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International Humanitarian Law and North Korea: Another Angle for Accountability

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INTERNATIONAL HUMANITARIAN LAW AND NORTH KOREA: ANOTHER ANGLE FOR ACCOUNTABILITY

MORSE TAN*

Throughout the last twenty years, the international focus on North Korea has predominantly been on its security issues while there is a paucity of scholarship exploring the legal implications of North Korea's grave human rights violations. This Article attempts to bridge this void through international humanitarian law, which applies to North Korea's continued hostilities and defiance on the Korean peninsula and around the world.

This Article further analyzes international law in relation to North Korea's repeated irresponsible military provocations against South Korea, the United States, and the world. It looks at such actions through an international humanitarian law lens, which no other scholar has explored in this way, and presents a new paradigm in which the world's most serious international crisis (security combined with human rights) can be evaluated.

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By analyzing the Korean Armistice Agreement, armistice law, and inter-Korean agreements over the last several decades, this Article will explain major legal implications of the ongoing Korean War. This Article not only argues that North Korea has perpetuated the Korean conflict through continued hostilities and belligerent behavior, but also that North Korea has committed, and continues to commit, rampant violations of international humanitarian law principles.

This Article chronicles yet another angle of North Korea's defiance of international law and provides a starting point for future prosecution of Kim Jong-Un, as well as other responsible leaders. Building on prior articles, this Article seeks relief for a devastated population living in hunger, fear, and horrendous injustices.

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But more than the litany of crimes committed against South Koreans or the kidnapping of Japanese citizens or the axe-murder of UN guards in the Demilitarized Zone, more than the macabre nature of the North Korean regime which allows its citizens to starve to death by the hundreds of thousands while pouring in one-third of its GDP into the military, more than the habitual violations of international agreements and the predictable pattern of blackmail and willful deceit that has always underlain North Korean diplomacy, there is a basic irrefutable fact that shows that North Korea always has been and remains to this day a grave threat to South Korea's national security and to peace in the region. It is North Korea's explicitly stated national goal as enshrined in the preamble of its Korean Workers' Party Rules and in its Constitution and repeated over and over again by the various channels of state propaganda machinery: "Liberate the South and bring about the complete victory of socialism on the fatherland."¹

I. INTRODUCTION

July 27, 1953, marked a momentous date in Korean history. The signing of the Korean Armistice on that date not only marked an official cessation of hostilities on the Korean peninsula, it also represented the end of the first wide-scale use of UN military forces and the first joint military response of UN member states.² Found within this historic ceasefire agreement between the belligerent parties lies a promise that a permanent peace treaty would soon be signed between the UN forces and the Korean People's Army and China.³ That promise was not kept, as negotiations for a political conference between the parties to resolve this and other matters on the peninsula fell apart by mid-1954.⁴ Since that time, Korea has teetered on the brink of resuming all-out war, with a communist north and a democratic south separated only by the

1. Sung-Yoon Lee, *Nuclear Diplomacy vis-à-vis the DPRK: A Dead-End Street*, FLETCHER F. WORLD AFF., Summer/Fall 2003, at 151, 156-57.

2. See Scott R. Morris, *America's Most Recent Prisoner of War: The Warrant Officer Bobby Hall Incident*, ARMY LAW., Sept. 1996, at 3, 3-4; Samuel Pollack, *The Korean Armistice: Collective Security in Suspense*, ARMY LAW., Mar. 1984, at 43, 43.

3. Military Armistice in Korea and Temporary Supplementary Agreement, art. IV, July 27, 1953, 4 U.S.T. 234, 260 [hereinafter Korean Armistice].

4. David M. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. INT'L L. 801, 885 (1996).

Demilitarized Zone, a mere 2.5 miles wide, part of the most militarized border in the world.

Since that day in 1953, dozens of scholars have written about both the momentous Korean Armistice and the joint UN military effort in Korea. Some of these scholars have recognized that the Korean War is anything but over.⁵ Unfortunately, with the exception of those scholars that have focused on North Korea's proliferation defiance and withdrawal from the Non-Proliferation Treaty (NPT),⁶ not enough attention has been devoted to articulate the consequences of North Korea's actions as part of the ongoing Korean War. North Korea's ongoing hostilities open it to application of international humanitarian law standards, which may factor into future prosecution, as this author and the UN Commission of Inquiry recommend.

This Article presents a starting point to fill these lacunae and highlight international law consequences of a continued international armed conflict on the Korean peninsula. It will primarily focus on North Korea's numerous actions of military aggression aimed at several nations around the globe and probe whether the Democratic People's Republic of Korea (DPRK) in performing such actions has been violating international humanitarian law (IHL—also known as the laws of war or the law of armed conflict). Part II of this Article will provide a background to this issue by analyzing the Korean Armistice agreement, armistice law, and the many inter-Korean agreements that exemplify the two Koreas' policies and priorities regarding the continuing Korean conflict.

Part III will discuss the applicable international law framework to this continued conflict. This Part will argue that under this framework—which includes a number of treaties, conventions, customary international law, and other sources of the laws of armed conflict and portions of international human rights law (IHR)—the Korean conflict and the actions of North Korea can be approached under the paradigm of international humanitarian law. Part IV continues this analysis by demonstrating that, in applying binding

5. See, e.g., Morris, *supra* note 2, at 14 (“In sum, the armistice in effect on the Korean peninsula has not ended the *state* of war between North Korea and the nations under the United Nations/United States command and their respective allies.”).

6. See, e.g., Antonio F. Perez, *Survival of Rights Under the Nuclear Non-Proliferation Treaty: Withdrawal and the Continuing Right of International Atomic Energy Agency Safeguards*, 34 VA. J. INT'L L. 749 (1994) (persuasively arguing that North Korea bears responsibility for its violations of the safeguards provisions while it remained under the NPT).

international humanitarian law principles to such actions, the DPRK has maintained a system of violations and continues to remain liable for most of these violations since the signing of the armistice. This Article continues to build upon the framework of several companion articles underscoring the mass violations of international law systematically perpetrated by the DPRK and constructing a forum for possible prosecution of the state's leaders.

II. THE KOREAN WAR AND THE KOREAN ARMISTICE AGREEMENT

On March 7, 2013, the UN Security Council unanimously passed a new round of economic sanctions against North Korea through a strongly worded resolution.⁷ This resolution, recalling the 2006 and 2009 resolutions that implemented similar sanctions on the DPRK, responded to yet another nuclear test performed by North Korea on February 12, 2013.⁸ Resolution 2094 bears great significance for two reasons: (1) the resolution was partially drafted by the Republic of China, North Korea's closest ally;⁹ and more importantly, (2) North Korea threatened again to "withdraw" or otherwise not abide by the armistice agreement.¹⁰ Four days later, on March 11, 2013, the North Korean state newspaper claimed that the nation did just that.¹¹

Why would a country like North Korea promulgate such a withdrawal? Why would a state like North Korea, a state that has repeatedly and egregiously violated every international agreement it has made,¹² engage in such defiance? One answer may be that it is the largest chip that North Korea has left as political leverage for its repeated pattern of brinkmanship, already having allegedly withdrawn from the NPT.¹³ Another likely reason resonates with the topic of this

7. S.C. Res. 2094, U.N. Doc. S/RES/2094 (Mar. 7, 2013); Edith M. Lederer & Hyung-Jin Kim, *UN Approves New Sanctions Against North Korea*, ALASKA J. COM. (Mar. 7, 2013, 9:37 AM), <http://www.alaskajournal.com/Alaska-Journal-of-Commerce/March-Issue-2-2013/UN-approves-new-sanctions-against-North-Korea/>, archived at <http://perma.cc/USR2-25MA>.

8. S.C. Res. 2094, *supra* note 7, ¶¶ 1, 5; Lederer & Kim, *supra* note 7.

9. Lederer & Kim, *supra* note 7.

10. Hyung-Jin Kim & Foster Klug, *North Korea Says It Cancels 1953 Armistice*, YAHOO! NEWS (Mar. 11, 2013, 3:37 PM), <http://news.yahoo.com/north-korea-says-cancels-1953-armistice-172852036.html>, archived at <http://perma.cc/UP3L-ZQRK>.

11. *Id.*

12. See, e.g., Morse H. Tan, *Finding a Forum for North Korea*, 65 SMU L. REV. 765 *passim* (2012) [hereinafter Tan, *Finding a Forum*].

13. See, e.g., S.C. Res. 1874, ¶ 5, U.N. Doc. S/RES/1874 (June 12, 2009) (one of the many Security Council resolutions demanding "that the DPRK immediately retract its

Article: North Korea knows that the Korean War has not reached its conclusion and the armistice stands as a roadblock to resumption of full-scale war on the peninsula¹⁴—a war that might yield more than a million casualties.¹⁵

A. The Background and Scope of the Korean Armistice Agreement

June 25, 1950, marked the beginning of a massive invasion by North Korean soldiers over the 38th parallel and the official beginning of the Korean War.¹⁶ In an unprecedented move, the newly created UN Security Council approved its first resolution to establish a UN coalition of armed forces to repel this war of aggression on July 7, 1950.¹⁷ Through the next three years, sixteen member state forces, led by the United States military, fought North Korean forces, driving them to the Yalu River on the border of the Republic of China within just a few months.¹⁸ Soon after this push, an influx of Chinese forces aided the North Korean forces, repelling the UN coalition back to the 38th parallel, where the fighting continued for two years.¹⁹ After three years of bloodshed and two years of negotiations near the village of Panmunjom, the “longest, most violated military armistice in modern history,” the Korean Armistice Agreement, took shape.²⁰

As mentioned above, the DPRK recently announced that it would no longer adhere to the armistice agreement, which it now considers

announcement of withdrawal from the NPT”); Frederic L. Kirgis, *North Korea’s Withdrawal from the Nuclear Nonproliferation Treaty*, INSIGHTS (Jan. 24, 2003), <http://www.asil.org/insights/volume/8/issue/2/north-koreas-withdrawal-nuclear-nonproliferation-treaty>, archived at <http://perma.cc/MB3Q-H4V8> (explaining North Korea’s alleged withdrawal from the NPT on January 10, 2003).

14. Morris, *supra* note 4, at 885, 887 (“The Korean Armistice has prevented renewed large-scale hostilities for over forty years Despite the breakdown of some of its major provisions, the Armistice has been durable enough to withstand failures and violations and to prevent the eruption of another full-scale war on the Korean peninsula.”).

15. Morse Tan, *The North Korean Nuclear Crisis: Past Failures, Present Solutions*, 50 ST. LOUIS U. L.J. 517, 525–26 (2006) [hereinafter Tan, *The North Korean Nuclear Crisis*] (explaining that military strategists claim that a full-scale North Korean invasion could produce over one million casualties).

16. Pollack, *supra* note 2, at 44–45.

17. S.C. Res. 84, U.N. Doc. S/RES/1588 (July 7, 1950); Pollack, *supra* note 2, at 45.

18. Pollack, *supra* note 2, at 45.

19. *Id.*; Tan, *The North Korean Nuclear Crisis*, *supra* note 15, at 521.

20. Pollack, *supra* note 2, at 43; Morris, *supra* note 2, at 4; Tan, *The North Korean Nuclear Crisis*, *supra* note 15, at 521.

void.²¹ However, the armistice itself specifically prohibits such an announcement. Article V (Paragraph 62) states that “[t]he Articles and Paragraphs of this Armistice Agreement shall remain in effect until expressly superseded either by *mutually acceptable amendments and additions* or by provision in an appropriate agreement for a *peaceful settlement* at a political level between both sides.”²² Unilateral withdrawal breaks its own terms, and on its face, supersession— not violation or withdrawal—appears to be the only tool by which the armistice’s precedent can be “undone.” Further, the agreement specifically states that its provisions apply to *all* ground, naval, and air forces of both sides so that the Demilitarized Zone (DMZ) and those territories under the military control of the other are adequately respected.²³ Not only must each military commander ensure that subordinates who violate the armistice are “adequately punished,” the responsibility for such compliance and enforcement remains in the hands of the signatories and their successors.²⁴ Moreover,

The Commanders of the opposing sides shall establish within their respective commands all measures and procedures necessary to insure *complete compliance* with all of the provisions hereof by all elements of their commands. They shall actively cooperate with one another and with the Military Armistice Commission and the Neutral Nations Supervisory Commission in requiring observance of both the letter and the spirit of all of the provisions of this Armistice Agreement.²⁵

As further explained below, such cooperation from the North has not transpired, and its defiance under this agreement commenced shortly after signing it.²⁶

The armistice clearly states its prohibitions of any acts of war by either side. Article I stresses that parties may not “execute any hostile act within, from, or against the Demilitarized Zone,” and that no persons, military or civilian, may enter the DMZ, let alone cross it,

21. Kim & Klug, *supra* note 10.

22. Korean Armistice, *supra* note 3, art. V (emphasis added).

23. *Id.* art II.

24. *Id.*

25. *Id.* (emphasis added).

26. See, e.g., DICK K. NANTO, CONG. RESEARCH SERV., RL30004, NORTH KOREA: CHRONOLOGY OF PROVOCATIONS, 1950–2003, at 3 (2003) (detailing the hijacking of a South Korean airliner by North Korean agents less than five years after the signing of the armistice); see also discussion *infra* Part IV.B.

“unless specifically authorized to do so by the Military Armistice Commission.”²⁷ Article II clarifies that a complete cessation of hostilities take place 12 hours after the signing of the Armistice Agreement, providing no exceptions for violations or encumbrances of the DMZ.²⁸ Neither a derogation clause nor other reserved right to withdraw or violate its provisions pending state emergency or other state interests exists.

Most importantly for our discussion, in addition to providing a comprehensive repatriation system for prisoners of war after the cessation of hostilities and the allowance of displaced civilians to temporarily cross the DMZ,²⁹ Article IV of the agreement presents the building blocks of this Article. Article IV had recommended that within three months of the signing of the armistice a political conference would “be held by representatives appointed respectively to settle through negotiation the questions of the withdrawal of all foreign forces from Korea, the peaceful settlement of the Korean question, etc.”³⁰ This peaceful settlement negotiation and treaty never materialized, exhibiting the lamentable fact that both sides remain at war because of the armistice’s provisions.³¹ We now turn to discuss armistice law and the Korean armistice agreement.

B. Armistice Law

With a majority of scholars, the inquiry stops there. However, some military scholars have discussed the significance of the armistice’s application to the situation under customary international law and armistice law,³² and their insight weighs heavily to make international humanitarian law applicable to North Korea’s actions since 1953. These scholars have pointed out that the armistice required a cessation of hostilities but may not have brought an end to a state of war in the region.³³ An armistice, in sum, brings only a temporary peace;³⁴ a peace treaty formalizes an end of a war.³⁵

27. Korean Armistice, *supra* note 3, art. I.

28. *Id.* art. II.

29. *Id.* art. IV.

30. *Id.* at 260.

