

A STUDY ON ECONOMIC SANCTIONS: STRATEGY
FOR THE NORTH KOREAN NUCLEAR AND HUMAN RIGHTS CRISES
-INTERNATIONAL LAW PERSPECTIVE-

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A STUDY ON ECONOMIC SANCTIONS: STRATEGY FOR THE NORTH
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North Korea has been criticized not only for manufacturing weapons of mass destruction but also for denying its people the most basic rights. In response to the North Korean crises, there have been two different approaches: economic sanctions or engagement. This study is to analyze whether and how the international community could change the North Korean behavior effectively under international norms.

The U.N. Charter expressly contemplates that economic sanctions may be imposed in order to maintain or restore international peace and security. Sanctions under the United Nations can be imposed when there is a threat of or breach of the peace. If the Council determines gross violations of human rights as a threat to peace, it can play a pivotal role in protecting.

Humanitarian causes limit the scope and types of economic sanctions. Economic sanctions are limited by humanitarian causes. Further, comprehensive economic sanctions are not effective.

North Korea has an extremely authoritarian political structure and it would make economic sanctions less effective. Sanctions might contribute directly to the economic hardship of North Koreans. There is no hope that sanctions may strengthen NGOs, opposition groups or movements in North Korea. The elite and the military do not suffer while the rest of the population starves.

On the other hand, economic engagement would strengthen reformer groups within the North Korean government, empower entrepreneurs, produce a middle class

and interest groups, and eventually stimulate some form of civil society. Engagement with North Korea will weaken the regime's authority to control the people. It would directly secure the right to food. Engagement expands the international community's alternatives.

Engagement with North Korea should be encouraged. North Korea finds that the only way to ensure its security is to change its relationship with the U.S. from hostility to reconciliation. An effective international strategy to force North Korea to respect international norms is to fully engage the country. A package deal with North Korea can be considered.

BIOGRAPHICAL SKETCH

Seung Jin Oh was born in Jeju, South Korea in 1964. He passed Korean Bar Exam in 1986 before graduating from Seoul National University in 1987. He served 3 year military service as military attorney after 2 year legal training at Judicial Research and Training Institute under the Korean Supreme Court. After 11 year of legal practice in South Korea, he studied at Cornell Law School. His LLM degree encouraged him to study further in JSD program at Cornell Law School. His academic concern is public international law, international human rights law.

To My Family

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CHAPTER ONE
INTRODUCTION

1. Background of the North Korean Crises

Until the 1990s, the Democratic People's Republic of Korea (DPRK), or North Korea, had remained a silent and remote country. North Korea, however, had never been a primitive society. Bruce Cummings depicts Pyongyang of the 1980s as "one of the most efficient, best-run cities in Asia."¹ Gavan McCormack describes North Korea as "a largely urban, highly educated society, and modern industrial state."² Through the 1970s and 80s, the international community was more concerned with the human rights violations by the South Korean military regime rather than by those of North Korea.³ During the Cold War, there was no evidence that the record of human rights violations in North Korea was worse than that of other comparable oppressive capitalist or communist countries.

Through the 1990s, North Korean issues became a major part of the international agenda. These included such issues as nuclear and human rights violations. North Korea was often criticized not only for manufacturing nuclear weapons, abducting foreigners, terrorism, drug trafficking, and currency counterfeiting, but also for denying its people the most basic rights and freedoms, operating a comprehensive surveillance system, performing public executions and managing political prison camps.

¹ Bruce Cummings, *Korea's Place in the Sun* 405 (2005).

² Gavan McCormack, *Target North Korea* 3 (2004).

³ South Korea had been under a military rule from 1961 to 1987 and the human rights violations by the regime had been a frequently discussed issue in U.S. politics. As for the U.S. economic sanctions against South Korea based on human rights, see Gary Clyde Hufbauer et al., *Institute for International Economics, Economic Sanctions Reconsidered: Supplemental Case Histories* (2nd ed. 1990). See also Cummings, *supra* note 1, at 352-392.

Especially, during the mid-1990s, North Korea experienced severe food shortages and appealed to the international community for food aid; hundreds of thousands of North Koreans flooded China trying desperately to avoid mass starvation in North Korea. The international community, including the U.N. and human rights NGOs, provided humanitarian aid to North Korea and the starving North Koreans. By the 1990s, the realities of the human rights situation in North Korea began to be known to the world through the testimonies of North Korean defectors and humanitarian relief staffs in North Korea. Subsequently, many reports and articles on the widespread and systematic human rights violations in North Korea were published.

The collapse of the North Korean economy not only threatened the social and economic rights of the North Koreans, causing a lot of people to die; it also led to the regime's even greater curtailment of the already suppressed civil and political rights. Pyongyang tried to cope with the crisis caused by the collapse of the economy through the harsh control over its people. In a totalitarian state, a state typically withstands “any amount of internal pressure as long as it possesses the coercive power to maintain control and the political will to employ it” by the use of terror and repression.⁴ North Korea took this approach, which resulted in more gross human rights violations.

Further, in March, 1993 Pyongyang announced its withdrawal from the Non-Proliferation Treaty (NPT).⁵ Pyongyang justified its withdrawal as a self-defense measure against the U.S. nuclear threat. The Agreed Framework, a comprehensive deal compensating North Korea in return for the abandonment of the program, broke down in 2001 after President George Bush’s inauguration. On 9 October 2006, North Korea tested its nuclear device and the Security Council imposed economic sanctions against North Korea.⁶ North Korean nuclear issue still remains unresolved.

⁴ Andrew Heywood, *Politics* 198 (1997).

⁵ Hy-Sang Lee, *North Korea: A Strange Socialist Fortress* 183 (Praeger, Westport, Connecticut, 2001).

⁶ S/RES/1718 (2006).

2. Need for Comprehensive Policy against North Korea

During the 1990s, after the dissolution of the Eastern bloc, many scholars and U.S. policy makers predicted that North Korea would no longer receive the aid or favorable trading arrangements that it needed to survive and would soon collapse. They urged the international community to prepare for this collapse.⁷ In their view, it would be unnecessary to establish a long-term strategy for North Korea;⁸ all that the world needed to do was “just wait and see” or “facilitate the collapse.” Interestingly enough, the collapse scenario was not new. For many decades, scholars and policy makers had predicted that, because of its extreme dependability on Kim Il Sung, the regime would collapse as soon as he died.⁹

However, the prediction turned out to be wrong. Even though North Korea's circumstances today seem harsher than anytime since 1948, the regime has remained stable after Kim Il Sung 's death and his son's succession to power. More than a decade after experts predicted its imminent collapse, the Pyongyang regime is still in control and there are no signs of its collapse.¹⁰

Therefore, the international community should formulate a long-term policy towards North Korea, including a review of its current policy.

3. Sanctions or Engagement?

In response to the North Korean crises, the strategy that states have taken varies state by state. Washington’s policy toward North Korea aims to denuclearize the country by “implementing fully the U.N. sanctions to penalize and isolate the regime.”¹¹ In 2006

⁷ Nicholas Eberstadt, *Why Hasn't North Korea Collapsed?* North Korea: The Politics of Regime Survival 268 (Young Whan Kihl et al. ed.); He argues “there is no reason at present to expect a reign by Kim Jong Il to be either stable or long.”

⁸ Michael O’Harlon and Mike Mochizuki, *Toward a Grand Bargain with North Korea*, in *Reshaping Rogue States* 159 (Alexander T.J. Lennon & Camille Eiss, 2004)

⁹ Cummings, *supra* note 1, at 447.

¹⁰ L. Gorden Flake, *Paved with Good Intentions: the NGO Experience in North Korea* 45 (2003).

¹¹ Nicholas Burns, *The U.S. Policy toward North Korea* (Testimony to the House International Relations Committee, November 16, 2006).

the U.S. asked South Korea to cut its Mt. Keumgang Tour Project and the Kaesong Industrial Project that bring valuable foreign currency to the North Korean regime, only to have the request declined.¹² Washington argues that if North Korea wants to be a part of the international community, it should satisfy the international standard of human rights.¹³ Further, it insists that North Korean defectors should be encouraged or welcomed under the international refugee conventions.¹⁴ The U.S. policy toward North Korea can be described as the “sanction or isolation approach.”

Seoul considers that a better approach is to engage North Korea fully, and to help it become a part of the international community. Seoul argues that preventing people from becoming refugees is better than providing relief after they become refugees. Therefore, it emphasizes the need for humanitarian aid to North Korea.¹⁵ South Korea hopes that this approach will decrease the hostility of North Koreans toward South Korea.¹⁶ South Korea's policy toward North Korea can be called an “engagement approach.”

The U.S. and South Korea have been allies on the Korean peninsula ever since the Korean War. During the Cold War they had shared a common goal: to defend the peninsula from communism. After the collapse of the Eastern bloc and the dissolution of the Cold War, however, they have found it more and more difficult to have a common goal on the Korean peninsula. The differences between the two are evident in their approach toward the North Korean nuclear and human rights issues. The gap widened after the inauguration of President George W. Bush in 2001.

¹² Time, October 19, 2006.

¹³ The U.S. wants the discussion of the human rights record to be part of any future normalization process. *supra* note 11.

¹⁴ The Bureau of Population, Refugees and Migration, The Status of North Korean Asylum Seekers and U.S. government Policy towards Them (March 11, 2005). Available at <http://www.state.gov/prm/ris/rpt43271.htm> (last visited October 10, 2006).

¹⁵ Ministry of Unification, Unification Policy, available at <http://www.unikorea.go.kr/english/EUP/EUP0207R.jsp> (last visited on December 4, 2006).

¹⁶ *Id.*

For many years, the South Korean government has been of the opinion that raising human rights issues against North Korea will not help improve North Korean human rights. In November 2005, the South Korean government abstained from voting on a U.N. General Assembly resolution, despite expressing “serious concern at continuing reports of systematic, widespread and grave violations of human rights” in North Korea.¹⁷ Under the “Sunshine Policy” of engagement with North Korea, the foreign ministry of South Korea defended its position, arguing that “the resolution could put at risk rapprochement efforts between the two Koreas and attempts to resolve the crisis over Pyongyang’s nuclear weapons program peacefully.”¹⁸

Some civic organizations in South Korea have criticized the United States for using the North Korean human rights issues as a pretext to attack North Korea politically. People’s Solidarity for Participatory Democracy (PSPD), a South Korean NGO group, even called the U.N. General Assembly resolution condemning North Korean human rights situations “a political approach” and demanded that “all states involved should also show the intention to improve their own human rights situation,” referring to the U.S. military prison at Guantanamo Bay and the war against Iraq.¹⁹

The U.S. has raised the North Korean human rights issues at the international and national level since the beginning of the 2000s as well as the North Korean nuclear issues. The nuclear issues and human rights have been two main bases that rationalize the U.S. pressure against North Korea.

It seems undesirable that the long-lasing allies that have direct critical interests with North Korea take opposite approaches against North Korea. The imminent tasks that the international community faces should focus on how it should coordinate its efforts effectively, multilaterally and individually, to deal with the North Korean

¹⁷ Statement of South Korea’s U.N. delegate Shin Kak-Soo, available at <http://www.atimes.com/atimes/Korea/GK23Dg02.html> (last visited on January 3, 2007).

¹⁸ Id.

¹⁹ Id.

issues. There are big gaps among the major states' policies and strategies regarding these tasks. Analyzing the North Korean issues from the perspective of international law is necessary for better coordination and cooperation within the international community to cope with the crises.

4. Purpose of the Study

I will focus primarily on one main international law topic: whether economic sanctions are legitimate and effective measures to force North Korea to comply with international norm and if not, what is the alternative? Under Chapter VII of the U.N. Charter, the Security Council may determine the existence of a threat to peace, breach of peace and an act of aggression.²⁰ Then, to maintain international peace and security, it may make recommendations,²¹ adopt enforcement measures not involving the use of force,²² and authorize the use of force.²³ Among them, economic sanctions which are one of measures according to Article 41 of the Charter are the most frequently used tools by the U.N. Security Council. Before 1990, the Council imposed mandatory economic sanctions only twice against Rhodesia and South Africa. After the Cold War, the Security Council has actively adopted mandatory economic sanctions.²⁴ However, the comprehensive economic sanctions against Iraq authorized by the Council caused severe civilian sufferings without forcing Iraq to comply with the international norms and their legitimacy was deeply questioned. With regard to sanctions against Iraq, the arguments that economic sanctions are illegal or should be restricted are raised. Moreover, the Iraqi sanction case and later on other international sanctions have been

²⁰ Article 39 of the U.N. Charter.

²¹ *Id.*

²² *Id.* Article 41.

²³ Article 42 of the U.N. Charter.

²⁴ Gary Clyde Hufbauer et al, Peterson Institute for International Economics, *Economic Sanctions Reconsidered* 131- 132 (3rd ed., Washington, DC, 2007).

criticized to have failed in bringing about desired policy changes in the target countries.²⁵

In response to the North Korean nuclear test, the Security Council has imposed economic sanctions against North Korea.²⁶ The Council has not imposed economic sanctions against North Korea because of the gross violations of human rights. The imposition of economic sanctions against North Korea under Chapter VII is already in effect. Therefore, in respect to economic sanctions against North Korea, analyzing legality and effectiveness of economic sanctions would be of great importance. In this study, I will focus on four points.

First, I will clarify two main international law issues that North Korea has presented: the North Korean nuclear program and human rights violations. With respect to the North Korean nuclear program, the Council already found that proliferation of nuclear weapons constituted a threat to international peace and security.²⁷ As far as the North Korean human rights situations are concerned, the Council has not yet determined that there exists a threat to peace. However, there is a possibility that human rights violations in North Korea constitute a threat to peace and take mandatory measures such as economic sanctions or the use of force under Chapter VII of the Charter. In the near future, the possible collapse of the North Korean regime may trigger humanitarian disaster in North Korea or force North Koreans to flee into neighboring states. This scenario may also trigger the Council's invocation under Chapter VII. Therefore, general information on the North Korean nuclear program and human rights violations may help understand the legal issues thereof. This will be discussed in Chapter 2.

Second, at issue is the question of whether economic sanctions are permitted in international law. Although, if found a threat to peace, the Security Council has

²⁵ Id.

²⁶ S/RES/1718 (2006).

²⁷ Id.

imposed economic sanctions, the legality of economic sanctions or their possibility of reconciliation with the many human rights instruments are one of the hotly debated issues in international law and politics.²⁸ Whether unilateral economic sanctions are legitimized under international law is more controversial. Although the Council has the power to impose economic sanctions under Chapter VII and states can apply sanctions, their power cannot be unlimited. Bossuyt argues that human rights and humanitarian law limit the right to impose economic sanctions.²⁹ He argues that sanctions must not result in undue hardships for the people of a country and otherwise it would be violations of the right to life.³⁰ The legality and scope of economic sanctions will be discussed in Chapter 3.

Third, at issue is the question of whether economic sanctions are effective in changing target country's behavior. There are many alternatives available for the international community to address violations of international law. The collapse of the Cold War resulted in more frequent use of economic sanctions.³¹ The international community frequently has imposed economic sanctions to address a threat to peace, breach of peace or an act of aggression and individual states have imposed unilateral sanctions as their foreign policy tools. Scholarly groups, however, unlike policy makers, are more skeptical on the effectiveness of economic sanctions.³² David Barnhizer states that, "the possibility of strong and predictable sanctions is integral to any effective human rights system."³³ He argues: "It is vital to begin the process of intervention and putting pressure on emerging violators before the worst of the

²⁸ Geoff Simons, *Imposing Economic Sanctions: Legal Remedy or Genocidal Tool?* 163 (Pluto Press, 1999).

