



2016

Human Rights in North Korea - The Pump Don't Work Cause the Vandals Took the Handles

Steven Gariepy
United States Military Academy, steven.gariepy@usma.edu

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Recommended Citation

Gariepy, Steven (2016) "Human Rights in North Korea - The Pump Don't Work Cause the Vandals Took the Handles," *International Human Rights Law Journal*: Vol. 2 : Iss. 1 , Article 3.
Available at: <https://via.library.depaul.edu/ihrlj/vol2/iss1/3>

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Introduction

On 10 December 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights (UDHR).¹ The underlying intent was to create a common standard of achievement for all peoples and all nations.² While the UDHR itself is not legally binding, its principles set forth the foundation for nearly all, modern international human rights treaties.³ There is perhaps no greater challenge to the claimed ‘universality’ and enforceability of these principles, from a theoretical and practical perspective, than the Democratic People’s Republic of North Korea (DPRK).⁴

The DPRK has created a culture of pervasive impunity and lack of accountability for systematic, widespread, and gross human rights violations within their territory.⁵ Respect for individual human rights, such as those rights that are defined within the UDHR, simply does not appear to exist within the DPRK.⁶ In contrast, implementation and enforcement of these very same rights have flourished within the Democratic Republic of South Korea.⁷ In order to understand this ideological divergence on the Korean peninsula, it is necessary to analyze the claimed universality of international human rights in relation to the current state of human rights within the DPRK. This analysis highlights both the limitations of international human rights law as well as the importance of several political factors unique to the DPRK, impacting the suitability of such rights therein.

¹ UN GENERAL ASSEMBLY, UNIVERSAL DECLARATION OF HUMAN RIGHTS, 10 DECEMBER 1948, 217 A (III), *available at*: <http://www.refworld.org/docid/3ae6b3712c.html>.

² *Id.*

³ *See* LOUIS HENKIN, THE AGE OF RIGHTS (1990).

⁴ *See* REPORT OF THE COMMISSION OF INQUIRY ON HUMAN RIGHTS IN THE DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA, A/HRC/25/63, (7 February 2014) [*hereinafter*, HRC REPORT], *available at*: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoIDPRK/Report/A.HRC.25.63.doc>.

⁵ *Id.*

⁶ *Id.*

⁷ CONCLUDING OBSERVATIONS ON THE FOURTH PERIODIC REPORT OF THE REPUBLIC OF KOREA, UNITED NATIONS HUMAN RIGHTS COMMITTEE, CCPR/C/KOR/CO/4, *available at*: <http://tbinternet.ohchr.org>.

The remainder of this article is divided into three parts. Part I addresses the universality of international human rights law, Part II focuses on national law and policies inherent within the DPRK impacting universal application therein. Following this analysis, Part III will provide a quantitative analysis of the history and current state of international human rights within the DPRK.

Part I: The Universality of International Human Rights Law

The system of international law in general, and international human rights law in particular, is no longer content with stating its principles; it wants them to be actually adhered to.⁸ Underpinning international human rights law is the principle of universal applicability. Something that is universal relates to everyone in the world or everyone in a particular group or society. As such, international human rights are those rights that relate to all human beings within the world. Without universality, the nature and scope of these rights would remain relative to the culture in which they are implemented. In order to ensure that these rights are actually adhered to, it is imperative to disentangle them from cultural considerations. It is only when these rights are viewed as being prominent over cultural considerations that governments become compelled to implement them, in spite of cultural considerations.

International organizations, such as the United Nations, have achieved tremendous success in prescribing international human rights.⁹ Regional organizations, such as the European Court of Human Rights, have become instrumental in adjudicating these rights.¹⁰ However, primary responsibility for the enforcement of these rights remains with the State parties

⁸ PHILLIPE DELMAS, *THE ROSY FUTURE OF WAR* (1997).

⁹ See The 20th Anniversary of OHCHR—20 Human Rights Achievements, *available at*: http://www.ohchr.org/EN/NewsEvents/OHCHR20_Backup/Pages/Achievements.aspx

¹⁰ Leo F. Zwaak & Therese Cachia, *The European Court of Human Rights: A Success Story?*, HUMAN RIGHTS BRIEF, VOL. 11, ISS. 3 [2004].

themselves.¹¹ As such, if a State is either unwilling or unable to enforce these rights, it is a moot point as to whether or not they are universal in theory.

The evolution of international human rights law can best be understood by analyzing three interrelated historical ideological debates. The first, and perhaps most contentious debate, focuses on the relationship between these rights and the particular culture within the society in which they were implemented in. The second debate centers on whether or not these rights are individual or collective in nature. Finally, the third historical debate highlights the inherent tension between individual rights and individual duties within a particular society.