31. See Morris, *supra* note 2, at 12–13.

32. E.g., Ernest A. Simon, *The Operation of the Korean Armistice Agreement*, 47 MIL. L. REV. 105 (1970).

33. E.g., Morris, *supra* note 2, at 12 (“Within twelve hours of the signing of the Armistice Agreement at 1000, 27 July 1953, hostilities on the Korean peninsula were

These authors' concepts emanate from The Hague Conventions and The Law of Land Warfare and have attained customary international law status.³⁶ For example, Article 36 of the Hague Convention (No. II) With Respect to the Laws and Customs of War on Land explicitly states that "[a]n armistice *suspends* military operations by mutual agreement between the belligerent parties. If its duration is not fixed, the belligerent parties can resume operations *at any time*, provided always the enemy is warned within the time agreed upon, in accordance with the terms of the armistice."³⁷ Although the Korean Armistice does not expressly allow for recommencing of hostilities due to an intentional and serious breach of the agreement, Article 40 of this Hague Convention permits a belligerent party to denounce a serious violation of the armistice by another party and recommence hostilities immediately, if the situation presents any urgency.³⁸

At least one scholar has traced this armistice law back to ancient Greece and Rome, where an armistice or truce (an *indutiae*) did not terminate the condition of war between parties like a treaty of peace

supposed to cease. However, that did not mean that the state of war on the peninsula ceased."); Simon, *supra* note 32, at 106 ("If the customary rules governing armistice are resorted to, the parties are technically still in a state of war, *de facto* and *de jure*, and the international law of war applies insofar as it is not displaced by the *Armistice Agreement* or the customary rules of armistice." (footnote omitted)).

34. Morris, *supra* note 2, at 13.

35. *Id.*; Simon, *supra* note 32, at 109 ("The end in view is always the treaty of peace by means of which the relations between belligerent nations pass from a state of war to a state of peace."). Although a Vienna-style peace through a bilateral treaty would be preferred to permanently end the conflict, the objective of this Article is not to discuss a preferred method of peace but simply to explore the means by which international humanitarian law can be applied to the North Korean situation.

36. See, e.g., Simon, *supra* note 32, at 108–09, 124–27.

37. Convention with Respect to the Laws and Customs of War on Land, art. 36, July 29, 1899, 32 Stat. 1803 [hereinafter Hague Convention II] (emphasis added); see also INST. OF INT'L LAW, *Laws and Customs of War on Land*, art. 5 (Sept. 9, 1880), in RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW DEALING WITH THE LAW OF NATIONS 25 (James Brown Scott ed. & trans., 1916) ("Military conventions made between belligerents during the *continuance of war, such as armistices* and capitulations, must be scrupulously observed and respected." (emphasis added)).

38. Hague Convention II, *supra* note 37, art. 40. These customary provisions found in the Hague Conventions were primarily and previously taken from Articles 47–52 of the Project of an International Declaration Concerning the Laws and Customs of War. Project of an International Declaration Concerning the Laws and Customs of War, arts. 47–52, August 27, 1874, in 1 SUPP. AM. J. INT'L L. 96 (1907) [hereinafter Conference of Brussels].

(the *foedus*).³⁹ Contemporary writers and modern military teachings have reflected this concept, and there is little indication that such law has changed over the last sixty years.⁴⁰ Simon expresses the contrary view that the armistice and Korea's unique situation bypass this customary rule and that the provisions of the armistice have little application to the current military and political status of the peninsula.⁴¹ However, this conclusion emerged at the beginning of continued provocations by North Korea in the region⁴² and well before the contracting parties agreed to the numerous inter-Korean and other agreements. These agreements and more contemporary events receive further analysis below.

C. Inter-Korean and Related International Agreements and Statements

Although North Korea's actions have expressed contempt for the armistice, "neither a new war nor a true peace has emerged to replace it."⁴³ Rather, the many concessions and agreements that North Korea has signed with various states support the contention that an international armed conflict still exists and that North Korea *knows* and understands that this state of war continues intact.

For example, the second principle of unification as pronounced in the North-South Joint Statement of 1972 states that any unification

39. Howard S. Levie, *The Nature and Scope of the Armistice Agreement*, 50 AM. J. INT'L L. 880, 885 (1956).

40. *See id.* Colonel Levie uses the United States Supreme Court's interpretation of the 1918 Armistice from World War I and a French Court of Cassation's 1944 case to demonstrate that courts around the time of the Korean Armistice interpreted armistice law consistent with the Greeks and Romans. *Id.*

41. Simon, *supra* note 32, at 136 ("The customary rules of international law governing armistice status, insofar as they allow a resumption of hostilities, are no longer relevant to the present situation in Korea. This conclusion emerged from an analysis of the military and political conditions under which the armistice was concluded, the nature of the *Armistice Agreement*, the settlement of disputes arising during the armistice, and the practice of both sides in dealing with specific incidents.").

42. Parts III and IV will highlight North Korea's pattern of hostilities, a pattern that is so widespread that over 124 provocations were recorded from the beginning of the Korean war to March 2003 and many more in the years to follow. *See generally* EMMA CHANLETT-AVERY, MARK E. MANYIN & HANNAH FISCHER, CONG. RESEARCH SERV., RL33389, NORTH KOREA: A CHRONOLOGY OF EVENTS IN 2005 (2006) [hereinafter CHANLETT-AVERY ET AL.]; MARK E. MANYIN, EMMA CHANLETT-AVERY & HELENE MARCHART, CONG. RESEARCH SERV., RL32743, NORTH KOREA: A CHRONOLOGY OF EVENTS, OCTOBER 2002-DECEMBER 2004 (2005) [hereinafter MANYIN ET AL.]; NANTO, *supra* note 26.

43. Morriss, *supra* note 4, at 887.

should occur “peacefully without the use of military force[.]”⁴⁴ North and South Korea expressly agreed that each side would “implement appropriate measures to stop military provocation[s] which may lead to unintended armed conflicts.”⁴⁵ One concrete means to address this problem—still in use today even as North Korea proclaims to have voided the armistice—was to establish direct phone lines between Seoul and Pyongyang to prevent accidental military clashes.⁴⁶ As history has shown, this preventative measure has proven relatively unsuccessful, considering that less than two years later, in February of 1974, North Korean patrol vessels sank two South Korean fishing boats and detained thirty fishermen.⁴⁷ The agreement as a whole proved to be no more than empty words, as six months after this incident Park Chung Hee’s wife (i.e., the Republic of Korea’s First Lady at that time) died in an assassination attempt on her husband’s life by an agent of a pro-North Korean group from Japan.⁴⁸

Twenty years later, through the Agreement on Reconciliation, Non-Aggression and Exchanges and Cooperation between South and North in December of 1991, the Koreans again wrote their concerns for the peninsula.⁴⁹ In addition to agreeing that the parties should refrain from acts of sabotage and insurrection by the terms of Article IV, Article V states that both the North and South would “endeavor together to transform the present state of armistice into a solid state of peace between the South and the North and shall abide by the present Military Armistice Agreement (of July 27, 1953) until such a state of peace [is] . . . realized.”⁵⁰ The agreement continues to forbid armed aggression or force between the parties and requires peaceful resolution of disputes.⁵¹ In addition to reiterating in Article 13 the need for a phone line—

44. July 4th North–South Joint Statement, N. Kor.-S. Kor. (July 4, 1972), http://www2.law.columbia.edu/course_00S_L9436_001/North%20Korea%20materials/74js-en.htm (last visited May 20, 2015), *archived at* <http://perma.cc/FL6R-2NK4>.

45. *Id.*

46. *Id.*

47. NANTO, *supra* note 26, at 6.

48. *Id.*

49. *See* Agreement on Reconciliation, Non-Aggression and Exchanges and Cooperation between the South and the North, N. Kor.-S. Kor., Dec. 13, 1991, *available at* http://peacemaker.un.org/sites/peacemaker.un.org/files/KR%20KP_911213_Agreement%20on%20reconciliation%20non%20aggression%20and%20exchangespdf.pdf, *archived at* <http://perma.cc/UED3-S6QD>.

50. *Id.* arts. 4–5.

51. *Id.* art. 9.

supposedly established previously—between military authorities to avoid accidental armed clashes, Articles 12 and 14 looked to establish a South–North Joint Military Commission and a South–North Military Sub-Committee in order to achieve “phased reductions in armaments including the elimination of weapons of mass destruction and attack capabilities,” as well as to help “remove military confrontation” between the parties.⁵² However, not more than three months after these agreements, three agents of the DPRK in South Korean uniforms were shot dead at Cholwon, Kangwondo, just south of the DMZ.⁵³

Also at this time, the Koreas signed the Joint Declaration of South and North Korea on the Denuclearization of the Korean Peninsula, which declared that neither Korea would use nuclear weapons and that nuclear capabilities would find only peaceful purposes.⁵⁴ In even more blatant defiance of these two agreements, a mere year after signing both, North Korea announced its first attempt at withdrawal from the NPT.⁵⁵

Five years after the June of 2000 North–South Declaration, which capitalized upon each Korea’s willingness to reunite families separated by the Korean conflict and settle unconverted long-term prisoners and other humanitarian issues,⁵⁶ the two Koreas signed the Joint Statement of the Fourth Round of the Six-Party Talks.⁵⁷

This latter statement and the Six-Party Talks in general aimed to denuclearize the Korean Peninsula again through peaceful terms. Beyond the aforementioned Denuclearization agreement, in which the DPRK committed to abandoning all nuclear weapons and existing nuclear programs and returning to the NPT and IAEA safeguards, it

52. *Id.* arts. 12–14.

53. NANTO, *supra* note 26, at 11.

54. Joint Declaration on Denuclearization of the Korean Peninsula, N. Kor.-S. Kor., Jan. 20, 1992, 33 I.L.M. 569, *as available at* <http://cns.miis.edu/inventory/pdfs/aptkoreanuc.pdf>, *archived at* <http://perma.cc/T6JG-LP6W>.

55. Brooke Milton & Gaurav Kampani, *IAEA–North Korea: Nuclear Safeguards and Inspections 1993*, JAMES MARTIN CTR. FOR NONPROLIFERATION STUDIES, http://cns.miis.edu/archive/country_north_korea/nuc/iaea93.htm (last visited May 21, 2015), *archived at* <http://perma.cc/TD8U-6UE8>.

56. *See* South–North Joint Declaration, N. Kor.-S. Kor., June 15, 2000, *available at* http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/n_skorea06152000.pdf, *archived at* <http://perma.cc/F9PH-45TL>.

57. *Joint Statement of the Fourth Round of the Six-Party Talks*, MINISTRY OF FOREIGN AFF. OF THE PEOPLE’S REPUBLIC OF CHINA (Sept. 19, 2005), http://www.fmprc.gov.cn/mfa_eng/topics_665678/dslbj_665832/t212707.shtml, *archived at* <http://perma.cc/SCF8-RPSE>.

also asseverated that the parties would “negotiate a permanent peace regime on the Korean Peninsula at an appropriate separate forum.”⁵⁸ Yet even during the time between the North–South Declaration and these Six-Party Talks, North Korea still test-fired missiles.⁵⁹ Furthermore, just a year after this Six-Party Talk Joint Statement, North Korea attempted to test yet another long-range missile, prompting UN Security Council Resolution 1695, which condemned the tests.⁶⁰

North Korea understands the current state of war on the peninsula. The Inter-Korean Summit Agreement of October 2007 clearly restates this status.⁶¹ This agreement reiterates the same commitment by both sides—that each would work together to end military hostilities and tensions to guarantee peace; however, it also stated that

[t]he South and the North *both recognize the need to end the current armistice regime and build a permanent peace regime.* The South and the North have also agreed to work together to advance the matter of having the leaders of the three or four parties directly concerned to convene on the Peninsula and *declare an end to the war.*⁶²

In 2011, the United States Congress acknowledged the fact that the Korean conflict has not ended and that North Korea must abide by IHL standards, at least in terms of prisoners of war and abductees.⁶³ Yet

58. *Id.*

59. CHANLETT-AVERY ET AL., *supra* note 42, at 15, 20, 22.

60. S.C. Res. 1695, U.N. Doc. S/RES/1695 (July 15, 2006); *A Timeline of North Korea’s Nuclear Development*, ACDIS, <http://acdis.illinois.edu/resources/arms-control-quick-facts/timeline-of-north-koreas-nuclear-development.html> (last visited May 21, 2015), *archived at* <http://perma.cc/FRC9-97KK>.

61. *October 4 Inter-Korean Summit Agreement*, DAILYNK.COM, http://www.daily-nk.com/english/db_info.php?db_name=October%204%20Inter-Korean%20Summit%20Agreement (last visited May 21, 2015), *archived at* <http://perma.cc/A3Z9-JRAQ>.

62. *Id.* (emphasis added).

63. See H.R. Res. 376, 112th Cong. (2011) (“Whereas 58 years have passed after the signing of the ceasefire agreement at Panmunjom on July 27, 1953, and the peninsula still technically remains in a state of war; . . . the House of Representatives . . . encourages North Korea to repatriate any American and South Korean POWs to their home countries to reunite with their families under the International Humanitarian Law set forth in the Geneva Convention relative to the treatment of Prisoners of War; . . . calls upon North Korea to agree to the family reunions and immediate repatriation of the abductees under the International Humanitarian Law set forth in the Geneva Convention relative to the Protection of Civilian Persons in Time of War.”).

only two years after the 2007 agreement, North Korea did not stop test-firing missiles but conducted yet another illegal nuclear test.⁶⁴

Thus, the Korean War has not ended—as indicated by North or South Korea’s agreement, treaty, or the Korean Armistice. The question remains whether this conflict has ended under the law of armed conflict or IHL. A resounding “no” emerges to this question—this established portion of international law accurately applies to North Korea’s actions.

III. INTERNATIONAL HUMANITARIAN LAW AND ITS APPLICATION

Although the laws of war have continued through thousands of years of armed conflict and find themselves fixed into the framework of customary international law, several treaties and conventions signed by the majority of the world’s nations have codified the law in this area. This treaty law, particularly the Geneva Conventions, to which the DPRK itself agreed, constitutes a solid starting point for assessing whether such laws of war actually apply to the actions of the DPRK since signing the armistice.

A. *The Geneva Conventions and Their Protocols*

The DPRK agreed to the four Geneva Conventions of 1949 on August 27, 1957, and the Conventions’ provisions came into effect on February 27, 1958.⁶⁵ Ironically, a mere week and a half earlier, North Korean agents hijacked a South Korean plane en route to Seoul.⁶⁶ North Korea later acceded to the Conventions’ first protocol on March

64. *A Timeline of North Korea’s Nuclear Development*, *supra* note 60.

65. Accession to Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 27, 1957, 278 U.N.T.S. 262 (entered into force Feb. 27, 1958); Accession to Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 27, 1957, 278 U.N.T.S. 261 (entered into force Feb. 27, 1958); Accession to Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 27, 1957, 278 U.N.T.S. 260 (entered into force Feb. 27, 1958); Accession to Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 27, 1957, 278 U.N.T.S. 259 (entered into force Feb. 27, 1958).