²⁹ Marc Bossuyt, Commission On Human Rights, Working Paper on the adverse consequences of economic sanctions on the enjoyment of human rights, E/CN.4/Sub.2/2000/33. para 18.

³⁰ *Id.*, para 26.

³¹ David Cortright, George A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* 1-2 (Lynne Rienner Publishers, Boulder, Colorado, 2000).

³² *Id.*

³³ David Barnhizer, *Effective Strategies for Protecting Human Rights* 21 (David Barnhizer ed. 2001).

violations arise.”³⁴ On the other hand, Richard Falk argues that “the difficulty with economic sanctions is that they cannot be effective, or that it is hard to make them effective.”³⁵

My assumption is that the goals of sanctions, the political structure of the target country, the relationship between the target country and sanctioning states, and the sanctions’ possibility of strengthening opposition movements determine the success and failure of economic sanctions. A comparative study will be used. I will analyze sanction cases against South Africa, Iraq, Cuba and Myanmar. The reasons behind the sanctions against the four countries vary: e.g. restoring international peace and security in Iraq,³⁶ restoring civilian rule and preventing human rights violations in Haiti,³⁷ the national security threat to the U.S. in the case of Cuba³⁸ and human rights in the case of South Africa.³⁹ This will be discussed in Chapter 4.

Fourth, the final issue is the question of how the international community should respond to the North Korean violation of international law. Therefore, I will discuss whether, by applying economic sanctions, the international community can address the North Korean violations of international norms. It will be performed by analyzing the factors that made the sanctions against the target countries effective or ineffective. My argument is that comprehensive economic sanctions against North Korea could trigger humanitarian disaster, and ineffective because North Korea lacks those factors that make sanctions effective. Craig Forcese argues that “[e]conomic engagement and the promotion of human rights-sensitive development are generally compatible objectives” and “the need for continued economic integration is strongly

³⁴ *Id.* at 1.

³⁵ Recited in *supra* note 31, at 13.

³⁶ S/RES/661 (1990).

³⁷ S/RES/841 (1993) and S/RES/940 (1994).

³⁸ Hossein G. Askari et al, *Case Studies of U.S. Economic Sanctions* 111-112 (Praeger, Westport, Connecticut, 2003).

³⁹ S/RES/418 (1977).

supported by the contemporary international legal apparatus.”⁴⁰ The fourth purpose of the study is to argue that in addressing the North Korean situation engagement policy is more effective. I will argue that an effective strategy to deal with the North Korean situations will help resolve the North Korean nuclear crisis and human rights crises simultaneously as well. This will be discussed in Chapter 5.

In Chapter 6, I will summarize the discussions and present conclusions.

5. Methodology of the Study

First, I will examine archival to research. In order to understand the international law issues that are related to North Korea, especially in studying human rights situation in North Korea, it would be most desirable to do research in North Korea. However, it is almost impossible for any researchers to visit North Korea. North Korea has not allowed even the U.N. human rights Rapporteur to visit.

Fortunately, over 10,000 North Korean defectors have been living in South Korea since the mid-1990s and many human rights NGOs have documented their testimonies, which describe all kinds of human rights violations including public executions and starvation. In general, they are reliable; they are consistent and vivid. Risking their lives, some NGO activists even went to North Korea to document North Korean human rights violations. Various governments and international organizations also have relied on the documents prepared by NGOs.

Until recently, documents released by the North Korean government were hard to obtain. These include official North Korean statutes, codes and statistics. Fortunately, it is getting easier to access those materials as a result of many scholars’ efforts mainly from South Korea. My study was made possible in part due to their efforts.

⁴⁰ Craig Forcece, *Globalizing Decency: Responsible Engagement in an Era of Economic Integration*, 5 Yale H.R. & Dev. L.J. 1, 54 (2002).

Second, I will adopt a comparative method to analyze various factors that make sanctions effective or ineffective. I will analyze the sanctions against South Africa, Iraq, Cuba and Myanmar, the study of which reveals the mechanism behind sanctions. Imposing sanctions against states is different from punishing individual criminals. While in violations of domestic laws by criminals, the focus may be on punishing the criminals, in violations of international laws by a state, the focus is on altering the state's behavior. However, a state is not an individual; and multiple interests come into play: the existence and relative power of various groups, NGOs, corporations, opposition activities or movements, and the interaction between elite groups and the people. All of these determine the response of the target country. The U.S. diplomatic normalization and economic engagement with China, once a communist country hostile to the U.S., present one example of dealing with a communist country. I will attempt to suggest an effective international strategy toward North Korea by analyzing the factors that determined the effectiveness of the sanctions in the other cases.

CHAPTER TWO

NORTH KOREA: INTERNATIONAL CONCERN

1. Introduction

Bruce Cummings describes North Korea as “a singular and puzzling nation that resists easy description.”¹ North Korea is a socialist country and therefore has characteristics common to the communist world, e.g. concentration of power, which legitimizes the dictatorship of the proletariat.² The North Korean Constitution³ declares that, “the state shall stick to a policy of class, and secure people’s democracy and socialism from our enemies by strengthening people’s democratic dictatorship.”⁴ All of North Korea’s activities are performed under the leadership of the Korean Workers’ Party.⁵

Further, North Korea is more dependent on its leader than any other socialist country. The Constitution declares itself a Kim Il Sung Constitution.⁶ It is a tool to secure the smooth transition of the dynastic leadership to Kim Jong Il, the son of Kim Il Sung. Absolute loyalty and obedience to the leader are supreme virtues in North Korea.⁷ While before the dissolution of the Eastern bloc and the Cold War, North Korea had been one of the communist countries; nowadays, it is a totalitarian country with unique ideology.

¹ Bruce Cummings, *Korea’s Place in the Sun* 404 (2005).

² Korea Institute for National Unification (KINU), *White Paper on Human Rights in North Korea* 6 (2005).

³ On the history of the North Korean constitution, see *Dae-Kyu Yoon, North Korea: Legal Perspectives and Analyses: The Constitution of North Korea: Its Changes and Implications*, 27 *Fordham Int’l L.J.* 1289 (2004).

⁴ Article 12 of the North Korean Constitution of 1998 (adopted September 5, 1998 by the Supreme People’s Council, hereinafter ‘the Constitution’). *Id.*

⁵ Article 11 of the Constitution..

⁶ *Id.*

⁷ ‘The 10 Great Principles of the Unitary Ideology System,’ proclaimed in 1974, stress the absolute loyalty to Kim Il Sung. See U.S. Commission on International Religious Freedom, *Thank You Father Kim Il Sung: Eyewitness Accounts of Severe Violations of Freedom of Thought, Conscience, and Religion in North Korea* 85 and Appendix 2.

A great famine and widespread violations of human rights in other countries would have generated regime changes, or at least riots or massive social unrest. Even an economic failure or depression, or minor human rights violations could result in regime changes. For example, in 1960 the corrupt dictatorial South Korean regime was toppled by student protests when Kim Chu Yol, a middle school student, who had been killed in a police shooting, was pulled out of Masan harbor.⁸ However, the massive starvation in the mid-1990s and gross human rights violations in North Korea have not resulted in any social unrest or civil disobedience, let alone regime change. The main reason that any social unrest or civil disobedience is not likely to happen in North Korea is a lack of a private sector. No private companies, no private news media, no NGOs, no opposition party and no private associations are allowed in North Korea. The regime owns and controls everything. Under these circumstances, North Korea has been an international concern mainly for two reasons: weapons of mass destruction and security, and human rights concerns, both threatening international peace and security.

Since the North Korea's invasion into South Korea in 1950, North Korea has been criticized for being a threat to international peace and security. North Korea joined the Non-Proliferation Treaty (NPT) system in 1992 but refused special inspections access to two sites by the International Atomic Energy Agency (IAEA). Responding to international pressures requesting special inspections, in March 1993, North Korea announced its intention to withdraw from the NPT. Although in October 1994 the United States and North Korea reached an agreement to freeze the North Korea's nuclear program, it broke after the inauguration of President George W. Bush in 2002. North Korea along with Iran and Iraq, was labeled as "an axis of evil, aiming to threaten the peace of the world"⁹

⁸ Cummings, supra note 1, at 349.

⁹ George W. Bush, Union address of 2002, available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> (last visited on May 1, 2007)

North Korea has ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and, therefore, is under the obligation to respect the human rights of North Koreans under the Covenants. It has formally insisted that the ICCPR has the same effect as a domestic law.¹⁰ North Korea claims it actively enforces the human rights recognized by the ICCPR and ICESCR its duty.¹¹ In reality, however, human rights violations in North Korea are widespread and systematic. The regime has a unique mechanism to maintain its power, which produces widespread human rights violations. In this Chapter, I will clarify several facts and issues that make North Korea an international concern.

2. Act of Aggression

North Korea has been an international concern for many years. It has engaged in aggression as well as the development of weapons of mass destruction and gross human rights violations.

On June 25, 1950, North Korea invaded South Korea. On the same day, the Security Council adopted a resolution calling for the immediate cessation of hostilities and calling upon North Korea to withdraw its armed forces.¹² The resolution also called upon all members to render assistance to the U.N. in the execution of the resolution and to refrain from giving assistance to North Korea.¹³

The U.S. considers North Korea a threat to its national security. In December 1950, President Truman declared national emergency in connection with the Korean War under the Trading with the Enemy Act. When the Korean War ended in 1953, 520,000 North Korean soldiers and 36,000 U.S. soldiers had been killed or wounded.¹⁴

¹⁰ CCPR/C/PRK/2000/2, para 12.

¹¹ CCPR/C/PRK/2000/2 para 26.

¹² S/RES/83 (1950).

¹³ S/RES/84 (1950).

¹⁴ Don Oberdorfer, *The Two Koreas* 9-10 (2001).

On July 27, 1953, an armistice was reached. With the end of the war, the U.N. Security Council resolution fulfilled its mandate but the U.S. has continued to prohibit all U.S. economic contacts with North Korea. Technically, North Korea has been at war with the U.S. and South Korea for the last 50 years because a peace treaty has never been signed. The U.S.- North Korea relations were generally hostile after the war. In January 1968, the North Koreans seized the U.S. spy ship *Pueblo* together with its crew. In August 1976, two U.S. officers were killed by North Korean soldiers in the Demilitarized Zone.¹⁵

During the Clinton administration, however, the U.S. and North Korea pledged “no hostile intent” toward one another.¹⁶ North Korea wanted to have normal relations with the U.S that would protect the country from the U.S. threat.¹⁷ Many policy makers in the U.S argued that a summit between the U.S. and North Korea, which might have normalized the relations, would legitimize North Korea’s evil leaders.¹⁸ North Korea is still considered a threat to the U.S. national security.

3. Weapons of Mass Destruction

The North Korean nuclear program is one of the main issues that the international community has been dealing with for many years. The nuclear issue has determined the image of North Korea in the eyes of the international community. It is complex and has a long history. In 1991, South and North Korea signed the Korean Peninsula Non-Nuclear Agreement, pledging not to “test, manufacture, produce, import, possess, store, deploy, or use” nuclear weapons and not to use waste processing or uranium enrichment facilities for those purposes.¹⁹ It appeared that the Korean peninsula would

¹⁵ Cummings, *supra* note 1, 494-495.

¹⁶ Madeleine Albright, Madam Secretary, 584 (2003).

¹⁷ See, the Agreed Framework of 1994, Ian Jeffries, North Korea: A guide to economic and political developments 113 (Routledge, New York, NY, 2006).

¹⁸ *Supra* note 16, at 596.

¹⁹ Gavan McCormack, Target North Korea 152 (2004).

be free from nuclear threats. However, in March 1993 Pyongyang announced its withdrawal from the Non-Proliferation Treaty (NPT).²⁰ In response, the Clinton administration planned to destroy North Korea's nuclear facilities by bombing. The operation was stopped at the last minute.²¹

In June 1994, the Geneva "Agreed Framework" was concluded. It provides that North Korea will stay in NPT and freeze its nuclear reactor program; the Korean Peninsula Energy Development Organization (KEDO) will provide North Korea with two light-water reactors by 2003 and an annual supply of 3.3 million barrels of heavy oil until the completion of the reactors;²² the United States and North Korea will move towards full normalization of their political and economic relations; the United States will provide formal assurances to North Korea against the threat or the use of nuclear weapons.²³ Faced with strong opposition by a Republican-dominated Congress, the Clinton administration was reluctant to commit.²⁴

Under the administration of President George W. Bush and after September 11, 2001, the U.S. view toward North Korea changed completely. In January 2002, George W. Bush declared North Korea part of the "axis of evil" together with Iran and Iraq.²⁵ On January 9, 2002, North Korea announced its withdrawal from the NPT. On October 9, 2006, Pyongyang announced that it had successfully tested a nuclear device.²⁶ The U.N. Security Council adopted resolutions urging North Korea²⁷ to abandon its nuclear program and imposed economic sanctions against North Korea.²⁸

²⁰ Cummings, *supra* note 1, at 488.

²¹ *Id.*

²² McCormack, *supra* note 19, at 154.

²³ *Id.* 155.

²⁴ *Id.* 156.

²⁵ See Harold Hongju Koh, *Jefferson Memorial Lecture Transnational Legal Process After September 11th*, 22 Berkeley J. Int'l L. 337, 344-345 (2004).

²⁶ JoongAng Daily, October 10, 2006.

²⁷ S/RES/1695 (2006).

²⁸ S/RES/1718 (2006).

As of December 15, 2006, the U.S., China, Japan, Russia and both Koreas have been having six-way talks to solve the North Korean nuclear issue.

The North Korean nuclear program is the key issue that the international community has engaged for many years. It has had priority over the human rights issue, which is to be approached after the nuclear issue is cleared. Without the resolution of the nuclear question, the North Korean human rights situation also appears hard to resolve.

4. Violations of Civil and Political Human Rights

The severity of the general human rights situation in North Korea has been known through the testimonies of North Korean defectors to China and South Korea since the mid-1990s. Because Pyongyang has not allowed human rights NGOs or international organizations to visit North Korea and gather information on various human rights issues, a lot of controversy surrounds the exact state of human rights in North Korea. Knowing the North Korean human rights situations are important for the purpose of providing better options to the international community, individual states and NGOs for solving North Korean nuclear issues and improving human rights in North Korea.

While the human rights violations by the regime are severe and widespread, the North Korean regime has remained stable even after the collapse of communism. The regime uses both physical force and psychological propaganda to control and alienate the people. The main tactic that supports the regime to remain in power is the complete isolation of the people from the outside world and their repeated indoctrination by the Juche ideology. North Koreans come to know that they have been deceived by the regime only after coming to China or hearing about the outside world.

One of the North Korea's arguments against the international criticism of the North Korean human rights situation is based on cultural relativism: i.e. the standard

of human rights in a country should not be judged by comparison with that of a Western democracy. Pyongyang insists: “No people in the world fully enjoy true human rights as the Korean people do under the man-centered socialist system of Korean style, where the popular masses have become genuine masters of the country and everything in the society is made to serve them.”²⁹ Pyongyang also claims that it would consolidate the Korean-style, man-centered system of ensuring socialist human rights “under the banner of the Juche idea.”³⁰ North Koreans are allegedly “enjoying genuine rights and freedom under the man-centered socialist system where the whole country forms a big harmonious family and the leader, the Party and the masses are single-heartedly united.”³¹

Pyongyang sees human rights through their own eyes and denies their universality. The peculiarity of the North Korean concept of human rights is that it is based on the “principle of collectivism.”³² The North Korean Constitution stipulates that the rights and the duties of the citizens are based on the principle of “one for all and all for one.”³³ They do not want to recognize the reality of their human rights situation and they see things only through the Juche ideology. North Korean people and their society have never been exposed to the international community and democracy.