A. Universalism versus Cultural Relativism

According to the universalistic approach, international human rights treaties are nothing more than the codification and expansion of those rights previously identified as natural rights, representing the most effective response yet devised to a wide range of standard threats to human dignity.¹² These rights, following the manifest literal sense of the term, are ordinarily understood to be the rights that one has simply because one is human.¹³ Moreover, human rights are often held to be universal in the sense that most societies and cultures have practiced human rights throughout most of their history.¹⁴

Cultural relativism, in contrast to universalism, stands for the proposition that human rights are relative in nature to the particular culture that they are part of.¹⁵ Since cultures vary across time and space, human rights among those cultures vary as well. In its purest form,

¹¹ See UN GENERAL ASSEMBLY, RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS : RESOLUTION / ADOPTED BY THE GENERAL ASSEMBLY, 8 JANUARY 2008, A/RES/62/61, *available at*: <http://www.refworld.org/docid/478f60c52.html>.

¹² See Jack Donnelly, *The Relative Universality of Human Rights*, 29 HUMAN RIGHTS QUARTERLY 281 (2007).

¹³ *Id.*, at 282.

¹⁴ *Id.* at 284.

¹⁵ JIYOUNG SONG, HUMAN RIGHTS DISCOURSE IN NORTH KOREA: POST-COLONIA, MARXIST, AND CONFUCIAN PERSPECTIVES 36 (Routledge 2011).

cultural relativism can be defined as “the acknowledgment of equal validity of diverse patterns of life.”¹⁶ Since neither superiority nor inferiority exists when judging different cultural practices, the paramount consideration is for tolerance of those conventions that may differ from one’s own.¹⁷ Tolerance, unlike respect, “does not require wholly acknowledging or embracing other cultures within a society but only noninterference with others’ value systems and cultural practices.”¹⁸

In the context of human rights, proponents of cultural relativism argue that respect for cultural differences must be taken into account in determining the suitability of a particular human rights norm within that particular culture.¹⁹ Critics of cultural relativism assail this theory as merely a convenient excuse for not advancing international human rights.²⁰ In their opinion, “no culture or comprehensive doctrine is by nature, or in any given or fixed way, either compatible or incompatible with human rights.”²¹ In other words, since cultures are malleable in nature, there is nothing indigenous within a culture that would prevent a majority of its members from endorsing human rights, if they chose to do so.²²

B. Individual versus Collective Rights

Underpinning the competing theories of universalism and cultural relativism is a fierce debate regarding the relative value of the individual over the collective body within a given society, as well as the primacy of individual rights over the individual’s duties to the state. In a holistic sense, “human rights concerns the relationship between the individual and the state; it

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 37.

¹⁹ *Id.*

²⁰ *See* DONNELLY, *supra* note 13.

²¹ *Id.* at 291.

²² *Id.*

involves the status, claims, and duties of the former in the jurisdiction of the latter.”²³ There remains significant debate as to whether these rights apply to individuals, collective groups or both. Cultures, such as the one within the DPRK, where identity and responsibility are seen as being collective, simply do not have the same understanding of the rights of the individual as cultures where identity and responsibility are viewed as belonging to the individual.²⁴

Individualists, refuting the notion of collective rights, argue that human rights are universal in nature and “are rights that belong to every human being in virtue of her or his common humanity [and] exist whether or not the government recognizes them.”²⁵ As such, collective rights are usually little better than excuses for violating individual rights.²⁶

Broadening the concept of 'rights' to include collective groups will not only undermine the basic conception of rights, it threatens the distinction between human rights and legal rights.²⁷ To have any meaning then, human rights must be understood to exist independent and superior to the civil liberties rights guaranteed by the state itself.²⁸ International human rights are revolutionary in nature because they “sweep away, in one fell swoop, all the grounds through which the subordination of some individuals, groups or categories of people to others had been justified.”²⁹ By making rights individualistic in nature, international human rights law makes any claims based on rank, birth, and status inherently flawed in nature.

Collective rights (also commonly referred to as group rights) are creatures of the state itself.³⁰ As such, they “are created by association and lack the independent authority of

²³ DONNELLY, *supra* note 13, at 285.

²⁴ DELMAS, *supra* note 9, at 119.

²⁵ SONG, *supra* note 16, at 41.

²⁶ Jin-Xue Fan, *On the Two Sides of Human Rights*, 9 INT’L LEGAL THEORY 79, 82 (2003).

²⁷ *Id.*

²⁸ Michael Goodhart, *Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization*, 25 HUMAN RIGHTS QUARTERLY 935, 946 (2003).

²⁹ *Id.*

³⁰ FAN, *supra* note 27.

universal human rights.”³¹ Generally, “collective rights are not as favorably regarded simply because many people endorse first-order normative views according to which the interests of individual people are of over-riding importance and that individuals should not bear duties for the sake of collectivities.”³² Proponents of collective rights believe that “no one can acquire a right except as a member of a society in which some common good is recognized by all members.”³³

Marxist ideology, the epitome of a collective rights theory, reasoned that human rights are neither universal nor inherent. Arguing that universal human rights within capitalistic regimes are illusory in nature, merely concealing inequality through formal and empty practices, Marx concludes that these regimes fail to uphold even the most basic of human rights of their citizens.³⁴ In contrast, within Marxist ideology, human rights are only guaranteed to members of the proletariat society who share the same goals as the surrounding society, the party, and ultimately the leader.”³⁵ As such, it is membership not individualism within Marxist ideology that confers human rights. Similarly, the North Korean *Dictionary of the Works of the Great Leader Kim Il Sun* incongruously defines individualism as an ideology of the exploitative class.”³⁶

Collectivism, on the other hand, is celebrated because it prioritizes collective interests in support of the collective struggle for society, the People, the Party and the revolution.”³⁷ Such policies, promoting collective rights at the expense of individual rights, in turn promote individual duties at the expense of individual rights. This is problematic because, as demonstrated by the history

³¹ *Id.* at 82.

