REPORT OF THE COMMISSION OF INQUIRY ON HUMAN RIGHTS IN THE DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA: GREEN LIGHT FOR HUMANITARIAN INTERVENTION

IDO KILOVATY*

“At the end of the Second World War, so many people said ‘if only we had known. If only we had known the wrongs that were done in the countries of the hostile forces. If only we had known that.’ Well now the international community does know, the international community will know, there will be no excusing of failure of action because we didn’t know, we do know.”

— Michael Kirby, Chair of the Commission of Inquiry on Human Rights Violations in North Korea

I. INTRODUCTION

Until August 13, 1948, Korea was one, inseparable and united territory. In 1910, Japan occupied and annexed Korea, during which time the former exercised absolute sovereign powers over the latter. In 1945, following Japan’s surrender to the Allied Forces at the end of World War II, Korea was on a course to become independent. However, it was temporarily divided between the Soviet Union in the north (north of the 38th parallel) and the United States in the south. Unfortunately, due to the politics of the Cold War, the ideal concept of “one unified Korea” quickly vanished, and in 1948 two different governments were established—one in the north and another in the south. Due to the influence of the Soviet, the North Korean’s government (the Democratic People’s Republic of Korea) was a communist government, run by a single supreme leader, while the South Korean’s government (the Republic of South Korea) was anti-communist, with an aspiration to become unified with the North. Ever since then, North Korea has been ruled by the Kim dynasty. Kim Il-sung was the first leader of North Korea, and today, his grandson Kim Jong-un is the current leader of North Korea. North Korea is the most isolated country in the world, and even so, evidence and reports on the situation of human rights in North Korea are available and reflect horrendous violations of fundamental human rights. It is important to note that with every day, the situation has been deteriorating, and to this day, four million North Koreans have died of starvation. In addition, six
million people today are at risk of dying of starvation, especially children and pregnant women who are breastfeeding.¹

Kim Kwang-il, a survivor of the Jeongeori “Re-education Camp” in North Korea, revealed in his testimony some of the torture methods and the horrifying life conditions in those camps.² In one of his drawings, Kwang-il demonstrated the “Pigeon Torture.”

In the “Pigeon Torture,” the prisoner is handcuffed behind his back and held aloft in a position that does not allow him to stand or sit.³ In that position, prisoners were beaten on their chests until they vomited blood, often confessing crimes they did not commit.⁴ Kwang-il further explained:

[W]e are bound to stay in that position until the jailer feels that you have been tortured enough. So, the torture goes on until the time has come to the satisfaction of the jailer. This is the pigeon torture. This is a very strange word in Korea and to you. Your hands are bound back and if they tie you like this, your chest comes out forward and in this position you are tortured.⁵

* The author is a Doctorate of Juridical Science Candidate (S.J.D.) at Georgetown University Law Center


Another defector even went as far as to claim that “[the Pigeon Torture] was the most painful of all torture. . . . [It] was so painful that I felt it was better to die.”6 The Pigeon Torture is one heinous method of torture employed in North Korea’s prison camps. It demonstrates the cruelty and inhumanity of the regime.

On March 21, 2013, The U.N. Human Rights Council established a Commission of Inquiry on the Human Rights Violations in North Korea (“Commission”). The Commission’s report7 (“Report”) was published on February 7, 2014, and contains evidence on systematic, widespread and grave violations of human rights, including murder, torture, rape, forced abortions and more.8 The Report notes that “the gravity, scale and nature of these violations reveal a state that does not have any parallel in the contemporary world.”9 Days after the Report was released, the U.N. Secretary-General, Ban Ki-moon, stated that he was “deeply disturbed by the findings of the commission.”10

The Report is the most comprehensive and authoritative research available on the humanitarian crisis in North Korea. This Report, issued by a commission established by the U.N. Human Rights Council, is among the most reliable and extensive reports available on human rights violations in North Korea, and therefore we can structure with certainty an argument to respond to the Report’s findings, namely, the argument that this paper will advance, in regard to the aftermath of the Report: that humanitarian intervention in North Korea is both legal and legitimate under international law.


