korea's Nuclear Programme*, SOUTH CHINA MORNING POST (Feb. 6, 2018), <http://www.scmp.com/news/china/diplomacy-defence/article/2132170/china-carries-out-anti-missile-test> [https://perma.cc/4DMD-C2Z9].

303. See Agence France-Presse, *supra* note 128.

304. See Finney, *supra* note 128.

305. *China Implements UN Sanctions Against North Korea, as Trump Trade Probe Looms*, FOX NEWS (Aug. 14, 2017), <http://www.foxnews.com/world/2017/08/14/china-implements-un-sanctions-against-north-korea-as-trump-trade-probe-looms.html> [https://perma.cc/7FRZ-QQXF].

China, as its views on its own interests have been shifting, has taken more action to pressure North Korea than it ever has done.

Assassinations and assassination attempts have driven a further wedge between China and North Korea. Kim Jong-Un executed his uncle Jang Song-Thaek, who had been prepared to serve as something of a regent to the new Supreme Leader.³⁰⁶ The accusations, which underwent no due process, included factionalism, corruption and dissolute behavior.³⁰⁷ Jang Song-Thaek ruled as the country's second most powerful man and a brother-in-law connection to the previous Kim's power in North Korea.³⁰⁸ Adam Cathcart, an expert on North Korea, said accusations of factionalism and seeking power were pro forma in such cases, but Jang's execution is unheard of because family members are normally dealt with more compassion and typically retained within the borders of North Korea.³⁰⁹ Cathcart went on to say the drama, speed, and improvisation on display made this "somewhat alarming."³¹⁰ Further, Patrick Ventrell, a spokesman for the National Security Council, said, "[i]f confirmed [as this act later was], this is another example of the extreme brutality of the regime."³¹¹ China considered Jang Song-Thaek to be its most important tie with North Korea.³¹² As such, his assassination has caused a serious rift in the relationship between Beijing and Pyongyang.³¹³

But Kim Jong-Un has gone after other members of his family besides his uncle. His eldest half-brother, Kim Jong-Nam—who was reportedly a possible replacement that China would have preferred—was "gruesomely" assassinated with a nerve agent in February of 2017.³¹⁴ China also very recently prevented the assassination of Kim Jong-Nam's son, Kim Jong-Un's nephew.³¹⁵ To put it mildly, none of these assassinations or attempted assassinations endear North Korea to China. Most recently as of this writing, North Korea has threatened to eliminate President Donald Trump for his "blasphemy" against Kim Jong-Un.³¹⁶

306. Tania Branigan, *Kim Jong-un's Uncle Jang Song-thaek Executed, Say North Korean State Media*, THE GUARDIAN (Feb. 24, 2016), <http://www.theguardian.com/world/2013/dec/12/north-korea-jang-song-thaek-executed> [https://perma.cc/Q9FQ-7B84].

307. *Id.*

308. *Id.* But see Choe, *supra* note 261.

309. Branigan, *supra* note 306.

310. *Id.*

311. *Id.*

312. Avni, *supra* note 298.

313. *Id.*

314. Alex Lockie, *China Reportedly Caught North Korean Assassins Plotting to Kill Kim Jong Un's Nephew*, BUS. INSIDER (Nov. 02, 2017), <http://www.businessinsider.com/china-caught-north-korean-assassins-for-kim-jong-uns-nephew-2017-11> [https://perma.cc/B7LL-QSVF]; Julian Ryall, *Did Kim Jong-Un Kill His Uncle And Brother Over 'Coup Plot Involving China'?*, TELEGRAPH (Aug. 24, 2017), <https://www.telegraph.co.uk/news/2017/08/24/did-kim-jong-un-kill-uncle-brother-coup-plot-involving-china/> [https://perma.cc/VUC3-PVW4].

315. Lockie, *supra* note 250a.

316. Sofia Lotto Persio, *North Korea Issues 'Death Sentence' Against Trump: 'He Will Be Forced to Pay Dearly For His Blasphemy'*, NEWSWEEK (Nov. 15, 2017, 4:58 P.M.), <http://www.newsweek.com/north-korea-issues-death-sentence-against-trump-711760> [https://perma.cc/TG55-VEMA].

The U.S., which holds more cards to impact China than any other country, has been playing its cards with China more than ever. The U.S. has implemented more secondary sanctions against Chinese individuals and entities violating the sanctions placed against North Korea.³¹⁷ More can follow and if additional entities and individuals continue breaking the sanctions against North Korea, more should follow.

Furthermore, China exports more to the U.S. than to any other individual country's market by far.³¹⁸ China also holds more U.S. debt than any other foreign holder of U.S. debt.³¹⁹ The U.S. has threatened to take further action on intellectual property issues, which China views very differently from the U.S.³²⁰ The U.S. government has also claimed that China has manipulated its currency to bolster its exports.³²¹ Also, China has a much larger trading relationship with South Korea, dwarfing its trade with North Korea.³²² China further objects to the defense systems that the U.S. has been providing to South Korea and Japan because of how it shifts the power configuration in the region.³²³ All of these issues have been realigning China's views of its own interests, fueling greater motivation for China to take actions to pressure North Korea, the declared number one priority of the U.S. government.

Notably, China has publicly declared that it would *not* defend North Korea if it attacks first.³²⁴ This is the first time that China has made such a statement, and it is quite significant because after all, it was the Chinese forces that prevented the UN Coalition from winning the Korean War.

317. Robert Delaney & Zhenhua Lu, *US Imposes New Sanctions on Chinese and Russian Companies to Cut Off North Korea Support*, SOUTH CHINA MORNING POST (Aug. 23, 2017), <http://www.scmp.com/news/china/policies-politics/article/2107874/us-imposes-new-sanctions-chinese-and-russian-companies> [https://perma.cc/9GFN-ST4L].

318. *Top 10 Trading Partners of the Chinese Mainland*, CHINA DAILY U.S.A., http://www.chinadaily.com.cn/bizchina/2014-02/19/content_17290565.htm (last updated Feb. 19, 2014, 8:21 A.M.) [https://perma.cc/W7BK-Y4RL].