³² Leslie Green, *Two Views of Collective Rights*, 4 CAN. J. L. & JURISPRUDENCE 315 (1991).

³³ SONG, *supra* note 16, at 39.

³⁴ Eric Engle, *Human Rights According to Marxism*, 65 GUILD PRAC. 249 (2008).

³⁵ *Id.*

³⁶ DICTIONARY OF THE WORKS OF THE GREAT LEADER KIM IL SUNG, SCIENCE ENCYCLOPEDIA PRESS (1982).

³⁷ SONG, *supra* note 16, at 105.

of the DPRK addressed below, promoting individual duties at the expense of individual rights can result in widespread and systemic human rights violations.

C. Individual Rights versus Individual Duties

Similarly, the relationship between individual rights and individual duties is rooted in a fundamental disagreement over the source of human rights.³⁸ Individualists argue that, since humanity is the source of all human rights, these rights exist independent from civil liberties.³⁹ This is important because civil liberties, unlike human rights, can be stripped away by depriving an individual of his status within a particular society. Malcolm X explained these relationships succinctly when he declared that civil liberties are things that you are asking ‘Uncle Sam’ to give you whilst human rights are things you were born with.⁴⁰

In contrast, the Soviet concept of human rights rested on the premise that “the interests of the state and the individual were coterminous, and that rights did not inhere in individuals by virtue of their humanity but derived from the state and reflected its stage of development.”⁴¹ Simply put, “human rights could not be conceived outside the state.”⁴² While the importance of individual duties is clearly reflected in traditional Western philosophy, attempts to codify a Universal Declaration of Individual Responsibilities⁴³ failed miserably.⁴⁴ The concern was “that duties would be overpowering rather than complementary to rights, that they would be used as an alternative force for evil, rather than as an additional force for good.”⁴⁵

³⁸ See GREEN, *supra* note 33.

³⁹ *Id.*

⁴⁰ Barbara J. Keys, *Reclaiming American Virtue: The Human Rights Revolution of the 1970s* (2014).

⁴¹ SONG, *supra* note 16, at 165.

⁴² *Id.*

⁴³ Inter-Action Council, *A Universal Declaration of Responsibilities* (Sept. 1, 1997), available at <http://www.interactioncouncil.org/udhr/declaration/udhr.pdf>.

⁴⁴ Jason Morgan-Foster, *Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement*, 8 YALE HUMAN RIGHTS & DEV. L. J. 67 (2005).

⁴⁵ *Id.* at 81.

While Christians often model their behavior after the Bible, North Koreans have been forced to seek guidance from the scripture of *juche* ideology, that is, the directions of Kim Il Sung and the words of Kim Jong-Il, so that they think and behave based upon their directions and words.⁴⁶ In contrast to the Ten Commandments of the Christian faith, the Ten Great Principles regulate and judge every word and action of the people in North Korea.⁴⁷ Officially announced by Kim Jong Il in 1974, these regulations govern the everyday lives of the North Korean people.⁴⁸ As such, the underlying natural law foundation supporting individual rights has essentially been misappropriated by the DPRK in furtherance of the government's own political mandate.⁴⁹ In order to understand how this occurred, it is necessary to gain a better understanding of the internal ideologies of the DPRK.

Part II: Understanding the DPRK

The Democratic People's Republic of Korea, a nation formed via revolution and forged through war, remains an extraordinary historical anachronism that simply cannot be understood apart from his history.⁵⁰ This miserable history, shaped by a brutal foreign occupation and never-ending fratricidal war, truly defined the ideology of the DPRK.⁵¹ The longevity and insolubility of the Korean conflict "makes it the best example in the world of how easy it is to get into a war and how hard it is to get out."⁵² Following the Korean conflict, "Kim Il Sung cut his nation off from the world in search of an ancient Korean ideal, a self-sufficient Hermit

⁴⁶ See Philo Kim, *An Analysis of Religious Forms of Juche Ideology in comparison with Christianity*, INT'L JOURNAL OF KOREAN UNIFICATION STUDIES, VOL. 11, NO. 1, 127, 138 (2002).

⁴⁷ *Id.*

⁴⁸ A listing of these principles is available at <http://www.dailynk.com/english/read.php?cataId=nk02900&num=10829>.

⁴⁹ *Id.*

⁵⁰ See Johnathan D. Pollack, *Korean Unification: Illusion or Aspiration?*, 8 BROWN J. WORLD AFF. 77, 79 (2001-2002).

⁵¹ Bruce Cumings, *North Korea: Another Country* (The New Press 2004).

⁵² *Id.* at 3.

Kingdom.”⁵³ To achieve, and more importantly preserve this Kingdom, Kim Il Sung embraced the philosophy of *Juche* and the *Songbun* classification system.⁵⁴ Each of these ideological tools, individually and collectively, have had a tremendous impact on the viability of human rights in the DPRK⁵⁵ and will be addressed separately below.