66. NANTO, *supra* note 26, at 3. The hijacking took place on February 16, 1958. *North Korean Agents Hijacked a South Korean DC-3 Airliner*, THIS WEEK IN USAF & PACAF HIST. (U.S. Air Force), Feb. 16–22, 2009, at 2, <http://www.pacaf.af.mil/shared/media/document/t/AFD-090218-081.pdf>, archived at <http://perma.cc/VY6U-VNU3>. This hijacking was separate from the hijacking that took place in December of 1969.

9, 1988, and its provisions came into effect on September 9, 1988.⁶⁷ The significance of these dates crystallizes when discussing these treaties' application to the DPRK's actions, but they demonstrate that North Korea has been a party to each for quite some time and hence should be aware of their applicability and relevance.

This analysis starts with Common Article 2 of the Geneva Conventions; Article 2 of each convention states:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.⁶⁸

Even though this language appears quite broad on its face, interpretation and applicability of its words have proven even broader. The Commentary to the Geneva Conventions clarifies how this article relates to the Conventions' applicability in the context of armed conflicts:

There is no need for a formal declaration of war, or for recognition of the existence of a state of war, as preliminaries to the application of the Convention. The occurrence of *de facto* hostilities is sufficient. . . . *Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2*, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbrous machinery.⁶⁹

The International Committee of the Red Cross (ICRC) reaffirmed this understanding of how a mere resort to arms by two states triggers

67. Accession to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Mar. 9, 1988, 1513 U.N.T.S. 492 (entered into force Sept. 9, 1988).

68. *E.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950).

69. INT'L COMM. OF THE RED CROSS, COMMENTARY: II GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA 28 (Jean S. Pictet ed., 1960) (emphasis added).

an international armed conflict (IAC) as well as the Conventions' applicability.⁷⁰ Citing the Conventions' commentary, the ICRC stated:

An IAC occurs when one or more States have recourse to armed force against another State, regardless of the reasons or the intensity of this confrontation. Relevant rules of IHL may be applicable even in the absence of open hostilities. Moreover, no formal declaration of war or recognition of the situation is required. The existence of an IAC, and as a consequence, the possibility to apply International Humanitarian Law to this situation, depends on what actually happens on the ground. It is based on factual conditions.⁷¹

The ICRC adopted the opinion of the scholars D. Schindler and H.P. Gasser: that an international armed conflict comes into existence and triggers the conventions' applicability under this Article as soon as one State employs any armed force against another.⁷²

North Korea on dozens of occasions—ranging from shooting down aircraft, infiltrating South Korea and killing its soldiers, government officials and citizens, sinking fishing and patrol boats, bombing military and civilian targets, and participating in gun battles at sea around the Korean peninsula—has resorted to and instigated armed conflict with South Korea and other nations, including the United States.⁷³ Therefore, under this definition, an international armed conflict still presently exists in Korea and applies to North Korea's actions from 1958 onward.

The first Protocol to the Geneva Conventions offers similar applicability, suggesting that its added protections apply to North

70. See generally *How Is the Term "Armed Conflict" Defined in International Humanitarian Law?* 1 (Mar. 2008) [hereinafter *ICRC Opinion Paper*], <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>, archived at <https://perma.cc/5E66-D3QN>.

71. *Id.*

72. *Id.* at 2 (citing Hans Haug with Hans-Peter Gasser, *International Humanitarian Law*, in HANS HAUG ET AL., *HUMANITY FOR ALL: THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT* 491, 510–11 (1993); Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, in 163 *THE COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 117, 131 (1979)).

73. See, for example, the United States' Congressional Research Service's many sources for a timeline of all such provocations from 1950 to early 2007. CHANLETT-AVERY ET AL., *supra* note 42, *passim*; HANNAH FISCHER, CONG. RESEARCH SERV., RL30004, *NORTH KOREAN PROVOCATIVE ACTIONS, 1950–2007 passim* (2007); MANYIN ET AL., *supra* note 42, *passim*; NANTO, *supra* note 26, *passim*.

Korea's actions as well. Under Article 1, Protocol 1 supplements the Geneva Conventions and thus applies in every situation that falls under Common Article 2 above.⁷⁴ The Protocol's Commentary reinforces this interpretation as well by stating that

humanitarian law also covers any dispute between two States involving the use of their armed forces. Neither the duration of the conflict, nor its intensity, play[s] a role: the law must be applied to the fullest extent required by the situation of the persons and the objects protected by it.⁷⁵

The question arises whether the Armistice constitutes a sufficient cessation of hostilities that would make IHL and the Conventions inapplicable. Article 3 may arguably place a damper on the Protocol's applicability to the Korean situation. It reads: "The application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations"⁷⁶ This could be interpreted to mean that the Korean Armistice represents a "general close of military operations" in the region, and therefore, the provisions of the Protocol would not apply. However, the Commentary again sheds light on the application to Korea:

"Military operations" means the movements, [maneuvers] and actions of any sort, carried out by the armed forces with a view to combat. "The general close of military operations" is the same expression as that used in Article 6 of the Fourth Convention, which, according to the commentary thereon, may be deemed in principle to be at the time of a general armistice, capitulation or just when the occupation of the whole territory of a Party is completed, *accompanied by the effective cessation of all hostilities*, without the necessity of a legal instrument of any kind. When there are several States on one side or the other, the general close of military operations could mean the *complete*

74. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1, *opened for signature* June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Geneva Protocol I].

75. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 40 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds., 1987), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf, *archived at* <http://perma.cc/AZD7-QBP2>.

76. Geneva Protocol I, *supra* note 74, art. 3.

cessation of hostilities between all belligerents, at least in a particular theatre of war.⁷⁷

In effect, this language indicates that the Protocol's application ceases only when there is a complete or effective cessation of all hostilities among all belligerents.⁷⁸ This makes sense because "[the Protocol] is aimed, above all, at protecting individuals, and not at serving the interests of States."⁷⁹ Applicability of humanitarian law to protect individuals does not cease merely because parties think that hostilities will not continue after an armistice. Again, based on North Korea's historic and continuing military provocations,⁸⁰ a complete cessation of hostilities has not transpired, and therefore, the DPRK's actions after 1988 (at a minimum because of accession to the Protocol then) would fall under the Protocol.

B. *International Case Law*

The opinion paper of the International Committee of the Red Cross analyzed above also presented the primary jurisprudence for its definition of an international armed conflict: *Prosecutor v. Tadic*.⁸¹ In its maiden case, the International Criminal Tribunal for the Former Yugoslavia (ICTY) considered and defined the term "armed conflict" within the bounds of IHL.⁸² The trial chamber, in considering a motion for interlocutory appeal on jurisdiction, found that

an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general

77. INT'L COMM. OF THE RED CROSS, *supra* note 75, at 67–68 (emphasis added) (footnotes omitted).

78. More evidence of this meaning is found in the next paragraph of the commentary: "The general close of military operations may occur after the 'cessation of active hostilities' referred to in Article 118 of the Third Convention: although a ceasefire, even a tacit ceasefire, may be sufficient for that Convention, military operations can often continue after such a ceasefire, even without confrontations." *Id.* at 68.

79. *Id.* at 40.

80. See *supra* note 73 and accompanying text; see also *infra* Part IV.

81. ICRC *Opinion Paper*, *supra* note 70, at 2 & n.5 (citing *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995)).

82. *Tadic*, Case No. IT-94-1-I, ¶ 70.

conclusion of peace is reached Until that moment, international humanitarian law continues to apply in the whole territory of the warring States⁸³

The court recognized that determining whether an armed conflict exists is a crucial jurisdictional question for international criminal tribunals because IHL applies only within the duration of an armed conflict.⁸⁴ However, IHL applies whether the armed conflict is international or non-international.⁸⁵ The appellate chamber affirmed this determination and added that an internal armed conflict can become international if another State intervenes with its own troops or if participants in the conflict act on behalf of an outside state.⁸⁶

The establishment of the *Tadic* rule has been confirmed by reliance upon it in many subsequent cases. For example, in *Prosecutor v. Kupreskic*,⁸⁷ the ICTY trial chamber stated again that “[a]n armed conflict can be said to exist whenever there is a resort to armed force between States.”⁸⁸ The ICTY has further clarified that a determination that an international armed conflict exists predicates application of Common Article 2 of the Geneva Conventions as a substantive element of a war crime.⁸⁹ The appeals chamber in *Prosecutor v. Naletilic & Martinovich*⁹⁰ did just this again in relation to grave breaches under the Geneva Conventions.⁹¹ The appellate chamber in *Tadic* further enshrined the concept that the existence of an international armed conflict activates the grave breaches provisions of the Geneva Conventions.⁹² Although this decision and precedent have proven

83. *Id.*

84. *Id.* ¶ 67.

85. *Id.*

86. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 84 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

87. Case No. IT-95-16-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

88. *Id.* ¶ 545; *see also* *Prosecutor v. Boskoski*, Case No. IT-04-82-T, Judgment, ¶ 175 (Int’l Crim. Trib. for the Former Yugoslavia July 10, 2008).

89. *Prosecutor v. Naletilic*, Case No. IT-98-34-A, Judgment, ¶ 116 (Int’l Crim. Trib. for the Former Yugoslavia May 3, 2006).

90. *Id.*

91. *Id.* ¶¶ 116–17.

92. *See* Bartram S. Brown, *Nationality and Internationality in International Humanitarian Law*, 34 STAN. J. INT’L L. 347, 376–77 (1998).

controversial,⁹³ it has become a defining element in prosecuting defendants for war crimes and these breaches under the conventions.

Under this definition, the hundreds of armed skirmishes between North Korea and primarily South Korea compose a continuing “international armed conflict,” especially considering their pattern through the decades. For example, in July of 1997, fourteen North Korean soldiers intentionally crossed the DMZ and, after repeated warnings to disengage, proceeded to start a twenty-three minute exchange of heavy gunfire with South Korean soldiers.⁹⁴ Accordingly, this analysis concludes that IHL would apply to these sorts of situations of armed attacks under *Tadic*, as well as the application of the Geneva Convention’s grave breaches provisions.

C. *The DPRK’s Continuing Hostilities: Its Pattern and Goals*

North Korea’s denunciation of the armistice continues a pattern of precipitating crises and engaging in provocations. The DPRK expelled mandated neutral armistice observers and closed their facilities to increase diplomatic pressure.⁹⁵ In addition to North Korea’s proliferation media dance and defiance, it has systematically perpetuated a series of hostilities against several other nations to achieve particular goals.⁹⁶

From 1953 to 1996, North Korea initiated a total of 361 armed attacks, 539 armed incursions, and 687 exchanges of gunfire, aggregating a total of 1,587 incidents.⁹⁷ From 1997 to 2003, infiltrations and abductions by North Korean agents, infantry and naval military skirmishes, and gunfire exchange remained commonplace.⁹⁸ For example, North Korean ships provoked a nine-day naval confrontation with South Korea in the Yellow Sea over disagreement about the Northern Limit Line in June of 1999.⁹⁹ Over the last decade, the DPRK has continued its provocations by launching a series of short-range and

93. *See id.* at 375–76.

94. NANTO, *supra* note 26, at 15.

95. Morris, *supra* note 2, at 33.

96. Tan, *The North Korean Nuclear Crisis*, *supra* note 15, at 522–23.

97. James M.H. Lee, *The Korean Armistice and North–South Dialogue*, KOREA SOC’Y Q., Summer 2001, at 9, 11 tbl.1.

98. NANTO, *supra* note 26, at 14–26.

99. *Id.* at 19.

medium-range missiles into the Sea of Japan (East Sea according to Korea) and conducting numerous nuclear tests.¹⁰⁰

Tensions and conflict have not ceased over the last few years. On March 26, 2010, as a recent independent investigation revealed, North Korea sank the South Korean navy corvette *Cheonan*, killing 46 South Korean sailors.¹⁰¹ Later on in 2010, on November 23, “North Korea fired over 170 artillery rounds toward Yeonpyeong Island in the Yellow Sea, killing two South Korean marines and two civilians, injuring many more and damaging multiple structures.”¹⁰² In 2012, the DPRK attempted to launch two satellites, one successfully, which many observers considered to be equal to ballistic missile tests and in violation of the Leap Day Agreement it had just signed with the U.S.¹⁰³

The year 2013 saw perhaps the apogee of such tension. The latest nuclear test of February 2013, conducted less than a month after the UN Security Council condemned North Korea’s satellite launches,¹⁰⁴ provoked another strongly worded resolution by the Council to impose immediate, greater economic sanctions.¹⁰⁵ Although this Article will discuss North Korea’s nuclear provocations in greater depth in the next section, this bold provocation highlights the North’s continued and

100. *E.g., id.* at 17, 25, 26 (August 31, 1998, saw the test fire of “a new 3-stage Taepodong-1 missile in an arc over Japan”; February 24, 2003, saw the firing of “a short-range, anti-ship missile into the Sea of Japan”; and March 2003 saw the firing of “a Silkworm ground-to-ship nonballistic missile into the Sea of Japan.”); CHANLETT-AVERY ET AL., *supra* note 42, at 20 (May 1, 2005: “The BBC reports that North Korea has test-fired a short-range missile into the Sea of Japan. The missile was believed to have traveled about 100 kilometers, or 60 miles, into the sea between the two countries.”); FISCHER, *supra* note 73, at 32 (“03/10/06—North Korea test-fires two short-range missiles from a coastal site on the Sea of Japan. According to a South Korea government official, the missiles probably dropped into the sea about 100 km away. . . . 07/04/06—Defying broad international pressure, North Korea test-fires six missiles into the Sea of Japan, including a long-range Taepodong-2 with the theoretical capacity to reach the continental U.S. However, the Taepodong-2 failed 40 seconds into its flight. . . . 07/05/06—North Korea launches a seventh missile, despite broad international condemnation of the earlier launches.”)

101. EMMA CHANLETT-AVERY & IAN E. RINEHART, CONG. RESEARCH SERV., R41259, NORTH KOREA: U.S. RELATIONS, NUCLEAR DIPLOMACY, AND INTERNAL SITUATION 6–7 (2013).

102. *Id.* at 7.

103. *See id.* at 7–8.

104. S.C. Res. 2087, ¶ 1, U.N. Doc. S/RES/2087 (Jan. 22, 2013); Press Release, Security Council, Security Council Condemns Use of Ballistic Missile Technology in Launch by Democratic People’s Republic of Korea, in Resolution 2087 (2013), U.N. Press Release SC/10891 (Jan. 22, 2013).

105. S.C. Res. 2094, *supra* note 7; Lederer & Kim, *supra* note 7.

systematic “fist-shaking” at the international community, the Northeast Asian region, and the United States.¹⁰⁶

North Korea, while proliferating weapons, tries to creep ever closer to its greater goals. As articulated in depth in the first companion article, the DPRK’s ultimate goal of reunifying the Korean peninsula by force reinforces the invocation of international humanitarian law.¹⁰⁷ In addition to intimidation, as the highest-level defector from North Korea, Hwang Jang-Yop, has conveyed, North Korea plans to do this by removing the United States’ commitment to South Korea and fostering positive sentiment towards North Korea within South Korea.¹⁰⁸ Its continued hostilities have not only kept the region on the brink of full-scale war but also twisted the arms of the international community to provide benefits to the nation.¹⁰⁹ It has also sought to intimidate the international community and to buy time to perfect nuclear capabilities—especially inter-continental ballistic missile capability along with the technology to shrink a nuclear device into a missile warhead—while keeping the United States, South Korea, and Japan at bay. However, North Korea, by continuing its systematic military hostilities and provocations, has ensured that the Korean conflict is not yet finished and that the state of war persists.¹¹⁰ Such hostilities trigger the application of the laws of international armed conflict and potential liability for crimes and violations of such law.¹¹¹ Applying this law to these continued provocations fills the subsequent, penultimate Part.

