The Responsibility to Protect and Northeast Asia: The Case of North Korea

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“The only reason that we cannot claim that North Korea is the worst human rights disaster in the world today is because we are not allowed to see the extent of it. The victims are faceless and nameless, whether they are forced to study Kim Il Sung-isms, banished to live in gulags, or tortured and executed for trying to escape the country.”

Victor Cha®

The Responsibility to Protect in international relations and international law has been widely debated during the past decade. However, relatively few commentators have focused on Northeast Asia as a whole and analyzed whether the Responsibility to Protect applies to North Korea. Therefore, the following article examines the Responsibility to Protect from the perspective of Northeast Asia and elaborates on the question of whether North Korea has manifestly failed the R2P and whether the international community has a responsibility to act.

There appears to be strong evidence that North Korea has violated its responsibility to protect its own citizens by committing crimes against humanity. Nevertheless, there has been little recognition by governments that the current human rights situation would trigger the responsibility of the international community. There will also be voices arguing that the denuclearization of the peninsula should have priority over human rights concerns. This article will argue, however, that treating human rights issues as a taboo will not guarantee any success in future arms negotiations.

Keywords: Responsibility to Protect (R2P), Northeast Asia, North Korea, China, South Korea, Japan, crimes against humanity, genocide, human rights, defectors, prison camps, Security Council

Introduction

The Responsibility to Protect (known by the acronym R2P) in international relations and international law has been widely debated during the past decade. However, relatively few commentators have focused on Northeast Asia as a whole and analyzed whether the R2P applies to North Korea. Therefore, this paper addresses the R2P

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from the perspective of Northeast Asia. The study will address the issue in the following way: The first two sections examine the background to the R2P and explain the current debate related to the concept. The third and fourth sections discuss the position of the People’s Republic of China, Japan, North and South Korea toward the R2P. The fifth section summarizes the human rights situation in North Korea. The final section elaborates on the question of whether North Korea has manifestly failed the R2P and whether the international community has a responsibility to act.

The Origin of the Responsibility to Protect

In response to the mass atrocities committed during the 1990s in places like Rwanda, Srebrenica and Kosovo and the failure of the international community to prevent and stop them, the International Commission on Intervention and State Sovereignty (ICISS) published a landmark report titled “The Responsibility to Protect.”2 According to the ICISS, every state has the responsibility to protect the rights of its own citizens. If a state is unable or unwilling to fulfill its responsibilities to protect citizens from grave harm, “the principle of non-intervention yields to the international responsibility to protect,”3 which is then transferred to the international community. The ICISS distinguishes among three different aspects of the responsibility to protect: a) the responsibility to prevent; b) the responsibility to react; and c) the responsibility to rebuild. The responsibility to prevent requires addressing the root causes and direct causes of internal conflicts. Key areas of prevention include early warning; preventive diplomacy; ending impunity and preventive deployment. The responsibility to react refers on the one hand to measures short of military actions such as military, political and economic sanctions and on the other hand to military intervention as an exceptional and extraordinary measure. Important aspects to rebuilding include among others: assistance to reestablish the institutions of the state, security and the rule of law, support of economic development and support of local ownership.

The ICISS report does not exclude the option of military intervention for humanitarian protection but only “as an exceptional and extraordinary measure”4 and if certain conditions have been met (just cause, legitimate authority, right intention, last resort, proportional means and reasonable prospects).5 Shortly after the release of the report, the so-called R2P became widely recognized and reaffirmed. In 2004, the High-level Panel on Threats, Challenges and Change endorsed the R2P.6

At the UN World Summit of 2005, world leaders agreed that:

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

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war
crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.”

Different from the report of the International Commission on Intervention and State Sovereignty, the World Summit document does not propose criteria for military intervention. States like China feared that the criteria could be used to legitimize unilateral intervention.