A. Juche

Steeped in the Stalinist dogmas of the 1940's and 50's, the DPRK formed North Korea into a mature socialist society.⁵⁶ By 1960, the DPRK broke with the former Soviet Union and began an anti-Soviet, pro-Chinese campaign.⁵⁷ The DPRK was to become a political anomaly, becoming more and more illiberal and isolationist, clutching to Stalinist dogmas abandoned by all other communist regimes.⁵⁸ The *juche* ideology of self-reliance was born out of this separatist campaign.⁵⁹ An understanding of the origins, components and philosophical underpinnings of the *juche* ideology is essential to an understanding of the DPRK and its people.⁶⁰

To begin with, etymologically, *ju* means ‘being master of one’s body’, and *che* is ‘a body’ or ‘an entity’.⁶¹ As such, *juche* means ‘being master of one’s body’, which can be interpreted as ‘sovereign autonomy’, ‘self-determination’, or ‘self-reliance’.⁶² In addressing the significance of *juche*, Kim Il Sung explained that “establishing *juche* means, in a nutshell, being the master of revolution and reconstruction in one’s own country.”⁶³

⁵³ *Id.* at 150.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ SONG, *supra* note 16.

⁵⁷ CUMINGS, *supra* note 53.

⁵⁸ SONG, *supra* note 16.

⁵⁹ CUMINGS, *supra* note 53.

⁶⁰ *Id.*

⁶¹ SONG, *supra* note 14, at 123.

⁶² *Id.*

⁶³ Grace Lee, *The Political Philosophy of Juche*, STANFORD JOURNAL OF EAST ASIAN AFF., VOL. 3, NO. 1, 105, 105

Correspondingly, *juche* requires “holding fast to an independent position, rejecting dependence on others, using one’s own brains, believing in one’s own strength, displaying the revolutionary spirit of self-reliance, and thus solving one’s own problems for oneself on one’s own responsibility under all circumstances.”⁶⁴

Drawing upon Confucian ideology, *juche* attempts to revive the state philosophy of independence espoused by the original Korea rulers.⁶⁵ Thus, *juche*, the governing principle of all aspects of North Korean life and the ideological basis of all state policies, quickly gained the full authority of Kim Il Sung’s ‘god like’ status.⁶⁶ Sung “successfully wielded the *juche* idea as a political shibboleth to evoke a fiercely nationalistic drive for North Korean independence and to justify policies of self-reliance and self-denial.”⁶⁷

From a human rights perspective, the fundamental problem with *juche* is that the term ‘self’ within the notions of self-reliance and self-denial refers to the Nation as an indivisible and sacred entity and not the individual.⁶⁸ In fact, “the notion that individuals are not worthy of living if they are deprived of their nation has been promoted so persuasively that complete loyalty to the nation is considered natural.”⁶⁹ This is best personified by early DPRK human rights discourse which, under the collective principles of *juche*, declared that “everyone in North Korea enjoys a happy life with guaranteed political rights, no social vices, and no worries over food, clothes, or consumption, no joblessness, no homelessness, free medical treatment and free education.”⁷⁰

Having already “established the infallibility of the *juche* philosophy”⁷¹, the veracity of

(2003).

⁶⁴ *Id.*

⁶⁵ *Id.* at 110.

⁶⁶ *Id.*, at 111.

⁶⁷ *Id.*, at 105.

⁶⁸ Cumings, *supra* note 52, at 159.

⁶⁹ *Id.*

⁷⁰ Song, *supra* note 16, at 134.

⁷¹ Lee, *supra* note 64, at 111.

this claim simply becomes irrelevant. This belief system, engrained within the North Korean psyche at the earliest age, makes them docile and loyal to Kim Il Sung even in the face of famines and energy crises that have devastated the country.⁷² While *juche* may help explain this docility, it is actually the *songbun* classification system that is most debilitating to the implementation of human rights within North Korean society.⁷³ *Songbun* “has an impact on human rights in North Korea that is incalculable and interminable in its highly destructive and repressive effects on the vast multitude of the North Korean population.”⁷⁴

B. Songbun

Songbun was initially implemented “as a social class restructuring to reverse the old Confucian feudal system of the Chosun Dynasty and Japanese colonialism [in order to] empower the working class.”⁷⁵ Ironically, not only has *songbun* failed to achieve this goal, it has created unrenowned class differences within Korean society.⁷⁶ Etymologically, *songbun* means “ingredients or material.”⁷⁷ Therefore, the DPRK employs this word “to refer to one’s sociopolitical background.”⁷⁸

The DPRK equates an individual’s class status in relation to their perceived loyalty to the nation and supreme leader, instead of their social class.⁷⁹ In order to achieve this goal, “the *songbun* system identifies, assesses, categorizes, and politically stratifies each North Korean resident as a political asset or liability to the socialist revolution and the regime in general and to

⁷² *Id.*

⁷³ Robert Collins, *Marked for Life: Songbun, North Korea’s Social Classification System* (2012) available at https://www.hrnk.org/uploads/pdfs/HRNK_Songbun_Web.pdf.