319. See Kimberly Amadeo, *U.S. Debt to China: How Much Does It Own?*, BALANCE, <https://www.thebalance.com/u-s-debt-to-china-how-much-does-it-own-3306355> (last updated Jan. 24, 2018) [https://perma.cc/5MU6-HCRR].

320. Jeff Mason, *Exclusive: Trump Considers Big 'Fine' Over China Intellectual Property Theft*, REUTERS (Jan. 17, 2018), <https://www.reuters.com/article/us-usa-trump-trade-exclusive/exclusive-trump-considers-big-fine-over-china-intellectual-property-theft-idUSKBN1F62SR> [https://perma.cc/H54A-FR25].

321. See Tim Worstall, *Trump's Right, China Is a Manipulator - Currency Reserves Drop as China Manipulates Yuan Up in Value*, FORBES (Jan. 07, 2017), <https://www.forbes.com/sites/timworstall/2017/01/07/trumps-right-china-is-a-manipulator-currency-reserves-drop-as-china-manipulates-yuan-up-in-value/#3e7b972a63e8> [https://perma.cc/W744-BD43].

322. See Blustein, *supra* note 256.

323. Gerry Mullaney & Chris Buckley, *China Warns of Arms Race After U.S. Deploys Missile Defense in South Korea*, N.Y. TIMES (Mar. 7, 2017), <https://www.nytimes.com/2017/03/07/world/asia/taad-missile-defense-us-south-korea-china.html> [https://perma.cc/Z624-LQPA].

324. Simon Denyer & Amanda Erickson, *Beijing Warns Pyongyang: You're On Your Own If You Go After The United States*, WASH. POST (Aug. 11, 2017), https://www.washingtonpost.com/world/china-warns-north-korea-youre-on-your-own-if-you-go-after-the-us/2017/08/11/a01a4396-7e68-11e7-9026-4a0a64977c92_story.html?utm_term=.Ca81ed6be4be [https://perma.cc/8CIT-PBTW].

As the current U.S. president took the longest foreign trip by any U.S. president in a score of years during November of 2017, he chose to do so to Asia with North Korea as the top agenda item.³²⁵ A parade of prominent U.S. officials, including the Vice-President, Secretary of State, and Secretary of Defense have made strategic journeys to northeast Asia with a focus on resolving the North Korean crises.³²⁶ President Trump reported after the trip that South Korea will join the U.S. in its sanctions, that Japan fully supports the U.S. approach, other Asian states will cut off North Korea economically, and that China has been urged to exercise its economic influence over North Korea.³²⁷

When North Korea sent college student Otto Warmbier back home in a coma, many Americans were shocked at the brutality of the regime. Warmbier, who suffered severe head trauma, died not long after returning.³²⁸ Several Americans, including two faculty members at the Pyongyang University of Science and Technology, still remain abducted by North Korea.³²⁹ The U.S. Special Envoy for North Korean Policy, Joseph Yun, reportedly has sought to negotiate their release.³³⁰ Japanese citizens kidnapped by North Korean agents still cause outrage in Japan.³³¹ All considered, North Korea has too many crimes such as these and others on its hands.

Concerns remain about how long and to what degree China will implement the UNSC sanctions. Additionally, the concern that Russia will backfill what China does not provide looms even larger. Russia has been violating the sanctions regime through the port of Vladivostok, including in

325. See Julian Borger, *North Korea Looms Large As Donald Trump Embarks On Asia Trip*, THE GUARDIAN (Nov. 4, 2017, 8:55 A.M.), <https://www.theguardian.com/us-news/2017/nov/04/north-korea-looms-large-as-donald-trump-embarks-on-asia-trip> [<https://perma.cc/G2CN-XCAA>].

326. Abigail Crutchfield, *VP Pence heads to Asia-Pacific amid North Korean Posturing*, CNN POL. (Apr. 14, 2017), <https://www.cnn.com/2017/04/14/politics/vice-president-pence-trip-asia-pacific/index.html> [<https://perma.cc/X4RM-C874>].

327. See David Jackson, *Analysis: Trump's Trip to Asia is Over. Now What?*, USA TODAY (Nov. 14, 2017), <https://www.usatoday.com/story/news/politics/2017/11/14/analysis-trumps-trip-asia-over-now-what/857474001/> [<https://perma.cc/8FLS-U8N3>]; David Jackson, *Trump: 'North Korea Is Worldwide Threat,' But There May Be 'Good Progress' Toward Deal*, USA TODAY (Nov. 6, 2017), <https://www.usatoday.com/story/news/politics/2017/11/06/trump-lands-south-korea-nuclear-talks-north-korea/838063001/> [<https://perma.cc/EP97-MQY6>].

328. See Ponniah & Spender, *supra* note 70; Svrluga & Fifield, *supra* note 71.

329. *North Korea Confirms Detention of US Professor Tony Kim*, AL JAZEERA (May 03, 2017), <http://www.aljazeera.com/news/2017/05/north-korea-confirms-detention-professor-tony-kim-170503081435814.html> [<https://perma.cc/7Y4X-QP5R>].

330. Reuters Staff, *U.S. Diplomat Met With Three Remaining U.S. Detainees In North Korea: State Department*, REUTERS (Jun. 15, 2017, 3:55 P.M.), <https://www.reuters.com/article/us-usa-northkorea-detainee-visit/u-s-diplomat-met-with-three-remaining-u-s-detainees-in-north-korea-state-department-idUSKBN1962R0> [<https://perma.cc/WLB9-ATRW>].