IV. APPLYING IHL TO NORTH KOREA’S CONTINUED PROVOCATIONS

A. *The Nuclear Crisis and the Non-Proliferation Treaty*

A brief analysis of North Korea’s proliferation defiance illustrates the DPRK’s use of serious, systematic provocations and presents an important segue into IHL application. It demonstrates North Korea’s goals of reunifying the peninsula through force and intimidation and manifests the state’s utter disregard for international law, as well as law in general.

106. See, e.g., Tan, *The North Korean Nuclear Crisis*, *supra* note 15, at 522–23; see also *infra* Part IV.

107. Tan, *The North Korean Nuclear Crisis*, *supra* note 15, at 527.

108. *Id.* at 543–46 & n.195.

109. See *id.* at 527, 536–37.

110. See *supra* Part III.A–B.

111. See *supra* Part III.A–B.

1. A Timeline

On March 12, 1993, North Korea informed the world that it would be the first nation in history to withdraw (or attempt to withdraw) from the NPT under the guise of the treaty's Article X provisions.¹¹² The DPRK claimed that recent, routine South Korean military exercises and a lack of objectivity of International Atomic Energy Agency (IAEA) inspections threatened their state sovereignty and supreme national interests.¹¹³ It proceeded to attempt this withdrawal just a day before the three-month required notice under Article X.¹¹⁴ After reactivating its nuclear facilities in December of 2002,¹¹⁵ on January 10, 2003, North Korea announced that it would officially withdraw from the NPT the following day.¹¹⁶ Its justification was that the aggregate notice of the two withdrawal statements was supposedly sufficient to fulfill the three month required notice.¹¹⁷

After several years and rounds of the Six-Party Talks, and after the United States' discovery that North Korea was performing extensive money laundering in late 2005, the DPRK threatened to completely withdraw from the Six-Party Talks.¹¹⁸ Tensions grew until July 4, 2006, when the attempted launching of a long-range missile triggered a Security Council resolution condemning the test-firing.¹¹⁹ Three months later, on October 9, 2006, North Korea announced that it had successfully conducted its first underground nuclear test.¹²⁰ This led to a strongly worded Security Council resolution condemning the test, urging North Korea to abandon the program and return to the NPT, and imposing widespread military and economic sanctions on the nation.¹²¹

112. *A Timeline of North Korea's Nuclear Development*, *supra* note 60.

113. George Bunn & Roland Timerbaev, *The Right to Withdraw from the Nuclear Non-Proliferation Treaty (NPT): The Views of Two NPT Negotiators*, YADERNY KONTROL (NUCLEAR CONTROL) DIG., Winter/Spring 2005, at 20, 20–21.

114. *Id.* at 21; *A Timeline of North Korea's Nuclear Development*, *supra* note 60.

115. *A Timeline of North Korea's Nuclear Development*, *supra* note 60.

116. FISCHER, *supra* note 73, at 25; Bunn & Timerbaev, *supra* note 113, at 21.

117. Bunn & Timerbaev, *supra* note 113, at 21.

118. *See A Timeline of North Korea's Nuclear Development*, *supra* note 60.

119. S.C. Res. 1695, *supra* note 60 (“Condemns the multiple launches by the DPRK of ballistic missiles on 5 July 2006 local time . . .”); FISCHER, *supra* note 73, at 32; *A Timeline of North Korea's Nuclear Development*, *supra* note 60.

120. FISCHER, *supra* note 73, at 32–33.

121. S.C. Res. 1718, ¶¶ 1–8, U.N. Doc. S/RES/1718 (Oct. 14, 2006) (“Condemns the nuclear test proclaimed by the DPRK on 9 October 2006 in flagrant disregard of its relevant resolutions, in particular resolution 1695 (2006), as well as of the statement of its President of

Less than three years later and after years of further negotiations and nuclear tension, North Korea conducted a second nuclear test on April 5, 2009.¹²² Another strong Security Council resolution passed shortly thereafter condemning the test, extending sanctions, and allowing for the inspection of all cargo to and from the DPRK.¹²³ However, such sanctions did not induce North Korea to return to the NPT. As if the DPRK did not learn of the gravity of its offenses, in 2012, after years of test-firing short and medium-range missiles mentioned above, it attempted to launch two satellites, bringing forth more Security Council disapproval.¹²⁴ Most recently, North Korea conducted another nuclear test on February 12, 2013, sparking international criticism, including from China, the DPRK's closest ally, and further rebuke by the Security Council.¹²⁵

2. Probing for Significance

One may ask why such acts bear significance in relation to international armed conflict and international humanitarian law. Two answers follow: (1) by incorrectly withdrawing from the NPT and egregiously violating the treaty's provisions thereafter, North Korea has insistently defied international law, and (2) available jurisprudence suggests that such breaches and threats of nuclear violence violate the principles found in the UN Charter and violate the general principles of international law applicable in armed conflict.

Article X of the NPT states that parties may withdraw from the treaty if a state "decides that extraordinary events, related to the subject matter of [the] Treaty, have jeopardized the supreme interests of its country," further requiring the party to give notice of any withdrawal and the reasons for doing so to all contracting parties and the Security

6 October 2006 (S/PRST/2006/41), including that such a test would bring universal condemnation of the international community and would represent a clear threat to international peace and security . . .").

122. *A Timeline of North Korea's Nuclear Development*, *supra* note 60.

123. S.C. Res. 1874, *supra* note 13.

124. S.C. Res. 2087, *supra* note 104, ¶ 1 ("Condemns the DPRK's launch of 12 December 2012, which used ballistic missile technology and was in violation of resolutions 1718 (2006) and 1874 (2009) . . ."); CHANLETT-AVERY & RINEHART, *supra* note 101, at 7.

125. S.C. Res. 2094, *supra* note 7, ¶ 1 ("Condemns in the strongest terms the nuclear test conducted by the DPRK on 12 February 2013 (local time) in violation and flagrant disregard of the Council's relevant resolutions . . ."); Lederer & Kim, *supra* note 7.

Council three months in advance.¹²⁶ North Korea simply did not do this, and thus, the NPT still applies to its actions to this very day. When the DPRK first reasoned that their supreme interest was at stake, they highlighted two reasons: (1) South Korea's standard military exercises and (2) the IAEA's biased nature toward inspections of nuclear facilities.¹²⁷ South Korea posed no nuclear threat to North Korea at this time—not having such capabilities—and the United States withdrew nuclear weapons in the region, albeit while retaining remote strike capabilities.¹²⁸

Further, it strains credibility as to how any “biased” (so accused because it successfully uncovered illicit activity) IAEA special inspections regarding a small reprocessing plant posed any nuclear threat or other imminent threat to North Korea, or even amounted to an extraordinary event.¹²⁹ Indeed, the accurate analysis of the IAEA that circumvented the DPRK's attempts to hide its military nuclear program led to the DPRK's protest and ejection of IAEA inspectors and monitoring devices.¹³⁰ Additionally, the objections differed in the second notice of withdrawal.¹³¹

Those that produced the NPT intended that the treaty's notice requirement help the Security Council and treaty members determine if valid reasons necessitating withdrawal exist based on a security threat to the withdrawing state, and whether to support, delay, or deny such withdrawal.¹³² North Korea did not adequately allow this to happen and then ignored the Council on several occasions when the Council concluded that no reason existed that necessitated withdrawal.¹³³

126. Treaty on the Non-Proliferation of Nuclear Weapons, art. X, July 1, 1968, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970) [hereinafter NPT].

127. Bunn & Timerbaev, *supra* note 113, at 21.

128. *See id.* at 23; Tan, *The North Korean Nuclear Crisis*, *supra* note 15, at 529 (“[I]n 1991, the United States removed all of its nuclear weapons from Korea.”).

129. *See* Bunn & Timerbaev, *supra* note 113, at 23.

130. *See* JASPER BECKER, ROGUE REGIME: KIM JONG IL AND THE LOOMING THREAT OF NORTH KOREA 165–89 (2005).

131. Bunn & Timerbaev, *supra* note 113, at 21 (“In North Korea's 2003 letter to NPT parties, it complained of President Bush's inclusion of it within his ‘axis of evil’ category and it maintained that the United States was targeting it for a preemptive strike. But, since it did not provide a new three-month withdrawal period, it had to have been relying on its 1993 notice of withdrawal as justification, and that notice did not contain these reasons.” (footnote omitted)).

132. *Id.* at 21–22.

133. *See, e.g.*, S.C. Res. 2094, *supra* note 7, ¶¶ 3–5 (“Condemns all the DPRK's ongoing nuclear activities, including its uranium enrichment, notes that all such activities are in

Furthermore, North Korea cannot patch together notice time periods to get past this notice requirement by pulling out a lapsed withdrawal and reinstating it a decade in the future.¹³⁴ North Korea's approach frustrates the object and purpose of the Treaty.

Additionally, IAEA Safeguards and IAEA inspections should have continued during these withdrawal periods,¹³⁵ something not possible considering North Korea refused to allow inspectors into the few areas where it likely produced nuclear weapons (i.e., the small reprocessing plant in Yongbyon) – well before a final supposed withdrawal in 2003.¹³⁶ In essence, it is difficult to see how North Korea's "withdrawal" could have been effective at any point in time to make the NPT not binding. However, a compelling case has been made that, even if North Korea had effectively withdrawn at its first attempt, the IAEA Safeguards provisions still would have applied, resulting in a clear breach of the NPT's provisions.¹³⁷

The NPT's application of its substantive provisions disallows the path that North Korea has pursued. Article II states that each party agrees "not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices."¹³⁸ It is impossible to test nuclear weapons without manufacturing them or acquiring help to do the same, as they reportedly received nuclear centrifuge technology from Pakistan in return for

violation of resolutions 1718 (2006), 1874 (2009) and 2087 (2013), *reaffirms* its decision that the DPRK shall abandon all nuclear weapons and existing nuclear programmes, in a complete, verifiable and irreversible manner and immediately cease all related activities and shall act strictly in accordance with the obligations applicable to parties under the NPT and the terms and conditions of the IAEA Safeguards Agreement (IAEA INFCIRC/403) . . .").

134. See Bunn & Timerbaev, *supra* note 113, at 23 ("In North Korea's view, by its 2003 announcement and a one-day notice period, it had fulfilled the NPT's three-month notice requirement because it was relying on the 89 days that had gone by after the 1993 notice was given before North Korea announced that the 1993 notice was no longer in effect.").

135. See Perez, *supra* note 6, at 797.

136. Bunn & Timerbaev, *supra* note 113, at 20–21; *A Timeline of North Korea's Nuclear Development*, *supra* note 60.

137. See Perez, *supra* note 6, at 797. Professor Perez presented compelling arguments on the subject: that the IAEA's right to safeguards based on the special investigation requested before North Korea's withdrawal from the NPT, in effect, survived the withdrawal, thereby making North Korea's refusal to allow inspections a continued breach of the NPT's provisions, which could have been justification for Security Council sanctions. *Id.* at 752–53.

138. NPT, *supra* note 126, art. II.

medium-range ballistic missile technology.¹³⁹ Article III maintains that parties must accept IAEA safeguards and actions taken thereupon.¹⁴⁰ North Korea essentially violated this article outright with its refusal to allow certain inspections in 1993 based on these safeguards, which ironically led to its attempted withdrawal from the treaty in the first place.¹⁴¹ Article VI requires parties “to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”¹⁴² North Korea has repeatedly defied this principle in its outright condemnation and violations of many negotiated agreements related to nuclear proliferation and intentionally ignoring numerous Security Council resolutions, sometimes days after their promulgation.¹⁴³

Moreover, nuclear threats and any use of such weapons violate principles of international law even beyond the NPT. The International Court of Justice in its *Legality of the Threat or Use of Nuclear Weapons* advisory opinion (*Nuclear Weapons Case*) confirmed this notion.¹⁴⁴ The court unanimously concluded that “[a] threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law.”¹⁴⁵ It also found that an obligation exists “to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”¹⁴⁶ With North Korea’s repeated defiance of the NPT and the IAEA, as illustrated above, and the numerous inter-Korean and other agreements that it has signed to put an end to proliferation on the Korean peninsula, good faith fails to fit North Korea’s forcible reunification goal.¹⁴⁷

139. SHARON A. SQUASSONI, CONG. RESEARCH SERV., RL31900, WEAPONS OF MASS DESTRUCTION: TRADE BETWEEN NORTH KOREA AND PAKISTAN 3–4, 7 (2006).

140. NPT, *supra* note 126, art. III.

141. *See supra* note 127 and accompanying text.

142. NPT, *supra* note 126, art. VI.

143. *See, e.g., supra* Part II.C and notes 112–25 and accompanying text.

144. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8).

145. *Id.* at 266.

146. *Id.* at 267.

147. Tan, *The North Korean Nuclear Crisis*, *supra* note 15, at 532–33 (discussing North Korea’s breaching of the Agreed Framework); *see supra* Parts II, IV.A and note 126.

More importantly, a majority of the Court specified how these requirements fit together:

[T]he threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake. . . .¹⁴⁸

After the passing of the Security Council resolution on March 7, 2013, which strongly condemned North Korea's third nuclear test, the DPRK directly threatened a preemptive nuclear attack against the United States.¹⁴⁹ Just like the repeated threats directed to South Korea, in which the North has threatened to turn Seoul into a "sea of fire,"¹⁵⁰ this reaction of the 7th of March included a statement by Army General Kang Pyo-Tolg Yong that long-range nuclear missiles would be launched against Washington, D.C., so that it would "be engulfed in a sea of fire."¹⁵¹ These sorts of nuclear threats contravene the aforementioned ICJ opinion. Additionally, North Korea does not make such threats out of self-defense, since neither aggression nor threat of aggression from any other state precipitated this highly inflammatory threat; conversely, it would be more appropriate under this standard to see that *South Korea* would be entitled to put forth such threats—considering North Korea's systematic provocations and hostilities over the last fifty-five years against that state.¹⁵²

Furthermore, the ICJ also alluded that such nuclear threats violate certain aspects of customary international law. For example, the court

148. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. at 266.

149. Lederer & Kim, *supra* note 7.

150. NANTO, *supra* note 26, at 12 ("03/1994—For the first time in more than two decades, North Korea issued a threat of war in an inter-Korean meeting in Panmunjom. In response to Seoul's chief delegate mentioning the possibility of UN sanctions against the North for its refusal to accept full international nuclear inspections, Pyongyang's chief delegate reportedly replied: 'Seoul is not far away from here. If a war breaks out, Seoul will turn into a sea of fire.'" (quoting John Burton, *North Korea's "Sea of Fire" Threat Shakes Seoul*, FIN. TIMES, Mar. 22, 1994, at 6)).