6 Brown, supra note 3.
8 Id.
9 Id. at 15.
The methodology of this article in advancing the argument is to analyze the findings of the Report in Part II. This will serve to lay the background of the current human rights violations in North Korea, their intensity, the degree of state involvement, the amount of people affected and others. Following the discussion on the Report’s findings, Part III of this article will analyze the current legal framework justifying and prohibiting humanitarian intervention and apply those to the concrete situation in North Korea. There is an ongoing debate among scholars toward the question of the legality of the humanitarian intervention. In support of the argument, this article focuses on the doctrine of the Responsibility to Protect (“R2P”), as well as the case study of NATO humanitarian intervention in Kosovo and Libya, and how those precedents are similar and different both legally and geopolitically from the situation in North Korea. This article also includes a discussion of the international law regulating the resort to force (jus ad bellum), which contains the specific provisions on the permitted types of use of armed force. All of those substantial discussions are included in Part III. In Part IV, the conclusion of this article, is composed of two parts: firstly, from the legal aspect, given the broad acceptance and development of the concept of humanitarian intervention, there is an emerging international norm that humanitarian intervention is legal, and therefore intervening in North Korea would be legal and legitimate; and secondly, with some specific considerations taken into account, humanitarian intervention in North Korea is practically possible.

II. THE REPORT: MANDATE, METHODOLOGY, AND FINDINGS

In order to fully understand the findings of the Report, it is important to understand the mandate, which was given to the Commission by U.N. Human Rights Council resolution 22/13. Moreover, in order to make determinations on human rights violations in North Korea, it is also helpful to analyze the relationship between the Commission and the government of North Korea.

---

11 See infra notes 14–41 and accompanying text
12 See infra notes 42–91 and accompanying text
Korea, and what methodology the Commission employed. Finally, the substantial part of the Report is discussed, namely, the specific and detailed human rights violations that are taking place in North Korea as of today. We move forward to discuss the Commission’s mandate.

A. THE MANDATE

On March 21, 2013, the U.N. Human Rights Council adopted Resolution 22/13 (“Resolution”) titled “Situation of Human Rights in the Democratic People’s Republic of Korea.” The Resolution established a commission of inquiry consisting of three members, and its mandate was to:

investigate the systematic, widespread and grave violations of human rights in the Democratic People’s Republic of Korea . . . including the violation of the right to food, the violations associated with prison camps, torture and inhuman treatment, arbitrary detention, discrimination, violations of freedom of expression, violations of the right to life, violations of freedom of movement, and enforced disappearances, including in the form of abductions of nationals of other States, with a view to ensuring full accountability, in particular where these violations may amount to crimes against humanity.

The list of human rights violations that the U.N. Human Rights Council mentioned is not exhaustive. The objective of the Commission was to investigate and document the human rights violations, to collect and document victims and perpetrators accounts, and to ensure accountability. Additionally, the Resolution called upon the government of North Korea to fully cooperate with the commission and to ensure access to humanitarian assistance. An important point to note is that the

15 Id. ¶ 5.
17 H.R.C. Res. 22/13, supra note 14, ¶ 5.
18 Id. ¶ 6.
19 Id. ¶ 7.
temporal scope of the investigation was not limited, meaning that the Commission examined not only recent human rights violations, but also the ones that occurred in the past.\(^{20}\) The Commission interpreted its mandate to include extraterritorial human rights violations, such as abductions of people from other countries.\(^{21}\) We move to examine the background in which the Commission has operated.

B. BACKGROUND AND METHODOLOGY

Although the Resolution asked the government of North Korea to “permit the Commission’s members unrestricted access to visit the country and to provide them with all information necessary to enable them to fulfill their mandate,” North Korea did not cooperate and rejected the mandate of the Commission.\(^{22}\) As a result, the commission members were not able to investigate human rights in North Korea. Instead, they had to rely on first-hand testimonies.

More than eighty witnesses provided testimony, during the course of the Commission’s investigation. Those testimonies were of high detail and the witnesses testified in public hearings at the end of 2013. Moreover, the Commission asked China to allow its members to visit the China-North Korea border, however, China refused to allow the visit.\(^{23}\)

The international legal written instruments used by the Commission to assess the human rights violations were the International Covenant on Civil and Political Rights (“ICCPR”), the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), the Convention on the Rights of the Child (“CRC”) and the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”).\(^{24}\) In addition, international customary law, with regard to the refugee law (non-refoulement) and international criminal law was considered.\(^{25}\) Surprisingly, North Korea has signed and ratified all of the above