331. Motoko Rich, *For Families of Japanese Abducted by North Korea, Trump Visit Brings Spotlight*, N.Y. TIMES (Nov. 3, 2017), <https://www.nytimes.com/2017/11/03/world/asia/north-korea-kidnap-japanese-trump.html> [<https://perma.cc/WKX4-3GV8>].

its fuel shipments.³³² Secondary sanctions have begun against a few Russian entities and individuals,³³³ but they may need to increase dramatically before Russia actually implements President Putin's promise to implement the UNSC Resolutions. Russia forgave some ninety percent of North Korea's debt in 2012, and Putin has generally acted as a cheerleader for the Kim Dynasty.³³⁴

Militarily, China and Russia have conducted joint naval exercises nearer to the Korean peninsula than ever before.³³⁵ China has amassed a large number of soldiers along its border with North Korea.³³⁶ Russian jets with nuclear payload capabilities have zoomed near Korea.³³⁷ The four largest militaries in the world have amassed military might and technology as never before seen around Korea before.³³⁸ At the same time, China frequently reiterates its desire for peace and stability in the region, and rebukes North Korea's destabilizing provocations.³³⁹

The U.S. has stationed three aircraft carriers around the Korean peninsula.³⁴⁰ China only has two such aircraft carriers in its entire fleet.³⁴¹

332. Polina Nikolskaya, *Exclusive: From Russia with Fuel - North Korean Ships May Be Undermining Sanctions*, REUTERS (Sept. 20, 2017), <https://ca.reuters.com/article/topNews/idCAKCN1BV1DC-OCATP> [<https://perma.cc/592H-FV5J>].

333. See Delaney & Lu, *supra* note 317.

334. See *Russia Writes Off 90 percent of North Korea Debt, Eyes Gas Pipeline*, REUTERS (Apr. 19, 2014), <https://uk.reuters.com/article/russia-northkorea-debt/russia-writes-off-90-percent-of-north-korea-debt-eyes-gas-pipeline-idUKL6N0NB04L20140419> [<https://perma.cc/7E33-NF52>].

335. Sarah Zheng, *China, Russia Conclude Naval Exercises Following North Korea Nuclear Test*, S. CHINA MORNING POST (Oct. 5, 2017), <http://www.scmp.com/news/china/diplomacy-defence/article/2114087/chinas-navy-returns-port-after-joint-drill-russia> [<https://perma.cc/Y6PD-SDB9>]; see O'Connor, *supra* note 242.

336. James Griffiths & Serenitie Wang, *Is China Reinforcing Its Border with North Korea?*, CNN (Jul. 26, 2017), <https://www.cnn.com/2017/07/25/asia/china-north-korea-border/index.html> [<https://perma.cc/J3PJ-9BT4>].

337. Lukas Mikelionis, *US Fighter Jets Intercept Russian Nuclear Bombers Near North Korea*, FOX NEWS (Nov. 02 2017), <http://www.foxnews.com/world/2017/11/02/us-fighter-jets-intercept-russian-nuclear-bombers-near-north-korea.html> [<https://perma.cc/D7EV-9XH9>].

338. Tom Batchelor, *North Korea: Russia and China Carry Out Military Drills Close to Border*, INDEP., (Sept. 18, 2017), <http://www.independent.co.uk/news/world/asia/north-korea-latest-russia-china-military-drills-us-trump-close-border-a7953506.html> [<https://perma.cc/L3CM-WBZ9>]; Jeremy Bender, *RANKED: The World's 20 Strongest Militaries*, BUS. INSIDER (Oct. 3, 2015), <http://www.businessinsider.com/these-are-the-worlds-20-strongest-militaries-ranked-2015-9/#5-india-16> [<https://perma.cc/K6QK-KGK7>].

339. See, e.g., Staff & Agencies, *supra* note 69.

340. Brad Lendon, *North Korea: 3 US Aircraft Carriers Creating "Worst Ever" Situation*, CABLE NEWS NETWORK (Nov. 20, 2017 1:37 PM), <https://www.cnn.com/2017/11/12/politics/us-navy-three-carrier-exercise-pacific/index.html> [<https://perma.cc/Y69N-RX9R>].

341. See Alex Lockie, *Here's How China's Aircraft Carrier Stacks Up to Other World Powers*, BUS. INSIDER (Sept. 10, 2015, 9:04 A.M.), <http://www.businessinsider.com/china-aircraft-carrier-stacks-up-to-other-world-powers-2015-9> [<https://perma.cc/2L5B-ANUP>]; Alex Lockie, *China Just Launched a New Aircraft Carrier - Here's How It Stacks Up To Other World Powers*, BUS. INSIDER (Apr. 26, 2017, 11:57 A.M.), <http://www.businessinsider.com/china-type-001a-new-aircraft-carrier-vs-liaoning-ford-nimitz-kuznetsov-2017-4> [<https://perma.cc/NUU8-GB5B>].

Nuclear submarines, state-of-the-art fighter jets and other major military assets have been drilling in and around Korea together with the Japanese self-defense forces and the South Korean military.³⁴² Congress is currently passing the largest military budget in U.S. history for 2018.³⁴³

At the same time, U.S. citizens have not been evacuated to date. The North Korean military has not shifted into an imminent attack posture yet. These signs point against full-scale hostilities resuming immediately, contrary to the hysteria of certain media sources.

With this tension between China and North Korea, as well as the further missile testing launches by North Korea, the United States has moved to push multiple pieces of legislation that seek to punish North Korea.³⁴⁴ For instance, on January 12, 2016, lawmakers voted on the North Korea Sanctions Enforcement Act, which proposed to deny North Korea the hard currency they say it needs for its weapons program.³⁴⁵ This passed out of the House of Representatives, later it passed the Senate, and President Obama signed it into law.³⁴⁶

A panel on North Korea said existing United Nations sanctions against the reclusive country have been seriously under-enforced.³⁴⁷ But as mentioned above, this may be changing: China has been heavily involved in the passage of the last four major UN Security Council Resolutions against the DPRK, and has attempted to actually enforce these resolutions. China also holds approximately 50,000–200,000 North Korean refugees or more.³⁴⁸

China, in accordance with their obligations under the Refugee Convention,³⁴⁹ must not repatriate North Korean refugees into the DPRK. Since North Korea labels leaving the country as criminal treason, the refugees who are returned to North Korea typically face torture, time in concentration camps, or even execution.³⁵⁰ Thus, even if one accepts the Chinese governments categorizing these refugees as “economic migrants,”³⁵¹ they

342. Lendon, *supra* note 262b.

343. See Robert Burns & Richard Lardner, *Congress, Trump Give Pentagon A Budget The Likes Of Which It Has Never Seen*, CHICAGO TRIBUNE (Feb. 9, 2018, 3:34 P.M.), <http://www.chicagotribune.com/news/nationworld/politics/ct-pentagon-budget-windfall-2018-0209-story.html> [https://perma.cc/HL8E-5SVL].