151. Lederer & Kim, *supra* note 7 (internal quotation mark omitted).

152. See *supra* Part III.C.

concluded in the *Nuclear Weapons Case* that “[a] threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful.”¹⁵³ Paragraph four indicates that UN members must refrain from using “threat or use of force against the territorial integrity or political independence of any state.”¹⁵⁴ This paragraph and the court’s conclusion matter because North Korea ultimately aims to destroy “the territorial integrity or political independence of” South Korea and reunite the peninsula by force.¹⁵⁵ Notably, the DPRK recently joined the UN as a member state. Furthermore, this principle may have risen to customary international law status.¹⁵⁶

B. *Applicable Treaties and Conventions*

In addition to North Korea’s proliferation mischief, its systematic hostilities towards South Korea, Japan, the United States, and other nations create greater ramifications under applicable international humanitarian law treaties and conventions. Restrictions on the means of warfare (*jus in bello*) follow with the application of IHL. Applicability to the present Korean conflict and North Korea’s actions are indisputable because *the DPRK signed or ratified every treaty and convention indicated below*. This section will demonstrate that the DPRK’s actions provide a solid basis for grave breaches of IHL and other international law.

1. The Geneva Conventions and Protocol I

Two of the 1949 Geneva Conventions rise to the level of primary concerns in our analysis: the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva Convention III)¹⁵⁷ and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (Geneva Convention IV).¹⁵⁸

153. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. at 266.

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

155. See, e.g., Tan, *The North Korean Nuclear Crisis*, *supra* note 15, at 519, 527, 533–34.

156. See, e.g., Mary Ellen O’Connell & Maria Alevras-Chen, *The Ban on the Bomb—And Bombing: Iran, the U.S., and the International Law of Self-Defense*, 57 SYRACUSE L. REV. 497, 502–03 (2007).

157. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention III].

158. Geneva Convention Relative to the Protection of Civilian Persons in Time of War,

This Article focuses on these two because the first two conventions apply to wounded, sick, and shipwrecked armed forces, classes of individuals that have not been the primary victims of North Korea's more current hostilities since 1958, when the DPRK became subject to the Geneva Conventions' provisions.¹⁵⁹ Prisoners of war (POWs) and civilians have not fared as well.

Geneva Convention III provides an extensive protective framework for prisoners of war in armed conflict. Article 12 makes it clear that states retain responsibility for these individuals' treatment, regardless of whom or what military unit captured them.¹⁶⁰ The majority of Geneva Convention III outlines the living conditions of POWs, who should receive humane treatment from the detaining power; murdering or endangering the health of a POW counts as a grave breach of the Convention's provisions.¹⁶¹ Violence, intimidation, torture, experimentation, and discrimination against POWs run contrary to Geneva Convention III.¹⁶² From Article 21 to Article 130, Geneva Convention III lists and explains the necessary treatment of POWs by the detaining power, requiring everything from providing adequate food and proper living arrangements (i.e., basic necessities)¹⁶³ to freedom of religion, reasonable payment for work performed while detained, and even periodic visits from the representatives of their home countries.¹⁶⁴ Indeed, the law even requires states to allow POWs to participate in recreational activities, write to their families back home, and elect representatives from their camps!¹⁶⁵ Article 129 requires parties to the convention to enact proper legislation to punish those individuals who violate such treatment requirements of POWs,¹⁶⁶ while Article 131

Aug 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention IV].

159. See *supra* Parts III.A, C.

160. Geneva Convention III, *supra* note 157, art. 12.

161. *Id.* art. 13 ("Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention.").

162. *Id.* arts. 13–17, 130.

163. *E.g., id.* art. 25.

164. *E.g., id.* arts. 34, 60–67, 126.

165. *E.g., id.* arts. 38, 70, 79–81.

166. *Id.* art. 129 ("The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.").

specifies that parties cannot absolve themselves of “any liability incurred by [themselves] . . . or by another High Contracting Party in respect of [grave] breaches.”¹⁶⁷

South Korea’s National Intelligence Service has reported in the recent past that 407 POWs still remained in North Korea, of which 268 were said to be alive in January of 2001 (83 fewer than the previous September).¹⁶⁸ It also reported that a total of 16 POWs had been returned between 1994 and September of 2000, after years of hard labor and “re-education” in the DPRK.¹⁶⁹ Although estimates are scarce on actual POW numbers and their treatment, one incident gives an example of how North Korea has violated and continues to violate Geneva III in their treatment.

On January 23, 1968, North Korea attacked and seized the intelligence ship, the *USS Pueblo*, in international waters, killing one crewman and detaining 82 others.¹⁷⁰ The DPRK incarcerated the crew until mid-December of that year when it returned them to South Korea, but the ship stayed behind as a trophy museum piece for the regime.¹⁷¹ Within that time period, North Korea quartered several to a room, and the POWs were “threatened with death, interrogated, and some were severely beaten,” eliciting supposed “[c]onfessions” as to their “criminal aggressive acts.”¹⁷² Their treatment was documented through interviews shortly after their return by the Naval Health Research Center in California:

167. *Id.* arts. 130–31 (“Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.”).

168. NANTO, *supra* note 26, at 5 & n.10.

169. *Id.* at n.10.

170. NANTO, *supra* note 26, at 4; RAYMOND C. SPAULDING, NAVAL HEALTH RESEARCH CTR., SOME EXPERIENCES REPORTED BY THE CREW OF THE USS PUEBLO AND AMERICAN PRISONERS OF WAR FROM VIETNAM 2 (1975), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a077057.pdf>, archived at <http://perma.cc/TMK5-E5VK>; Richard Mobley, *Pueblo: A Retrospective*, NAVAL WAR C. REV., Spring 2001, at 98, 98, available at <https://www.usnwc.edu/getattachment/08740ee7-e8a4-497e-83c8-6a12bb3e3827/Pueblo--A-Retrospective---Mobley,-Richard.aspx>, archived at <https://perma.cc/XKD4-PUHM>.

171. NANTO, *supra* note 26, at 4; SPAULDING, *supra* note 170, at 5; Mobley, *supra* note 170, at 98.

172. SPAULDING, *supra* note 170, at 4 (internal quotation marks omitted).

Their treatment by the North Koreans varied; in general the living quarters, sanitation facilities and medical care were unsatisfactory by western standards. Food was deficient both in quality and quantity. Physical maltreatment was concentrated in two specific periods—the first three weeks (i.e. until all had “confessed”) and a “purge” two weeks prior to release in an effort to obtain names of those crew members who had attempted to communicate their lack of sincerity to the western world. (Propaganda photographs often showed smiling faces in association with obscene gestures.) Physical abuse consisted of fist assaults or kicks in the head or groin. Several crew members who were forced to squat with an inch square stick behind their knees reported losing consciousness and, as a result of the beatings, one man had a fractured jaw. Through lectures, field trips, and written material, the North Koreans attempted to convince crew members of the injustices of their “imperialist” government.¹⁷³

Because of such treatment, researchers discovered that the men were initially depressed and anxious upon return and weeks later were angry and increasingly hostile toward others.¹⁷⁴

The *USS Pueblo* incident demonstrates that North Korea does not treat POWs as required under Geneva Convention III. The psychological and mental torture to which the DPRK subjected them, along with inadequate living quarters, show that the DPRK committed grave breaches of this Convention in 1968.¹⁷⁵ Current POWs apparently have not been allowed to write home to their families.¹⁷⁶ North Korea retains culpability for these violations.

Geneva Convention IV has a similar objective to Geneva Convention III, but instead of protecting POWs, it seeks to protect civilians. Civilians under the Convention “are those who, at a given

173. *Id.*

174. *Id.* at 10–11.

175. *See, e.g.*, Geneva Convention III, *supra* note 157, arts. 17, 130.

176. In fact, few non-citizens of the DPRK can find their way into the North. Even the Special Rapporteurs appointed by the UN Office of the High Commissioner for Human Rights have been disallowed from entering North Korea to investigate mass human rights abuses. *See, e.g.*, G.A. Res. 67/181, ¶ 1, U.N. Doc. A/RES/67/181 (Dec. 20, 2012) (“The continued refusal of the Government of the Democratic People’s Republic of Korea to recognize the mandate of the Special Rapporteur on the situation of human rights in the Democratic People’s Republic of Korea or to extend cooperation to him, despite the renewal of the mandate by the Human Rights Council in its resolutions 7/15, 10/16, 13/14, 16/8 and 19/13” (footnotes omitted)).

moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”¹⁷⁷ These individuals, like POWs, must be granted respect and be free from all forms of violence or coercion.¹⁷⁸ Article 34 prohibits taking hostages, and under Articles 25 and 35, civilians may write to their family and possibly leave the country.¹⁷⁹ As with Convention III, states retain responsibility for the treatment of civilians regardless of individual responsibility.¹⁸⁰ Even if civilians suffer confinement, standards in the Convention grant humane treatment,¹⁸¹ adequate housing, food, water, clothing, and health needs,¹⁸² freedom of religion and recreational opportunities,¹⁸³ a complaint system and representation,¹⁸⁴ and even an outlet for allowing family visits.¹⁸⁵ Any internment must end once the necessity ends, and international humanitarian organizations must have access to these civilians.¹⁸⁶ As with Convention III, grave breaches include torture, inhumane treatment, murdering and other causing of suffering; parties cannot absolve themselves of liability from these grave breaches.¹⁸⁷

Just a few examples illustrate that North Korea has also continuously violated Geneva Convention IV. In December of 1969, “North Korean agents hijacked a South Korean airliner YS-11 to Wonsan en route from Kangnung to Seoul with 51 persons aboard,” of which 12 remained in custody as of January of 2001.¹⁸⁸ The South Koreans aboard the plane place this incident under Geneva IV. A few more kidnapping and hostage cases illustrate North Korea’s actions contrary to Geneva IV: Kim Jong-Il ordered the kidnapping of South Korean actress Choi Eun-hee and her husband Shin Sang-ok in February of 1978, and the DPRK abducted a South Korean teacher in June of 1979, a South Korean student in August of 1987, a pastor in July

177. Geneva Convention IV, *supra* note 158, art. 4.

178. *Id.* arts. 27, 31–32.

179. *Id.* arts. 25, 34–35.

180. *Id.* art. 29.

181. *Id.* art. 37.

182. *Id.* arts. 85, 89, 90, 92.

183. *Id.* arts. 93–94.

184. *Id.* arts. 101–04.

185. *Id.* art. 116.

186. *Id.* arts. 132, 142–43.

187. *Id.* arts. 147, 148.

188. NANTO, *supra* note 26, at 5.

of 1995, a South Korean businessman in September of 1999, and a U.S. reverend in January of 2000.¹⁸⁹ When North Korea seizes hostages in clear violation of Article 34,¹⁹⁰ it often does not allow them to write home to their families, to leave the country, or to accept visits from international organizations like the Red Cross.¹⁹¹ North Korea has not adopted as its *modus operandi* the disclosure of the precise location of these civilian prisoners to the protecting power (i.e., South Korea or the United States) or their families under Article 83,¹⁹² and at times does not release them under Article 132 after any supposed necessity for their internment has ended.¹⁹³ North Korea sometimes subjects these individuals to torture, not unlike what it inflicts upon the estimated 120,000–200,000 North Korean citizens found in concentration camps scattered throughout the country.¹⁹⁴

The Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I)¹⁹⁵ creates several additional protections for POWs and civilians and provides very clear humanitarian standards for armed

189. *Id.* at 7, 10, 12, 20.

190. A good definition of “hostage taking” that demonstrates North Korea is likely violating international law can be found in Article 1 of the International Convention Against the Taking of Hostages, a convention that unfortunately they are not a party to:

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person . . . in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages (“hostage-taking”) within the meaning of this Convention.

International Convention Against the Taking of Hostages, art. 1, Dec. 17, 1979, 1316 U.N.T.S. 205 (entered into force June 3, 1983).

191. *E.g.*, BECKER, *supra* note 130, at 147–48.

192. Geneva Convention IV, *supra* note 158, art. 83 (“The Detaining Power shall give the enemy Powers, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of places of internment. Whenever military considerations permit, internment camps shall be indicated by the letters IC, placed so as to be clearly visible in the daytime from the air. The Powers concerned may, however, agree upon any other system of marking. No place other than an internment camp shall be marked as such.”).

193. *Id.* art. 132 (“Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.”).

194. See, for example, DAVID HAWK, CONCENTRATIONS OF INHUMANITY 8 (2007), <https://freedomhouse.org/sites/default/files/ConcentrationsInhumanity.pdf>, archived at <https://perma.cc/A7T8-PKGH>, one of several of David Hawk’s reports from defectors finding that up to 200,000 North Koreans are in such camps across the North.

195. Geneva Protocol I, *supra* note 74.

conflict. For example, it protects POWs and civilians from medical experiments, a grave breach of the protocol.¹⁹⁶ Under Articles 32, 33 and 34, contracting parties must inform families of their relatives' fates promptly and also respect the remains of the dead and search for missing persons after the cessation of active hostilities.¹⁹⁷ The principle of distinction, memorialized in numerous articles, requires that attacks target only military personnel and military establishments rather than civilians and civilian structures.¹⁹⁸ An indiscriminate attack does not aim for a specific military objective.¹⁹⁹ This principle forbids military reprisals against the civilian population.²⁰⁰ Article 60 prohibits parties from extending "their military operations to zones on which they have conferred by agreement the status of demilitarized zone, if such extension is contrary to the terms of this agreement."²⁰¹ The best known DMZ globally, ironically the most militarized border in the world, divides the two Koreas and frequently sees skirmishes.

Article 75 provides a minimum human rights floor prohibiting all violence against a protected individual's health (i.e., murder, physical and mental torture, corporal punishment, and mutilation), humiliating and degrading treatment, forced prostitution, and any form of indecent assault; it also prohibits the taking of hostages, collective punishments, and threats of any such acts.²⁰² Grave breaches include targeting civilians, launching indiscriminate attacks, making demilitarized zones the object of attack, and unjustifiable delay in the repatriation of POWs or civilians.²⁰³ These breaches constitute "war crimes" under Protocol I.²⁰⁴ Most importantly, Article 91 summarizes responsibility: "A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall . . . be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."²⁰⁵

196. *Id.* art. 11.

197. *Id.* arts. 32–34.

198. *E.g., id.* arts. 48, 51.

199. *Id.* art. 51.

200. *Id.*

201. *Id.* art. 60.

202. *Id.* art. 75.

203. *Id.* art. 85.

204. *Id.*

205. *Id.* art. 91.

All of these provisions of Protocol I point directly to numerous hostile acts that North Korea has committed after 1988, when it ratified this Protocol.²⁰⁶ For example, in April of 1996, on three occasions, hundreds of armed North Koreans crossed into the DMZ at or near Panmunjom in clear violation of the armistice.²⁰⁷ Seven more crossed the DMZ the following month, along with eight ships clashing with South Korean forces on two separate occasions.²⁰⁸ Twenty-four more died doing the same that September while on a failed espionage/reconnaissance mission.²⁰⁹ These incidents violate Article 60 as well as the grave breaches provisions of the Protocol.