Therefore, the effective strategies to improve the North Korean human rights situation, I think, should be to free North Koreans from the Juche ideology, to reduce the level of isolation from the outside world, and to provide North Koreans with information on democracy and universal values and beliefs, while not turning a blind eye on the immediate human rights violations in the country. The isolation of North

²⁹ Korean Central News Agency, July 4, 2003.

³⁰ Korean Central News Agency, October 31, 2004. Statement by North Korean delegate at the 3rd Committee of the 59th UN General Assembly on October 26, 2004.

³¹ Korea Central Agency, April 20, 2004.

³² Article 63 of the Constitution.

³³ Article 63 of the Constitution.

Korea is only strengthening the regime because even in extreme hardship, the North Korean people do not know how to oppose the regime, and the regime will use foreign isolation or sanctions as a pretext to tighten its control over the people. Now, I will analyze the general North Korean human rights situations.

4. 1. Death Penalty

Article 6(1) of the ICCPR declares that, “every human being has the inherent right to life. No one shall be arbitrarily deprived of his life. This right shall be protected by law.”³⁴ The right to life is the supreme right and no derogations are allowed. The death penalty may be imposed “only for the most serious crimes.”³⁵ The death penalty can only be carried out by a final judgment of a competent court.³⁶

The North Korean Criminal Code of 1987 stipulates that the death penalty can be imposed for: activities in collusion with the imperialists to suppress the national-liberation struggle or acts of betraying the state;³⁷ betrayal of the country and defection, espionage or helping the enemy;³⁸ instigating, masterminding or being a principal participant in a plot to overthrow the Republic; acts of terrorism with a view to opposing the Republic;³⁹ particularly serious cases of murder and other offences.⁴⁰

In August 1999, North Korea reduced the number of crimes punishable by death from 33 to 5, conspiracy to overthrow the state, treason against the fatherland, terrorism, treason against the people and premeditated murder.⁴¹ In April 2004, it defined the crimes punishable by death even more precisely.⁴² Nonetheless, the

³⁴ Article 6(1) of the CCPR.

³⁵ Article 6(2) of the CCPR.

³⁶ Article 6(2) of the CCPR.

³⁷ Article 52 of the North Korean Criminal Code of 1987.

³⁸ *Id.*, Article 47.

³⁹ *Id.*, Article 45.

⁴⁰ *Id.*, Article 141.

⁴¹ CCPR/C/PRK/2000/2, para.40.

⁴² Korea Institute for National Unification (KIINU), White Paper on Human Rights in North Korea 38-39 (2005).

definition of the crimes punishable by the death penalty is likely to be subjected to arbitrary interpretation. For instance, the Criminal Law states that the death penalty is mandatory in the case of a “particularly serious participation in activities against the country.”⁴³ North Korea reported, without disclosing bases of the death sentences, that 6 death sentences were handed down and 5 executions were performed in 1998; 4 death sentences were imposed and 4 executions were carried out in 1999; and 5 death sentences were issued and 4 executions were administered in 2000.⁴⁴

North Korea declares that the death penalty is imposed only for five types of extremely grave crimes stipulated in the Criminal Code.⁴⁵ It claims that it is headed in the direction of completely abolishing the death penalty.⁴⁶ In North Korea, however, there are some doubts that, during the North Korean famine of 1995-1998, the practice of extra-judicial killings or sentencing to death not based on the Criminal Code were performed. A number of reports have mentioned several cases of sentencing to death for economic crimes.⁴⁷ A man was executed for having stolen rice.⁴⁸ A proclamation of the Social Safety Agency in 1997 threatened that criminals found guilty of stealing grains would be executed by a firing squad.⁴⁹

Death penalty is administered by a court. In 1976, North Korea enacted “the Law Concerning the Composition of Courts.” There are three levels of courts: the Central Court, Provincial Court, and People’s Courts. People’s Court deals with ordinary cases not belonging to Provincial Court. Provincial Court deals with cases involving anti-state, anti-people cases and cases to result in the death sentence. A judge and two people’s jury render a court’s decision.⁵⁰ The Higher Court consists of

⁴³ Supra note 37, Article 59.

⁴⁴ KINU, supra note 42, at 40.

⁴⁵ CCPR/C/PRK/2000/2, para 35.

⁴⁶ CCPR/PRK/2002, page 13 para 40.

⁴⁷ See, Good Friends, Human Rights in North Korea and the Food Crisis 65-68 (2004).

⁴⁸ Amnesty International, Public Executions: Converging Testimonies 4 (2004).

⁴⁹ KINU, supra note 42, at 41-42 (2005).

⁵⁰ Article 4 of the Law Concerning the Composition of Courts

three judges. Court decisions shall be determined by a majority vote.⁵¹ The criminal procedure is based on mass principle. Article 3 of the Criminal Procedural Law stipulates that “in handling criminal case, the state shall rely on the power and wisdom of the masses.” The independence of the court is not fully secured.

The United Nations Economic and Social Council (ECOSOC) Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty states that, “where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.”⁵² The North Korean Criminal Procedure Law states that the death penalty is carried out in the presence of a prosecutor and with the approval of the Supreme Peoples’ Assembly (SPA) Presidium.⁵³ Pyongyang has never admitted to public executions. However, the regime uses public executions “as a means of ruling for the purpose of planting fear among the populace and spurring awareness of specific social problems” without following established standards.⁵⁴ Trials take place immediately before execution or several weeks before.⁵⁵ The North Korean Criminal Procedural Law has the provision that allows public execution to take place immediately after trials. Article 286 of the Criminal Procedural Law stipulates that “in an effort to prevent crimes and make the masses aware of the consequences, the Courts may organize on-site trial procedures.” In this case, the heads or leaders of agencies, work places, and unions involved, could bring accusation and reveal the acts of criminal perpetrators.⁵⁶ Posters are put at workplaces with the time, place of execution, and the name of the defendant.⁵⁷

⁵¹ Id. Article 17.

⁵² Safeguard 9. of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the UN Economic and Social Council.

⁵³ Article 297 of the North Korean Criminal Procedure

⁵⁴ Human Rights Without Frontier Int, Public Executions (2004).

⁵⁵ Amnesty International, Public Executions: Converging Testimonies 4 (1997).

⁵⁶ Article 286 of the North Korean Criminal Procedural Law

⁵⁷ Id.

Public executions are carried out where a lot of people gather, such as schools and farms. “Everyone is welcome to attend.”⁵⁸ One North Korean defector testified that he had witnessed his first public execution when he was in fourth grade, and that generally, public executions were attended by large numbers of children “who came out of curiosity.”⁵⁹ Sometimes, family members of the accused are forced to appear at the scene of execution to publicly denounce the accused.⁶⁰

Public executions of Christian believers have been reported several times.⁶¹ On November 20, 1996 five Christians were executed; in 1997, a young woman in her twenties carrying a Bible was executed along with her father.⁶² Public executions were carried out frequently during 1996-1998 when famine was severe in North Korea.⁶³ Public executions by shooting were widespread during the period.⁶⁴

4. 2. *Right to Liberty*

The ICCPR declares that, “no one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.”⁶⁵ Anyone arrested must be notified at the time of arrest of the reasons for the arrest and be informed of any charges against him.⁶⁶ All detained persons must be treated with humanity and with respect for the inherent dignity of the human being.⁶⁷

The North Korean Constitution stipulates that, “citizens are guaranteed inviolability of the person and the home, and privacy of correspondence. No citizens

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Human Rights Without Frontier Int. supra note 54.

⁶¹ Id..

⁶² U.S. Commission on International Religious Freedom, Thank You Father Kim Il Sung: Eyewitness Accounts of Severe Violations of Freedom of Thought, Conscience, and Religion in North Korea, 49-50.

⁶³ Id.

⁶⁴ Id.

⁶⁵ Article 9 of the ICCPR.

⁶⁶ Id., Article 9(2).

⁶⁷ Id., Article 10(1).

can be placed under control or be arrested, nor can their homes be searched without a legal warrant.”⁶⁸

Punishment under the North Korean penal code is classified as “basic punishment” or “additional punishment.” There are four types of punishment: the death penalty, the unlimited term of correctional labor, the limited term of correctional labor, and labor training.⁶⁹ The unlimited term of correctional labor sentences are 15 years or longer. The limited term sentences range from one to 15 years. Those sentenced to unlimited or limited correctional labor punishment, are detained in “correctional centers” called “kyohwaso” and undergo corrections through labor.⁷⁰ Labor training is a new form of punishment and ranges from six months to two years of sentences.⁷¹ They are typically economic criminals rather than political criminals. “Collection points” are detaining centers for defectors, those transgressing the designated areas. If a person is caught traveling without a traveling permit, he/she is sent to a “collection points.”

North Korea has been criticized for operating concentration camps and labor training camps for political prisoners. They are called “Gwalliso” and often called “control district” or “special district for dictatorial control.” In fact, persecutions against political prisoners are legitimized in the North Korean Constitution. Article 12 of the Constitution states: “The state shall adhere to the class line, strengthen the dictatorship of the people’s democracy and firmly defend the people’s power and socialist system against all subversive acts of hostile elements at home and abroad.”⁷²

After the establishment of the North Korean regime, religious leaders and those who had collaborated with the Japanese during the occupation were detained in

⁶⁸ Article 79 of the Constitution.

⁶⁹ Article 28 of the North Korean Criminal Law

⁷⁰ Id. Article 30.

⁷¹ Id. Article 31.

⁷² Article 12 of the Constitution.

detention camps.⁷³ These facilities have evolved into political prison camps. In 1972 Kim Il Sung declared: “Factionalists or class enemies, whoever they are, their seed must be eliminated through three generations.”⁷⁴ Consequently, those people are put into prison camps, mostly with other family members, without a trial. They have to endure extremely hard labor with below- sustenance food rations because the regime does not want them back in society. Kang Chol Hwan, a North Korean who, when he was nine was taken with his family to one of the political camps in North Korea and later defected to South Korea through China, testified in his book about several public executions without proper legal process.⁷⁵

Gwalliso are located in the Northern Provinces in valleys between high mountains.⁷⁶ It is estimated that approximately 200,000 prisoners are detained in all the gwalliso camps throughout North Korea.⁷⁷ The living conditions in the prison camps are extremely poor,⁷⁸ and family members are also detained through guilt by association.⁷⁹

Torture and inhumane treatment is not uncommon, especially in political camps and detention camps where repatriated North Koreans are also held.⁸⁰ Torture and inhumane treatment are inflicted upon women and children alike. Labor in prison camps is extremely hard. It is a tool for the creation of a new citizen who is obedient and full of the spirit of the revolution.⁸¹

⁷³ U.S. Commission on International Religious Freedom, *supra* note 62, at 69-78.

⁷⁴ Heo Man-Ho, North Korean Human Rights in “Cooperative Antagonistic Relations”: Intervention and Education, *Sungkok Journal* No. 35, 188 (Sungkok Science and Culture Foundation, 2004).

⁷⁵ Kang Chol Hwan, *The Aquariums of Pyongyang*, 137-144 (2001).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See, Kang Chol Whan, *supra* note 75, at 124.

⁷⁹ KINU, *supra* note 42, at 117.

⁸⁰ Joanna Hosaniak, *Prisoners of Their Own Country: North Korea in the Eyes of the Witnesses*, A Report of Citizens’ Alliance for North Korean Human Rights (NKHR) 37.

⁸¹ *Id.* at 44.

4. 3. Right to Freedom of Movement and Freedom of Residence

Article 12 of the ICCPR stipulates that everyone has the right to liberty of movement and freedom to choose his residence, and should be allowed to leave any country.⁸²

Article 75 of the North Korean Constitution stipulates that “citizens have freedom of residence and travel.” Although Pyongyang insists that North Koreans are free to leave or come back to the country,⁸³ they are not allowed to go abroad freely.

The right to travel is extremely restricted in North Korea. Travelers should file an application with the supervisors of their workplaces two weeks in advance and have a travel certificate issued by people’s committees.⁸⁴ The regime has absolute control over the movement of the people through its power to issue a traveler’s certificate. Article 6 of the North Korean Regulation of Travel stipulates that the citizens who want to travel have traveler’s certificate issued by people’s committees. Persons, including foreigners, who want to move their residence, must have their move registered.⁸⁵ This prevents the exchange of information, and consequently, the formation of political opinions harmful to the regime. North Koreans do not know the country's internal affairs because the flow of information and people are restricted.

North Korea maintains strict government control over “the flow of information, the movement of people, and the means of production.”⁸⁶ These are important tools to control the people, isolating them internally and internationally.⁸⁷ After the collapse of the Eastern bloc, China and Russia started to improve their relationship with the outside world. North Korea, on the other hand, limits the exposure of its citizens to “the polluting influences” of the outside world.⁸⁸ North Koreans are not allowed to

⁸² Article 12 of the ICCPR.

⁸³ CCPR/C/PRK/2000/2, para 78.

⁸⁴ Id. para 76.

⁸⁵ Id. para 77.

⁸⁶ L. Gordon Flake et al.eds. *The Experience of U.S. NGOs in North Korea, Paved with Good Intentions: The NGO Experience in North Korea* 36 (2003).

⁸⁷ Id.

⁸⁸ Id.

travel abroad; they cannot meet foreigners even inside the country. Contacts with foreigners or foreign information are completely banned or controlled by the central government. Even during the extreme famine crisis in the mid-1990s, Pyongyang insisted that food-aid NGOs should notify the authorities of their intended site visits outside of Pyongyang at least a week in advance, and that Korean-speaking staff could not be assigned to North Korea. These requirements made the food aid operations ineffective and the monitoring of food deliveries difficult.⁸⁹ Maintaining the regime by controlling foreign information and influences was more important from the perspective of the North Korean government, than saving the starving population by allowing and facilitating the monitoring process.

Pyongyang has denied access to the U.N. Special Rapporteur on Human Rights and on the Right to Food.⁹⁰ It does not allow independent human rights observers to monitor or investigate the human rights situation in North Korea. Scot Snyder argues that, “the primary North Korean objectives in dealing with U.N. organization representatives and NGO monitors in the country were clear: minimize contact and channels of communication with ordinary people and control access to the broader North Korean public, while drawing in as many resources as possible.”⁹¹

Further, North Korea forcibly relocates people depending on the needs of the regime or for political reasons.⁹² The disabled are not allowed to live in major cities such as Pyongyang and Kaesong, and have no right to reproduction.

The restriction on the right to movement contributed to the aggravation of the famine in the mid-1990s. People could not move freely in search of food during the famine while the Public Distribution System (PDS) could not provide them with food

⁸⁹ Id., at 6.

⁹⁰ See, the report of Special Rapporteur on the North Korean human rights, A/60/306 (29 August 2005).

⁹¹ Flake et al. supra note 86, at 3.

⁹² KINU, supra note 42, at 132.

any more.⁹³ North Koreans had to bribe party officials or security guards to get a certificate or to avoid being punished.⁹⁴

4. 4. Right to Fair Trial

Article 14 of the ICCPR stipulates that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” In order for the right to fair trial to be guaranteed, the independence of the court should be secured; trials should be conducted openly; the suspects should have the right to an attorney and the right to appeal unfair trial procedures.

Article 160 of the North Korean Constitution stipulates that, “in administering justice, the court is independent, and judicial proceedings are carried out in strict accordance with the law.”⁹⁵ In reality, however, the fair trial is not secured in the North Korean criminal procedures.