344. Richard Lardner, *House Moves on North Korea Sanctions Bill After Bomb Test*, AMERICAN PRESS, (Jan. 11, 2016), <http://bigstory.ap.org/article/7fd932b7f53d4717a460686275aafafe/house-vote-north-korea-sanctions-bill-after-bomb-test> [https://perma.cc/4K89-5TYN].

345. See *id.*

346. North Korea Sanctions and Policy Enhancement Act of 2016, H.R.757, 114th Cong. (2015-2016).

347. Lardner, *supra* note 344.

348. Hyun-Joo Lim, *A Terrible Fate Awaits North Korean Women Who Escape To China*, CONVERSATION (Oct. 2, 2017, 4:32 A.M.), <https://theconversation.com/a-terrible-fate-awaits-north-korean-women-who-escape-to-china-82992> [https://perma.cc/PP6E-6LTZ] (citing Asia Today, *50,000-200,000 N. Korean Defectors Estimated to be Residing in China*, HUFFINGTON POST, https://www.huffingtonpost.com/asiatoday/50000-200000-n-korean-def_b_10857816.html [https://perma.cc/C26T-D2D9]).

349. HUMAN RIGHTS WATCH, NORTH KOREA: HARSHER POLICIES AGAINST BORDER-CROSSERS 3 (2007).

350. See *id.* at 4, 5, 6, 8–9.

351. *Id.* at 3.

still, at a minimum, qualify as refugees *sur place* because of what awaits them upon return to North Korea.³⁵²

The UNSC has passed an array of resolutions against North Korea over the past quarter century. The main points of these can be summarized in the following way: (1) they seek to block munitions and military know-how from entering or proliferating from the DPRK; (2) they call for a ban on luxury items entering the DPRK; (3) they do nothing to impede legitimate humanitarian, medical, safety, judicial and diplomatic efforts; and (4) they call on the DPRK to abide by its already existing treaty obligations and to return to diplomacy.

The United Nations Security Council passed at least four major resolutions from 2016 to 2017.³⁵³ In March of 2016, the council unanimously voted to severely toughen its penalties against the isolated country in Resolution 2270.³⁵⁴ The closer cooperation between the United States and China on this resolution was noteworthy.³⁵⁵ The fifteen member Council approved the resolution, which was negotiated for weeks by American and Chinese officials, which requires inspection of all cargo going in and out of North Korea.³⁵⁶ The sanctions further called for “banning all weapons trade and expanded the list of individuals facing sanctions.”³⁵⁷ Many diplomats said that this resolution was one of the most stringent efforts yet to “undermine North Korea’s ability to raise money and secure technology for its nuclear weapons program.”³⁵⁸ The American Ambassador to the United Nations said the resolution was “comprehensive, robust and unyielding.”³⁵⁹

Additionally, two weeks before the resolution was passed, President Obama signed the North Korea Sanctions and Policy Enhancement Act of 2016 into law.³⁶⁰ The statute and resolution work together to enhance and toughen sanctions against the North Korean government. They both call for CVID, the complete, verifiable and irreversible dismantlement of its nuclear weapons programs.³⁶¹ The statute also incorporated Resolution 2270 by definition.³⁶²

352. TAN, *supra* note 89, at 155

353. Kelsey Davenport, *UN Security Council Resolutions on North Korea*, ARMS CONTROL ASS’N (Jan. 3, 2017), <https://www.armscontrol.org/factsheets/UN-Security-Council-Resolutions-on-North-Korea> [<https://perma.cc/CT4F-S433>].

354. *Id.*

355. Somini Sengupta & Choe Sang-Hun, *U.N. Toughens Sanctions on North Korea in Response to Its Nuclear Program*, N.Y. TIMES (Mar. 2, 2016), http://www.nytimes.com/2016/03/03/world/asia/north-korea-un-sanctions.html?_r=1 [<https://perma.cc/B7W7-2DPL>].

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.*

360. Morse Tan, *North Korea Now: Turning Point for a Regime of Rightlessness?*, in THE ROUTLEDGE HANDBOOK OF KOREAN CULTURE AND SOCIETY 162, 167 (Youna Kim ed., 2017).

361. *Id.*

362. North Korea Sanctions and Policy Enhancement Act of 2016, H.R.757, 114th Cong. § 104 (2015-2016).

Resolution 2270 builds upon but then extends further than the prior resolutions in a number of ways: (1) warning of North Korea's use of shell companies; (2) restricting the use of gold as a means of sidestepping the resolutions; (3) including human rights concerns of the people in using language such as the "humanitarian concerns of the international community," "Expressing deep concern at the grave hardship that the DPRK people are subjected to" and "while DPRK citizens have great unmet needs," thus joining human rights concerns with security ones for the first time; (4) adding specific individuals and entities that were not included before as sanction targets; (5) including small arms and light arms in extending existing sanctions to *all* arms; (6) making inspection mandatory for both incoming and outgoing vessels; (7) calling for the closing of offices relating to DPRK commerce and for not engaging in business with the DPRK and its entities; (8) expelling individuals in violation of these measures; (9) prohibiting specialized teaching usable for illicit military purposes; (10) forbidding Member states from providing vessels for use by the DPRK; (11) banning flights that violate purposes of these resolutions; (12) specifically banning biological and chemical weapons; (13) prohibiting the sale of coal, iron, iron ore, vanadium ore, titanium ore, gold, and rare earth minerals (which the DPRK reportedly has over 1 billion U.S. dollars' worth); (14) forbidding the sale of aviation fuel, including aviation gasoline, naphtha-type jet fuel, kerosene-type jet fuel, and kerosene-type rocket fuel to the DPRK; (15) making the DPRK asset freeze comprehensive; (16) forbidding banking with DPRK banks, opening new branches in the DPRK, and calls for closing bank branches in the DPRK; (17) forbidding trade that could support the nuclear or ballistic missile programs of the DPRK; (18) reinforcing the importance of state reporting related to these resolutions.³⁶³