⁷⁴ *Id.*, at 1.

⁷⁵ *Id.* at 9.

⁷⁶ *Id.*

⁷⁷ *Id.* at 6.

⁷⁸ *Id.*

⁷⁹ SONG, *supra* note 16.

the ruling Kim family specifically.”⁸⁰ The DPRK officially divides the North Korean population into three classes with only those deemed loyal to the nation being entitled to human rights.⁸¹ At the top of the social class structure is the *haek-sim kyechung*, or core class, which is embodied by twenty-five to thirty percent of the regime’s most favored individuals, i.e., political leaders, the military elite, and members of the Workers Party of Korea.⁸² Under the *songbun* system, this group, assessed by the regime to be loyal to the nation and the Kim regime, is clearly entitled to human rights.⁸³

⁸⁰ *Id.*

⁸¹ *Id.* at 104.

⁸² Ralph Hassig & Kongdan Oh, *THE HIDDEN PEOPLE OF NORTH KOREA: EVERYDAY LIFE IN THE HERMIT KINGDOM* (Rowman & Littlefield Publishers, Inc. 2009).

⁸³ Collins, *supra* note 74, at 7.

Fifty percent of the population, such as technicians, teachers, and enlisted soldiers, belongs to the *tong-yo kyechung*, or wavering class.⁸⁴ This class is determined to be of questionable loyalty to the regime and is entitled to human rights so long as they serve the regime well through proper economic and political performance.⁸⁵ Based on their questionable loyalty, “the party assesses that constant ideological indoctrination is essential to maintaining the reliability of the wavering class.”⁸⁶

The bottom twenty-five to thirty percent of the North Korean population is the *jok-tae kyechung*, or hostile class.⁸⁷ This class is comprised of individuals perceived as carrying ‘political taint,’ including defectors, relatives of defectors, and former landowners and merchants.⁸⁸ This class is assessed as “disloyal to the socialist revolution, the party, and its leadership, members of this class are regarded as enemy by the Kim regime, and they suffer the most traumatic victimization of the *songbun* system.”⁸⁹ Members of the hostile class, as enemies of the regime, are not entitled to any human rights.⁹⁰

Songbun is further broken down into two subcategories, *chulsin songbun* and *sahoe songbun*, with the former referring to the socio-economic background of an individual’s extended family, while the latter refers to an individual’s socio-political and economic performance and behavior.⁹¹ While an individual’s *songbun* is hereditary, since it can decrease based on perceived disloyalty to the Nation or ruling party, it is not completely static in nature.⁹² For example, “conviction of a political crime— particularly slander against the

⁸⁴ Ralph Hassig & Kongdan Oh, *NORTH KOREA: THROUGH THE LOOKING GLASS* (2000).

⁸⁵ Collins, *supra* note 74, at 7.

⁸⁶ *Id.*

⁸⁷ Hassig & Oh, *supra* note 83, at 201.

⁸⁸ Hassig & Oh, *supra* note 83, at 133.

⁸⁹ Collins, *supra* note 74, at 7.

⁹⁰ Hassig & Oh, *supra* note 85.

⁹¹ *Id.*

⁹² Collins, *supra* note 74.

Kim regime—will not only cause one’s *songbun* level to fall to rock bottom, but so will that of one’s family members up to third-degree relatives, which will last for generations.”⁹³

In contrast, while not impossible, “moving up in the *songbun* requires a lifetime of devotion to the Kim family regime, the party, and their teaching.”⁹⁴ This vicious circle is precisely what makes *songbun* such an effective tool in preserving the status quo within the DPRK and North Korean society.⁹⁵ This classification system, expressly denying the inherent dignity of the individual, “is by its very nature a violation of human rights.”⁹⁶

Part III: The Current Situation of Human Rights in the DPRK

In order to fully appreciate the scope and depravity of the DPRK’s violations of human rights within North Korea, it is important to first identify their international legal obligations. Currently, the DPRK is a state party to the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, the Convention on the Elimination of all Forms of Discrimination against Women, the Convention on the Rights of the Child (including the Optional Protocols), and is a signatory to the Convention on the Rights of Persons with Disabilities.⁹⁷

These treaties, in contrast to the aspirational UDHR, are legally binding and the act of ratifying these treaties requires a certain degree of relinquishment of sovereignty on the part of the state.⁹⁸ Ratifying these treaties obligates the DPRK to undertake steps, individually and through international assistance and co-operation, to achieve the full realization of the rights recognized

⁹³ *Id.* at 7.

⁹⁴ *Id.* at 8.

⁹⁵ *Id.*

⁹⁶ *Id.* at 86.

⁹⁷ United Nations Human Rights, Office of the High Commissioner for Human Rights: Status of Ratification, available at: <http://indicators.ohchr.org>.

⁹⁸ See Morse H. Tan, *State of Rightlessness: The Egregious Case of North Korea*, 80 MISS L. J. 681, 687 (2010-2011).

within each of these treaties.⁹⁹ At a minimum, in accordance with customary international law¹⁰⁰, the DPRK must refrain from ideological policies such as *juche and songbun*, which frustrate the intent and purpose of these treaties.¹⁰¹ As the recently released UN Human Rights Council report makes clear, the DPRK has failed to achieve even these minimal standards.¹⁰² In order to understand the depth of this failure, it is necessary to analyze the recently released United Nations Human Rights Council Report on North Korea, to determine whether or not *juche and songbun* constitute crimes against humanity.