\(^{21}\) Id. ¶ 8.
\(^{22}\) Id. ¶ 9.
\(^{23}\) Id. ¶ 17.
\(^{24}\) Id. ¶ 21.
\(^{25}\) Id.
treaties.\textsuperscript{26} However, on August 23, 1997, North Korea requested withdrawal from the ICCPR.\textsuperscript{27} The Secretary-General who received the notification of withdrawal remarked that such withdrawal was not possible.\textsuperscript{28} since the ICCPR does not have a withdrawal provision and in such case, Article 54(b) of the Vienna Convention on the Law of Treaties applies, which requires the consent of all state parties to the covenant.\textsuperscript{29} Therefore, it is established that North Korea is a party to all of the above treaties, as well as customary international law, which generally binds all states.

In the light of the international human rights sources, we move to examine the findings of the commission.

C. FINDINGS ON HUMAN RIGHTS VIOLATIONS

The Commission’s Report\textsuperscript{30} found that the “widespread and gross human rights violations” took place in North Korea and were


\textsuperscript{27} International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, n. 8, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no =IV-4&chapter=4&lang=en#8 (“On 25 August 1997, the Secretary-General received from the Government of the Democratic People's Republic of Korea a notification of withdrawal from the Covenant, dated 23 August 1997. As the Covenant does not contain a withdrawal provision, the Secretariat of the United Nations forwarded on 23 September 1997 an aide-mémoire to the Government of the Democratic People's Republic of Korea explaining the legal position arising from the above notification. As elaborated in this aide-mémoire, the Secretary-General is of the opinion that a withdrawal from the Covenant would not appear possible unless all States Parties to the Covenant agree with such a withdrawal.”)

\textsuperscript{28} Sarah E. Kirsch, North Korea as a Signatory to the International Covenant on Civil and Political Rights, ACADEMIA.EDU, http://www.academia.edu/1203872/North_Korea_as_a_Signatory_to_the _International_Covenant_on_Civil_and_Political_Rights (last visited on Feb. 12, 2015).


\textsuperscript{30} H.R.C. Rep. 25/63, supra note 7, ¶ 26–73.
carried out by the organs of the Worker’s Party of Korea, which is currently the effective government in North Korea.\textsuperscript{31}

The Report provided that there were violations of freedom of religion and thought, the right to movement and residence, the right to food and water, freedom from torture and executions and prison camps.\textsuperscript{32} For example, people who are suspected of holding different political views than those ones of the Worker’s Party are imprisoned without trial, starved and treated inhumanely, and some of them even disappear indefinitely.\textsuperscript{33}

All those human rights violations are severe and widespread, however, for the purpose of this paper, the most gross and intense human rights violations are considered. Such violations are the ones that reach the degree of crimes against humanity. The report concludes that “[t]hese crimes against humanity entail extermination, murder, enslavement, torture, imprisonment, rape, forced abortions and other sexual violence, persecution on political, religious, racial and gender grounds, the forcible transfer of populations, the enforced disappearance of persons and the inhumane act of knowingly causing prolonged starvation.”\textsuperscript{34}

One example the Report gives is of enslavement. The individuals who are imprisoned in prison camps are forced to work under inhumane conditions, they are not provided with adequate food or water, and they are regarded as “ploughing animals.”\textsuperscript{35} The malnourishment of those people sometimes makes them work to their deaths.\textsuperscript{36} Failure to work can result in execution, torture and ration cuts, which exacerbate the starvation.\textsuperscript{37} Moreover, an attempt to escape typically results in immediate execution.\textsuperscript{38} It is

\textsuperscript{31} Id. ¶ 24.
\textsuperscript{32} Id. ¶ 26–73.
\textsuperscript{33} Id. ¶ 58, 59.
\textsuperscript{34} Id. ¶ 76.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
the Commission’s view that this qualifies to be a crime against humanity.\textsuperscript{39}

The Report concludes by making recommendations to North Korea, China, the states in friendly relations with North Korea, business enterprises, and the international community.\textsuperscript{40} The Report does not expressly recommend using armed force for humanitarian reasons (also “humanitarian intervention”). Instead, the main recommendations for the international community include a referral from the U.N. Security Council to the International Court of Justice, continuation of monitoring of the human rights situation in North Korea, support the people of North Korea and sanction the leadership involved in the violations.\textsuperscript{41} However, there might be an implied recommendation to use armed force to overthrow the North Korean regime and to change the dire situation in North Korea, with the Report stating that: “[W]here so much suffering has occurred, and is still occurring, action is the shared responsibility of the entire international community.”\textsuperscript{42} The words “action,” “responsibility” and the “entire international community” are key words in the Report’s recommendation to the international community. The view of the author is that such wording, in fact, \textit{implies} humanitarian intervention to resolve the humanitarian crisis in North Korea. We proceed to examine the international law that deals with different aspects of humanitarian intervention.