As for the North Korea Sanctions and Policy Enhancement Act of 2016, it explicitly references the DPRK's willful violations of multiple UNSC resolutions. The rest of the Act gives the government power to act towards North Korea while also attempting to advance the human rights situation. Some of the highlights include sections 202, 301-304, and 403. Section 202 calls for measures to increase the percentage of countries submitting reports on implementation of sanctions pursuant to UNSC resolutions 1718, 1874 and 2094, and in particular notes the critical role of China to enforce the UNSC resolutions.³⁶⁴ Section 301 requires a classified report from the President that contains a detailed plan for making unmonitored mass communications available to the North Korean people.³⁶⁵ Section 302 requires the Secretary of State to raise international awareness of the human rights situation in North Korea through a report as well as sustained outreach to other governments, media outlets and NGOs.³⁶⁶ Section 303 mandates a report from the Secretary of State on

363. Tan, *supra* note 360, at 162, 167.

364. North Korean Sanctions and Policy Enhancement Act of 2016, Pub. L. No. 114-122, § 202, 13 Stat. 93, 104 (2016).

365. *Id.* § 301.

366. *Id.* §§ 302(a), (c).

North Korea's concentration camps.³⁶⁷ Section 304 demands another report from the Secretary of State regarding gross human rights violations and censorship in North Korea—even naming specific governmental entities in North Korea such as the prominent National Defense Commission.³⁶⁸ Section 403 authorizes \$10,000,000 per annum in funding from 2017–2021 to carry out the sanctions.³⁶⁹ When I spoke at the State Department in January of 2017, one of the people working there told me that the State Department considers the use of these funds to be merely precatory—suggestions that the State Department could implement or not at its discretion. If it has not done so yet, I urge the State Department to employ these funds to increase the flow of helpful information to the North Korean people.

As noted in section 202, enforcement and reporting on past resolutions have been major problems. The Security Council has been trying to secure much greater cooperation from member states along these lines. Progress has already been made, but much more progress can yet come. Kudos to China, then, for recently stepping up enforcement, at least ostensibly, as its role remains pivotal in this regard. Beijing publicly opposes Pyongyang's development of a nuclear weapons arsenal, and reprimanded the North on March 2, 2016, for carrying out nuclear and rocket tests in 2016 in “defiance” of international prohibitions.³⁷⁰ China further signaled that it believed the sanctions in resolution 2270 would soon spur peace talks.³⁷¹

The second resolution of 2016, UNSC Resolution 2321, addresses the growing threat of the DPRK and how the DPRK generates revenue through prohibited arms sales, which are diverted to pursue the development of nuclear weapons and ballistic missiles, while DPRK citizens attempt to subsist in starvation conditions.³⁷²

Resolution 2321 places secondary sanctions on specific individuals listed in Annex I.³⁷³ The sanctions also prohibit Member States from allowing DPRK nationals to practice commercial or professional activities for personal profit,³⁷⁴ limiting bank accounts to DPRK nationals, and limiting the use of real estate by DPRK nationals. UNSC seeks to stop DPRK nationals from providing financial support for nuclear and missile programs for the DPRK.³⁷⁵ The prohibitions also expand to metals and supplies that can be used to manufacture weapons, such as copper, nickel, silver, and zinc.³⁷⁶ The sanctions also allow for Member States to confiscate and dispose of any of the prohibited items that they find on board

367. *Id.* § 303.

368. *Id.* § 304(a)(2)(B).

369. *Id.* § 403(a).

370. Sengupta & Choe, *supra* note 355.

371. *Id.*

372. S.C. Res. 2321 (Nov. 30, 2017).

373. *Id.* ¶ 3.

374. *Id.* ¶ 32.

375. *Id.* ¶ 34.

376. *Id.* ¶ 28.

DPRK vessels and aircraft.³⁷⁷ The sanctions also call for the expulsion of an individual working for or on behalf of a DPRK bank or financial institution from their territories for the purpose of repatriation to the individual's state, consistent with international law.³⁷⁸

This round of sanctions on the DPRK limits the movement of DPRK nationals and government officials outside of the DPRK. The sanctions also try to limit the resources coming out of the DPRK and limits the resources going back in. This is meant to stifle the DPRK's financial gain as a way of cutting off their funding of illegal weapons.³⁷⁹ As stated earlier, the UNSC's chief concern was over the DPRK's testing of illegal weapons and use of its revenue towards nuclear and missile programs instead of providing for its citizens.

Notwithstanding the second resolution towards the end of 2016, China increased its year-over-year trade with North Korea during the first three quarters of 2017, citing a desire to avoid destabilizing its neighbor.³⁸⁰ Three Chinese coal companies have imported over half a billion dollars' worth of coal between 2013 and 2016.³⁸¹ At the same time, 2017 has seen the largest seizure of North Korean ammunition to date.³⁸²

The United Nations Security Council then passed two major resolutions imposing further sanctions on North Korea in August and September of 2017, following ICBM tests by the DPRK.³⁸³ The UNSC once again called for the DPRK to uphold the Treaty on Non-Proliferation of Nuclear Weapons (NPT), noting that the DPRK should look to support the needs of their people instead of supporting weapon construction.³⁸⁴ The UNSC also noted that the DPRK should be willing to facilitate a peaceful and comprehensive solution through dialogue with member states, particularly those involved in the Six Party Talks.³⁸⁵ In line with the general pattern, the UNSC's sanctions on the DPRK moved in a much more stringent direction even in the short span from August to September.

At the Security Council's 8019th meeting on August 5, 2017, the Security Council, *inter alia*, sought: (1) to get the Democratic People's

377. *Id.* ¶ 40.

378. *Id.* ¶ 33.

379. *Id.* at introductory paragraphs.