Structurally, the North Korean court system is placed below the Supreme People’s Assembly, the National Defense Commission, and the Cabinet. The Central Court is accountable to the Supreme People’s Assembly under article 162 of the Constitution; the Constitution limits the tenure of judges to five years.⁹⁶ Article 255 of the North Korean Criminal Procedural Law mandates punishment of judges for unfair, unjust and/or arbitrary judgment or decisions.

In North Korea citizens are tried in open courts, but officials and party staffs are tried in secret because trying party official openly will have a negative impact on the society. Typically, one judge and two peoples’ jurors participate in the sentencing. However, this is totally different from the American jury system. Only workers such as farmers and laborers can qualify to serve as jury. They play a nominal role. Further,

⁹³ Id.

⁹⁴ Id.

⁹⁵ Article 160 of the Constitution.

⁹⁶ Article 154 of the Constitution.

article 230 of the Criminal Law states that “whenever representatives of workers and farmers are present in the trials, they will be asked to make initial accusations of the crimes.” The impartiality of courts could not be expected.

Right to fair trial can be effectively secured by the attorney’s independence from the state. Attorneys in North Korea, however, play the role of a political educator. Article 11 of the Legal Representation Law provides that one of the attorney’s responsibilities is to “explain the nation’s laws and regulations to the people, and to help the people obey these laws and regulations.” North Korea does not have bar examinations, and attorneys, judges and prosecutors are appointed by the state from law school graduates. In short, North Korea lacks a legal system that guarantees the impartiality and independence of the judiciary, which is essential in securing equal protection under the law.⁹⁷

4. 5. *Right to Privacy*

Article 17 (1) of the ICCPR declares that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.”⁹⁸

Article 79 of the North Korean Constitution says: “Citizens are guaranteed inviolability of the person and the home and privacy of correspondence.”⁹⁹ However, the invasion of privacy and private life, including wiretapping, is widespread in North Korea.

The North Korean regime performs widespread surveillance through public networks. The Korean Workers' Party, the People’s Safety Agency and the State Security Protection Agency keep an eye on the individual’s everyday life and prevent

⁹⁷ CCPR/CO/72/PRK, para 8.

⁹⁸ Article 17 (1) of the CCPR.

⁹⁹ Article 79 of the Constitution.

any opposition to the regime or anti-revolutionary acts from happening.¹⁰⁰ People do not know who would report their behavior to the authorities. One North Korean testifies:

My husband was a teacher. One day, while drinking with his friends, he said, ‘When on earth are we going to be able to get out of this suffering? It would be better if the state falls as soon as possible if it is doomed to go away.’ This remark was reported by some of his friends, so he was taken to a detention camp and was tortured for 40 days there.¹⁰¹

Here is another testimony:

My father was working in a company. He said, ‘if it is like this, all our North Korean people will starve to death.’ Someone reported this to a person from an upper class. Then my father was accused of ‘complaint against the nation.’ It has been two months since he was arrested, but he has not come back.¹⁰²

All North Koreans are required to join various organizations throughout their lives.¹⁰³ These are not interest groups or pressure groups, but “primary control mechanisms over the people.”¹⁰⁴ Employment assignments, food rationing, and travel constraints are all tied to a political system of comprehensive surveillance.¹⁰⁵ North Koreans are classified into 3 classes and 51 categories according to their family

¹⁰⁰ Hosaniak, *supra* note 80, at 55.

¹⁰¹ Good Friends, *Human Rights in North Korea and the Food Crisis: A Comprehensive Report on North Korean Human Rights Issues 70*, available at <http://www.goodfriends.or.kr>

¹⁰² *Id.*

¹⁰³ KINU, *supra* note 42, at 148.

¹⁰⁴ *Id.* at 149.

¹⁰⁵ McCormack, *supra* note 19, at 74.

background and loyalty to the regime.¹⁰⁶ The social classification in North Korea has contributed to the strengthening of the core class's loyalty to the regime.

Amid reports of spreading corruption, bribery, pilfering, absenteeism, and noncompliance, North Korea's repressive system may well be loosening. As systems of production and reproduction break down, the control system too comes under heavy pressure.¹⁰⁷ However, the regime seems to be maintaining full control over the population.

The regime and the Korean Workers' Party have all the background information, such as family circumstances and ideological or political inclination. The information in possession of the regime and the Party determines a person's future, including education and work assignment.¹⁰⁸ Informants working for the regime or the Korean Workers' Party are everywhere at work and in private lives. The continual ideological and self-criticism sessions in workplaces, schools and political prison camps are a method of obtaining information on a person and the activities of family members or neighbors.¹⁰⁹

4. 6. Freedom of Religion

Article 18 of the ICCPR states: "Everyone shall have the right to freedom of thought, conscience and religion."¹¹⁰ The freedom of thought is a fundamental basis for a democratic society. Coercion that would impair the right to have or to adopt a religion or belief such as the use of threat or physical force or penal sanctions, or to recant one's religion or to convert is not allowed.¹¹¹

¹⁰⁶ KINU, *supra* note 42, at 101-127.

¹⁰⁷ McCormack, *supra* note 19, at 77.

¹⁰⁸ Hosaniak, *supra* note 80, at 73.

¹⁰⁹ *Id.* at 73.

¹¹⁰ Article 18 (1) of the CCPR.

¹¹¹ Article 18 (2) of the CCPR.

North Korea considers religion as a tool for the ruling class to exploit the masses and has persecuted religious activities. Christians were purged because they were regarded as tools of imperialist aggression. Religion almost disappeared because of severe persecution. In 1972, North Korea recognized in its constitution “the freedom of religion” along with “the freedom to launch anti-religious campaigns.”¹¹² Freedom of religion was practically denied by the freedom to launch anti-religious campaigns.

As the international criticism on the North Korean persecution against religion mounted, North Korea relaxed its policies towards religion. Article 68 of the North Korean Constitution of 1998 stipulates: “Citizens have freedom of religious belief. This right is granted by the permission to build religious buildings and have the legal freedom to select any religious ceremonies.” Although the hostility of the constitution toward religion has decreased recently, the freedom of religion is perceived only as freedom of building religious buildings or having religious ceremonies. North Korea advertises internationally the fact that religious facilities have been established.

North Korea insists that there is no limitation in organizing religious bodies and conducting religious activities,¹¹³ religion is completely independent of the state, and all religions are equal.¹¹⁴ Pyongyang explains that in North Korea the number of religious believers is small because many of them were killed during the Korean War, and young people do not have an interest in religious groups.¹¹⁵

In North Korea, Kim Il Sung is “the sun of the nation,”¹¹⁶ and “the eternal president of the nation”.¹¹⁷ Consequently, the freedom of religion in North Korea is very narrow.¹¹⁸ Freedom of religion is “granted” and includes “the construction of

¹¹² Article 54 of the 1972 Constitution.

¹¹³ North Korea’s report under the ICCPR, *supra* note 97, para 112.

¹¹⁴ *Id.* para 115.

¹¹⁵ Summary record of the 1946th meeting [Human Rights Committee]: DPRK, 30/10/2001.

¹¹⁶ Preamble of the Constitution.

¹¹⁷ Preamble of the Constitution.

¹¹⁸ U.S. Commission on International Religious Freedom, *supra* note 62, at 27.

religious buildings and the holding of religious ceremonies.”¹¹⁹ It is not inherent in every human being and does not include freedom to change one's religion, and freedom, either alone or in community with others and in public or private, to manifest one's religion in teaching, practice, worship and observance.¹²⁰

Further, North Korea considers religion an obstacle to the establishment of a communist society. The North Korean Constitution states: “Religion cannot be used to draw in foreign forces or for harming the State and social order.”¹²¹ This is a significant limitation of the freedom of religion because many religions, especially Buddhism and Christianity, are of foreign origin.

Pyongyang, in order to prevent Christianity from entering North Korea, severely punishes those who get in touch with South Korean religious groups in China.¹²² This shows the real condition of freedom of religion in North Korea. It allows religious activities only for political and economic purposes, such as decreasing international criticism, and securing humanitarian assistance from the international community. One North Korean defector testifies: “The North Korean ideology is the single-leader doctrine. The central theme of the ideology is Juche. Kim Il Sung is the center of things, so nothing else can exist.”¹²³ The worship of Kim Il Sung and Kim Jong Il is specifically stipulated in “The Ten Great Principles of Unique Ideology.” For example, article 3 of the Principles reads: “Make absolute the authority of the Great Leader Kim Il Sung.” Article 4 of the Principles reads: “Accept the Great Leader Kim Il Sung’s revolutionary thought as your belief and take the Great Leader’s instructions as your creed.”

Freedom of religion is not likely to be fully recognized in North Korea while the Juche ideology is operative. The North Korean regime demands of its people to be

¹¹⁹ Article 68 of the Constitution.

¹²⁰ Article 18 of the ICCPR.

¹²¹ Article 68 of the Constitution.

¹²² U.S. Commission on International Religious Freedom, *supra* note 62, at 14.

¹²³ *Id.* at 32.

absolutely loyal to its Great Leader. Worshiping any other entity but Kim Il Sung contradicts his absolute power of a Creator. The Juche ideology as a nationalistic ruling ideology has replaced religion.

4. 7. Freedom of Expression

Article 19 of the ICCPR stipulates: “Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of their choice”¹²⁴ The right to freedom of expression, press, publication, association, demonstration and assembly is essential in modern democratic society. Article 67 of the North Korean Constitution provides: “Civilians shall have the freedom of press, publication, association, demonstration, and assembly.”¹²⁵

In North Korea, the press is owned and controlled by the regime. All news media in North Korea belongs either to the state or to public organs. North Koreans who own radio or television sets cannot listen to or watch South Korean or Chinese broadcasts because the stations are pre-set and the radio and television sets sealed only to receive North Korean broadcast.¹²⁶ North Koreans can only get information screened by the regime and are completely excluded from other information.¹²⁷ “Many journalists are in fact high ranking government officials or members of the Party.”¹²⁸

The North Korean press does not provide critical information and commentary to citizens. It focuses on the propaganda of Kim Il Sung based on the Juche ideology and upon indoctrinating the population. Information is provided, omitted, exaggerated,

¹²⁴ Article 19 (2) of the CCPR.

¹²⁵ Article 67 of the Constitution.

¹²⁶ Id. at 138.

¹²⁷ KINU, supra note 42, at 140.

¹²⁸ Hosaniak, supra note 80, at 84.

or fabricated by the government. The press in North Korea is an advertiser, instigator and organizer for Korea Workers' Party designed to help achieve its goals. Under any circumstances, the North Korean press may not engage in any type of criticism of the leadership or instructions of the Great Leader Kim Il Sung and Kim Jong Il. Reports on the two Kims occupy the front pages of newspapers, and their names are printed in special bold fonts.

All news is for the express purpose of embedding the supremacy of the North Korean system in the minds of the people. There are no critical reports or discussions on sensitive issues regarding the system. North Koreans do not have any meaningful information to compare their political, social, and cultural situation with the outside world. The sale of foreign newspapers and magazines is also prohibited in North Korea.¹²⁹

The external and internal isolation contribute to the strengthening of the regime. This, in combination with government propaganda about the threats from foreign forces, strengthens the people's reliance on the current regime.¹³⁰

In North Korea, the right to freely express one's opinion is subject to strict controls. Article 195 of the North Korean Criminal Law of 2004 stipulates that "people who systematically listen to broadcasts opposing the North Korea, or who have collected, retained or disseminated their contents, shall be punished by up to two years of labor training." Article 222 stipulates that "anyone found spreading unfounded lies that could contribute to the distrust of North Korea would be punished by up to two years of labor training."

¹²⁹ Id.

¹³⁰ Yun-Jo Cho, The Sources of Regime Stability in North Korea: Insights from Democratization Theory, *Stanford Journal of East Asian Affairs*, 97 (2005 Volume 5)

4. 8. Right of Political Participation

Article 25 of the ICCPR stipulates that “every citizen shall have the right and the opportunity...without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives:[and] to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.” The right to political participation include the right to participate directly in the formation of their country, to join in the election and voting process as election candidates or voting members and to be elected to public office.

Article 6 of the North Korean Constitution stipulates: “The organs of state power at all levels, from the county People’s Assembly to the Supreme People’s Assembly, are elected on the principle of universal, equal and direct suffrage by secret ballot.”¹³¹ Article 66 of the Constitution also declares: “All citizens above the age of 17 shall have the right to vote and the right to elective office.”¹³² North Korea claims that North Koreans “enjoy the right to participate in government according to their wishes.”¹³³

In its second report to the Human Rights Committee, North Korea states: “[North Korea] does not have separate legislation for the organization of political parties, for the existing parties have been in activity for over 50 years since their formation” and “there is actually no public force that requires the formation of a new party.”¹³⁴ On the other hand, it admits that several parties exist in North Korea: the Korean Workers’ Party, the Korean Social Democratic Party and the Korean Chondoist Chongu Party.¹³⁵ In reality, the law forbids the formation of new political parties. The North Korean Constitution declares that North Korea performs its

¹³¹ Article 6 of the Constitution.

¹³² Article 66 of the Constitution.

¹³³ Supra note 128, para 155.

¹³⁴ North Korea’s report under the ICCPR, supra note 97, para 129.

¹³⁵ Id.

activities under the leadership of the Korean Workers' Party.¹³⁶ Under the North Korean Constitution, it is impossible for those parties to win elections. Those parties are established for the purpose of propaganda that democracy is being practiced.

5. Economic, Social and Cultural Rights in North Korea

5.1. Right to Work

Article 6 of the ICESCR stipulates that everyone has the right “to gain his living by work which he freely chooses or accepts.”¹³⁷ The ICESCR also demands that states take appropriate steps to safeguard this right.¹³⁸ Article 70 of the North Korean Constitution provides: “People have a right to the choice of employment according to their desire and talent.”¹³⁹ North Korea insists that “[u]nemployment or semi-unemployment is never found” because the means of production are owned by the public.¹⁴⁰ North Korea claims that “working people have no need to hold more than one full-time job to secure an adequate standard of living for themselves and their families,”¹⁴¹ because the state provides all working people with every condition for obtaining food, clothing and housing.

In North Korea, labor is considered as “responsibility.”¹⁴² Article 83 of the Constitution also states that “the people must voluntarily and diligently engage in labor and strictly obey labor regulations and labor hours.” Labor is not for the individual’s benefit, but a group activity for the benefit of everyone.¹⁴³

Free labor unions that protect and represent the interests of laborers do not exist in North Korea. The only labor union in North Korea is the General Federation

¹³⁶ Article 11 of the Constitution

¹³⁷ Article 6 of the ICESCR.

¹³⁸ Article 7 of the ICESCR.

¹³⁹ Article 70 of the Constitution.

¹⁴⁰ E/1990/6/Add.35, para 5.

¹⁴¹ *Id.*, 14.

¹⁴² Article 83 of the Constitution

¹⁴³ Article 1 of the Socialist Labor Law of 1978.

of Korean Trade Unions, which does not have the right to collectively organize, bargain, or strike. Labor activities are severely restricted by the penal code. Article 59 of the North Korean Criminal Law provides that “any person who uses his or her employment to destroy or damage the state’s industry, transportation, commerce will be executed.” Further, Article 61 of the Criminal Law stipulates that “people who carry out their work in an inattentive manner will be sentenced to at least five years imprisonment and cannot vote for four years after the completion of their sentence.”