\textbf{III. INTERNATIONAL LAW AND HUMANITARIAN INTRODUCTION: \textsc{LEX FERENDA} \& \textsc{LEX LATA}}

What is the law regulating the use of force, and how does it interact with the idea of humanitarian intervention? This question initiated many debates, and is a matter of great controversy among scholars. More importantly, the answer to this question has to take into account many considerations, which complicates the matter even more, since international law itself does not seem to have an explicit answer to the question. First, the \textit{jus ad bellum} must be explored, namely, the international law regulating the use of force by states. Second, the rising doctrines, such as the Responsibility to Protect (“R2P”) and its specific components must be considered, as well as the current legal weight of the R2P doctrine. Third, the

\textsuperscript{39} Id. ¶ 1211.
\textsuperscript{40} H.R.C Rep. 25/63, \textit{supra} note 7, ¶ 90–94.
\textsuperscript{41} H.R.C Rep. 25/CRP.1, \textit{supra} note 35, ¶ 1225.
\textsuperscript{42} H.R.C Rep. 25/63, \textit{supra} note 7, ¶ 94(f) (emphasis added).
opinions of scholars, with regard to humanitarian intervention will
be analyzed and those can reflect the controversy and the variety of
legal arguments, which can be reduced to the question of *jus ad bellum*, which generally prohibits the use of force, unless narrow exceptions are met, versus the R2P doctrine, which advocates for an exception to the use of force prohibition on humanitarian grounds. Fourth, state practice can serve as an important factor in formalizing the answer. Although state practice of humanitarian intervention is somewhat limited, it still has legal value because it shows the response from the international community, which can often reflect the current international law. Finally, the theoretical legal substance will be applied on the humanitarian crisis in North Korea.

A. **The International Law Governing the Use of Force by States—*Jus ad Bellum***

The use of force by states is governed today by the Charter
of the United Nations and the customary international law
applicable to it. Generally, the use of force or the threat to use the
force in inter-state relations is prohibited by Article 2(4) of the
U.N. Charter that posits: “[A]ll Members shall refrain in their
international relations from the threat or use of force against
the territorial integrity or political independence of any state, or in any
other manner inconsistent with the Purposes of the United
Nations.”\(^{43}\) Generally, states are permitted to use force within their
territories, as part of their sovereign rights.\(^{44}\) Moreover, states are
permitted to allow *other* states to use force, within their
territories.\(^{45}\)

The U.N. Charter contains two exceptions to the
prohibition on the use of force. First, Article 51 recognizes the
“inherent right of individual or collective self-defense if an armed
attack occurs against a Member of the United Nations.”\(^{46}\) Second,

\(^{43}\) U.N. Charter art. 2, para. 4.

\(^{44}\) **Yoram Dinstein**, *War, Aggression and Self-Defence* 87
(5th ed., 2011), quoting A. Randelzhofer ‘Article 2(4)’, *The Charter of
2002).

\(^{45}\) Draft Articles on Responsibility of States for Internationally
Wrongful Acts art. 20 reads: “Valid consent by a State to the commission
of a given act by another State precludes the wrongfulness of that act in
relation to the former State to the extent that the act remains within the
limits of that consent.”

\(^{46}\) U.N. Charter art. 59.
the U.N. Security Council is authorized by Chapter 7 of the Charter to take “action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”

The U.N. Charter does not include an explicit authorization to use the force for a humanitarian cause and intention. However, the international community, as discussed infra, gave some effort to legally, morally and doctrinally justify humanitarian intervention.