380. See Everett Rosenfeld, *China's Exports To North Korea Jumped 20.9% In First Three Quarters Of 2017*, CNBC (Oct. 23, 2017), <https://www.cnbc.com/2017/10/23/chinas-exports-to-north-korea-jumped-20-point-9-percent-in-first-three-quarters-of-2017.html> [<https://perma.cc/Y69Q-VXL6>].

381. Zachary Cohen, *US Targets Chinese, Russian entities funding North Korea's nukes*, CNN POL. (Aug. 22, 2017) <https://www.cnn.com/2017/08/22/politics/us-treasury-sanctions-china-russia-north-korea/index.html> [<https://perma.cc/4CGA-REB7>].

382. Joby Warrick, *A North Korean ship was seized off Egypt with a huge cache of weapons destined for a surprising buyer*, WASH. POST (October 1, 2017), https://www.washingtonpost.com/world/national-security/a-north-korean-ship-was-seized-off-egypt-with-a-huge-cache-of-weapons-destined-for-a-surprising-buyer/2017/10/01/d9a4e06e-a46d-11e7-b14f-f41773cd5a14_story.html?utm_term=.A47ffe6b0a19 [<https://perma.cc/XD4B-YUWQ>].

383. See Davenport, *supra* note 353.

384. *Id.*

385. *Id.*

Republic of Korea (DPRK) to respond to the international community's security and humanitarian concerns; (2) to reiterate that none of the measures by this resolution were meant to have adverse humanitarian consequences for the civilian population of the DPRK; and (3) to address the DPRK's July 3 and July 28 ICBM tests, which violated the Security Council's current resolutions, and which challenges the NPT's goal to "strengthen the global regime of non-proliferation of nuclear weapons, and the danger they pose to peace and stability in the region and beyond," because other nations may decide to obtain and/or construct their own nuclear weapons, emboldened by the DPRK's tests.³⁸⁶ The Security Council "condemns in the strongest of terms" the DPRK's ballistic missile tests during the month of July. The Security Council then ordered the DPRK not to conduct any more tests of its missiles, and that it must abandon any other existing weapons of mass destruction and ballistic missile programs in a "complete, verifiable, and irreversible manner."³⁸⁷

This resolution declares sanctions on the DPRK's coal, iron, iron ore, lead, and lead ore exports.³⁸⁸ The UNSC also decided that the DPRK shall not supply, sell or transfer, directly or indirectly, from its territory or by its nationals or using its flag vessels or aircraft, seafood, unless the Member State had a pre-existing contract with the DPRK prior to the resolution taking effect. If that is the case, then the Member State can continue to do business with the DPRK only up to thirty days after the resolution takes effect.³⁸⁹

The UNSC seeks thereby to restrict the amount of funds that the DPRK has to spend on its ballistic missile and nuclear programs. The sanctions apply to dual-use (both civilian and military) items, a pretext that China used in the past to ship contraband to North Korea.

The September 2017 sanctions increased in intensity in response to yet another ballistic missile test by the DPRK on September 2, 2017 in violation of its prior resolutions.³⁹⁰ Resolution 2375 prohibits or limits the sale and transfer of natural gas liquids, refined petroleum products, crude oil, and textiles from the DPRK.³⁹¹ The resolution notes that while the DPRK funds its weapons programs, many women and children go with unmet needs, and are malnourished.³⁹²

The September resolution allows for joint ventures to continue for 120 days after the resolution, but only on a case-by-case basis with approval from the UNSC.³⁹³ The UNSC also allows Member States to stop and inspect vessels identified as DPRK vessels on the high seas, and to bring them into port to conduct the inspection if the vessel refuses.³⁹⁴ The reso-

386. S.C. Res. 2371 (Aug. 5, 2017).

387. *Id.* ¶ 1.

388. *Id.* ¶ 10.

389. *Id.* ¶ 8.

390. S.C. Res. 2375 (Sept. 11, 2017).

391. *Id.* ¶¶ 13-16.

392. *Id.* ¶ 25.

393. *Id.* ¶ 15.

394. *Id.* ¶ 7.

lution also allows for Member States to seize and dispose of any items prohibited by the UNSC, or items that can be used for any type of weapon prohibited under the NPT.³⁹⁵

South Korea, Japan, and the European Union have also passed multiple sanctions against North Korea. South Korea passed their unilateral sanctions on March 16, 2016 a few days after the United Nations.³⁹⁶ Lee Seok-jun, minister of the government policy coordination office, claimed that the South Korean government “will continue to sanction and press the North in close cooperation with the international community so as to create conditions where there is nothing for it but to change.”³⁹⁷ These sanctions require foreign ships that have visited North Korea in the previous 180 days be banned from entering South Korean waters.³⁹⁸ This in essence forces countries to decide whether to trade with South Korea or North Korea. Japan passed a very similar sanction one month prior.³⁹⁹

The European Union passed sanctions in line with the United Nations on April 1.⁴⁰⁰ EU foreign policy Chief Federica Mogherini said they were still considering additional EU-only sanctions on top of the UN measure and officials said some preparatory work had started on this task already.⁴⁰¹ These sanctions include additional export and import bans on any goods that could benefit North Korea’s military, a requirement that member states inspect all cargo to and from North Korea, and a ban on flights and port calls carrying prohibited items.⁴⁰² The EU will further ban exports from North Korea of coal, iron, gold and aviation fuel.⁴⁰³ Furthermore, the EU placed financial sanctions on North Korea, including freezing the assets of government entities associated with the country’s nuclear or ballistic missile programs, and closing branches, subsidiaries and representative offices of North Korean banks.⁴⁰⁴

Most of the EU sanctions follow the UN sanctions. The EU sanctions additionally ban: (1) provision of new DPRK banknotes and coins; (2) diamonds; (3) new commitments for grants and loans to the DPRK; (4) restrictions on issuance of and trade in certain bonds; (5) obtaining certain ores and minerals from North Korea; (6) restrictions regarding certain flights involving EU airports and on overflight.⁴⁰⁵

395. *Id.* ¶ 20.