By adopting UN Security Council Resolution 1674 of 2006 on the protection of civilians, the Security Council endorsed the approach of the World Summit Outcome Document. In 2011, the Security Council embraced the R2P in the context of the popular uprising against Colonel Muammar Gaddafi by adopting UN Security Council Resolution 1973 and authorized the use of force to protect civilians and the establishment of a no-fly zone. A strong proponent of the R2P is UN Secretary-General (SG), Ban Ki-moon who said he would “spare no effort to operationalize the responsibility to protect” and stressed the need to translate the R2P “from promise into practice, from words into deeds.” In 2008, he appointed Edward C. Luck as special advisor on the R2P. In 2009, SG Ban Ki-moon further developed his ideas on the R2P and proposed a range of concrete measures that member states, regional organizations and the United Nations could adopt. In the same year, the General Assembly continued its debate on the responsibility to protect. There was broad agreement that the 2005 World Summit Outcome was not open for renegotiation and that the R2P was confined to four crimes. Many states like China stressed the importance of prevention but also raised their concern about selectivity and double standards.

The Responsibility to Protect and the Ongoing Debate

Since the release of the report by the ICISS, the debate on the R2P has taken many different directions, including the questions of how the R2P should be implemented, whether it should be applied to other scenarios than originally intended and whether the R2P was applicable in the context of different conflicts in the Côte d’Ivoire, Democratic Republic of Congo, Sudan/Darfur, Georgia, Myanmar, Sri Lanka and Syria. The latest controversy concerned the situations in Libya and in Syria and the legality and appropriateness of the measures taken by the Security Council and the international community. Another issue is related to the role of civil society in the implementation and development of civil society. International and national non-governmental organizations (NGOs) may provide valuable information and analysis about R2P-related scenarios where governments are unable to obtain information on
gross violations of human rights or where the international community is reluctant to address these situations because of other prevailing security interests as in the case of the North Korea’s nuclear weapons program.

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China, Japan and South Korea are cautious supporters of the R2P concept but North Korea is not.13

The People’s Republic of China

The People’s Republic of China (PRC) has traditionally taken a stance of strict non-interference in the affairs of other states and its foreign policy is based on the five principles of peaceful coexistence (mutual respect for each other’s territorial integrity and sovereignty, mutual non-aggression against anyone, mutual non-interference in each other’s internal affairs, equality and mutual benefit and peaceful coexistence).14 The PRC has strongly opposed Western interventions in recent years including the Iraq War in 2003, NATO’s intervention in Kosovo in 1998, and the establishment of no-fly zones in Iraq during the 1990s.15 Although the PRC was initially highly critical of the R2P it also supports the responsibility to protect.16 It emphasizes that the concept should apply to the four core crimes of genocide, crimes against humanity, war crimes, and ethnic cleansing. An important aspect for China is that the R2P should not be abused for unilateral military interventions and it stresses the important role of the Security Council, and the views of the government and regional organizations.17

Japan

Although Japan’s foreign policy focuses on human security, Japan also proactively supports the R2P. At the 2009 General Assembly Meeting on the R2P, the Permanent Representative of Japan to the United Nations, Yukio Takasu stressed that the R2P should not apply to overall threats to humanity such as poverty or natural disasters but only to the four core crimes mentioned in the World Summit Outcome document. He also pointed out that “the international community should make every possible effort through diplomatic, humanitarian and peaceful means in implementing the R2P” and the use of force should be considered only as a last resort and exercised in accordance with the UN Charter.18 Japan also stressed “the need to establish good governance, and the rule of law and functioning law-enforcement and justice systems.”19 Furthermore, it highlighted the importance of the International Criminal Court and urged non-members to become parties to the Rome Statute. Like South Korea, Japan supports certain policies helping to implement the R2P. Both countries support the role of the UN Peacebuilding Commission and the UN Human Rights Council in this respect.

The Republic of Korea

South Korea has affirmed its support of the R2P on a number of occasions and stressed the importance of prevention and capacity building. In 2009 at the UN General
Assembly General Assembly Meeting on the R2P, the Permanent Representative of the Republic of Korea to the United Nations, Ambassador Park In-kook, pointed out that the R2P should only apply to the four specified crimes and be understood as “an ally of sovereignty, not an adversary” and that “the substance of R2P has nothing to do with so-called “humanitarian intervention.” South Korea also urged UN member states to become parties and implement relevant international instruments on human rights, international humanitarian and refugee law and the Rome Statute of the ICC. In addition, South Korea recommended “to ensure effective mechanisms for handling domestic disputes, to engage in candid self-reflection, searching dialogue, and periodic risk assessment” as well as to consider introducing criteria relating to R2P into regional peer review mechanisms.