In addition to the prohibition on the use of force and its exceptions, states are generally prohibited from intervening in the internal affairs of another state. The principle of non-intervention is a long-standing principle in customary international law and it is derived from the Westphalian understanding of state sovereignty. The International Court of Justice in the case of \textit{Military and Paramilitary Activities in and Against Nicaragua} explained that intervention is prohibited when it is:

\begin{quote}
[b]earing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a
\end{quote}

\begin{flushright}
47 U.N. Charter art. 42.


49 G.A. Res. 25/2625 (XXV), at 123, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970) (“No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.”). \textit{See also} UN Charter art. 2, para. 1, 4, 7.

\end{flushright}
political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.  

Moreover, Article 2(7) strengthens the idea that states have the prerogative to freely decide on their internal affairs by positing that “nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.” Therefore, formally speaking, humanitarian intervention has to overcome two main challenges to be considered lawful. First, it must be a permissible use of force according to international law, and it must be an exception to the principle of non-intervention. However, as will be discussed further, those barriers are only imaginary, and humanitarian intervention is legal, even without specifically responding to them. In order to examine how humanitarian intervention is in fact legal, we move forward to examine the doctrine of the Responsibility to Protect.

B. HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT

The doctrine of the Responsibility to Protect was mainly a response to the failure of the U.N., as well as the international community, to protect lives during the ethnic cleansings in Srebrenica and Rwanda. In his millennium report, former Secretary-General of the United Nations, Kofi Annan, challenged the international community by stating:

[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we

51 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 205 (June 27)
52 U.N. Charter art. 2, para. 7.
respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity? . . . surely no legal principle—not even sovereignty—can ever shield crimes against humanity. Where such crimes occur and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community.\footnote{U.N. Secretary-General, \textit{We the Peoples: The Role of the United Nations in the 21st Century}, Rep. of the Secretary-General, 48 (2000), available at www.un.org/millennium/sg/report.}

Annan’s statement reflects precisely the difficulty with humanitarian intervention. On one hand, states are sovereign and have the right to decide on their domestic political, economic, social and cultural affairs. However, on the other hand, there is a tendency to limit the scope of the principle of sovereignty – states are not permitted to justify grave violations of fundamental human rights on the grounds of sovereignty. To respond to the challenge reflected in Annan’s statement, in 2000 the Canadian government established the International Commission on Intervention and State Sovereignty (‘ICISS’) in order to develop a doctrine to regulate and set the framework for humanitarian intervention.\footnote{CRISTINA GABRIELA BADESCU, \textit{HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: SECURITY AND HUMAN RIGHTS} 3 (2011).} In December 2001, the ICISS published a comprehensive report titled “The Responsibility to Protect,” also referred to as R2P.\footnote{See ICISS, supra note 50.}

In order to understand the concept of R2P, first we must precisely examine what humanitarian intervention means for the purpose of this paper. According to Holzgrefe, humanitarian intervention is:

\begin{quote}
the threat or use of force across state borders by a state (or a group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without permission of the state within whose territory force is applied.\footnote{J. L. HOLZGREFE, \textit{HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS} 18 (2003).}
\end{quote}
There are three main components in the definition. First, the means must be threat or use of force. “Force” in this definition refers specifically to armed force (as opposed to economic or political coercions). Second, the aim of the use of force must be the prevention or the termination of widespread and grave violations of fundamental human rights of other than its own citizens. According to this limited aim, sporadic, occasional violations of fundamental human rights, as well as non-fundamental human rights violations are outside the scope of humanitarian intervention. It must also be the human rights of citizens that are not nationals of the intervening state. Third, the intervention has to be without permission of the violating state. The reason for this, as mentioned in the previous part of this article, is the fact that states are allowed to call upon another state or group of states to use force within their territories, and once such use of force is authorized by a state, it is not a violation of the prohibition on the use of force.

The R2P report sets the conceptual and normative framework to address humanitarian intervention. Some even go as far as to claim that R2P is “the most dramatic normative development of our time.” The R2P report summarizes the idea behind it, by providing that “sovereign states have a responsibility to protect their own citizens from avoidable catastrophe . . . but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.”