Workers are assigned to their jobs according to the central economic plan and individual talents and/or wishes are secondary considerations. In order to resign from a job, one has to obtain the approval of the manager and the party secretary. North Koreans are assigned on a group basis to factories, mines or various construction facilities. For example, in 2001, high school students and soldiers discharged from the military were group-assigned to the Pyongyang Textile Factory and Ranam Coal Mine Collective. The authorities awarded service medals and held send-off ceremonies to praise their resolutions to work there.¹⁴⁴ Group-assignment means that one has to live there for life. Refusal to obey a group-assignment means being excluded from all rations.

Family background and party loyalty determine the assignment of workers.¹⁴⁵ Students without a good family background are assigned to a field that demands physical labor; children of party cadres or government officials are assigned to better work places. Work assignments are susceptible to personal favoritism or bribes.¹⁴⁶

In North Korea, production quotas are very often assigned to a group of workers and the group members are collectively responsible for the result of the work.

¹⁴⁴ Yohhap News, December 13, 2001.

¹⁴⁵ Hosaniak, *supra* note 82, at 90.

¹⁴⁶ KINU, *supra* note 42.

Workers must attend collective meetings and study sessions including self-criticism and ideological study sessions.¹⁴⁷

5. 2. *Right to Education*

Education should be directed “to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.”¹⁴⁸ Further, education should “enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups.”¹⁴⁹ Article 73 of the North Korean Constitution recognizes the right to education.¹⁵⁰

The goal of education in North Korea is to train solid revolutionaries for the future who will fight for the society and for the people, and to educate new communist citizens. The Constitution provides that “the state shall put the principles of socialist education into practice and raise a new generation of steadfast revolutionaries who will fight for the society and the people, people of a new communist type who are knowledgeable, morally sound and physically healthy.”¹⁵¹ Article 27 of the Family Law stipulates that parents should raise their children to be steadfast revolutionaries and new communists.¹⁵²

At early stages of elementary and secondary schools, infusing students with the ideology of the Great Leader Kim Il Sung and the Dear General Kim Jong Il is the primary process of education.¹⁵³ Kim Il Sung's life and revolutionary struggle are school subjects. The textbooks are full of propaganda idolizing Kim's family.¹⁵⁴

¹⁴⁷ Hosaniak, *supra* note 82, at 90.

¹⁴⁸ Article 13 (1) of ICESCR.

¹⁴⁹ *Id.*

¹⁵⁰ Article 73 of the Constitution.

¹⁵¹ Article 43 of the Constitution.

¹⁵² Article 27 of the Family Law.

¹⁵³ U.S. Commission on International Religious Freedom, *supra* note 62, at 33.

¹⁵⁴ *Id.*

There is a systematic policy of discrimination against the lower classes. No matter how good one's academic achievements are, one is unable to get college education if one's personal or family background is low. Since the food crisis of the mid-1990s, the compulsory education system has not been working. Both teachers and students spend more time in search of food rather than in schools.

5. 3. *Right to Food*

In September 1995, the North Korean government appealed for food aid to the United Nation's World Food Program (WFP) and the international community. The collapse of the Eastern-bloc economic system and natural disasters are allegedly the main reasons for North Korea's food shortage.¹⁵⁵

First, North Korea has had a close relationship with China and the Soviet Union since the regime was established on the Northern part of the Korean peninsula. It received food subsidies from China and the Soviet Union, for which it paid in goods. China and the Soviet Union also provided North Korea with oil.¹⁵⁶ The Eastern economic bloc collapsed around 1990-1991.¹⁵⁷ North Korea lost its sources of food aid and oil supply, which resulted in an economic catastrophe. With the dissolution of the Eastern economic bloc North Korea also lost its market for goods through which it could earn foreign currency.¹⁵⁸ This reduced its buying capabilities. The North Korean government launched a "let's eat two meals a day" campaign in 1991 and the Public

¹⁵⁵ Amnesty International, *Starved of Rights: Human Rights and the Food Crisis in Democratic People's Republic of Korea (North Korea)* 4 (2004); the WFP lists droughts, flooding, typhoons, deforestation, economic downturn, lack of agricultural inputs and lack of foreign currency as the causes of food shortages. See Food Security Overview of North Korea at http://www.wfp.org/country_brief/indexcountry.asp?country=408#Overview (last visited on November 22, 2006); on the other hand, some argue that "the fundamental failure of the North Korean government to respond to its changed circumstances in a timely and appropriate way" was the cause of the famine. See Stephan Haggard and Marcus Noland, *Hunger and Human Rights: The Politics of Famine in North Korea* 11 (U.S. Committee for Human Rights in North Korea, 2005).

¹⁵⁶ Natsios, *supra* note 2, at 10-11.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

Distribution System (PDS) rations were reduced by 10 percent in 1992.¹⁵⁹ It appears that the food shortage or famine had begun long before natural disasters hit North Korea in the mid-1990s.

Second, the North Korean government claimed that the food shortage was caused by natural disasters such as flooding and drought.¹⁶⁰ Severe flooding occurred in successive years and a drought followed in 1997.¹⁶¹ The country had to cope with the catastrophic famine years of 1995-98, which claimed hundreds of thousands of lives. The number of estimated victims of the North Korean famine in 1995-1998 ranges from 200,000 to three million. Nicholas Eberstadt estimated the famine casualties to be around three million based on a survey conducted by the North Korean government.¹⁶² Good Friends, a South Korean humanitarian aid group, also estimated the casualties to be three million.¹⁶³ In May 1999, an official of the North Korean Foreign Ministry admitted that 220,000 people had died during the famine.¹⁶⁴ Despite the launch of a large-scale international relief effort, especially targeting children, there were many deaths, especially among the most vulnerable members of the population. Malnutrition and stunting of growth among children became chronic.

Other fundamental human rights were also violated or aggravated as a result of the violations of the right to food. First, public executions were used to control the population. They had been reported even before the famine. North Korea frequently used public executions to suppress the public unrest caused by the famine. A proclamation by the Social Safety Agency during the famine warned people not to

¹⁵⁹ Amnesty International, *Starved of Rights: Human Rights and the Food Crisis in the Democratic People's Republic of Korea (North Korea)* 5 (2004).

¹⁶⁰ Second periodic reports submitted by States parties under CESCR, E/1990/6/Add.35, May 15, 2002, para 55.

¹⁶¹ *Id.*

¹⁶² Andrew S. Natsios, *The Great North Korean Famine: Famine, Politics and Foreign Policy* 204 (United States Institute of Peace Press).

¹⁶³ Good Friends, *Human Rights in North Korea and the Food Crisis: A Comprehensive Report on North Korean Human Rights Issues*, 53 (2005). Available at <http://www.goodfriends.or.kr>.

¹⁶⁴ Associated Press, "North Korea Says 220,000 Dead in Famine," May 10, 1999.

engage in grain-selling activities. It declared, “[t]hose who are engaged in grain-selling activities for the purpose of illicit accumulation of wealth shall be sternly punished under the law, including execution by firing squad.”¹⁶⁵

Second, the famine aggravated especially the human rights of women and children and the effects on them were long-lasting. The famine had an enormous impact on women and children. Women were exposed to trafficking after they crossed the Chinese border in search of food.¹⁶⁶ Children were left behind without parental care because parents died of hunger or were away from home searching for food. The number of abandoned children increased.¹⁶⁷

Third, the famine forced many North Koreans seeking food into China. A number of them returned, while some remained in China or made their way to South Korea. Returning North Koreans have faced various forms of human rights violations by the regime, while those seeking shelter in China are easily exposed to human rights violations including forced marriage and prostitution by the Chinese.¹⁶⁸

Fourth, the famine had disastrous effects on prisoners because they had no other alternatives to find food other than what was given them through the prison system. The combination of hard labor and below-subsistence-level food provisions resulted in malnutrition and disease, and even death from starvation.¹⁶⁹

6. Rights of Women

In February 2001, North Korea joined the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹⁷⁰ Under the Convention, North Korea

¹⁶⁵ A proclamation by the Social Safety Agency of North Korea regarding the stern punishment of those who steal, sell or waste grains. Korean Institute for National Unification (KINU), White Paper on Human Rights in North Korea 42-43 (2005).

¹⁶⁶ Refugees International, supra note 52, at 8-10; Anti-Slavery, An Absence of Choice (2005).

¹⁶⁷ Good Friends, supra note 163, at 50-52.

¹⁶⁸ Anti-Slavery International, An Absence of Choice: The Sexual Exploitation of North Korean Women in China 3-8.

¹⁶⁹ David Hawk, The Hidden Gulag: Exposing North Korea’s Prison Camps 42.

¹⁷⁰ CEDAW/C/PRK/1, para 1.

is under the obligation to eliminate discrimination against women and to take all appropriate measures to ensure the full development and advancement of women.¹⁷¹

Article 77 of the North Korean Constitution stipulates: “Women are accorded an equal social status and rights with men,” and the Law on Sex Equality says: “Women shall have equal rights with men in all spheres of the state’s economic, social, cultural and political life.”¹⁷² The Constitution provides that the state shall afford special protection to mothers and children by providing maternity leave, reduced working hours for mothers with several children, a wide network of maternity hospitals, nurseries and kindergartens, and other measures.¹⁷³ According to the Constitution, the state should provide all conditions for a woman to play a full role in society.”¹⁷⁴ Pyongyang insists that since the Law on the Equality of Sexes was promulgated on July 30, 1946, “women’s equality has been fully realized and there is no legal discrimination against women” in North Korea.¹⁷⁵

In practice, however, the status and the role of North Korean women have not improved as much as the regime claims. Although women participate in various political organs, their participation is arbitrarily prescribed by the Korean Workers’ Party according to its political considerations.¹⁷⁶ For example, about 20 percent of the people’s deputies at the Supreme People’s Assembly have been female, but they are not elected through free elections. Only very small number of women is appointed to cabinet positions.

Further, trafficking in women and sexual assault have been reported very often.¹⁷⁷ Women trafficking in North Korea include forcible abduction, enticement by intermediaries, and voluntary submission for the purpose of supporting the family,

¹⁷¹ Article 2, 3 of the CEDAW.

¹⁷² Article 1 of the Law on Sex Equality.

¹⁷³ Article 77 of the Constitution.

¹⁷⁴ Article 77 of the Constitution.

¹⁷⁵ CCPR/C/PRK/2000/2, page 7, para 18-19.

¹⁷⁶ KINU, *supra* note 42, at 184.

¹⁷⁷ Good Friends, *supra* note 163, at 67.

which is the result of the economic hardships and food shortage in North Korea. Women, in order to survive and support their families in North Korea, volunteer for arranged marriages with Chinese farmers. When women in search of food are caught in China and deported to North Korea, they would routinely be detained, tortured or mistreated.

7. *Rights of Child*

The ICCPR guarantees every child, without any discrimination, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state.¹⁷⁸ North Korea joined the Convention on the Rights of the Child (Child Convention) in 1990.¹⁷⁹ According to article 6 of the Convention, North Korea should ensure to the maximum extent possible the survival and development of the child. Further, North Korea must secure that “all children be entitled to enjoy the standard of living adequate for the physical, mental, intellectual, ethical and social development.”¹⁸⁰ In 1999, North Korea established National Committee for the Rights of the Child. The North Korean Childrearing Guideline Law stipulates that, “the state and social cooperative organizations shall guarantee all necessary measures for childrearing under the principle of best interests for the children.”¹⁸¹

In its second periodic report to the Convention, Pyongyang insisted that “the youth and children of [North Korea] are filled with pride, joy and optimism of life,”¹⁸² and at the same time admitted that the successive natural disasters severely damaged the education and public health facilities, and millions of children were severely

¹⁷⁸ Article 24 of the CCPR.

¹⁷⁹ CRC/C/65/Add.24, para 5.

¹⁸⁰ Article 27 of the Child Convention.

¹⁸¹ Article 12 of the North Korean Childrearing Guideline Law.

¹⁸² CRC/C/65/Add.24. para 80.

affected with regard to education and medical services.¹⁸³ The child mortality rate has been continuously increasing since 1993.¹⁸⁴

North Korean children's living conditions have deteriorated since the mid-1990s due to the food crisis and economic hardship. Due to hunger and disintegrating families, many children were thrown into the streets begging for food. According to the Nutrition Assessment carried out in 2002 by UNICEF and WFP, the prevalence of wasting and stunting in children less than 7 years of age was 9 percent and 42 percent respectively. An estimated 70,000 children were severely wasted and required hospitalization.¹⁸⁵ According to the UNICEF and WFP survey, one third of mothers were suffering from anemia and the under-nutrition of mothers was the main cause of poor nutrition of newborn babies.¹⁸⁶

8. North Korean Refugees

The exact number of North Koreans who have crossed or are crossing the Chinese-North Korean border into China is unknown because they are constantly moving, some returning to North Korea, others staying in China, and still others coming to South Korea. It is estimated that as many as 300,000 North Koreans were living in China¹⁸⁷ during 1995-1998 when the famine peaked in North Korea.¹⁸⁸ In March 2005, the U.S. Department of State estimated that number to be between 30,000 and 50,000.¹⁸⁹ The legal status of the North Koreans who defect to China or other

¹⁸³ CRC/C/65/Add.24. para 24.

¹⁸⁴ *Id.*, para 80.

¹⁸⁵ http://www.unicef.org/dprk/nutrition_assessment.pdf

¹⁸⁶ *Id.*

¹⁸⁷ The term "migrant" stands for a person who leaves his or her country mainly for economic reasons; "refugee" is someone who is entitled to protection from repatriation because of a well-founded fear of persecution in his or her home country, as defined in the Convention Relating to the Status of Refugees of 1951; I also use "defectors," meaning those who have escaped from North Korea, regardless of their motivation. Human Rights Watch, *The Invisible Exodus: North Koreans in the People's Republic of China* 8.

¹⁸⁸ *Supra* note 183, at 1.

¹⁸⁹ U.S. Department of State, A Report of the State Department to the U.S. Congress under the North Korean Human Rights Act of 2004, "The Status of North Korean Asylum Seekers and the U.S. Policy

neighboring countries¹⁹⁰ and the question how to protect them from being further victimized is one of the key issues in the international human rights law.

China is party to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (Refugee Convention). The fundamental obligation of states under the Convention is to honor the principle of “non-refoulement.”¹⁹¹ According to the principle, states are not allowed to forcibly return people to a country where their life or freedom would be endangered. China considers the North Korean defectors in China as illegal, economic migrants or trespassers, not as refugees in the meaning of the Refugee Convention. A spokesperson for the Chinese Foreign Ministry said:

[a]s for some North Koreans entering China illegally, judged from their plight, they are not refugees. Rather, they are illegal trespassers. Therefore, we are always treating them in accordance with the International law, the relevant laws of China and in a humanitarian spirit.¹⁹²

Between the end of the Korean War in July 1953 and September 2006, nearly 10,000 North Koreans have entered South Korea. South Korea accepts all North Koreans and facilitates the procedure through silent negotiations with relevant states. The South Korean position is that they should not be returned to North Korea against their consent. However, Seoul opposes direct involvement in a North Korean exodus and believes that promoting economic cooperation and providing financial support to

Towards Them”, March 11, 2005. Available at <http://www.state.gov/g/prm/rls/rpt/43275.htm> (last visited on October 20, 2006).

¹⁹⁰ The border between North Korea and China is much longer than the one between North Korea and Russia. Most North Korean defectors cross into China and find food and shelter there. Some of them travel as far as Thailand, Vietnam and Mongolia.

¹⁹¹ Dennis Mcmara, *The Protection of Refugees and the Responsibility of States: Engagement or Abdication*, 11 Harv. Hum. Rts. J. 355, 356.