**The Democratic People’s Republic of Korea**

North Korea has been very critical toward the application of the R2P in international relations and considers that “it is all the more urgent to take steps for fundamental resolutions of war and conflicts within the current framework rather than making a new protection arrangement.” In 2009, the Deputy Permanent Representative of the Democratic People’s Republic of Korea, Ambassador Pak Tok Hun, expressed North Korea’s major concerns that the R2P could be abused to intervene in the internal affairs of small and weak states and stressed that “the international community can encourage and assist sovereign states in their efforts to fulfill their responsibilities to protect their own people, but it cannot act like a master in place of their governments.”

**Assessing Northeast Asia’s Support of the R2P: From Words to Deeds**

The R2P has been welcomed by most states in Northeast Asia because of the shift of thinking away from discussing a right to humanitarian intervention to a responsibility to prevent, react and rebuild. The R2P should not be understood as humanitarian intervention in sheep’s clothing but rather as an ongoing process and debate on the best means of helping those in need. China’s negative stance on humanitarian intervention finds support in customary international law which does not permit the unilateral right to humanitarian intervention. Many scholars agree that allowing individual states to intervene on humanitarian grounds is open to abuse and could lead to the erosion of the existing legal system on the use of force. The focus is no longer on the rights of individual states but on the requirement of those who need or seek assistance. The very idea of the R2P is to reduce the number of mass atrocities and genocides in the world, which took place on too many occasions in the past century. An important aspect of the R2P is to prevent mass atrocities before they occur although it may not be entirely clear how this should be done. However, in order to successfully implement and gain the greatest consensus on the R2P as suggested by China, Japan and South Korea, the focus should be on the four core crimes as mentioned in the World Summit Document.

Although one can recognize a deepening support for the R2P, there are still ways the R2P could be strengthened. One key recommendation relates to the existing capacities regarding the responsibility to rebuild. Many current UN peacekeeping operations are involved in peacebuilding and play an important role to prevent or
mitigate violence in the context of ongoing mass atrocities. Arguably, South Korea and Japan could make a stronger commitment to UN peacekeeping operations. While South Korea is currently providing 634 peacekeepers to the UN and ranks 34th among troop contributing countries (TCCs), Japan is providing 499 peacekeepers to the UN and ranks 38th. During the past decade the PRC has become the major troop contributor among the permanent members of the Security Council to UN peacekeeping operations (the PRC is currently providing 1,904 peacekeepers to the United Nations and is ranking 16th among TCCs) but has remained reluctant to participate in robust operations and is uncomfortable with peacekeeping operations authorizing the protection of civilians. Another recommendation relates to the ratification of the Rome Statute of the International Criminal Court by China. Unlike Japan and South Korea, China did not become a member of the International Criminal Court. The function of the court is not only to punish those found guilty of war crimes, genocide, crimes against humanity or aggression but also to prevent the commission of such crimes. A third recommendation concerns the development of regional institutions and research centers. As to the best knowledge of the author, such institutions do not exist in Northeast Asia.

Among the states in Northeast Asia, China plays the most important role in implementing the R2P in practice because of its role as a permanent member of the Security Council. Arguably, China will also be key to effectively addressing the human rights situation in North Korea from a R2P perspective. In practice, China’s position on the R2P is complex and highly fluid. It should be noted that China’s response to the crises in Myanmar and Sudan has been strongly criticized. In regard to the crises in Darfur/Sudan, the Security Council members could not agree on strong measures for three years although they expressed their concern about the humanitarian situation. When the SC finally decided to authorize the use of all necessary means to protect, China objected and refrained from voting because it considered host state consent as a necessary condition for the establishment of peacekeeping forces. When the Security Council adopted Resolution 1973 on March 17, 2011, authorizing the use of force for the protection of civilians and the establishment of a no-fly zone in Libya, China along with Russia, Brazil, Germany, and India abstained from voting because these states were unconvinced about the need to use military force. While some commentators argue that the intervention was a milestone in the application of the R2P, China and Russia has been very critical of NATO’s intervention because it led to the overthrow of Colonel Muammar Gaddafi. In July and February 2012, China and Russia vetoed a SC resolution calling for tougher sanctions on Syria and for President Assad to step down. Both states had already vetoed a draft resolution in October 2011 despite the ongoing violence in Syria.