A. UN Human Rights Council Report on North Korea

The Human Rights Council is an inter-governmental body within the United Nations system made up of 47 States responsible for the promotion and protection of all human rights around the globe.¹⁰³ On 21 March 2013, at its 22nd session, the United Nations Human Rights Council established the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (DPRK).¹⁰⁴ Resolution A/HRC/RES/22/13 mandates the body to investigate the systematic, widespread and grave violations of human rights in the Democratic People's Republic of Korea, with a view to ensuring full accountability, in particular for violations that may amount to crimes against humanity.¹⁰⁵ The resulting report confirmed, “systematic, widespread and gross human rights violations have been and are being committed by the

⁹⁹ See UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, *available at*: <http://www.refworld.org/docid/3ae6b36c0.html>.

¹⁰⁰ Customary international law is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 247 (2nd Cir. 2003).

¹⁰¹ United Nations, Vienna Convention on the Law of Treaties, Art. 18, 23 May 1969, 1115 U.N.T.S. 331 *available at*: <http://www.refworld.org/docid/3ae6b3a10.html>.

¹⁰² HRC Report *supra* note 5.

¹⁰³ United Nations Human Rights Office of the High Commissioner, *available at*: <http://www.ohchr.org/en/hrbodies/hrc/pages/hrcindex.aspx>.

¹⁰⁴ UN Human Rights Council, Situation of Human Rights in the Democratic People's Republic of Korea: resolution / adopted by the Human Rights Council , 14 July 2013, A/HRC/RES/22/13, *available at*: <http://www.refworld.org/docid/53c3bb5d4.html>

¹⁰⁵ *Id.*

Democratic People's Republic of Korea.”¹⁰⁶ These violations included torture, inhumane treatment, arbitrary detention, denial of the right to life, limited freedom of movement, and enforced disappearances.¹⁰⁷ The Human Rights Commission concluded, recognizing the influence of *juche*, that “the particular nature and the overall scale of human rights violations in the State can be more easily understood through an appreciation of the nature of its political system.”¹⁰⁸

Furthermore, *songbun*, according to the Commission, represents the “most important factor in determining where individuals are allowed to live; what sort of accommodation they have; what occupations they are assigned to; whether they are effectively able to attend school, in particular university; how much food they receive; and even whom they might marry.”¹⁰⁹ Additionally, *songbun* has resulted in a “socioeconomically and physically segregated society, where people considered politically loyal to the leadership can live and work in favorable locations, whereas families of persons who are considered politically suspect are relegated to marginalized areas.”¹¹⁰ The DPRK, adhering to the tenants of *juche*, have implemented nearly an absolute ban on foreign travel in violation of fundamental human rights.¹¹¹

Notwithstanding the ban on travelling abroad, “nationals still take the risk of fleeing, mainly to China.”¹¹² Former DPRK security officials, pursuant to a policy dating back to the early 1990s, may shoot to kill anyone attempting to cross the border.¹¹³ A former State Security Department (SSD) agent involved in border control indicated that border guards who shoot at

¹⁰⁶ HRC Report *supra* note 5, at para. 24.

¹⁰⁷ *Id.* at para. 2.

¹⁰⁸ *Id.* at para. 25.

¹⁰⁹ *Id.* at para. 33.

¹¹⁰ *Id.* at para. 39.

¹¹¹ *Id.* at para. 42.

¹¹² *Id.*

¹¹³ *Id.* at para. 402.

DPRK citizens trying to flee the country are not punished.¹¹⁴ The SSD considers anyone who illegally flees to China to be a traitor, no matter their reason, and does not “treat them as human.”¹¹⁵ In turn, China continues to pursue a rigorous policy of forcibly repatriating citizens of the Democratic People’s Republic of Korea who cross the border illegally, in contravention of its obligations under the 1951 Convention Related to the Status of Refugees and the Convention's 1967 Protocol.¹¹⁶

As a result, North Korea’s border crossers are left heavily dependent on lawful residents in China willing to risk aid, vulnerable to exploitation by the human trafficking trade, and in constant danger of repatriation and brutal punishment by the DPRK regime.¹¹⁷ When repatriated, these individuals are subjected “to persecution, torture, prolonged arbitrary detention and, in some cases, sexual violence.”¹¹⁸ *Juche* and *songbun*, working together, thus create a vicious cycle of discrimination and violence amounting to crimes against humanity.¹¹⁹

B. *Juche* and *Songbun* May Constitute Crimes against Humanity

Under international law, crimes against humanity “entail gross human rights violations of a scale and level of organization that shock the conscience of humanity.”¹²⁰ Crimes against humanity require both a specific intent, as well as a widespread or systematic attack directed against a civilian population.¹²¹ An attack is ‘widespread’ if it involves “massive, frequent, large

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ TAN, *supra* note 99, at 700.