¹⁹² Press conference on May 22, 2003, in Beijing, Xinhua News Agency, June 25, 2003.

North Korea can provide a permanent solution to the problem of North Korean defectors.¹⁹³

The Special Rapporteur for North Korean human rights has noted that there are lapses in the compliance with the principle of non-refoulement in some countries that are receiving North Korean asylum seekers.¹⁹⁴ He argues that in determining refugee status “a key test is whether they are protected by the country of origin.”¹⁹⁵

9. Conclusion

After the end of the Cold War, the former Soviet Union collapsed and China essentially abandoned its socialist system and pursued economic reform and openness. The North Korean regime was facing serious threats internally and internationally because its economy began to collapse and the regime became isolated from the international community. Under these circumstances, the North Korean regime considers its nuclear program as the last resort that would guarantee its survival.¹⁹⁶ The regime started its nuclear program in 1993 when the economic collapse threatened the survival of the people, and eventually the regime itself. Having been labeled part of the “axis of evil” in 2002 along with Iraq and Iran,¹⁹⁷ and having seen the invasion of Iraq by American troops in 2003, North Korea resumed its nuclear program. On October 9, 2006, it announced that it had successfully conducted an underground nuclear test.¹⁹⁸

There are three main bases on which the international community can possibly adopts international measures against North Korea: act of aggression, weapons of

¹⁹³ Ministry of Unification, Humanitarian Support for North Korea: Significance and Impact, available at <http://www.unikorea.go.kr/english/EUP/EUP0207R.jsp> (last visited on October 10, 2006).

¹⁹⁴ E/CN.4/2005/34, para 46-47.

¹⁹⁵ Id.

¹⁹⁶ On the history of the North Korean nuclear program, see Bruce Cummings, *supra* note 1, at 479-491.

¹⁹⁷ The President’s State of Union Address, on January 29, 2002, available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.

¹⁹⁸ Korean Central News Agency, October 9, 2006.

mass destruction and violations of human rights. One of the measures that can be adopted to alter the North Korean behavior is imposing economic sanctions. The U.N. Security Council may impose economic sanctions under Chapter VII of the Charter and individual states may impose sanctions as one of their foreign policy tools. Imposing economic sanctions against North Korea, however, would be limited by two factors: its legality, in other words, the scope of economic sanctions permitted by international law, and its effectiveness.

With regard to effectiveness of sanctions, it should be noted that without Washington's clear guarantee for the survival of the regime, Pyongyang might not relinquish the program, despite its great economic difficulties. The U.N. Security Council imposed economic sanctions on North Korea after Pyongyang performed a nuclear test.¹⁹⁹ Well-planned economic sanctions can accomplish the proposed goal. For example, banning the export of nuclear technology or parts necessary for developing nuclear weapons can foil the nuclear program of a country that pursues nuclear weapons. However, if the country has already secured nuclear technology and materials, and already has nuclear weapons, it would be almost impossible to denuclearize it by imposing economic sanctions unless the very threat that has caused it to engage in the nuclear program has been completely removed.

The first assumption of this study is that economic sanctions cannot dismantle the North Korean nuclear program. The North Korean regime has remained stable even after the collapse of communism. The North Korean nuclear program has remained as threats to international peace and security and the human rights violations by the regime are severe and widespread. It is urgently needed that an effective strategy to solve the North Korean nuclear threats and promote the North Korean human rights should be established.

¹⁹⁹ S/RES/1718 (2006).

CHAPTER THREE

LEGALITY OF ECONOMIC SANCTIONS

1. Introduction

The previous chapter focused on the various international concerns caused by North Korea, which might trigger actions by the international community. Now, attention turns to the possible measures the international community can take against North Korea. When faced with violations of international law, a lot of options are available for the international community. These include: public statements, restrictions on cultural and sports contacts, embargoes on arms sales, cessation of aid, breaking diplomatic relations, and economic sanctions, and use of force.¹ Sanctions have been most frequently adopted. Generally, sanctions have been classified into: travel,² military,³ diplomatic⁴ or cultural,⁵ and economic.

Machael P. Malloy defines economic sanctions as “any country-specific economic or financial prohibition imposed upon a target country or its nationals with the intended effect of creating dysfunction in commercial and financial transactions with respect to the specified target, in the service of specified foreign policy

¹ Evan Luard, *Human Rights and Foreign Policy 26-27* (Oxford: Pergamon Press 1981), pp-26-27.

² Travel sanctions can include both sanctions against the travel of certain individuals or groups and sanctions against certain kinds of air transport. In its Resolution 1267 (1999), the Security Council prohibited taking off or landing of any aircraft owned, leased or operated by or on behalf of the Taliban. S/RES/1267 (1999).

³ Military sanctions include arms embargos or the termination of military assistance or training. Marc Bossuyt, Commission On Human Rights, Working Paper on the adverse consequences of economic sanctions on the enjoyment of human rights, E/CN.4/Sub.2/2000/33 (2000), para 14. Arms embargos are analyzed as economic sanctions in this study.

⁴ Types of diplomatic sanctions vary. They can prohibit diplomats and political leaders of the target country from participating in international bodies and organizations. They also may include the withdrawal of diplomatic personnel and international organizations from the target country. See generally, Gary Clyde Hufbauer et al., *Peterson Institute for International Economics* 91-98 (3rd ed, 2007), pp. 91-98.

⁵ Cultural sanctions may include banning the athletes of the target country from international sports. See, Neta C. Crawford & Audie Klotz, *How Sanctions Work: Lessons from South Africa* 213-228 (St. Martin's Press, New York, 1999), pp. 213-228.

purposes.”⁶ States and the international community, by applying economic sanctions, confirm international standards, monitor international behavior, and express dissatisfaction over violations of human rights norms.⁷

Economic sanctions are imposed to accomplish various foreign policy goals such as warfare, destabilization of foreign governments, and denuclearization as well as promoting human rights.⁸ Even when economic sanctions fail to change the target country’s behavior, they could demonstrate unified disapproval and resolution by those applying the sanctions and may deter other countries which would otherwise violate international norms.⁹ Economic sanctions also can serve important domestic political purposes.¹⁰ A frequent aim is to please domestic constituencies, providing a satisfying effect on them. In that case, sanctions are usually weak and ultimately ineffective because proposed policy goals are not toward the target country and therefore, not meant to be achieved.

Economic sanctions can be applied simultaneously with other kinds of sanctions, for example, diplomatic or cultural sanctions. They can be applied under the authorization of the U.N. Security Council, which is usually called multilateral sanctions. The United Nations imposed collective sanctions twice, against Rhodesia in 1966¹¹ and South Africa in 1977¹², before the end of the Cold War. Since the collapse of the Cold War, the number of the U.N. approved sanctions has increased. Post-Cold

⁶ Michael P. Malloy, *United States Economic Sanctions: Theory and Practice* 10-11 (Kluwer Law International, Hague, 2001), pp. 10-11.

⁷ Sarah H Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 *Yale J. Int’l L.* 1, 87 (2001).

⁸ *Id.*

⁹ David Cortright & George A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* 14-17 (Lynne Rienner Publishers, Boulder, Colorado, 2000), pp. 14-17.

¹⁰ Gary Clyde Hafbauer et al, *Peterson Institute for International Economics, Economic Sanctions Reconsidered: History and Current Policy* 5-7 (Washington DC, 2007), pp.5-7.

¹¹ U.N. Doc. S/Res/232 (1966).

¹² U.N. Doc. S/Res/418 (1977).

War U.N. sanctions include those against Iraq,¹³ former Yugoslavia,¹⁴ Haiti¹⁵ and Libya.¹⁶

Economic sanctions can be applied unilaterally, without the authorization of the U.N. Security Council. Unilateral sanctions are considered to be less effective than multilateral sanctions.¹⁷ Haass argues that “unilateral sanctions will be little more than statements or expressions of opposition” unless the sanctioning and target countries have close ties each other.¹⁸ The U.S. has frequently used unilateral economic sanctions, alone or with other countries.

The issue of legal basis of economic sanctions poses the question as to what extent the international law permits economic sanctions. This question is important to find legally permissible measures against North Korea by the international community.

2. Economic Sanctions under the U.N. Charter

The U.N. Security Council has the primary responsibility of maintaining international peace and security.¹⁹ Chapter VII of the U.N. Charter gives the Council the power to adopt mandatory decisions which are binding on all member states.²⁰ The U.N. Charter expressly contemplates that multilateral economic sanctions, which mean sanctions approved by the U.N. Security Council,²¹ may be imposed in order to maintain or

¹³ U.N. Doc. S/Res/661 (1990).

¹⁴ U.N. Doc. S/Res/713 (1991).

¹⁵ S/Res/841 (1993) and S/Res/875 (1993).

¹⁶ S/Res/883 (1993).

¹⁷ Hossein G. Askari, John Forrer, Hildy Teegen, and Jiawen Yang, *Economic Sanctions: Examining Their Philosophy and Efficacy* 32 (Praeger, 2003).

¹⁸ Richard N. Haass, *Lessons and Recommendations*, in *Economic Sanctions and American Diplomacy 200* (A Council on Foreign Relations Book, Richard N. Haass ed., 1998).

¹⁹ Article 24 of the U.N. Charter.

²⁰ Article 25 of the U.N. Charter.

²¹ Article 41 of the U.N. Charter stipulates: “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, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

restore international peace and security.²² The Security Council, under Article 39 of the U.N. Charter, may determine the existence of a threat to the peace or breach of the peace, and an act of aggression²³ and may ask member states to call for non-military measures, including “complete or partial interruption of economic relations.”²⁴ These provisions are the legal bases on which the U.N. can impose economic sanctions in the U.N. mechanism.

During the Cold War, multilateral economic sanctions²⁵ were hard to be adopted because of the difficulty obtaining a consensus among the Security members.²⁶ In 1965, the U.N. Security Council authorized economic sanctions against Rhodesia after its unilateral declaration of independence.²⁷ In 1977, after hundreds of blacks were killed in Soweto, it imposed a limited arms embargo on South Africa, finding arms trade with South Africa, not apartheid per se, a threat to peace.²⁸ The United Nations efforts to impose broader economic sanctions against South Africa were unsuccessful for nearly a decade by the Western veto powers.²⁹

After the Cold War, the Council began to employ economic sanctions more actively. In 1990 the Council imposed the first mandatory comprehensive sanctions against Iraq in response to the Iraqi invasion of Kuwait.³⁰ In 1990 the Council adopted an arms embargo against former Yugoslavia by prohibiting the supply of any weapons and military equipment to any of the constituent parts of former Socialist Federal

²² Article 39 and 41 of the U.N. Charter.

²³ Article 39 of the U.N. Charter.

²⁴ Article 41 of the U.N. Charter.

²⁵ Multilateral sanctions can mean sanctions with the Council’s authorization, or literally sanctions by multi-states. In this study, multilateral sanctions mean sanctions with the Council’s authorization.

²⁶ See, David Schiweigman, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the Internatinonal Court of Justice 1-4* (Kluwer Law International, The Hague, 2001).

²⁷ U.N. Doc. S/Res/232 (1966). In 1962, U.N. General Assembly affirmed that South Rhodesia was a non-self governing territory. The sanction resolution was adopted after Ian Smith, white minority regime in South Rhodesia, declared independence in 1965.

²⁸ U.N. Doc. S/Res /418(1977).

²⁹ Schiweigman, *supra* note 26, at 52-56.

³⁰ U.N. Doc. S/Res/661(1990).

Republic of Yugoslavia.³¹ The collapse of the Cold War enabled the Council to cope with new challenges on a common ground.

Basically, the Security Council enjoys broad discretion in determining the existence of “a threat to the peace”, “breach of the peace”, or ‘act of aggression’ necessary for invoking Article 39 and 41 of the Charter. The Charter recognizes its discretionary power by stipulating its authority to determine the existence of any threat to the peace³² and decide what measures are to be employed.³³ If the Council determines that a certain situation constitutes a threat to the peace, it can intervene, through sanctions or the use of force, despite the principle of non-intervention of internal affairs under Article 2(7) of the Charter. Therefore, the question of what constitutes a threat to the peace to or breach of the peace is critical.³⁴

The first question relating to the Council’s power under Article 39 of the Charter is whether the Council has absolute discretion on the determination of the existence of a threat to the peace, breach of the peace, and an act of aggression. There are two opposite arguments. One argument is that the Security Council has an absolute discretion in determining the existence of the conditions under Article 39. This argument is based on the assumption that there is no direct judicial review of Security Council jurisdiction by the International Court of Justice (ICJ).³⁵ Kelsen states that the determination under Article 39 is an outcome of political deliberations by a political United Nations organ and therefore the Council may impose economic sanctions at its discretion for the purpose of Chapter VII.³⁶ Derek Bowett also argues that the Security Council is a political organ composed of five major powers and

³¹ U.N. Doc. S/Res/713 (1991).

³² Article 39 of the U.N. Charter.

³³ Article 41 of the U.N. Charter.

³⁴ The notion of an act of aggression is relatively clear. See, Erika De Wet, *The Chapter VII Power of the United Nations Security Council* 145-149 (Hart Publishing, 2004).

³⁵ L. Picchio Forlati, L.A. Sicilianos, *Les sanctions économiques en droit international: Economic Sanctions in International Law* 332 (Martinus Nijhoff Publishers, Boston, 2004).

³⁶ Hans Kelen, *The Law of the United Nations, A Critical Analysis of its Fundamental Problems* 733 (Frederick A. Praeger, New York, 1964).

therefore decisions in the interest of peace and security are fundamentally of political considerations.³⁷

Judge Weeramantry explains that the determination under 39 of the existence of any threat to the peace, breach of the peace or an act of aggression is “one entirely within the discretion of the Council.”³⁸ He states:

The Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation. That decision is taken by the Security Council in its own judgment and in the exercise of the full discretion given to it by Article 39.³⁹

Others argue that the Security Council’s power under Chapter VII is not unlimited and vagueness of Article 39 is no different from any other legal provisions.⁴⁰ Article 39 stipulates three criteria that is the basis of binding resolutions of the Council, and this means that its power is not unlimited. This argument asserts that the three criteria in Article 39 play “the role of checks and balances that prevents the Council from becoming the world government.”⁴¹ The Council could impose binding measures only under Chapter VII, whereas it could recommend under Chapter VI only non-binding measures. If the Council’s power under Chapter VII is not unlimited, these distinctions would be meaningless.⁴²

Considering the distinction of the Council’s power between under Chapter VI and Chapter VII, and the Council’s careful practice in determining the existence of a

³⁷ Derek Bowett, *The Impact of Security Council Decisions on Dispute Settlement Procedures*, European Journal of International Law 93 (1994).

³⁸ Separate opinion of Judge Weeramantry in Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America), Provisional Measures, ICJ Rep 1992, at 176.

³⁹ *Id.*

⁴⁰ De Wet, *supra* note 34, at 136.

⁴¹ *Id.*, at 137.

⁴² *Id.*, at 137.

threat to the peace, the Council's discretion is not unlimited. Sanctions under the United Nations must be imposed only when there is a threat of or breach of the peace, and an act of aggression. Therefore, economic sanctions under the Chapter VII of the Charter may not be imposed for economic benefits or undue political interference.

The argument that the Council's discretion is not unlimited, however, does not exclude the possibility that in its practice the Council interprets the existence of a threat to the peace with flexibility to meet new challenges. In reality, the Council, to cope with new challenges threatening international peace and security, has been expanding the meaning of "a threat to the peace." In this Chapter, after reviewing the meaning of Article 39 of the Charter, I will turn to the limits of the power of the Security Council.