The Human Rights Situation in North Korea

Although the Democratic People’s Republic of Korea (DPRK) is a party to a number of important human rights treaties—including the International Covenant on Civil and Political Rights of 1966 (ICCPR); the Convention on Economic, Social and Cultural Rights of 1966 (ICESCR); the Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW); and the Convention on the Rights of the Child of 1989 (CRC), the country belongs to the worst human rights
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According to Freedom House, North Korea ranks among the least free societies in the world. Alleged human rights violations include, inter alia, cases of abduction, systematic starvation, human trafficking, and gross human rights violations committed by North Korean authorities inside the detention and correctional facilities of North Korea, as well as against defectors expelled or returned to the DPRK. Various governmental and non-governmental organizations have expressed concerns about extrajudicial killings, disappearances, arbitrary detentions, arrests of political prisoners, harsh and life-threatening prison conditions, torture and denial of the freedom of speech, press, assembly, and association, as well as restrictions on freedom of religion, citizens’ movement, and worker’s rights. North Korean citizens can be punished for acts that would not be considered crimes in other legal systems of the world including crossing the border, the humming of a South Korean pop song or allowing a portrait of the Great Leader to collect dust. The DPRK operates its own gulag system, the so-called kwan-li-so. It is estimated that some 150,000–200,000 persons live in the six prison camps of North Korea. In addition to the kwan-li-so, other types of re-education and forced labor camps also exist kyo-hwan-so (long-term prison labor camps), jip-gyul-so (detention facility) and rodongdanryundae (labor facility). According to Grace M. Kang "prisoners are arbitrarily detained and forcibly transferred to labor camps without adequate due process; there, many suffer enslavement, torture, rape, sexual violence, persecution, and other inhumane acts." Families of prisoners are reported to be found guilty by association and the conditions in these camps are extremely unsanitary. Some of the prisoners are even born in the prison camps and live their whole lives in captivity. Although the constitution of the DPRK protects religious freedom, it is estimated that 50,000 to 70,000 Christians are held in North Korean prison camps.

North Korea has suffered from chronic food shortage crises over the past two decades. Different estimates exist as to how many people died during the famine in the mid-1990s. The U.S. Congress has estimated that more than two million North Koreans have died because of the government’s failure to distribute food. North Korea has been unwilling and unable to address the root causes of these crises. Food aid often did not reach those in need but was diverted to the North Korean military and elite.

Another issue is related to the harsh treatment of North Koreans leaving the country without permission. After their return to North Korea they allegedly face severe punishment, ranging from torture, to execution and imprisonment, and there are reported cases of forced abortions and infanticide. Even if the defectors can reach China, the PRC considers the North Korean defectors as economic migrants and not as refugees under the 1951 Refugee Convention. Therefore the defectors are subject to forcible repatriation and no protection is provided to them. According to the 1951 Refugee Convention, a person is only deemed a refugee when he or she is outside the country of origin because of “a well-founded fear of being persecuted” in that country “for reasons of race, religion, nationality, membership of a particular social group or political opinion.” China’s policy to return defectors also raises serious concerns under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (UN Torture Convention). According to Article 3 of the UN Torture Convention “no State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing
that he would be in danger of being subjected to torture.”