The determination of an R2P action (i.e., humanitarian intervention in accordance with R2P principles) consists of five substantial criteria. Just cause, which requires that the use of

---

58 Id. at 18, n. 13.
59 Id. at 18.
61 HOLZGREFE, supra note 57.
64 ICISS, supra note 50, at VIII.
65 Id. at XII.
military force will serve as an exceptional measure to stop grave human rights violations, and as so, the threshold should be either large-scale loss of life or a large-scale ethnic cleansing.\(^66\) The state in question should be either directly involved in those situations or unable to prevent them. Right intention provides that the purpose of the military intervention should be the prevention of grave and widespread human rights violations. Other motives are strictly prohibited.\(^67\) Last resort requires that military force only be used after all other non-forceful measures have been exhausted.\(^68\) Proportional means limits the intensity, severity and temporal scope of the military force, so only the minimum will be exercised.\(^69\) And lastly, reasonable prospects which requires predicting whether there is reasonable chance of success and whether inaction will yield worse consequences than action.\(^70\)

There is an additional criterion, which some refer to as the “Sixth Criterion,” which requires legitimate authority.\(^71\) This criterion provides that the Security Council is the most appropriate authority to engage in a R2P operation, however, it also recognizes that sometimes the Security Council, due to its nature as a political body, is unable to act, and therefore, states should consider acting on their own, whether individually or collectively with other states.

The R2P was reaffirmed on many occasions. Firstly, in December 2004, the High-level Panel on Threats, Challenges and Change, consisting of 16 member states, affirmed the “emerging norm that there is a collective responsibility to protect.”\(^72\) Moreover, in September 2005, heads of state and government adopted R2P at the World Summit High-level Plenary Meeting of the 60\(^{th}\) Session of the United Nations General Assembly.\(^73\) Even


the Security Council itself reaffirmed the conclusion that R2P is an emerging norm in international law.\textsuperscript{74} We move forward to examine the relations between R2P and the UN Charter \textit{jus ad bellum} paradigm.

C. \textbf{Responsibility to Protect and the UN Charter Use of Force Paradigm}

As discussed above, the U.N. Charter prohibits threat or the use of force. However, interpreting the prohibition should be in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“VCLT”).\textsuperscript{75} Article 31(1) of the VCLT provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”\textsuperscript{76} The prohibition on the use of force, which according to some scholars thwarts the legality of humanitarian intervention, should be read along with the purposes of the U.N. Charter. The relevant purposes of the United Nations as provided by Article 1 to the U.N. Charter are “[t]o maintain international peace and security”\textsuperscript{77} and “[t]o achieve international co-operation in solving international problems . . . of humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms.”\textsuperscript{78} Moreover, the interpretation of the prohibition on the use of force must be read in context. When the Charter was promulgated, its view was to prevent inter-state tensions and uses of force. However, as a matter of fact, between 2001 and 2010, out of 29 armed conflicts in total, 27 were intra-

\begin{flushright}
follows: “I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it. This responsibility lies, first and foremost, with each individual State, whose primary raison d’être and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations.”
\end{flushright}


\textsuperscript{76} Id., art. 31(1).

\textsuperscript{77} U.N. Charter art. 1, para. 1.

\textsuperscript{78} U.N. Charter art. 1, para. 3.

The rise of armed conflicts and humanitarian crises inside a state serves to demonstrate that the vision of the U.N. Charter drafters was that states cannot use force against other states for merely inter-state disputes. For instance, State A cannot use force against State B to make B pay the debt owed to State A. Such a paradigm did not consider the possibility of intra-state conflicts—i.e., an oppressive regime that tortures and kills its own citizens, while the international community is unable to effectively react. The state practice shows that states are using force to intervene in situations of massive intra-state killings or genocides, as the paradigm of the inter-state use of force is inadequate to address intra-state atrocities and human rights violations. The prohibition is therefore irrelevant in addressing intra-state conflicts, since it was not intended to situations requiring humanitarian intervention, such as the current humanitarian crisis in North Korea.