Consider the North Korean patrol boats that fired on a fishing vessel in May of 1995, killing three fishermen and detaining five more for over six months²¹⁰ in transgression of Article 51. In further violation of Article 51, North Korean agents poisoned Choi Duk-Keun, a South Korean diplomat, while in Russia, to “retaliate” for the above submarine espionage attack gone awry in September.²¹¹ In contravention to Articles 32 through 34, North Korea abducted over a dozen Japanese nationals in the 1970s and 1980s. In response to protests, the DPRK subsequently sent boxes of ashes to Japan; contrary to North Korea’s claims, tests revealed that the boxes did not contain the remains of the kidnapped victims.²¹² Such episodes have galvanized the Japanese populace against North Korea.

An additional violation of Article 51 transpired in November of 2010 when the North unleashed “over 170 artillery rounds toward Yeonpyeong Island in the Yellow Sea, killing two South Korean marines and two civilians,” injuring nineteen, and damaging several structures.²¹³ No intended, specific military target related to the Yeonpyeong Island attack has emerged to date.

2. Illicit Weapons

In addition to the NPT, North Korea ratified two important weapons treaties: the Protocol for the Prohibition of the Use of Asphyxiating,

206. *See supra* note 67 and accompanying text.

207. FISCHER, *supra* note 73, at 12–13.

208. *Id.* at 13.

209. *Id.*

210. *Id.* at 12.

211. *See id.* at 13.

212. MANYIN ET AL., *supra* note 42, at 7.

213. CHANLETT-AVERY & RINEHART, *supra* note 101, at 7.

Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Gas Protocol)²¹⁴ and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (Biological Weapons Convention).²¹⁵ The Gas Protocol prohibits the use of bacteriological warfare methods,²¹⁶ and the Biological Weapons Convention widely expands such prohibitions.²¹⁷

Under the Biological Weapons Convention, parties must not develop or manufacture biological agents, toxins, and weapons for armed conflict,²¹⁸ and must destroy such weapons or divert them to peaceful purposes within nine months of the convention entering into force.²¹⁹ It also prohibits states from transferring such weapons to another state or assisting production of such weapons,²²⁰ as well as requiring states to take all necessary measures to prevent development or retention of them.²²¹ Parties have a duty to “continue negotiations *in good faith* with a view to reaching early agreement on effective measures for the prohibition of their development, production and stockpiling and for their destruction.”²²²

Sources such as the Russian Federal Foreign Intelligence Service, the South Korean Ministry of Defense, and the Central Intelligence Agency (CIA) have reported that North Korea has been developing biological weapons since the 1960s.²²³ Some reports from South Korea claim that the DPRK could have up to thirteen biological agents and pathogens that the DPRK could easily “weaponize” (if it has not done so already) and use in armed conflict, including anthrax, cholera, the

214. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571 [hereinafter Gas Protocol].

215. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583 [hereinafter Biological Weapons Convention].

216. Gas Protocol, *supra* note 214, at 575 (“That the High Contracting Parties . . . agree to extend this prohibition to the use of bacteriological methods of warfare . . .”).

217. See Biological Weapons Convention, *supra* note 215, art. I.

218. *Id.*

219. *Id.* art. II.

220. *Id.* art. III.

221. *Id.* art. IV.

222. *Id.* art. IX (emphasis added).

223. *Chemical and Biological Weapons: Possession and Programs Past and Present*, JAMES MARTIN CTR. FOR NONPROLIFERATION STUD., <http://cns.miis.edu/cbw/possess.htm> (last updated Mar. 2008), archived at <http://perma.cc/ML2X-ER38>.

plague, yellow fever, and smallpox.²²⁴ Simply having these capabilities ready to use for combat alone breaks the Biological Weapons Convention,²²⁵ and North Korea's continued development after signing the Convention demonstrates yet another grave breach.²²⁶

3. Additional Protections and Restrictions

The DPRK has signed several other conventions providing additional protections to certain classes of people and further limiting its behavior pertaining to armed conflict. They include the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (Diplomatic Agents Convention),²²⁷ the Convention on the Rights of the Child (Child Convention),²²⁸ the International Convention for the Suppression of the Financing of Terrorism (Terrorism Convention),²²⁹ the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide

224. *North Korea: Biological*, NUCLEAR THREAT INITIATIVE, <http://www.nti.org/county-profiles/north-korea/biological/> (last updated Dec. 2014), *archived at* <http://perma.cc/4ZRP-PXPM>.

225. *See, e.g.*, John R. Bolton, *Beyond the Axis of Evil: Additional Threats from Weapons of Mass Destruction* (May 6, 2002), *available at Lecture #743 on Missile Defense*, HERITAGE FOUND. (May 6, 2002), <http://www.heritage.org/research/lecture/beyond-the-axis-of-evil>, *archived at* <http://perma.cc/GY4L-YZ9U> ("North Korea has a dedicated, national-level effort to achieve a BW capability and has developed and produced, and may have weaponized, BW agents in violation of the Convention.").

226. INT'L COMM. OF THE RED CROSS, STATES PARTY TO THE FOLLOWING INTERNATIONAL HUMANITARIAN LAW AND OTHER RELATED TREATIES AS OF 13-MAY-2015, at 8 (2015), http://www.icrc.org/applic/ihl/dihl_setup.nsf/xsp/.ibmmodes/domino/OpenAttachment/applic/ihl/dihl_setup.nsf/6A9E93D954458967C1257DF100397C0C/%24File/IHL_and_other_related_Treaties.pdf?Open, *archived at* <http://perma.cc/2UEV-GSM3> (showing that North Korea signed the Biological Weapons Convention on March 13, 1987). For the U.S. Secretary of Defense's sources and investigations of North Korea's various chemical, biological, and nuclear capabilities, see also OFFICE OF THE SEC'Y OF DEF., U.S. DEP'T OF DEF., *PROLIFERATION: THREAT AND RESPONSE* (2001), <http://www.fas.org/irp/threat/prolif00.pdf>, *archived at* <http://perma.cc/JM4Y-QCXB>; *Biological Weapons Program*, FED'N OF AM. SCIENTISTS, <http://www.fas.org/nuke/guide/dprk/bw/index.html> (last visited May 26, 2015), *archived at* <http://perma.cc/TU2P-CFC2>.

227. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 167 (entered into force Feb. 20, 1977) [hereinafter *Diplomatic Agents Convention*].

228. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter *Child Convention*].

229. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197 (entered into force Apr. 10, 2002) [hereinafter *Terrorism Convention*].

Convention),²³⁰ and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (War Crimes Convention).²³¹

North Korea acceded to the Diplomatic Agents Convention on December 1, 1982.²³² The Convention's purpose is to prevent assassinations and assassination attempts of diplomats by requiring state parties to prohibit such acts in domestic law.²³³ Heads of state, as well as representatives or state officials or agents of international organizations, along with their immediate family members, receive protection.²³⁴ States agreeing to this Convention must desist from murdering, kidnapping, or attacking protected persons; violently attacking their known premises; threatening to do so; attempting such acts; or even playing a part in such acts.²³⁵ Under the treaty, states should criminalize such actions, track down perpetrators, and inform other states of the violator's whereabouts and circumstances if they have the proper knowledge.²³⁶

The timing of the DPRK's accession to this convention presents an irony because just four months prior Canadian police uncovered a North Korean plot to assassinate then-South Korean President Chun Doo Hwan during a visit to that nation.²³⁷ More ironically, North Korea attempted to assassinate the South Korean president again the following year in Myanmar—even after becoming a party to the convention.²³⁸ North Korea evinces no respect for the concept of *pacta sunt servanda*.²³⁹

The Child Convention, the most ratified human rights treaty in the world, also applies to North Korea's actions. Article 38 requires that

230. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

231. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73 (entered into force Nov. 11, 1970) [hereinafter War Crimes Convention].

232. Accession to Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 1, 1982, 1295 U.N.T.S. 393 (entered into force Dec. 31, 1982).

233. See Diplomatic Agents Convention, *supra* note 227, art. 3.

234. *Id.* art. 1.

235. *Id.* art. 2.

236. *Id.* art. 5.

237. FISCHER, *supra* note 73, at 8.

238. *Id.* at 8–9.

239. Loosely translated, *pacta sunt servanda* means “treaty obligations must be met” or “kept” in Latin. Benjamin Neaderland, Note, *Quandary on the Yalu: International Law, Politics, and China's North Korean Refugee Crisis*, 40 STAN. J. INT'L L. 143, 157 (2004).

“States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to [children] in armed conflicts which are relevant to the child” and that “Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.”²⁴⁰ The DPRK signed this convention in August of 1990 and ratified it in September of 1990.²⁴¹ Since that time, North Korea has failed to protect its own children in a time of ongoing war and famine on the peninsula. “UNICEF has reported that each year some 40,000 North Korean children under five became ‘acutely malnourished,’ with 25,000 needing hospital treatment. The food security situation improved slightly from 2011 to 2012, but 28% of the population reportedly suffers from stunting.”²⁴² However, when looking at the money spent on its military, if North Korea effectively transferred this spending by approximately even five to ten percent on agricultural infrastructure, for example, it could markedly ameliorate this situation.²⁴³

Similar to the Diplomatic Agents Convention, the Terrorism Convention seeks to eliminate and prevent acts of international terrorism around the world.²⁴⁴ Through its many articles, the Convention requires state parties to illegalize terrorism, prosecute it, and prevent it, especially through suppressing funding.²⁴⁵ North Korea signed the Convention in November of 2001.²⁴⁶ Although it has not yet ratified the Convention, it is important to note its continued defiance in regards to the treaty. Signing a convention marks a commitment not to contravene the object and purpose of that treaty. North Korea has a history of supporting terrorism financially and militarily²⁴⁷—abundant

240. Child Convention, *supra* note 228, art. 38.

241. *Id.*

242. CHANLETT-AVERY & RINEHART, *supra* note 101, at 16–17.

243. Tan, *The North Korean Nuclear Crisis*, *supra* note 15, at 539.

244. Terrorism Convention, *supra* note 229, at pmbl. (“Being convinced of the urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators . . .”).

245. *Id.* arts. 4–19.

246. *Id.* at 282.

247. See Bruce E. Bechtol, Jr., *North Korea and Support to Terrorism: An Evolving History*, 3 J. STRATEGIC SECURITY 45 (2010) (giving a history of North Korea’s support to terrorist and radical groups, including the Japanese Red Army and the Popular Front for the Liberation of Palestine); see also FISCHER, *supra* note 73, at 24 (describing the Scud missiles on their way to Yemen in 2002 found by allied forces in the Persian Gulf aboard a North Korean ship).

evidence can be found showing that the DPRK has supported numerous terrorist organizations since 2001—including Syrian and Lebanese terrorists, the Tamil Tigers, and Hezbollah—by helping them train in North Korea, building structures and bunkers, as well as selling missiles and chemical weapons.²⁴⁸

North Korea became a party to the Genocide Convention on January 31, 1989.²⁴⁹ Parties, by signing the convention, according to the very first article of the treaty, are explicitly “confirm[ing] that genocide, *whether committed in time of peace or in time of war*, is a crime under international law which they undertake to prevent and to punish.”²⁵⁰ Genocide is considered “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such” under Article II:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.²⁵¹

Article III forbids genocide, conspiracy to commit genocide, direct/public incitement to commit it, an attempt to commit it, and complicity in genocide.²⁵²

As explored in the previous companion articles, North Korea has been engaging in genocide for decades. Numerous accounts have been recorded of infanticide policies involving Chinese and partially Chinese children.²⁵³ The DPRK directly kills them by stabbing, shooting,

248. Bechtol, *supra* note 247, at 49–51 (giving a more recent history of North Korean terrorist financing and aid).

249. Accession to Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 31, 1989, 1523 U.N.T.S. 352 (entered into force May 1, 1989).

250. Genocide Convention, *supra* note 230, art. 1 (emphasis added).

251. *Id.* art. 2.

252. *Id.* art. 3.

253. See, e.g., Morse H. Tan, *A State of Rightlessness: The Egregious Case of North Korea*, 80 MISS. L.J. 681, 699 (2010) [hereinafter Tan, *A State of Rightlessness*] (providing the

suffocation, or intentional abandonment. North Korea also destroys them in the womb by severely beating the women or by other forced abortion techniques.²⁵⁴ North Korea similarly targets Christians, who find themselves systematically imprisoned, tortured, and executed.²⁵⁵ Genocide has been a crime against humanity since the International Military Tribunals of Nuremberg. Some scholars of international law consider it the ultimate crime.

The War Crimes Convention also intersects with North Korea's actions during armed conflicts. That Convention seeks to extend any statutes of limitations for war crimes indefinitely.²⁵⁶ Such crimes (i.e., war crimes and crimes against humanity) include the aforementioned grave breaches regarding the Geneva Conventions (e.g., directly attacking civilians), apartheid, and genocide.²⁵⁷ In addition to specifically requiring state parties to abolish any statute of limitations on war crimes,²⁵⁸ it states that the Convention applies directly

to representatives of the State authority and private individuals who . . . participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to

testimony of a sixty-four-year-old grandmother witnessing the execution of half-Chinese infants).

254. See David Hawk's numerous articles of refugee and defector testimony on the brutal treatment and executions of these infants. DAVID HAWK, COMM. FOR HUMAN RIGHTS IN N. KOREA, *THE HIDDEN GULAG: THE LIVES AND VOICES OF "THOSE WHO ARE SENT TO THE MOUNTAINS"* *passim* (2d ed. 2012), http://www.davidrhawk.com/HRNK_HiddenGulag2_Web_5-18.pdf, *archived at* <http://perma.cc/W7CF-FVSC>; DAVID HAWK, U.S. COMM. FOR HUMAN RIGHTS IN N. KOREA, *THE HIDDEN GULAG: EXPOSING NORTH KOREA'S PRISON CAMPS* *passim* (2003), <http://www.davidrhawk.com/HiddenGulag.pdf>, *archived at* <http://perma.cc/7CKV-PM8V>; *see also* KOREA INST. FOR NAT'L UNIFICATION, WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA 2011, at 513–20 (2011), http://www.kinu.or.kr/eng/pub/pub_04_01.jsp?page=1&num=32&mode=view&field=&text=&order=&dir=&bid=DATA04&ses=, *archived at* <http://perma.cc/8MT2-YPDD>.

255. *See, e.g.*, Robert Park, *North Korea and the Genocide Movement*, HARV. INT'L REV. (Sept. 27, 2011), <http://hir.harvard.edu/north-korea-and-the-genocide-movement>, *archived at* <http://perma.cc/A88E-2LTF>; *see also supra* note 247 and sources cited therein.

256. War Crimes Convention, *supra* note 231, at pmb1. ("Recognizing that it is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application").

257. *Id.* art. 1.