An ongoing problem concerns the return of abducted foreigners, including foreigners from Europe, Japan, South Korea as well as Chinese citizens who helped defectors in China. The UN General Assembly has expressed very serious concern about the human rights situation in a number of resolutions since 2005 and established the position of a Special Rapporteur dealing with North Korean human rights. Despite several requests, the Special Rapporteur was never allowed to enter North Korea. North Korea views the “Special Rapporteur” as a “product of political confrontation and a plot against the Democratic People’s Republic of Korea.” It considers country-specific mandates such as that of the “Special Rapporteur” as “a breeding ground of politicization, selectivity and double standards.” The first UN Special Rapporteur on the Situation of Human Rights in the Democratic People’s Republic of Korea, Vitit Muntarbhorn, described in his final report of February 2010 “the human rights situation as sui generis (in its own category), given the multiple particularities and anomalies that abound. Simply put, there are many instances of human rights violations which are both harrowing and horrific.” He expressed his concern inter alia about the “disconcerting practice” of “collective punishment based on ‘guilt by association’. ” The Human Rights Council has also been alarmed at the continuing reports of systematic, widespread and grave violations of civil, political, economic, social and cultural rights in the DPRK, in particular the use of torture and labor camps against political prisoners and repatriated citizens of the DPRK. In March 2012, the Human Rights Council adopted a resolution condemning the human rights situation in North Korea. It was for the first time that a resolution was adopted by consensus and without a vote. No state defended North Korea’s human rights record. North Korea has rejected all allegations of human rights violations. In its national report submitted to the Human Rights Council, the DPRK explained that the government, based on the fundamental requirement of the Juche idea, which places the human person at the centre of all considerations and makes everything in the nature and society serve him/her, and specific reality and practical experiences of the country, has comprehensively defined Juche-oriented ideas and position on human rights, and is actively pursuing their realization.... The DPRK considered the policy of the United States, the EU and Japan toward the DPRK as obstacles and challenges to the protection and promotion of human rights. North Korea further argues “that any attempt to interfere with others’ internal affairs, overthrow the governments and change the systems on the pretext of human rights issues constitutes violations of human rights. In this sense, the DPRK holds that human rights mean national sovereignty.” In addition, the delegation of the DPRK denies the existence of political prisoners and points out that there are only reform institutions for those who are sentenced to the penalty of reform through labor for committing anti-State crimes or other crimes prescribed in the Criminal Law.

Despite various efforts from the United Nations and NGOs to improve the human rights situation in North Korea there has been very little progress. There are also no signs that the human rights situation will improve because of Kim Jong Un’s accession to power. According to the latest report of the Special Rapporteur on the Situation of Human Rights in the DPRK, Marzuki Darusman, the human rights and humanitarian situation has even continued to deteriorate. In 2009–2010, governments made 167 recommendations under the Universal Periodic Review of the Human Rights Council. The DPRK rejected one-third of them including, most importantly, the suggestions to
end collective punishment of families, to end forced labor, and to have a moratorium on executions. The DPRK promised to examine 117 recommendations, including for example the ratification of treaties on child labor and disabilities, setting up a national human rights commission and providing human rights education to North Korean citizens. However, it is not known which recommendations North Korea finally accepted.

**North Korea and the Responsibility to Protect**

Despite the graveness of the human rights violations, there has been relatively little recognition by States that the human rights violations in North Korea would rise to the level of genocide, crimes against humanity, war crimes, or ethnic cleansing which would trigger the responsibility of the international community to protect the citizens of North Korea. Relatively few commentators have focused on the question of whether the R2P applies to North Korea. Calls for bringing the North Korean leadership to trial have been mainly put forward by NGOs and academics. Grace M. Kang, for example, concluded in an article published in the Columbia Human Rights Law Review that the facts “provide a reasonable basis to believe that Kim Jong II and his cadres are individually liable for crimes against humanity, genocide, and war crimes.” The late former President of the Czech Republic, Vaclav Havel, the former Prime Minister of Norway, Kjell Magne Bondevik, and Nobel Peace Prize Winner, Elie Wiesel came to the conclusion in the report “Failure to Act: A Call for the UN Security Council to Act in North Korea” that the North Korean government is actively committing crimes against humanity.” In the follow up report “Failure to Protect: The Ongoing Challenge of North Korea,” they implored “the United Nations, through the Security Council, to invoke the responsibility to protect doctrine because all other efforts to engage with North Korea through the UN system to address the sets of activities that comprise crimes against humanity (i.e., food policy and famine, and the gulag system) have failed to protect the civilian population of the country.”

According to the Freedom House Report “Concentrations of Inhumanity,” the severe human rights violations are so egregious that they amount to crimes against humanity, war crimes, or genocide. In 2009, Yoon Sang-hyun of the Korean Grand National Party said that “North Korea perpetrates various crimes against humanity, including public executions, tortures or rapes against those who try to escape.” In the same year, a private South Korean organization called the Anti-human Crime Investigation Committee announced its goal to bring the North Korean leader Kim Jong II to the International Criminal Court. In June 2010, the former President of South Korea, Kim Young-sam pointed out that North Korea “is also a serious threat to its own people and to humankind in terms of humanitarianism, human security and human rights” and argued that North Korea’s human rights violations should be addressed “from the perspective of the ‘responsibility to protect’. “ For human rights activist Robert Park, the DPRK is the world’s principal violator of the responsibility to protect. In April 2012, the International Coalition to Stop Crimes against Humanity (ICNK) submitted a petition to the Human Rights Council to investigate and report on the North Korean gulag system consistent with the precedent established in its joint study on the Situation of Detainees at Guantanamo Bay. The ICNK also arrived at the conclusion that North Korea had violated its responsibility to protect by committing
On April 25, 2012, Geoffrey Nice, the chief prosecutor in the trial of Slobodan Milosevic, and one of the leading international criminal law experts, William Schabas published an article in the *New York Times* calling for North Korea to be put on trial.57