¹¹⁷ See U.S. COMMITTEE FOR HUMAN RIGHTS IN NORTH KOREA, THE NORTH KOREAN REFUGEE CRISIS: HUMAN RIGHTS AND INTERNATIONAL RESPONSE (2006), *available at*:

https://www.hrnk.org/uploads/pdfs/The_North_Korean_Refugee_Crisis.pdf.

¹¹⁸ HRC REPORT *supra* note 5, at para. 42.

¹¹⁹ *Id.*

¹²⁰ REPORT OF THE DETAILED FINDINGS OF THE COMMISSION OF INQUIRY ON HUMAN RIGHTS IN THE DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA N LONG REPORT, A/HRC/25/CRP.1, PARA. 1026 (7 February 2014) [*hereinafter* HRC LONG REPORT], *available at*:

<http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/CommissionInquiryonHRinDPRK.aspx>.

¹²¹ *Id.* at para. 1027.

scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”¹²² A ‘systematic attack’ requires “organized action, following a regular pattern, on the basis of a common policy and involves substantial public or private resources.... [T]here must exist some form of preconceived plan or policy.”¹²³ While theoretically some attacks can be classified as either widespread or systematic, in practice, there is significant overlap between these two categories. Within North Korea, the DPRK has committed, and continues to commit, a wide variety of crimes satisfying these criteria.¹²⁴

C. The United Nations Security Council—A Lost Opportunity

On 18 December 2014, the United Nations General Assembly addressed the situation of human rights in the DPRK.¹²⁵ The General Assembly condemned the long-standing and ongoing systematic, widespread and gross violations of human rights in the Democratic People’s Republic of Korea and encouraged the United Nations Security Council to take appropriate action to ensure accountability.¹²⁶ In response to this request, on 23 December 2014, the United Nations Security Council convened at an emergency meeting, to address the situation in the DPRK.¹²⁷ During this meeting, Mr. Lie Jieyi of China, asserted that “the Security Council is not the forum designed for involvement in human rights issues, and still less should human rights issues be politicized.”¹²⁸ Mr. Simonovic, representing the United Nations High Commissioners for Human Rights, responded by declaring that “real

¹²² *Id.* at para. 1029.

¹²³ *Id.* at para. 1032.

¹²⁴ *See Id.* at para. 76. These crimes include: 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.

¹²⁵ 88 GENERAL ASSEMBLY RESOLUTION 69/188, SITUATION OF HUMAN RIGHTS IN THE DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA, A/RES/69/188 (18 December 2014), *available at*: undocs.org/A/RES/69/188.

¹²⁶ *Id.*

¹²⁷ UNITED NATIONS, SECURITY COUNCIL, PROVISIONAL REPORT OF THE SITUATION IN THE DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA, S/PV.7353 (22 December 2014), *available at*: http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7353.pdf.

¹²⁸ *Id.*

change in the human rights situation in the Democratic Republic of Korea will not only require reform; it also demands justice.”¹²⁹ Based on the nature of the allegations contained within the HRC Report, Mr. Simonovic concluded that it was the “international community’s responsibility to take action to prevent and punish such crimes.”¹³⁰

Chapter V of the United Nations Charter lays out the general powers and functions of the Security Council¹³¹. Article 24(1) of the UN Charter, confers on the Security Council, primary responsibility for the maintenance of international peace and security.¹³² Moreover, Members of the United Nations agree to accept and carry out the decisions of the Security Council.¹³³ Under Chapter VII, the Security Council is tasked with the responsibility to determine the existence of any threat to the peace, breach of the peace, or act of aggression and to decide what measures shall be taken in response thereto.¹³⁴ Similarly, the Security Council is charged with investigating any dispute, or any situation that might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.¹³⁵ Maintaining peace and security is the Council's primary, but not only, mandate.¹³⁶

Promoting and encouraging respect for human rights and fundamental freedoms for all, is a further purpose of the UN identified in Article 1 section 3 of the United Nations Charter.¹³⁷

The establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ UNITED NATIONS, CHARTER OF THE UNITED NATIONS, 24 October 1945, 1 UNTS XVI, *available at*: <http://www.refworld.org/docid/3ae6b3930.html>.

¹³² *Id.*, Art. 24(1).

¹³³ *Id.*, Art. 24(2).

¹³⁴ *Id.*, Art. 39.

¹³⁵ *Id.*, Art. 34.

¹³⁶ LAWRENCE MOSS, THE UN SECURITY COUNCIL AND THE INTERNATIONAL CRIMINAL COURT TOWARDS A MORE PRINCIPLED RELATIONSHIP, INTERNATIONAL POLICY ANALYSIS, MARCH 2012, *available at*: <http://library.fes.de/pdf-files/iez/08948.pdf>.