258. *Id.* art. 4.

representatives of the State authority who tolerate their commission.²⁵⁹

North Korea acceded to the convention on November 8, 1984,²⁶⁰ effectively attributing culpability upon North Korea and directly exposing it to liability for war crimes and crimes against humanity for its numerous violations. Regrettably, North Korea signs and ratifies treaties for tactical gain, not in good faith.

C. *Applicable Customary International Law*

Although the majority of the basis of customary international law in the field of armed conflict has been covered heretofore—North Korea having ratified the 1949 Geneva Conventions, for example—a short analysis of two principles follows in this section: (1) directly attacking demilitarized zones that the parties agreed to forbid attacking, and (2) the use of chemical weapons.

The International Committee of the Red Cross stands highly respected in the international community for its coverage, interpretation, and publications on international humanitarian law. It has documented dozens of rules of customary international law in IHL, which are based on decades of use by nations and dozens of international agreements, cases, and domestic laws.²⁶¹ This section demonstrates that North Korea, which has allegedly confirmed that it has not and will not break these two rules of customary international law presented above,²⁶² has evinced every intention of ignoring such rules.

Many scholars have noted that the Geneva Conventions of 1949 and their Protocols replaced many of the Hague Conventions and other former IHL treaties.²⁶³ As demonstrated above, the Geneva

259. *Id.* art. 2.

260. Accession to Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 8, 1984, 1379 U.N.T.S. 316 (entered into force Feb. 6, 1985).

261. See generally JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES (2005) (providing the results of a study of the Red Cross regarding basic customary IHL Rules).

262. See *supra* note 260 and accompanying text; *infra* note 264 and accompanying text.

263. See, e.g., J. Ashley Roach, *Certain Conventional Weapons Convention: Arms Control or Humanitarian Law?*, 105 MIL. L. REV. 3, 35–36 (1984) (“The 1949 Conventions however ‘replace,’ ‘complement,’ or ‘supplement’ earlier Geneva and Hague Conventions in relations between powers who are bound by both.” (footnote omitted)).

Conventions stand in judgment over violations of IHL, like indiscriminate bombing of unaware and defenseless civilian towns and villages.²⁶⁴ The Red Cross's rules on demilitarized zones and chemical weapons have a similar function.²⁶⁵ North Korea's communication regarding its compliance with such rules counts as ludicrous.

In 1989, North Korea made a statement claiming that the country would not test, produce, store, or introduce from the outside any nuclear or chemical weapons, nor would it allow passage of such weapons through its territory; it also claimed in 1995 to be opposed in principle to such weapons.²⁶⁶ However, the DPRK has tested, produced, and stored chemical weapons for many years in several locations around the North, some estimating that the nation has 2,500 to 5,000 metric tons of such weapons, such as phosgene, hydrogen cyanide, mustard gas, and sarin.²⁶⁷ North Korea has tested its chemical weapons on concentration camp prisoners in violation of this customary rule or established IHL.²⁶⁸ When South Korea provided over 610,000 gas masks to its citizens after the bombing of Yeonpyeong Island, it did so to guard against a chemical weapons attack.²⁶⁹

264. See, e.g., Convention Concerning Bombardment by Naval Forces in Time of War, arts. 1, 3, 5–6, Oct. 18, 1907, 36 Stat. 2351 (entered into force Feb. 28, 1910) (prohibiting naval bombardment of various civilian targets).

265. HENCKAERTS & DOSWALD-BECK, *supra* note 261, at 576, 600.

266. *Democratic People's Republic of Korea: Practice Relating to Rule 74. Chemical Weapons*, INT'L COMM. FOR THE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/v2_cou_kp_rule74 (last visited May 27, 2015), *archived at* <https://perma.cc/FW8K-CWPP>.

267. *North Korea: Chemical*, NUCLEAR THREAT INITIATIVE, <http://www.nti.org/country-profiles/north-korea/chemical/> (last visited May 27, 2015), *archived at* <http://perma.cc/RA5C-A9KD>; see also *DPRK: Chemical Weapons*, FED'N OF AM. SCIENTISTS, <http://www.fas.org/nuke/guide/dprk/facility/cw.htm> (last visited May 27, 2015), *archived at* <http://perma.cc/YY6S-VGQF> (“North Korea has at least eight industrial facilities that can produce chemical agents, and probably nearly twice this many; however, the production rate and types of munitions are uncertain.”).

268. See several of the Hague conventions and other conventions regarding the prohibition of the use of poisons and asphyxiating gas in warfare: Convention Relating to the Conversion of Merchant Ships into War-Ships, Oct. 18, 1907, 205 Consol. T.S. 319, 3 Martens Nouveau Recueil (ser. 3) 557 (entered into force Jan. 26, 1910); Convention Respecting the Laws and Customs of War on Land, annex art. 23, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (entered into force Feb. 28, 1910); Hague Declaration (IV, 2) Concerning the Prohibition of the Use of Projectiles Diffusing Asphyxiating Gases, July 29, 1899, 26 Martens Nouveau Recueil (ser. 2) 998, 187 Consol. T.S. 453 (entered into force Apr. 9, 1900); Hague Convention II, *supra* note 37, art. 23; INST. OF INT'L LAW, *supra* note 37, art. 8; Conference of Brussels, *supra* note 38, art. 13.

269. See *North Korea: Chemical*, *supra* note 267.

North Korea's constantly breaks Rule 36 of these customary rules through its DMZ incursions. In 1996, the DPRK made accusations to the president of the UN Security Council that the Republic of Korea had overstepped the bounds of the armistice by building up military forces in the DMZ; in turn, it claimed the armistice no longer bound it in relation to the DMZ.²⁷⁰ However, North Korea has breached the DMZ with infiltrators and armed attacks hundreds of times and for decades well-before this 1996 date, and hundreds of times thereafter.²⁷¹ In sum, even if North Korea had not signed the many IHL treaties above, it would likely still have been liable for its hostilities in violating various principles of customary international law like these two presented here.

*D. International Human Rights Law and IHL:
Two Sides of the Same Coin*

As highlighted in the prior companion articles, North Korea has a terrible human rights record.²⁷² Although many scholars tend to differentiate the fields of international human rights law (IHR) and IHL, this section will show that the two can fit together rather well, especially in characterizing North Korea's violations of international law and future liability. A few international courts have recognized this link, and their opinions tend to demonstrate that if North Korea's leaders were to be indicted and prosecuted under IHL, human rights law would appropriately find itself part of the proceedings.

One of the first courts to discuss the connection between these two major areas of international law was the International Court of Justice (ICJ) in 2004. In the ICJ's *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Palestinian Case)* advisory opinion,²⁷³ the court explained that protections offered by IHR conventions do not stop operating during an armed conflict.²⁷⁴ Derogation clauses, however, may apply. The court said that although

270. INT'L COMM. OF THE RED CROSS, 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: PRACTICE 697-98 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

271. See *supra* notes 97-98 and accompanying text.

272. See, e.g., Tan, *A State of Rightlessness*, *supra* note 253, at 682 ("Experts in the human rights field have averred that the human rights situation in North Korea is the worst in the world.") (citing such experts).

273. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9).

274. *Id.* ¶ 106.

each of these areas of the law afford distinctive rights, areas of overlap also exist; accordingly, the court said it had to look at both to determine whether rights had been violated in the occupied territory of Palestine.²⁷⁵ For example, the court found that Article 2 of the Child Convention applied to the occupied territory in dispute, even though the events the court addressed transpired in the midst of an international armed conflict.²⁷⁶

Additionally, other human rights courts have thought the same regarding applying IHL. For example, the Inter-American Court of Human Rights in the case of the *Mapiripán Massacre v. Colombia* stated that it was necessary to analyze IHL principles to interpret the American Convention on Human Rights and find Colombia civilly liable for its paramilitary groups torturing and killing civilians in the town of Mapiripán.²⁷⁷ Judge A.A. Cançado Trindade, in a separate opinion, not only agreed with this convergence of these areas of international law, he stated that the convergence clearly includes International Refugee Law as well.²⁷⁸ The UN Commission on Human Rights has clearly recognized this link, providing guidance for states on internal displacement of refugees.²⁷⁹

The ICJ reaffirmed its commitment to utilizing both IHR and IHL when assessing civil liability of states in armed conflict. In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*,²⁸⁰ the court cited the *Palestinian Case* when finding that it should consider a number of IHR instruments and agreements in order to analyze whether the Uganda People's Defence Forces (UPDF) violated international law during the civil war in the Congo.²⁸¹ After looking at both types of law, the court found that the UPDF had violated customary IHL (i.e., the Hague Regulations) and various principles of IHR law²⁸² in its occupation of Ituri and fighting in

275. *Id.*

276. *Id.* ¶ 113.

277. *Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 115 (Sept. 15, 2005).

278. *Id.* ¶ 43 (opinion of Trindade, J.).

279. See UNITED NATIONS OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT (2d ed. 2004), <http://www.brookings.edu/~media/Projects/idp/GPEnglish.pdf>, archived at <http://perma.cc/Q4GE-RVCZ>.

280. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168 (Dec. 19).

281. *Id.* ¶¶ 215–17.

282. *Id.* ¶ 219.

Kisangani by indiscriminately attacking civilians; killing, torturing, and inhumanely treating the Congolese civilian population; inciting ethnic conflict; and failing to take measures to put an end to the armed conflict.²⁸³

Another example comes from the Inter-American Commission on Human Rights. In a case regarding indiscriminate bombing during an internal conflict in Colombia,²⁸⁴ the commission provided an *apropos* quote in relation to North Korea and other states that abuse human rights in the midst of armed conflicts:

The events of the present case are framed in the context of the internal armed conflict of Colombia, which does not exonerate the State from respecting and guaranteeing respect for basic human rights of individuals not directly involved, in accordance with the provisions of Common Article 3 of the Geneva Conventions. In this regard, the Commission considers that the State has general and special duties to protect the civilian population under its care, derived from international humanitarian law.²⁸⁵

These opinions demonstrate that if North Korea's leaders came before a tribunal or if North Korea as a nation-state stood before an international court, its human rights violations would substantially supplement its liability. This nexus should wax clearer in the following section.

E. Applicable Case Law and UN Security Council Resolutions

In addition to the above case law regarding the application of IHL during armed conflict in the Korean context, ample case precedents from various international courts demonstrate that North Korea and its leaders could find themselves prosecuted for their continued hostilities and human rights abuses during the ongoing Korean conflict. North Korea's genocidal tendencies toward Christians and Chinese (and even partially Chinese) children have generated grave concerns.²⁸⁶

283. *Id.* ¶ 220.

284. Lopez v. Colombia, Case 12.573, Inter-Am. Comm'n H.R., Report No. 64/11, ¶ 240 (2011).

285. *Id.* ¶ 215 (footnote omitted).

286. See *supra* notes 253–55 and accompanying text.

Genocide, a *jus cogens* norm, can yield even more serious consequences.²⁸⁷ For example, the International Criminal Tribunal for Rwanda (ICTR) has concluded that, at least under the ICTR's statute, incitement to commit genocide does not have to be public or even successful.²⁸⁸ Specifically, the ICTR has stated that merely preventing births of an ethnic group, what North Korea has clearly done, qualifies as genocide.²⁸⁹ In fact, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has found that any act committed with intent to destroy a group in whole or part constitutes an act of genocide.²⁹⁰ North Korea's leaders should take heed because the ICTY (prosecuting former President Milosevic) and the ICTR (by convicting the former Prime Minister of Rwanda, Jean Kambanda, for genocide, ordering a life sentence) have asserted that heads of government have no immunity from any criminal liability for genocidal acts.²⁹¹

The DPRK should think twice before engaging in torture of POWs, like those from the *USS Pueblo*, or its own people.²⁹² As the Inter-American Court of Human Rights has pointed out, torture rises to the level of a *ius cogens* violation (or at least customary international law),

287. See Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Judgment, ¶ 417 (June 1, 2001), available at <http://www.unict.org/sites/unict.org/files/case-documents/ict-96-4/appeals-chamber-judgements/en/010601.pdf>, archived at <http://perma.cc/H492-Z8ZG> ("Akayesu was individually responsible, under Article 6(1) of the Statute, for genocide, direct and public incitement to commit genocide, and crimes against humanity, all extremely serious crimes.").

288. *Id.* ¶¶ 482–83; see also Jose E. Alvarez, *Lessons from the Akayesu Judgment*, 5 ILSA J. INT'L & COMP. L. 359, 361 (1999) ("[T]he judges elaborate the controversial offense of incitement to genocide. They find that incitement need not be *direct* but *can be implicit*.").

289. Alvarez, *supra* note 288, at 362 ("The Akayesu judges note that, 'in patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.'" (quoting Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 507 (Sept. 2, 1998))).

290. Prosecutor v. Krstic, Case No. IT-98-33-A, Judgment, ¶ 220 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

291. See generally Kingsley Chiedu Moghalu, *International Humanitarian Law from Nuremberg to Rome: The Weighty Precedents of the International Criminal Tribunal for Rwanda*, 14 PACE INT'L L. REV. 273, 289–93, 301 (2002) (discussing the ICTR case of *Prosecutor v. Kambanda* in which Kambanda was convicted on all counts indicted against him, including genocide).

292. See *supra* notes 168–72 and accompanying text; see also Tan, *A State of Rightlessness*, *supra* note 253, at 704–07 (giving a few examples of the horrific torture procedures used against its own civilians in the various concentration camps throughout the North).

and its prohibition does not cease during wartime.²⁹³ In addition, North Korea should desist from rape, as the ICTY has pointed out that rape can qualify as a form of torture.²⁹⁴ The Rome Statute, the constitutive treaty of the International Criminal Court, also counts rape as a crime against humanity.²⁹⁵

North Korea's military hostilities raise further concerns. Courts like the European Court of Human Rights have found nations civilly liable for IHL violations like indiscriminate bombing and killing of civilians.²⁹⁶ Such bombings can violate the right to life under IHR law as well.²⁹⁷ In other words, North Korea may incur legal culpability for shelling areas like Yeonpyeong Island.

Moreover, the DPRK must take note that even the well-known defense of merely "following orders" does not immunize its military and civilian personnel for IHL and IHR law transgressions, although it may mitigate culpability.²⁹⁸ So long as any accused exercised effective control over his or her subordinates when a crime was committed (i.e.,

293. See, e.g., *Gonzales v. Peru*, Case 11.157, Inter-Am. Comm'n H.R., Report No. 67/11, ¶ 172 & n.158 (2011) (citing numerous Inter-American Court of Human Rights cases stating this principle).

294. *Alvarez*, *supra* note 288, at 362 ("For this purpose, the judges affirm that rape when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity constitutes torture.") (citing *Akayesu*, Case No. ICTR-96-4-T, Judgment).

295. Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 3 (expressly including "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" under subsection (g) of Article 7, the article that lists the terms included in the phrase "crimes against humanity" as defined by the court).