Many human rights reports published over the past decades point to the conclusion that North Korea has failed to protect its own citizens. However, obviously not all human rights violations in the DPRK trigger the R2P. Arguably, the food policy leading to famine and the treatment of political prisoners could be regarded as crimes against humanity. Crimes against Humanity were first included as a category of crimes in Article 6(c) of the Nuremberg Charter and later also included among others in the statutes of the Yugoslavia and Rwanda tribunal as well as the statute of the International Criminal Court. For crimes against humanity, there has to be a widespread and systematic attack directed against any civilian population, with knowledge of the attack. According to Article 7 of the ICC Statute, individual acts of crimes against humanity include: “(a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

Regarding the DPRK’s policy leading to the famine one may wonder whether the R2P should apply to acts of omission, where large-scale deaths result from a passive government, under the crimes against humanity criterion. In general, one has to make a distinction between a government that mismanages its own economy and is incapable of resolving food shortage problems following natural disasters, and a government which uses starvation as a weapon against its own people. If North Korea decides to impose conditions of life which intentionally excludes certain groups of its population from the provision of food during times of famine this policy could be considered as crimes against humanity. To the best knowledge of the author, neither international nor so-called mixed tribunals have ruled explicitly on the issue. However, the Extraordinary Chambers in the Courts of Cambodia could address mass famine crimes within the context of the crimes committed by the Khmer Rouge during the period of the Democratic Kampuchea (1975–1979).58 The ICISS report explicitly provided that R2P could be triggered by “overwhelming natural and environmental catastrophes” causing significant loss of life if the state concerned is unable or unwilling to cope or reject assistance. However, states at the World Summit 2005 did not follow the proposal and agreed that only the four abovementioned crimes should trigger the R2P. In this context, the debate over Cyclone Nargis in 2008 needs to be revisited. In the case of Myanmar and Cyclone Nargis, the Security Council did not invoke the responsibility to protect, although French Foreign Minister Bernard Kouchner had called for the application of the R2P.59 It is therefore unlikely that key players such as China or Russia in the SC will agree on a new approach...
extending the list of the four R2P atrocity crimes to include natural or environmental disasters.

As to the situation of detainees in the DPRK, there appears to be a prima facie case for the commission of crimes against humanity. According to different reports by NGOs as well as accounts by former detainees and defectors all acts including murder and torture and enumerated in Article 7 of the ICC statute have been committed by the DPRK, with the exception of apartheid. These atrocities seem to be also widespread and systematic since they are not isolated or sporadic acts but large-scale in nature and appear to follow a regular pattern. According to Christian Solidarity Worldwide, 10,000 North Koreans die in the prison camps every year because of direct killings and the harsh conditions. The same organization estimates that 380,000 to over one million people have died in the North Korean gulags.

Another question is whether the crimes committed in the North Korean prison camps amount to genocide. The standard definition of genocide can be found in Art. II of the Convention on the Prevention and Punishment of the Crime of Genocide (known as the Genocide Convention) which is adopted verbatim in the statute of the International Criminal Court. Genocide is “any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to the members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; and (e) forcibly transferring children of the group to another group.” A major obstacle will be to prove that North Korea has the special intent to destroy in whole or in part a group—for example, Christians or political prisoners—since direct evidence of genocidal evidence may not be easily available. However, intent could be deduced from the behavior of the North Korean regime.