¹³⁷ *Id.*

the International Criminal Tribunal for Rwanda (ICTR), under Chapter VII powers, demonstrates the ability of the Security Council to establish and direct international criminal prosecutions, as a tool for promoting international peace and security.¹³⁸ Following the entry into force of the Rome Statute in 2002,¹³⁹ the authority to establish ad hoc international criminal tribunals has been replaced by Security Council's ability to refer cases to the International Criminal Court (ICC).¹⁴⁰

Crimes against Humanity, such as those being committed by the DPRK, fall within the jurisdiction of the ICC.¹⁴¹ Unfortunately, the Human Rights Council lacks the authority to refer these crimes to the ICC,¹⁴² however, in accordance with Article 13 of the Rome Statute, the Security Council has authority to refer these crimes to the ICC for investigation and possible adjudication.¹⁴³ Article 13 of the Rome Statute provides that the Court may exercise jurisdiction over statutory crimes referred to the Prosecutor by the Security Council acting under Chapter VII of the United Nations.¹⁴⁴ The Security Council has exercised its authority to refer crimes to the ICC on several occasions, including the adoption of Security Council Resolutions 1593¹⁴⁵ and 1970,¹⁴⁶ referring the situations in Darfur, Sudan and Libya respectively. The Security Council's failure to refer the situation in North Korea to the ICC is simply inexcusable.

¹³⁸ *Id.* at 132.

¹³⁹ UN GENERAL ASSEMBLY, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, *available at*: <http://www.refworld.org/docid/3ae6b3a84.html>.

¹⁴⁰ *Id.*, Art. 13.

¹⁴¹ *Id.*, Art. 5.

¹⁴² UNITED NATIONS, SECURITY COUNCIL, PROVISIONAL RULES OF PROCEDURE OF THE SECURITY COUNCIL, S/96/REV.7, (1983), Rule 6, *available at*: <http://www.un.org/en/sc/about/rules/chapter2.shtml>.

¹⁴³ *Id.*, Art. 13.

¹⁴⁴ *Id.*

¹⁴⁵ UN SECURITY COUNCIL, SECURITY COUNCIL RESOLUTION 1593 (2005) ON VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW IN DARFUR, SUDAN, 31 March 2005, S/RES/1593 (2005), *available at*: <http://www.refworld.org/docid/42bc16434.html>.

¹⁴⁶ UN SECURITY COUNCIL, SECURITY COUNCIL RESOLUTION 1970 (2011) [ON ESTABLISHMENT OF A SECURITY COUNCIL COMMITTEE TO MONITOR IMPLEMENTATION OF THE ARMS EMBARGO AGAINST THE LIBYAN ARAB JAMAHIRIYA], 26 February 2011, S/RES/1970 (2011), *available at*: <http://www.refworld.org/docid/4d6ce9742.html>.

Conclusion

International scrutiny of the human rights situation within the DPRK has been far-reaching with minimal success. Oscillating between carrots and sticks, efforts by the international human rights community to persuade the DPRK into protecting the human rights of their citizenry remain ineffective. The HRC Report clearly demonstrates that this external pressure has had little impact on the DPRK. While national authorities remain primarily responsible for safeguarding the human rights of their citizenry, when they manifestly fail to fulfill this responsibility, it is important to the credibility of the United Nations Security Council to make a referral of the situation to the ICC.¹⁴⁷

While international scrutiny has achieved some residual successes, such as coaxing border reform measures within the People's Republic of China, focusing on the symptoms of the problem does little to ameliorate the problem itself. As a result of the underlying ideologies of *juche* and *songbun*, coupled with *Kimilsungism*, meaningful human rights reform within North Korea must be internal in nature to have any chance of success. Although the DPRK has ratified nearly all, major international human rights treaties¹⁴⁸, incorporating many treaty provisions into the national constitution, they continue to selectively enforce these provisions based on an individual's *songbun* status.¹⁴⁹ This is important because, "to the extent that the law and the justice system serve to legitimize violations, there is a **rule by law** in the DPRK, but no **rule of law**, upheld by an independent and impartial judiciary."¹⁵⁰ Even where relevant checks have been incorporated into statutes, these can be disregarded with impunity."¹⁵¹

¹⁴⁷ Moss, *supra* note 138, at 12.

¹⁴⁸ UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, *available at*: <http://indicators.ohchr.org/>.

¹⁴⁹ See HRC LONG REPORT, *supra* note 122.

¹⁵⁰ *Id.* at para. 123.

¹⁵¹ *Id.*

While the DPRK's internal ideological framework is somewhat unique, historical similarities do exist. For example, "the turning point for Marxism was the calcification of the communist party...when Marxism in practice became seen as the collective oppression of the individual, rather than as a force for liberation, the moral force of legitimation of that ideology was lost and thus its capacity for expansion was also lost."¹⁵² In other words, when an "ideology of liberation that does not in fact liberate, but instead stagnates and oppresses...it loses all power of legitimation."¹⁵² This highlights that "when the Soviet system degenerated into rule by the party, for the party, that system was doomed thereby."¹⁵³ The question remains whether or not the same fate awaits the DPRK.

While international human rights are universal in nature, they are also fragile and susceptible to abuse by regimes such as the DPRK. If international human rights are to flourish throughout the Korean Peninsula, the international community must remain resolute in their belief of universality and continue to hold the DPRK accountable for their violations. They must not question whether or not the pump of international human rights law works, but instead focus their collective efforts in prosecuting the DPRK for taking away its handle.

¹⁵² ENGLE, *supra* note 35, at 253.

¹⁵³ *Id.*