296. E.g., *Esmukhambetov v. Russia*, App. No. 23445/03, ¶¶ 150–51 (Eur. Ct. H.R. 2011) ("In sum, the Court considers that the indiscriminate bombing of a village inhabited by civilians—women and children being among their number—was manifestly disproportionate to the achievement of the purpose under Article 2 § 2 (a) invoked by the Government. . . . There has accordingly been a violation of Article 2 of the Convention on that account."); *Isayeva v. Russia*, App. Nos. 57947/00, 57948/00 & 57949/00, ¶¶ 199–200 (Eur. Ct. H.R. 2005) ("To sum up, even assuming that that the military were pursuing a legitimate aim in launching 12 S-24 non-guided air-to-ground missiles on 29 October 1999, the Court does not accept that the operation near the village of Shaami-Yurt was planned and executed with the requisite care for the lives of the civilian population. The Court finds that there has been a violation of Article 2 of the Convention in respect of the responding State's obligation to protect the right to life of the three applicants and of the two children of the first applicant, Ilona Isayeva and Said-Magomed Isayev.").

297. See *supra* notes 286–91 and cases cited therein.

298. See Matthew Lippman, *Humanitarian Law: The Uncertain Contours of Command Responsibility*, 9 TULSA J. COMP. & INT'L L. 1 (2001) (discussing numerous ICTY and ICTR cases that convicted defendants based on command responsibility).

de jure or de facto control), he or she can also be criminally liable for said crime.²⁹⁹ It is “the failure of an official to fulfill his obligation to prevent or to punish criminal conduct” that incurs liability to everyone in the chain for the crimes committed.³⁰⁰ Much of North Korea’s military and governmental elite remain vulnerable in regards to IHL and IHR atrocities against their own people as well as those of other nations.

The International Criminal Court (ICC), after I urged the Prosecutor to do so, has commenced investigation of some of the DPRK’s most recent hostilities against South Korea under the auspices of the Rome Statute.³⁰¹ The Office of the Prosecutor has been investigating whether it can charge DPRK nationals for war crimes regarding their sinking of the *Cheonan* and their shelling of Yeonpyeong Island.³⁰² North Korea’s concern should arise from the fact that the ICC has jurisdiction under the Rome Statute to investigate and issue indictments for these incidents because South Korea remains a party to the Rome Statute and such acts concluded on South Korean territory.³⁰³ Noting the *in absentia* indictment by the ICC of President Omar al-Bashir of Sudan,³⁰⁴ who has never appeared before the Court, North Korea’s leaders may fall within the ICC’s grasp as well. The DPRK should remain cognizant of this risk, considering that the prosecutor has been trying in vain to receive a response from the country for investigative purposes over the past several years.³⁰⁵ The ICC remains open to a possible referral, although it has discontinued its pursuit of a prosecution based on the *Cheonan* sinking and the shelling of Yeonpyeong Island.

299. *E.g.*, *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgment, ¶¶ 84–85 (May 23, 2005).

300. Lippman, *supra* note 298, at 72.

301. OFFICE OF THE PROSECUTOR, INT’L CRIMINAL CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2012, at 15 (2012), <http://www.icc-cpi.int/NR/rdonlyres/C433C462-7C4E-4358-8A72-8D99FD00E8CD/285209/OTP2012ReportonPreliminaryExaminations22Nov2012.pdf>, archived at <http://perma.cc/FY8X-D8Y2>.

302. *Id.*

303. *See id.*

304. *E.g.*, Press Release, Office of the Prosecutor, Int’l Crim. Ct., ICC Prosecutor Presents Case Against Sudanese President, Hassan Ahmad AL BASHIR, for Genocide, Crimes Against Humanity and War Crimes in Darfur, PR341 (July 14, 2008), [http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2008\)/Pages/a.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20(2008)/Pages/a.aspx), archived at <http://perma.cc/P2HT-C7RR>.

305. *See* OFFICE OF THE PROSECUTOR, *supra* note 301, at 15.

The UN Security Council could pursue further action against North Korea in the near future. The DPRK has been violating the Council's resolutions involving various restrictions on North Korea's activities, especially regarding nuclear proliferation, for a number of years now,³⁰⁶ and it should take heed for at least several reasons. First, it should bear in mind that the Security Council assembled the original military coalition forces to repel North Korea's attack of the South in 1950 and remains technically in control of such forces, with the armistice the primary agreement in place and the peninsula still at war.³⁰⁷ Second, under the same Chapter VII powers that the Council used to assemble these forces, the Council can carry out other military actions to restore international peace and security if North Korea's hostilities and threats continue in the region.³⁰⁸ Thirdly, the Council can continue to cripple North Korea in other respects through additional sanctions that could contribute to its collapse.³⁰⁹ Additionally, China's support for North Korea has waned, as seen with its involvement in the drafting of the latest resolution; China's support for further action against North Korea could deliver a large blow to the DPRK — as China remains its biggest lifeline.³¹⁰ China has the potential to exert more influence over the DPRK than any other nation — if it chooses to do so. Moreover, in light of these developments, the UN Human Rights Council recently created the UN Commission of Inquiry on North Korea; the Council held its first official meeting on July 5, 2013, in Geneva and plans to look more

306. See *supra* note 125 for the language of the latest Security Council resolution condemning North Korea's repeated violations of the Council's relevant resolution.

307. See *supra* notes 17–20 and accompanying text.

308. See U.N. Charter arts. 39–51 (composing the articles of Chapter VII titled “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression” (capitalization omitted)).

309. See, e.g., *id.* art. 41 (“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. *These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.*” (emphasis added)).

310. As mentioned above, China had a hand in drafting the latest Security Council resolution against North Korea's third nuclear test, even though it has been the biggest supporter of North Korea since the fall of the Soviet Union. Lederer & Kim, *supra* note 7; see also INT'L CRISIS GRP., CHINA AND NORTH KOREA: COMRADES FOREVER? 1 (2006), http://www.crisisgroup.org/~media/Files/asia/north-east-asia/north-korea/112_china_and_north_korea_comrades_forever.pdf, archived at <http://perma.cc/M96E-8S7G> (providing one overview of China's continuous support to North Korea since the early 1990s).

in-depth at the internal human rights situation in the North.³¹¹ This Commission serves to more widely disseminate knowledge about North Korea's crimes and may also serve as a springboard for further action.

North Korea must remember that disobeying these various Security Council resolutions violates international law and could lead to any one of the three aforementioned actions by the Council (which it has done several times in the past). For example, North Korea recently threatened to restart its nuclear facilities in direct violation of the latest Security Council resolution,³¹² moved a long-range missile to its east coast,³¹³ and refused to allow South Korean workers into its industrial zone to work.³¹⁴ In looking at all angles of the issues and the recent, harshly worded Security Council resolution,³¹⁵ even miscues or miscalculations could quickly escalate into a conflagration.³¹⁶ Consistently with its pattern of brinkmanship, nearly two months after its initial threat to reopen its nuclear facilities, North Korea approached the United States to resume talks.³¹⁷

F. Forum and Jurisdiction

The most recent companion article to this one analyzed the best forum for a prosecution of North Korean officials for IHR and other

311. *UN Commission of Inquiry on North Korea Begins Operations*, UN OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS (Jul. 5, 2013), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13508&LangID=E>, archived at <http://perma.cc/A4ED-5CVM>.

312. S.C. Res. 2094, *supra* note 7, ¶ 6; Hyung-Jin Kim & Foster Klug, *North Korea Vows to Restart Nuclear Facilities*, SEATTLE TIMES (Apr. 2, 2013), <http://old.seattletimes.com/text/2020684508.html>, archived at <http://perma.cc/PMM3-3M7C>.

313. Sam King & Hyung-Jin Kim, *S Korea: North Korea Moved Missile to East Coast*, L.A. SENTINEL (Apr. 4, 2013), http://www.lasentinel.net/index.php?option=com_content&view=article&id=10816:skorea-north-korea-moved-missile-to-east-coast&catid=78&Itemid=168, archived at <http://perma.cc/X8KM-5NFL>.

314. Kim Yong-Ho & Ahn Young-Joon, *N. Korea Refuses to Let S. Koreans Enter Joint Factory*, SAN JOSE MERCURY NEWS (Apr. 3, 2013), http://www.mercurynews.com/ci_22934760/n-korea-refuses-let-s-koreans-enter-joint, archived at <http://perma.cc/2K8F-HKGN>.

315. S.C. Res. 2094, *supra* note 7, ¶ 1 (“*Condemns* in the strongest terms the nuclear test conducted by the DPRK on 12 February 2013 (local time) in violation and flagrant disregard of the Council’s relevant resolutions . . .”).

316. Interview with Young-jin Choi, Ambassador of the Republic of Kor. to the U.S., in Wash., D.C. (April 5, 2013).

317. Jean H. Lee, *North Korea Changes Tack and Tells U.S.: Let's Talk*, USA TODAY (June 16, 2013), <http://www.usatoday.com/story/news/world/2013/06/15/nkorea-proposes-nuclear-talks/2427457/>, archived at <http://perma.cc/CF2Z-DN76>.

violations, ideally after the reunification of the Korean peninsula.³¹⁸ In addition to the possibility of a hybrid tribunal redressing certain international crimes after North Korea's disintegration,³¹⁹ this section will briefly delve into the forum options and other redress options available specifically for violations of IHL without the necessity of reunification.

The ICC can indict North Korean leaders for their crimes and try them individually.³²⁰ Under Article 25, individuals can face criminal culpability for their actions, and they may have to pay reparations to victims of their crimes under Article 75.³²¹

Additionally, the Geneva Conventions provide a means of chastising violations. Under Article 132 of Geneva Convention III, a party to the conflict can inquire whether there have been transgressions of the Convention and work to put an immediate end to them.³²² Article 149 of Geneva Convention IV provides for the same.³²³ Under Article 91 of Protocol I, any party to the conflict that violates the Conventions can be liable to pay compensation for such violations.³²⁴ Additionally, international criminal tribunals use the Geneva Conventions and its Protocols to find individuals criminally liable for violations.³²⁵

A similar paradigm exists with the Genocide Convention. Under Article VIII, any party to that convention can call upon UN organs to take any action necessary under the UN Charter to prevent or suppress acts of genocide.³²⁶ This means that states can call for action through a body like the Security Council to stop the genocide in North Korea by any means necessary without an objection by the DPRK — a signatory to

318. See, e.g., Tan, *Finding a Forum*, *supra* note 12, at 771–72.

319. See *id.* at 809–11.

320. See Rome Statute of the International Criminal Court, *supra* note 295, art. 25; Tan, *Finding a Forum*, *supra* note 12, at 777.

321. Rome Statute of the International Criminal Court, *supra* note 295, art. 25; *id.* art. 75 (“The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”).

322. Geneva Convention III, *supra* note 157, art. 132.

323. Geneva Convention IV, *supra* note 158, art. 149.

324. Geneva Protocol I, *supra* note 74, art. 91.

325. E.g., Prosecutor v. Naletilic, Case No. IT-98-34-A, Judgment, ¶ 117 (Int’l Crim. Trib. for the Former Yugoslavia May 3, 2006) (stating that the ICTY Statute gave the tribunal the jurisdiction to prosecute individuals for grave breaches of the Geneva Conventions of 1949).

326. Genocide Convention, *supra* note 230, art. 8.

the treaty.³²⁷ The Biological Weapons Convention gives similar powers to the UN Security Council to investigate alleged violations via complaints of state parties, but it contains weaker language and delves less deeply regarding the enumerated powers of the Council as a UN organ.³²⁸ These conventions have found individuals of state parties criminally liable.³²⁹

North Korea must also keep in mind the concept of universal jurisdiction. Certain egregious crimes rise to the level of *jus cogens* violations and can be redressed anywhere in the world with certain limits.³³⁰ Many of these (such as war crimes, genocide, and torture) have been addressed above, and individuals may be subject to this jurisdiction when any one of the following crimes has been committed: piracy, slavery, war crimes, crimes against humanity, genocide, apartheid, and torture.³³¹ Additionally, other crimes—such as hijacking airplanes, taking hostages, kidnapping, harming diplomatic agents, and forced disappearances, crimes that North Korea has committed as shown above—also coincide with universal jurisdiction.³³² No separate criminal tribunal needs to award jurisdiction for some of the most heinous crimes if any nation has an interest in the crime and wants to prosecute North Korean individuals.³³³ However, nations have exercised universal jurisdiction very sparingly—it remains very delicate and sensitive politically.³³⁴ Belgium, for example, is a nation that has

327. *See id.*

328. Biological Weapons Convention, *supra* note 215, art. VI.

329. *See, e.g.*, Press Release, U.N. Int'l Crim. Tribunal for the Former Yugoslavia, Radislav Krstic Becomes the First Person to Be Convicted of Genocide at the ICTY and Is Sentenced to 46 Years Imprisonment, UN Press Release OF/P.I.S./609e (Aug. 2, 2001), <http://www.icty.org/sid/7964>, archived at <http://perma.cc/25JB-S5W7> (stating that Article 5 of the ICTY Statute defined Genocide exactly the same as the Genocide Convention, which was used to convict Radislav Krstic of genocide on August 2, 2001).

330. *E.g.*, M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 106 (2001).

331. *Id.* at 107.

332. *See id.*

333. *Id.* at 88 (“As an *actio popularis*, universal jurisdiction may be exercised by a state without any jurisdictional connection or link between the place of commission, the perpetrator’s nationality, the victim’s nationality, and the enforcing state. The basis is, therefore, exclusively the nature of the crime and the purpose is exclusively to enhance world order by ensuring accountability for the perpetration of certain crimes.” (footnote omitted)).

334. As given above, this Article’s focus is not on the importance of the rule of law or the application of that paradigm to the leaders, culture and citizens of North Korea. The prior companion article addressed that subject in relation to formal international redress. *See Tan, Finding a Forum, supra* note 12, *passim*.

ventured to use it more than others, but it too has pulled back due to backlash.³³⁵

V. CONCLUSION

As seen from the continued hostilities on the Korean Peninsula and the increased tension between the DPRK and the rest of the world, the Korean conflict has not yet ended. North Korea has admitted that fact on more than one occasion with its many agreements with South Korea and other interested nations. With this continuous armed conflict come consequences and the application of certain international rules. International law, in its cases precedent, conventions, and customary rules, clearly provides the notion that the laws of international armed conflict still apply on the Korean peninsula.

A law-abiding nation could remain insouciant about these laws; North Korea, on the other hand, has egregiously defied these rules in nearly every turn of the conflict. Every infiltration of the DMZ, every plane hijacking, every murder and assassination, every kidnapping, every tortured POW, and every illegal weapon speak to North Korea's liability under this law. It is the hope of this Article that one day in the near future the leaders of North Korea will come to understand that they cannot hide their numerous violations of international law. For the sake of the DPRK's many victims, it is my wish that its attempts to mask, obfuscate, and distract from their heinous violations of international law will prove futile: justice demands it. A just peace must replace the ongoing war between the Koreas as well as the lesser known war North Korea wages against its own people.

335. Bassiouni, *supra* note 330, at 145; *Belgium: Universal Jurisdiction Law Repealed*, HUM. RTS. WATCH (Aug. 2, 2003), <http://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed>, archived at <http://perma.cc/63Q4-FCHV>.