In any case, there appears to be strong evidence that North Korea has violated its responsibility to protect its own citizens by committing crimes against humanity. This raises the question regarding what options are available for the United Nations and member states to effectively improve the human rights situation in North Korea. The Security Council could adopt measures under Chapter VII of the UN Charter. North Korea could also not argue that the Security Council would violate Article 2(7) of the UN Charter, which states the principle of non-intervention, meaning that states should refrain from intervening in matters which international law recognizes as solely within domestic jurisdiction. However, Article 2(7) cannot bar action because the article makes an express exception to the general prohibition allowing intervention for enforcement measures under Chapter VII.

Before adopting measures under Chapter VII, two preconditions have to be fulfilled. Firstly, the Security Council must have determined in accordance with Article 39 of the UN Charter “the existence of a threat to the peace or breach of the peace or act of aggression,” and secondly the measures to be taken should serve “to maintain or restore international peace and security.” It is questionable whether the Council would consider the grave human rights abuses by North Korea as the sole reason to determine the existence of a threat to peace. Only on some occasions the Security Council characterized massive but internal human rights violations, without transboundary effect, as a threat to the peace. In case the internal human rights situation of North Korea would lead to transnational consequences, for example to
the flow of North Koreans toward the Chinese or South Korean border, the Council might take action as it had done during the Kurdish crisis during the 1990s.\textsuperscript{65}

Such measures could include the adoption of sanctions or the establishment of a commission of inquiry which would investigate reports of violations of human rights law as in the case of Sudan. It is difficult to imagine that the SC will adopt sanctions because it has already unsuccessfully adopted sanctions after North Korea’s nuclear and missile tests in 2006 and 2009. Although North Korea is not a party to the Rome Statute, the ICC could have jurisdiction if the Security Council refers a case to the court, acting under Chapter VII.

However, it is unlikely that the Council will take such steps. The Security Council is a political organ and enjoys a wide margin of discretion on when and how to act. There is no automaticity for Security Council action, even if a situation triggers the responsibility to protect. China would probably veto Security Council referral to the ICC or the establishment of a commission of inquiry. China has never acknowledged the problematic situation of human rights in North Korea. It has even praised North Korea for its constitution and laws providing for respect of human rights. In response to North Korea’s country report submitted to the Human Rights Council, it also noted “that the protection and promotion of human rights are priority tasks of various State organs.”\textsuperscript{66} China will possibly point out that the Security Council should only be involved in case of threats to international peace and security and not with domestic problems. In general, one may also expect that China will be reluctant to apply the R2P in future SC resolutions after the crisis in Libya.

Some may point out that instead of punishment and sanctions developing economic relations and initiating a dialogue with North Korea could also have a possible positive impact on the human rights dialogue. There will also be voices arguing that the denuclearization of the peninsula should have priority and any attempt at raising human rights concerns would only hamper future talks on North Korea’s nuclear weapon program. However, the latter argument is not entirely convincing. Treating human rights issues as taboo will not guarantee any success to future arms negotiations. Arguably, there is a close link that a regime that poses a threat to peace and security is a threat to its own people. Therefore, one may suggest raising the issue of human rights in future six-party talks.

In any case, political commitment to act will depend on the availability of acceptable options. In regard to North Korea, there are not many available and it reveals the current limitations of the R2P. Member states of the United Nations including the United States, South Korea, and the European Union will continue to raise the human rights issue but whether this will lead to any improvement in the human rights situation of North Korea remains an open question.

Notes


3. Ibid., xi.
4. Ibid., para. 4.18.
5. Ibid., paras. 4.10–4.43.
9. UN Secretary-General Ban Ki-moon, Secretary-General Defends, Clarifies ‘Responsibility to Protect’ at Berlin Event, UN doc. SG/SM/11701 (July 15, 2008).
19. Ibid.
21. Ibid.
23. Ibid.
25. Ibid.
27. UN doc. S/PV. 6498 (March 17, 2011).
39. See also the three annual resolutions adopted by the predecessor of the Human Rights


44. Ibid.

45. Ibid.

46. See UN doc. A/HRC/19/65 (February 13, 2012).


63. For example, the Genocide Watch researcher Kim Hye-won argues that the DPRK has committed genocide since the creation of North Korea, Kim Hye-won, Genocide and Politicide Alert: North Korea (December 19, 2011), www.genocidewatch.org/.../GENOCIDE_and_POLITICIDE_ALERT_-_North_Korea_111219.doc (accessed May 21, 2012).


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