396. Ben McGrath, *South Korea Imposes Extra Sanctions on North Korea*, WORLD SOCIALIST WEB SITE (Mar. 15, 2016), <https://www.wsws.org/en/articles/2016/03/15/skor-m15.html> [<https://perma.cc/U4HE-B8DU>].

397. *Id.*

398. *Id.*

399. *Id.*

400. Laurence Norman, *European Union Expands Sanctions Against North Korea*, WALL STREET J. (Mar. 31, 2016), <http://www.wsj.com/articles/european-union-expands-sanctions-against-north-korea-1459450223> [<https://perma.cc/H8DU-4NDW>].

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. See generally Service for Foreign Policy Instruments, *European Union Restrictive Measures in Force*, EUR. COMM’N H.R. (last updated May 28, 2016).

Additionally, many means exist to deliver knowledge directly to the citizens of North Korea. DVD players and even computers are now becoming more and more common within North Korea.⁴⁰⁶ Tunable radios are being smuggled into the country more regularly now as well.⁴⁰⁷ Savvy organizations have sent materials via balloons.⁴⁰⁸ Even though there are laws against radios within North Korea, and breaking them is a criminal offense, more and more citizens are taking the risk. This allows the general public, as well as the elite of North Korea, to hear truthful messages to break the propagandistic illusions of the Kim regime.

The United Nations should follow South Korea's (and to a lesser extent, the United States')⁴⁰⁹ example in waging an information war with North Korea. It is possible to broadcast messages receivable on one of the five non-state-run radio stations that North Korea have available.⁴¹⁰ More DVDs, leaflets, thumb drives, etc. specifically tailored to North Korea audiences can give truthful messages about their country and the outside world.⁴¹¹ Additionally, these materials can incorporate anonymous (to prevent harm to their family and friends) narratives of North Korean refugees, including what they experienced inside North Korea, how they escaped, and the better life they now have.⁴¹² These messages can both foster a movement towards reunification, even as it prepares them for the reunification to come.

The concept of *hostis humani generis*, and what it means to be an "enemy of all mankind" or "enemy of all humanity" should be applied to the leadership of the Democratic People's Republic of Korea (DPRK), especially to the Supreme Ruler Kim Jong-Un.⁴¹³ This term comes out of piracy law.⁴¹⁴ Cicero first defined pirates as *hostis humani generis*, and of nearly equal importance were the attendant laws furnished by Cicero and the Roman Senate which first construed piracy not as a mere action against individuals, but against the nation as a whole.⁴¹⁵ Some have made the argument that the same concept should be applied to terrorists, as terrorists do not necessarily operate under the flag of a recognizable sovereign state, but rather under their own organization, which lies outside of any sovereign state, and is therefore not protected under any national body

406. Andrei Lankov, *How to Defeat North Korea*, BLOOMBERG VIEW (Apr. 11, 2013) <http://www.bloombergvie.com/articles/2013-04-11/how-to-defeat-north-korea> [https://perma.cc/4NFN-9L5G].

407. *Id.*

408. See Julian Ryall, *The Interview Sent Into North Korea By Balloon*, TELEGRAPH (Apr. 8, 2015, 10:35 A.M.), <https://www.telegraph.co.uk/news/worldnews/asia/northkorea/11521640/The-Interview-sent-into-North-Korea-by-balloon.html> [https://perma.cc/BZB5-UUYH].

409. North Korean Sanctions and Policy Enhancement Act § 301.

410. Lankov, *supra* note 406.

411. *Id.*

412. See *id.*

413. See Douglas R. Burgess, Jr., *Hostis Humani Generi: Piracy, Terrorism and a New International Law*, 13 U. MIAMI INT'L & COMP. L. REV. 293, 313 (2016).

414. *Id.* at 298-99.

415. *Id.* at 301-02.

of law, and thus subject to universal jurisdiction.⁴¹⁶ Just like the pirate, the terrorist's activity is also not directed only against individuals, but against the nations to which the citizens belong.⁴¹⁷ Kim Jong-Un has been individually singled out for U.S. sanctions, and some say he qualifies as a terrorist. That includes the U.S. Department of State which recently re-added North Korea to the list of State Sponsors of Terrorism.⁴¹⁸

The Second Circuit case *Filártiga v. Peña-Irala* applied the term *hostis humani generis* to a person who tortures another.⁴¹⁹ In that case, Peña-Irala, who was the inspector general of police in Asuncion, Paraguay, kidnapped the seventeen-year-old son of Dr. Filártiga, who had openly denounced the government of Paraguay.⁴²⁰ Peña-Irala tortured Dr. Filártiga's son, Joelito, who subsequently died from his injuries. Peña-Irala then brought Dr. Filártiga's daughter, Dolly Filártiga, to his house to view her brother's body, where she noticed all of his bruises. Dr. Filártiga brought suit in Paraguay for his son's death, where Hugo Duarte, a member of Peña-Irala's household, testified that Peña-Irala did not kill Joelito, but that Duarte killed Joelito in a crime of passion after catching Joelito and Duarte's wife in flagrante delicto. Even though three different autopsy reports corroborated the allegation of torture, the court still ruled in favor of Peña-Irala, but then refused to arrest Duarte for the murder.⁴²¹ Dr. Filártiga decided not to continue to pursue the matter in Paraguay's courts as he thought it would be futile.⁴²²

After the trial in Paraguay, Peña-Irala emigrated to the United States under a visa where he lived even after his visa expired. Peña-Irala resided in New York. Years later, Dolly Filártiga also emigrated to the United States under a visa, and resided in Washington, D.C.⁴²³ Upon learning that Peña-Irala lived in the U.S. as well, Dolly brought suit against him for the wrongful death of Joelito under wrongful death statutes, the UN Charter, the Universal Declaration on Human Rights, the UN Declaration Against Torture, the American Declaration of the Rights and Duties of Man, and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations, as well as 28 U.S.C. § 1350, Article II, sec. 2, and the Supremacy Clause of the U. S. Constitution. Jurisdiction was claimed under the general federal question provision, 28 U.S.C. § 1331, and, principally on this appeal, under the Alien Tort Statute.⁴²⁴ The court found that under applicable laws, the

416. See generally *id.*

417. *Id.* at 302.