Not only is the current *jus ad bellum* paradigm incompatible with today’s reality, but it also fails in the same places where previous instruments that regulated the use of force have failed. Before the U.N. Charter came to life, there were different instruments, such as the Covenant of the League of Nations of 1919, which referred the parties to a dispute to arbitration, judicial decision or report of inquiry of the League’s Council, and parties were prohibited from using force until three months after the award.\footnote{League of Nations Covenant art. 12.} In addition, in the General Treaty for Renunciation of War as an Instrument of National Policy, also known as Kellogg-Briand Pact, the main substantial article posited that the parties “condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.”\footnote{General Treaty for Renunciation of War as an Instrument of National Policy, art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.} Such absolutist paradigms failed because they were unable to address the limits of the legality of war and they lacked the flexibility required in order to address new challenges.\footnote{Yoram Dinstein, *War, Aggression and Self-Defence* 85 (5th ed. 2011).}
The R2P developed because there is a normative gap within the U.N. Charter. The state practice of humanitarian intervention out of legal and moral obligation toward the suffering peoples, along with the reaffirmation in the U.N. Security Council and other international forums demonstrate that humanitarian intervention is legal under current international law. This conclusion is based on the interpretation of Article 2(4) in accordance with the VCLT, taking into consideration the context, purpose, intention of the U.N. Charter drafters and the travaux préparatoires, given that the pure textual meaning is inconsistent with the purpose of the U.N. Charter and it leads to a manifestly absurd and unreasonable result.\textsuperscript{83} We move forward to examine the specific application on North Korea.

D. R2P in North Korea

In order to establish the admissibility of the R2P in North Korea, the five substantial criteria should be fulfilled:

Firstly, and as mentioned in the beginning of this paper, four million North Koreans have died of starvation and six million are at immediate risk to die of starvation, with torture and public executions used occasionally by the government organs.\textsuperscript{84} The Reports make it clear that crimes against humanity that involve extermination, murder and enslavement have been carried out by the government of North Korea. Judging from the available evidence, it appears that there is a just cause to intervene militarily in North Korea.

Secondly, the intervening state should have the right intentions in doing so. North Korea is not particularly rich in natural resources, but there is a risk that intervention in North Korea, if carried out by the United States, will be considered a reprisal for the North Korean nuclear weapons program, as well as the humiliating statements of Kim Jong-il and Kim Jong-un against the United States. In order to overcome this difficulty, the intervention must reach a wider consensus and be carried out by a collective of states.

\textsuperscript{83} See VCLT supra note 75, art. 32(b) (providing that if the textual interpretation of a treaty leads to a manifestly absurd or unreasonable result, the interpreter must resort to supplementary means of interpretation, including the travaux préparatoires and circumstances of the conclusion of the treaty).

\textsuperscript{84} See supra notes 1–5 and accompanying text.
Thirdly, intervention should be the last resort. So far, North Korea is the most isolated country in the world. There are strict limitations on trade, banking and travel, with more sanctions being considered daily. The current U.N. Security Council sanctions against North Korea include embargo on arms and related material, a ban on certain export of goods, travel bans and assets freeze and more. Many of such sanctions were also imposed by states, such as the United States, the European Union, and Canada. However, those sanctions are mainly in response to violations for proliferation of chemical, biological and nuclear weapons. It appears that not all sanctions were considered, but due to the North Korea’s close ties with Russia and China, it is questionable whether such sanctions by other states can harm or coerce North Korea to comply with international human rights law. However, it appears that those ties are shaky, due to the unpredictable foreign policy of North Korea.

Finally, the reasonable prospects and proportional means are interconnected in the case of North Korea. First, there is a high chance that the oppressive regime in North Korea will most likely react, using military force against both South Korea and Japan. As noted above, North Korea possesses nuclear capabilities, i.e. weapons of mass destruction, and therefore, the harm likely to be caused by the humanitarian intervention could be severe. There is also a possibility that China or Russia will use some kind of reprisal to deter intervention in North Korea. Second, the proportional means is the minimal military means necessary to achieve a successful result. However, in this context, “minimal”

85 Obama warns it may be time for more North Korea sanctions, N.Y. DAILY NEWS (Apr. 25, 2014), http://www.nydailynews.com/news/politics/obama-korea-article-1.1768713.
86 Id.
88 Id.
also indicates that it must be the minimal to cause the least collateral damage, caused by the North Korea regime. This balancing test will ensure that the military means used against North Korea is proportional, and not more than necessary, as well as prevent a potentially harmful response from North Korea.

Previous lessons of humanitarian intervention can also serve to develop a comprehensive and effective plan to intervene in North Korea. In the case of the humanitarian intervention in Kosovo by NATO, the intervention was carried out with non-U.N. Security Council authorization.\textsuperscript{92} The implications, formally speaking, were that NATO violated Article 2(4) of the U.N. Charter prohibiting the use of force between member states. However, the U.N. Security Council resolution that intended to condemn NATO for an “illegal operation” was defeated 12-3.\textsuperscript{93} Moreover, the fact that the humanitarian intervention was carried out by a collective of states, rather than a single one, strengthens the component of a just cause and right intentions. While an individual state may act opportunistically and possibly with lack of pure motives, a collective of states is more likely to act for the right motives and with a just cause.