2. 1. Threat to the Peace

The term "peace" can be defined negatively as "the absence of an organized use of force between states."⁴³ According to this view, a threat to the peace means to potentially provoke armed conflicts between states.⁴⁴ Supporters of this view argue that the Security Council is basically 'a reactionary organ' and not required to prevent all, possible long term tensions.⁴⁵ They also argue that the structure and composition of the Security Council limits its mandate. According to this view, for example, human rights violations cannot be a threat to the peace unless they have some effect causing armed conflicts beyond national boundaries.⁴⁶ The Security Council is not allowed to address, under Article 39, human rights violations committed internally.

Some argue, however, that peace means "friendly relations between states and other economic, social, political and environmental conditions which are needed for a

⁴³ The Charter of the United Nations: A Commentary edited by Bruno Simma, 608 (Oxford University Press, 1994).

⁴⁴ De Wet, *supra* note 34, at 138.

⁴⁵ *Id.*, 139.

⁴⁶ *Id.*, 140.

lasting, conflict free society.”⁴⁷ According to this view, the notion “threat to the peace” can be more flexible and human rights violations can be a threat to the peace even without direct impact on neighboring countries. The Security Council can be more active in responding to the violations of international law and maintaining international peace.

In the Council’s practice, a threat to the peace involves many types of activities. The Council, in its Resolution 748, determined that “the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism constituted a threat to international peace.”⁴⁸ In its Resolution 1540, it confirmed that “proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security.”⁴⁹ In 2000, Al Gore, the then vice-President of the United States, suggested that the Council’s agenda should include the global environmental challenge, drugs and corruption, terrorism and HIV/AIDS.⁵⁰ The notion of a threat to the peace is a very flexible concept that can be changed and developed by the subsequent practice of the Council.⁵¹ In this respect, the notion of peace cannot be understood as a simple absence of use of force.

2. 2. Breach of the Peace and an Act of Aggression

Breach of the peace means a serious outbreak of armed conflicts, not amounting to an act of aggression.⁵² In practice of the Security Council, however, breach of the peace includes a substantial act of aggression. The Security Council has determined the existence of a breach of peace in four cases, the North Korean invasion of South

⁴⁷ Simma, *supra* note 43, at 608.

⁴⁸ U.N. Doc. S/Res/748 (1992).

⁴⁹ U.N. Doc. S/Res/1540 (2004).

⁵⁰ Vice President Al Gore, Opening Statement in the Security Council Meeting on AIDS in Africa, SC/6791 (2000), on 10 January 2000, www.un.org/News/Press/docs/.

⁵¹ De Wet, *supra* note 34, at 167.

⁵² Simma, *supra* note 43, at 609.

Korea,⁵³ the Argentinean invasion of the Falklands,⁵⁴ the war between Iran and Iraq,⁵⁵ and the Iraqi invasion of Kuwait.⁵⁶ In these cases, the Council determined that there had existed breaches of the peace, not an act of aggression. In the Korean case, the Soviet Union unsuccessfully argued that the situation in Korea was a civil war and therefore was not breach of the peace, which was a threat to international peace.⁵⁷

The General Assembly Resolution 3314⁵⁸ defines an act of aggression as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner” with the Charter. An act of aggression includes the invasion or attack, bombardment, blockade of the ports or coasts of a State.⁵⁹ The notion of aggression includes indirect aggression, meaning use of force short of full-scale armed invasion across national borders.⁶⁰ ICJ, in *Nicaragua v. United States*, finds that the arming and training of the contra rebels by the United States as the use of force and interference in internal affairs, but not the mere supplying of funds to them.⁶¹

2. 3. Human Rights Violations as “a Threat to the Peace”

Before World War II, the international order was based on the traditional view of the principle of state sovereignty. According to this principle, a sovereign state has complete freedom to deal with its own nationals.⁶² It was falling within the domestic jurisdiction and does not allow any interference. The U.N. is also based on the

⁵³ U.N. Doc. S/Res/82 (1950).

⁵⁴ U.N. Doc. S/Res/502 (1982).

⁵⁵ U.N. Doc. S/Res/598 (1987).

⁵⁶ U.N. Doc. S/Res/660 (1990).

⁵⁷ Simma, *supra* note 43, at 609.

⁵⁸ U.N. Doc. GA/ Res /3314 (1974).

⁵⁹ *Id.*

⁶⁰ De Wet, *supra* note 34, at 147.

⁶¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, merits, ICJ Rep 1986, at 101.

⁶² Richar B. Lillich and Hurst Hannum, *International Human Rights: Problems of Law, Policy, and Practice*, Little, Brown and Company 33 (1995).

principle of the sovereign equality⁶³ and any intervention within the domestic jurisdiction of any state is not allowed.⁶⁴ The Charter, however, declares “respect for human rights and for fundamental freedoms” as one of their purposes⁶⁵ and has several remarks on human rights.⁶⁶ The development of human rights after World War II has given the notion of “a threat to the peace” a new meaning.

The Council has a broad discretion to determine the existence of a threat to the peace. In theory, the Council may determine whether the human rights situation in a country is a threat to the peace and security, and enforce economic sanctions⁶⁷ or military action.⁶⁸ Member states undertake to accept and carry out the decisions of the Security Council.⁶⁹ However, the Council has refrained from considering human rights issues as a matter of international peace and security.⁷⁰

The discretionary power of the Security Council in determining the existence of a threat to the peace is so broad that arguably “any conduct whatsoever, either within or outside a State, such as the adoption of a certain political regime, a treatment of the economic interests of aliens that is not in conformity with international standards, the closing of ports to foreign ships, the extradite criminals, and the like” can constitute “a threat to the peace.”⁷¹ Malanczuk states that “a threat to the peace seems to be whatever the Security Council says is a threat to the peace.”⁷² As a consequence, if the Council determines as a threat to peace ethnic cleansing, genocide and other gross violations of human rights, it can play a pivotal role in promoting human rights.

⁶³ Article 2(1) of the Charter.

⁶⁴ Article 2(7) of the Charter.

⁶⁵ Article 1(2) of the Charter.

⁶⁶ For example, the preamble and Article 55 of the Charter.

⁶⁷ *Id.*, Article 41.

⁶⁸ *Id.*, Article 42.

⁶⁹ *Id.*, Article 25.

⁷⁰ Zdzislaw Kedzia, *supra* note 00, at 8.

⁷¹ Benedetto Conforti, *The Law and Practice of the United Nation* 176 (3rd ed., Martinus Nijhoff Publishers, Leiden/Boston, 2005).

⁷² P. Malanczuk, *Akehusrt’s Modern Introduction to International Law* 336 (1997).

In its Resolution 232 (1966), the Council determined the independence declaration by the white minority in Southern Rhodesia as a threat to the peace and imposed mandatory economic embargo against it.⁷³ In this case, the racist regime was declared as a threat to the peace. In its Resolution 392(1976), the Council determined the “policy of apartheid is a crime against the conscience and dignity of mankind and seriously disturbs international peace and security.”⁷⁴ In its Resolution 418 (1977), it determined “having regard to the policies and acts of the South African Government, that the acquisition by South Africa of arms and related material constitutes a threat to the maintenance of international peace and security”⁷⁵ and applied economic sanctions against South Africa under Chapter VII. The Council, however, carefully avoided declaring apartheid itself as a threat to the peace. In those cases, the Council was criticized for violating the principle of non-interference in matters belonging to the domestic jurisdiction.⁷⁶

Even after the end of the Cold War, the Council avoided determining human rights violations as a direct threat to the peace under which U.N. enforcement measures could be adopted. For example, in its Resolution 688, the Council found that Iraqi governments’ oppression on the Kurdish minority and a massive exodus of refugees thereof into the surrounding states constituted a threat to the peace.⁷⁷ The consequences of the oppression-influx of refugees into the neighboring states- rather than the oppression itself were taken into account more importantly. Malanczuk argues that “the resolution cannot be cited as such, without trans-boundary effects, as a direct threat to international peace and security.”⁷⁸

⁷³ U.N. Doc. S/Res/232 (1966).

⁷⁴ U.N. Doc. S/Res/392(1976).

⁷⁵ U.N. Doc. S/Res/ 418 (1977).

⁷⁶ David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* 152 (Kluwer Law International (2001)).

⁷⁷ U.N. Doc. S/Res/ 688 (1991).

⁷⁸ Peter Malanczuk, *Humanitarian Intervention and The Legitimacy of The Use of Force* 17-18 (1993).

In its Resolution 794, the Council, not referring to the cross-border refugee flows, determined that the magnitude of the human tragedy in Somalia constituted a threat to the peace and security, and authorized the use of force to facilitate humanitarian aid.⁷⁹ The resolution enjoyed general support and was accepted by the international community.⁸⁰ Some argue that the resolution is unique and the general rule not requiring the cross-border effects has not been established by this resolution.⁸¹ This argument, however, disregards the clear wording contained in the resolution. The resolution should be understood that the Council interprets that gross human rights violations in a failed state can constitute a threat to peace.

Finally, the Council's position is confirmed clearly by the following resolution. In its Resolution 940, the Council determined that a military coup and non-democratic system of government in Haiti posed a threat to international peace.⁸² The resolution, after failed economic sanctions against Haiti, authorized the formation of a multinational force, and use of all necessary means to facilitate the departure from Haiti of the military leadership and the restoration of the legitimate authorities in Haiti.⁸³ The Council declared that, without referring to the flow of refugees, the humanitarian situation in Haiti had constituted a threat to the peace and security in the region and authorized member states to use all necessary means including use of force.⁸⁴

In the Security Council's practice, a threat to the peace has been frequently used as the basis of the intervention in what has been considered as a state's domestic affairs where a gross violation of human rights is committed. Human rights are "the rights that one has simply because one is a human being,"⁸⁵ Henkin argues that the

⁷⁹ U.N. Doc. S/Res 794 (1992).

⁸⁰ De Wet, *supra* note 34, at 175.

⁸¹ *Id.*

⁸² U.N. Doc. S/Res/ 940 (1994).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Jack Donnelly, *Universal Human Rights in Theory and Practice* 10 (2003).

development of human rights has led to a “significant erosion of state sovereignty.”⁸⁶ According to the doctrine of state sovereignty, each state has an absolute autonomy in its internal affairs and other states are not allowed to interfere.⁸⁷ It has contributed to limiting the possibilities of military or non-military intervention from outside powers.

The development of international human rights after World War II has been remarkable. The dogma of state sovereignty gradually weakened as the system of international human rights developed. In December 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights as a “common standard of achievement for all peoples and all nations.”⁸⁸ The Declaration includes social, economic and cultural rights,⁸⁹ as well as civil and political rights.⁹⁰ In 1966, the International Covenants on Civil and Political Rights (CCPR) and Economic, Social and Cultural Rights (CESCR)⁹¹ were adopted by the United Nations General Assembly.⁹²

The Vienna Declaration and Program of Action confirmed that the promotion and protection of all human rights and fundamental freedoms is a priority objective of the United Nations.⁹³ It further declares that “the promotion and protection of all human rights is a legitimate concern of the international community.”⁹⁴ “[T]he traditional understanding of state sovereignty should yield before considerations of

⁸⁶ Louis Henkin, *That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 *Fordham L. Rev. J.* 3 (1999).

⁸⁷ See, Article 2(7) of the U.N. Charter.

⁸⁸ Javaid Rehman, *International Human Rights* 54 (2003).

⁸⁹ So-called “second generation rights.”

⁹⁰ So-called “first generation rights.”

⁹¹ The CESCR includes the so-called “second generation” of human rights. The Covenant is far weaker in wording. States are only under the obligation of accomplishing progressive implementation of the rights.

⁹² The separation of the CCPR from the CESCR was the intention of the West, which argued that economic, social and cultural rights were only programmatic. See, Rehman, *supra* note 88, at 63.

⁹³ Vienna Declaration and Program of Action, adopted by the United Nations World Conference on Human Rights, June 25, 1993. U.N. Doc. A/CONF.157/24 (Part I, 1993).

⁹⁴ *Id.*

human dignity and morality.”⁹⁵ The fact that human rights have been accepted as an international concern means that the Security Council can take measures under Charter VII.

It is notable that the International Commission on Intervention and State Sovereignty asserts that state sovereignty implies “responsibility to protect” its own citizens from avoidable catastrophe, and when it is not willing or unable to do so, the international community should intervene.⁹⁶ To that extent, the principle of non-intervention should yield to the international responsibility to protect.⁹⁷ According to the Commission, the responsibility to protect is included in the obligations inherent in the concept of sovereignty, and the responsibility of the Security Council for the maintenance of international peace and security. The Commission also urged the permanent members of the Council not to use their veto power to obstruct the passage of resolutions authorizing military intervention for human protection purposes.⁹⁸ Now, the Security Council is most likely to determine that if gross human rights violations occur in a failed state, there exists a threat to the peace.

If a threat to the peace was found, in most cases, the Council imposed economic sanctions. Target countries were prohibited from importing certain goods.⁹⁹ Especially, arms embargoes were a useful means to contain armed conflicts.¹⁰⁰ Financial sanctions such as the freezing of funds were also imposed.¹⁰¹ Financial

⁹⁵ Daphne Richmond, *Normativity in International Law: The Case of Unilateral Humanitarian Intervention*, 6 Yale H.R. & Dev. L.J. 45, 60 (2003).

⁹⁶ The International Commission on Intervention and State Sovereignty is an independent commission established by the Canadian government in 2000 to promote a comprehensive debate on intervention and state sovereignty. In 2001, it issued its report titled “The Responsibility to Protect.” <http://www.iciss.ca/menu-en.asp> (last visited Jan 12, 2008).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ U.N. Doc. S/Res/232 (1966).

¹⁰⁰ Arms embargoes were adopted in the following cases. Southern Rhodesia: U.N. Doc. S/Res/232 (1966); South Africa: S/Res/418 (1977); Libya: S/Res/748 (1992); Liberia: S/Res/788 (1992); Angola: S/Res/864 (1993); former Yugoslavia: S/Res/713 (1991); Somalia: S/Res/733 (1992); Rwanda: S/Res/918 (1994); Haiti: S/Res/841 (1993).

¹⁰¹ Iraq: S/Res/661 (1990); Libya: S/Res/883 (1993); Angola: S/Res/1173 (1998); Haiti: S/Res/917 (1994); Afghanistan: S/Res/1267 (1999).

sanctions were often aimed at specific activities or specific actors responsible for actions that threaten international peace and security.¹⁰² Targeting activities or actors responsible for actions threatening international peace is important as a means of smart sanctions.

3. Unilateral Economic Sanctions

Unilateral economic sanctions are generally referred to as economic sanctions without the U.N. Security authorization.¹⁰³ Unilateral sanctions could be applied by a state or multi-states. Unilateral economic sanctions are not authorized by the Security Council and therefore their legality is quite often questioned. Some argue that “nearly all universal sanctions fail nearly all of the time.”¹⁰⁴ On the contrary, multilateral sanctions are more likely to be considered effective.¹⁰⁵ Although the possibility that multilateral sanctions can cause more harm than unilateral ones is higher, the dichotomy seems to be of limited utility in that economic harm does not guarantee the success of sanctions.¹⁰⁶

The U.N. Charter prohibits the use of force except in self-defense or with the approval of the Security Council under Chapter VII.¹⁰⁷ The Charter, however, does not have any provision prohibiting unilateral interference, where sanctions are imposed by individual states. The traditional doctrine of state sovereignty includes “the national economic liberty to trade with other nations.”¹⁰⁸ States are entitled to applying “trade embargoes or boycotts for any reason whatsoever, including simple economic

¹⁰² Angola: U.N. Doc. S/Res/1127 (1997); Sudan: S/Res/1054 (1996); Haiti: S/Res/917; Afghanistan: S/Res/1267 (1999).