418. *State Sponsors of Terrorism*, U.S. DEP'T ST., <https://www.state.gov/j/ct/list/c14151.htm> [<https://perma.cc/NC78-EABP>]; Michael D. Shear & David E. Sanger, *Trump Returns North Korea to List of State Sponsors of Terrorism*, N.Y. TIMES (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/us/politics/north-korea-trump-terror.html> [<https://perma.cc/635W-568W>].

419. See *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

420. *Id.* at 878.

421. *Id.*

422. *Id.* at 880.

423. *Id.* at 878-79.

424. *Id.* at 879; see Alien Tort Act, 28 U.S.C.A. § 1350 (1948).

United States had jurisdiction to hear cases alleging torture in other countries by non-citizens under the authority of universally accepted norms of the international law of human rights, as long as the person accused of torture is properly served within the borders of the United States.⁴²⁵ The opinion finished by stating that for the purposes of civil liability, “the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.”⁴²⁶ With this, a federal appellate court applied the term *hostis humani generis* to someone who engages in acts of torture. However, the *Filártiga* court dismissed the appellee’s “Act of the State” defense, where the appellee asserted that the act of torture was an act of his government, and not his own act.⁴²⁷ Therefore, appellee asserted that he only acted as a tool putting into motion the will of his government, and that he did not act on his own accord, and therefore the liability fell upon his government, and not himself. As stated, the court did not allow the appellee to take refuge under this defense and held him liable for his personal involvement with the torture. The court applied this term of admiralty law to government officials who engage in acts of torture. However, the term applied narrowly to only include those government officials that personally engage in acts of torture, and not to government officials and/or leaders who give the order to torture a person.

The United States enacted the Torture Victim’s Protection Act of 1991, which further classifies torture as an international crime and a “crime against humanity,”⁴²⁸ This Act, following the *Filártiga* case, defines the scope of the authority that the United States has as far as jurisdiction over, and the ability to enforce claims of torture by citizens and non-citizens in other countries.⁴²⁹ Again, this act limits claims to include only those against people who personally engaged in the torture. It should be noted that this act creates universal *civil* jurisdiction over torturers, even though the international community has agreed that only *criminal* jurisdiction should be allowed.⁴³⁰

In re Estate of Ferdinand Marcos brings a closer analogue to Kim Jong-Un.⁴³¹ In this case, families of victims of torture, summary executions, and unexplained disappearance brought suit against the former President of the Philippines, Ferdinand Marcos.⁴³² The allegations against the former President (torture, executions, etc.) were based upon the actions of his military during a period when Marcos had declared martial law, and Marcos himself had not personally participated in the actions except to give the order.⁴³³ The estate appealed on the grounds of the Foreign Sover-

425. *Filártiga*, 630 F.2d at 878.

426. *Id.* at 890.

427. *Id.* at 889.

428. Pub. L. No. 102-256, 106 Stat. 73 (1992); Yoav Gery, *The Torture Victim Protection Act: Raising Issues of Legitimacy*, 26 GEO. WASH. J. INT’L L. & ECON. 597, 606 (1993).

429. Gery, *supra* note 428, at 597.

430. *Id.* at 612.

431. 25 F.3d 1467 (9th Cir. 1994).

432. *Id.* at 1469.

433. *Id.*

eign Immunities Act (FSIA).⁴³⁴ The lower court dismissed all lawsuits against the former president under the “Act of State” doctrine; however, the Court of Appeals reversed and reinstated the claims.⁴³⁵ The court held that: (1) the FSIA did not apply to former President’s acts of torture, execution, and disappearance; (2) the District Court had jurisdiction under the Alien Tort Statute; (3) the families’ stated cause of action was based on violating the law of nations; (4) claims did not abate upon the former President’s death; and (5) the District Court did not abuse its discretion in granting a temporary injunction, although the case sought only money damages.⁴³⁶

The *Marcos* case demonstrates how a court can hold a former President of another government responsible for his actions under the Alien Tort Statute.⁴³⁷ Although civil, this case asserts that the FSIA does not protect a former leader from his acts of torture and summary executions, especially when acting outside the scope of his presidency.⁴³⁸ The *Marcos* case shows that even though the former President did not personally engage in the torture, executions, and disappearances of his people, the fact that he declared martial law and gave the orders to others to do the initial acts triggered liability for the injuries and deaths of the victims.

This case provides legal justification for labeling Kim Jong-Un *hostis humani generis*. *Marcos* holds a former government leader accountable for giving orders to subordinates to carry out human rights violations, akin to the violations that Kim Jong-Un orders his subordinates to carry out against his people, his family members, and foreigners like Otto Warmbier. Thus, the Foreign Sovereign Immunities Act, on the basis of this case, does not apply to Kim Jong-Un. *Marcos* extends the *Filártiga* decision that a *torturer* is a *hostis humani generis*, by extending liability to those who order torture. Kim Jong-Un has ordered more and worse than *Marcos*—not to mention the threat he poses to the region and the world. Hence, he qualifies as *hostis humani generis*, or “enemy of all humanity.”

Conclusion

North Korea has the worst human rights crisis in terms of the breadth and extent of its violations, and also presents the most serious security crisis in the world. A trio of doctrines—International Humanitarian Intervention, the Responsibility to Protect, and legitimate defense—provide the foundation for a range of solutions and approaches to resolve this crisis. At the same time, North Korea poses real dangers, the situation is delicate, and the resolutions may prove difficult. Strong determination is necessary to stay the course until the Koreas reunite, ideally in a peaceful manner. The situation has moved rapidly over the past year, and seems to be headed

434. *Id.*; see Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611 (1976).

435. *Marcos*, 25 F.3d at 1469.

436. *Id.* at 1471-80.

437. Alien Tort Statute, 28 U.S.C. § 1350 (1948).

438. See *Marcos*, 25 F.3d at 1472.

towards a climax of one kind or another. Hope remains on the Korean peninsula that the gross and systematic human rights violations in North Korea will finally be put to rest, and that the North Korean people will be able to live in a just peace, no longer a menace to the region and the world.