The humanitarian intervention in Libya also serves to show that gradually, the UN Security Council and the international community are readier than ever to authorize R2P actions. In the case of Libya, the intervention was authorized by the UN Security Council resolution—unlike the situation in Kosovo.\textsuperscript{94} The reluctance to authorize the R2P states, China and Russia, abstained in this case, due to lack of interest or special relations with Libya.\textsuperscript{95} Unfortunately, it is very likely that China and Russia will veto similar resolutions on intervention in North Korea. The case of Libya demonstrates that the UN Security Council is still a political body, making decisions that are based not on norms and principles, but also on the identity of the state in question.

\textsuperscript{92} See Bruno Simma, \textit{NATO, the UN and the Use of Force: Legal Aspects}, 10 EUR. J. INT’L L. 1 (1999).

\textsuperscript{93} Ian Williams, \textit{The UN’s Surprising Support}, INST. FOR WAR & PEACE REPORTING (Apr. 18, 1999), http://iwpr.net/report-news/uns-surprising-support.


Moreover, even if the humanitarian intervention will succeed in overthrowing the North Korean regime, there are other political powers that will prevent a change in the character of the successor regime in North Korea. It is believed that China will not let North Korea have a different kind of regime after the collapse of the current regime, and the former will act diplomatically following the intervention to shape the successor regime, which obviously will not be the democratic human rights abiding regime that the people of North Korea deserve. The potential floodgate of refugees fleeing from North Korea toward China will also increase China’s involvement in the internal politics of North Korea.

It appears that in order to successfully intervene in North Korea, a careful and thoroughly considered operation plan is required. In addition, cooperation between the intervening forces, as well as China and Russia could lower the risk of adverse results caused either by China or Russia, and might even convince North Korea to refrain from responding.

IV. CONCLUSION

Humanitarian intervention, according to the R2P doctrine, is legal. This conclusion is based on the discussion and realization that pure textual interpretation of Article 2(4) and its exceptions is inconsistent with the context and intention of the U.N. Charter drafters, and therefore it cannot be assumed that humanitarian intervention in the case of intra-state humanitarian crisis is illegal. There is an ongoing process of growing acceptance of the idea that sovereignty is not only a right, but also a duty to protect a state’s nationals. Given that North Korea is directly involved in committing crimes against humanity against its own people, the world cannot sit back, without taking appropriate action. According to the current situation in North Korea and the non-

---


forceful measures already implemented on North Korea, humanitarian intervention would be legitimate and legal under international law.

The practical interpretation is in fact that the intervening forces (the United States or NATO) should take into account the very specific geopolitical characteristics of the region. North Korea is in possession of weapons of mass destruction, and has close and strong ties with China and Russia. In order for an operation to be successful, those characteristics should be taken into account, in order to fulfill the five substantive requirements of the R2P. Unfortunately, those difficulties could also prevent intervention, since it is more difficult to have a sterile operation, like the operations in Libya and Kosovo, which did not cause action, due to the controversy of other states, and despite the controversy, it did not amount to any actual action.

Article 2(4) of the U.N. Charter concludes with stating that the use of force is prohibited, if it is “in any other manner inconsistent with the Purposes of the United Nations.”  

As discussed in this article, it would be consistent with the purposes of the United Nations to intervene in North Korea, due to the grave, severe and widespread violations of the most fundamental human rights, which amount to crimes against humanity. Successful intervention supported by the U.N. will only enhance the reputation of the U.N. as a promoter of human rights and freedoms.

The recommendation for the future of the R2P is to limit it so to limit the possibility that strong states will exploit it for their own gain. Such limitation can be either toward the subject of application—only severe situations, such as genocides, war crimes, ethnic cleansings, and crimes against humanity—or it can be toward the means, i.e., what is allowed and what is prohibited in humanitarian intervention. The narrower the scope of R2P, the more acceptance it will gain, since it will guarantee that strong states will have to justify their actions and motives.

---

98 U.N. Charter art. 2, para. 4.