¹⁰³ Joseph J. Collins and Gabrielle D. Bowdoin, *Beyond Unilateral Economic Sanctions*, CSIS Report 1 (1999)

¹⁰⁴ *Id.*

¹⁰⁵ Hossein G. Askari et al, *Economic Sanctions: Examining Their Philosophy and Efficacy* 31-32 (Praeger, Westport, Connecticut, 2003).

¹⁰⁶ *Id.*

¹⁰⁷ See Article 2(4) and 51 of the U.N. Charter.

¹⁰⁸ L. Picchio Forlati, L.A. Silianos, *Les sanctions économiques en droit international: Economic Sanctions in International Law* 483 (Martinus Nijhoff Publishers, Boston, 2004).

coercion to advance national political or economic interests against those of other states.”¹⁰⁹

On the other hand, the General Assembly urges individual states not to impose economic sanctions that violate international law and the U.N. Charter, and not to use unilateral coercive measures “as tools for political or economic pressure against any country, particularly against developing countries, because of the negative effects on the realization of all human rights.”¹¹⁰ Customary international law do not prohibit the international community or individual states from using economic sanctions to promote compliance with international norms or any other policy.

Generally speaking, imposing sanctions to promote human rights may be allowed because the promotion of human rights is one of the main goals of the U.N.¹¹¹ Experience shows that many states including the U.S. have frequently imposed economic sanctions such as import and export prohibitions, and financial restrictions.¹¹² The ICJ holds that “state sovereignty evidently extends to the area of its foreign policy, and there is no customary international law to prevent a state from choosing and conducting a foreign policy in co-ordination with that of another state.”¹¹³ The ICJ further states that economic sanctions do not violate the customary norm of non-intervention.¹¹⁴ The ICJ declares that one intervention prohibited by international law is the “one bearing on matters in which each state is permitted, by the principle of state sovereignty, to decide freely.”¹¹⁵ Generally speaking, unilateral economic sanctions are permissible by international law.

¹⁰⁹ Id.

¹¹⁰ G.A. Res. 141, U.N. GAOR, U.N.Doc. A/RES/53/141 (1991); also see, A/Res/60/185 (2005).

¹¹¹ Article 1 (3) of the Charter. On the adverse consequences of economic sanctions upon the enjoyment of human rights, see Working Paper of the Sub-Commission on the Promotion and Protection of Human Rights, Commission on Human Rights, Economic and Social Council, E/CN.4/Sub.2/2000/33 (claiming that economic sanctions are often ineffective and illegal).

¹¹² Michael P. Malloy, *United States Economic Sanctions: Theory and Practice* 306-313 (Kluwer law International, 2001).

¹¹³ *Military and Paramilitary Activities (Nicar. V. U.S.)* 1986, I.C.J (June 27), para 265.

¹¹⁴ Id. para 245.

¹¹⁵ Id. para 205.

3. 1. State Practice

Why do states such as the U.S. impose unilateral economic sanctions? First, it is mainly because resolutions that the U.S. pursue sometimes are not welcomed by other Security members. The U.S., for example, pursued a U.N.-mandated embargo against Libyan oil, but the Western countries that needed oil opposed it.¹¹⁶ In the early 1990s, the U.S. sought much harsher U.N. sanctions against North Korea but China opposed it.¹¹⁷ Where multilateral economic sanctions are blocked in the Council, the U.S. pursues unilateral economic sanctions with or without participation of other states.¹¹⁸

Second, imposing unilateral sanctions is a good way for politicians to appease the demands from NGOs and constituents to do something.¹¹⁹ Satisfying domestic voters or making moral statements by imposing symbolic unilateral sanctions is quite attractive for politicians.¹²⁰

One of the issues related to unilateral economic sanctions is whether they are effective as foreign policy tools, or more effective than multilateral economic sanctions. Generally speaking, the greater the number of countries needed to implement sanctions, the greater the economic difficulty of the target country will be.¹²¹ Therefore, the majority opinion argues that multilateral sanctions are more effective than unilateral sanctions, or economic sanctions are rarely effective.¹²² In a global economy, unilateral economic sanctions tend to impose greater costs on sanctioning states than on the target country, which usually can find alternative sources of supply and financing.¹²³ Where the target country depends heavily on the sanctioning country, the target country is more likely to be harmed.¹²⁴ Even in this

¹¹⁶ Geoff Simons, *Imposing Economic Sanctions*, Pluto Press 115 (1999).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Collins et al, *supra* note 103, at 9.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Collins et al, *supra* note 103, at 4.

¹²³ Simons, *supra* note 116, at 200.

¹²⁴ Collins et al, *supra* note 103, at 15.

scenario, it is argued that economic difficulties the target country receives do not guarantee the success of economic sanctions.¹²⁵ Authoritarian regimes in the target country become more repressive and positive socioeconomic developments cannot be stimulated.¹²⁶ In fact, the economic difficulties that the economic sanctions imposed against Haiti and Cuba could not alter their behavior.¹²⁷

The U.S. has sought to enhance the effectiveness of unilateral economic sanctions by threatening secondary sanctions against those third parties unwilling to sanction the target country.¹²⁸ Where secondary sanctions are adopted, sanctions apply to overseas firms that violate the terms of the U.S. legislation. This strategy has some deterrent effects on individuals and firms that seek prohibited activities by the legislation, but with great challenges from other countries.¹²⁹

On the other hand, it is argued that multilateral sanctions are not necessarily more effective than unilateral sanctions.¹³⁰ It is claimed that international support for a sanctions policy can hurt chances of success by “diluting the scope and impact of the common sanctions in the process of securing agreement among the senders.”¹³¹ Therefore, international attempts to establish cooperation do not yield desirable results.¹³² It is an irony that regardless of its effectiveness, states are still employing unilateral economic sanctions.¹³³

The United States has overwhelmed other countries in the numbers of unilateral economic sanctions against other countries. During the Cold War, the

¹²⁵ Id.

¹²⁶ Id., at 6.

¹²⁷ Id.

¹²⁸ Economic Sanctions and American Diplomacy, edited by Richard Hass 201 (A Council On Foreign Relations Book, 1998).

¹²⁹ Id.

¹³⁰ Gary Clyde Hufbauer et al, Peterson Institute for International Economics, Economic Sanctions Reconsidered 172 (3rd ed, 2007).

¹³¹ Id.

¹³² Id., at 172-173.

¹³³ Collins et al, supra note, 103, at 7.

United States could achieve relatively high level of success with less cooperation.¹³⁴ After World War II, the U.S. maintained the strongest economy, supporting war-stricken western economies. Until 1960s, the U.S. provided developing countries with economic assistance.¹³⁵ These factors contributed to the level of success.¹³⁶ The developing global economy, however, undermined the effectiveness of unilateral sanctions. As Europe and Japan has emerged as competitive economic superpowers, the U.S. position in the world economy has declined.¹³⁷

Nevertheless, even in the post-Cold War, the importance of unilateral economic sanctions has not diminished as a policy tool of the United States.¹³⁸ The goals of economic sanctions by the United States vary including discouraging the proliferation of weapons of mass destruction, promoting human rights, ending support for terrorism, thwarting drug trafficking, and discouraging armed aggression.¹³⁹

3. 2. U.S. Legislative Authority

3.2.1. The Trading with the Enemy Act (TWEA)

Unlike U.N. based multilateral economic sanctions, unilateral economic sanctions have their bases in domestic legislations. Section 5(b) of the TWEA delegates to the President the power of economic sanctions during the periods of declared war.¹⁴⁰ The TWEA is the primary source that the President could use to sanction states declared enemies of the U.S.¹⁴¹ After the North Korean invasion into South Korea, the U.S. imposed financial and commercial sanctions against the People's Republic of China and North Korea under the TWEA. The U.S. maintained economic sanctions against

¹³⁴ Hufbauer et al, supra note 130, at 128.

¹³⁵ Id.

¹³⁶ Collins et al, supra note 103, at 9.

¹³⁷ Id.

¹³⁸ Haass, supra note 128, at 1.

¹³⁹ Id.

¹⁴⁰ 50 U.S.C. app. Section 5(b).

¹⁴¹ Malloy, supra note 112, at 152.

North Korea under the Foreign Assets Control Regulations promulgated under TWEA section (5) in 1950 until 2000.¹⁴²

3. 2. 2. *The U.N. Participation Act (UNPA)*

In fact, UNPA is not an act that authorizes unilateral economic sanctions, but a U.S. domestic legislation for implementing domestically the U.N. authorized economic sanctions. Section 5 of the UNPA authorizes the President to apply economic sanctions against a target country under a mandatory U.N. Security Council decision.¹⁴³ The UNPA is a legal basis to implement multilateral sanctions in the U.S. under Article 41 of the Charter. After the Cold War, the U.S. implemented under the UNPA Security Council resolutions in response to the Iraqi invasion of Kuwait in 1990.¹⁴⁴

3.2.3. *The International Emergency Economic Powers Act (IEEPA)*

The IEEPA gives the President the power to apply economic sanctions in times of national emergency.¹⁴⁵ Enacted in 1977, it was used to block Iranian government assets in the U.S. and the trade with Iran in response to the 1979-1981 hostage crises.¹⁴⁶ In order for the IEEPA to be invoked, a specific national emergency with respect to a national threat is declared by the President.¹⁴⁷ In 1985, under the increasing pressure to impose economic sanctions against the South African apartheid, the Reagan administration invoked the IEEPA to apply economic sanctions against

¹⁴² Id.

¹⁴³ 22 U.S.C. Section 5.

¹⁴⁴ Ex. Order No. 12, 724, 55 Fed. Reg. 33,089 (1990) (prohibiting transactions with Iraq under UNPA)

¹⁴⁵ 50 U.S.C. 1701.

¹⁴⁶ Malloy, *supra* note 12, at 171.

¹⁴⁷ Section 202 (a) of IEEPA.

South Africa.¹⁴⁸ The sanctions turned out to be unsuccessful and Congress enacted the Comprehensive Anti-Apartheid Act of 1986 over the Reagan's veto.¹⁴⁹

3.2.4. The Cuban Liberty and Democratic Solitary Act (CLDSA, Helms-Burton Act)

The CLDSA, cited as the Helms-Burton Act, was enacted in 1996 after Cuba shot down two civilian U.S. airplanes off the Cuban coast.¹⁵⁰ First of all, the act prohibits persons subject to U.S. jurisdiction from extending financing to finance transactions with regard to any property confiscated by Cuba from a U.S. national.¹⁵¹ Under the Act, U.S. nationals whose property was confiscated by Cuba are entitled to sue any person "trafficking" in confiscated property. "Trafficking" means wide range of transaction involving confiscated property.¹⁵² The Act was criticized from U.S. trading partners, especially from the E.U. because it, with wide extraterritorial effects, targeted third country nationals and companies that traded with Cuba.¹⁵³

4. Humanitarian Limitations of Economic Sanctions

The fact that the Security Council has the power to impose economic sanctions under the Charter, or individual states may apply economic sanctions for their foreign policy goals does not mean that there is no limit on their power. While economic sanctions are designed to change the behavior of the target country, they cause human sufferings.¹⁵⁴ Therefore, it has been argued that there should be some limits on the power or scope applying economic sanctions.¹⁵⁵ The United Nations Secretary-

¹⁴⁸ Malloy, *supra* note 112, at 184.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ 22 U.S.C. 6034 (a).

¹⁵² *Id.* 6023 (10)(A)(i).

¹⁵³ Malloy, *supra* note 12, at 193.

¹⁵⁴ Usually, it is called collateral damage.

¹⁵⁵ Forlati, *supra* note 108, at 338.

General Kofi Annan noted that the humanitarian and human rights policy goals were hard to be reconciled with sanctions regime.¹⁵⁶

The promotion of human rights is one of the main purposes of the U.N.¹⁵⁷ and the Council, in discharging its duties, has to act in accordance with the purposes and principles of the U.N.¹⁵⁸ Therefore, the United Nations purpose of promoting and encouraging respect for human rights in Article 1, paragraph 3, limits the scope and types of economic sanctions. Specifically, the U.N. is arguably restricted in its mandate by the human rights norms such as the right to life or right to food.

Then, to what extent the Council or individual states can apply economic sanctions are at issue. As far as human rights norms in times of emergency are concerned, certain human rights norms are derogable.¹⁵⁹ On the other hand, right to life is non-derogable even in times of emergency.¹⁶⁰ Further, the States Parties to the ICESCR has the obligation to respect the right to food, and to the continuous improvement of living conditions.¹⁶¹ The right to life and food are most likely to be endangered by economic sanctions because economic sanctions may restrict the flow of food and other materials necessary for the survival of human beings.

The other side of the right to life and food suggests that economic sanctions must not target “civilians who are uninvolved with the threat to or breach of the peace.”¹⁶² Economic sanctions may not target goods needed to ensure the basic subsistence of the civilian population such as food and basic medicines.¹⁶³ Economic sanctions that continue for too long may cause a negative humanitarian effect and to

¹⁵⁶ Annual Report of the Secretary-General on the Work of the Organization, UN Doc. A/53/1 (1998) at 62.

¹⁵⁷ Article 1(3) of the Charter.

¹⁵⁸ Article 24 of the Charter.

¹⁵⁹ Article 4(1) of International Covenant on Civil and Political Rights (ICCPR).

¹⁶⁰ Article 4(2) of the ICCPR.

¹⁶¹ Article 11 of the ICESCR

¹⁶² Marc Bossuyt, Commission on Human Rights, Working Paper on the adverse consequences of economic sanctions on the enjoyment of human rights (E/CN/4/Sub.2/2000/33), para 44.

¹⁶³ Id.

be ineffective.¹⁶⁴ In short, although a threat to or breach of the peace are found, selecting the types and scope of economic sanctions is not unlimited.

This humanitarian concern has been recognized by the Council. It stated that: “further collective actions in the Security Council within the context of any future sanctions regime should be directed to minimize unintended adverse side-effects of sanctions on the most vulnerable segments of targeted countries.”¹⁶⁵ Further, in its practice, the Council’s resolution imposing economic sanctions usually include exemptions for humanitarian purposes to minimize the effect of economic sanctions on the oppressed or innocent people in the target country. For example, in its Resolution 661 against Iraq, the Council allowed the import of “supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs.”¹⁶⁶

The effectiveness of the humanitarian provisions included in comprehensive economic sanctions which are designed to mitigate humanitarian disasters, however, is doubtful. The humanitarian exception in Resolution 661 has been criticized to have failed to mitigate the human sufferings of Iraqi people.¹⁶⁷ Now, I will analyze the limits of economic sanctions, especially focusing the right to life and food. Those fundamental rights could be at risk by economic sanctions.

4.1. Right to Life

Every human being has the inherent right to life.¹⁶⁸ The Universal Declaration of Human Rights stipulates the right to life¹⁶⁹ and the right to freedom from inhuman or degrading treatment.¹⁷⁰ The right to life is the supreme right¹⁷¹ and no derogation is

¹⁶⁴ Bossuyt, supra note 162, paras 45-46.

¹⁶⁵ ‘Letter from the Permanent Members of the Security Council on the Humanitarian Aspects of Sanctions’, U.N. Doc. S/1995/300, 13 April 1995.

¹⁶⁶ U.N. Doc. S/Res/661 (1990).

¹⁶⁷ David Cortright and George A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* 45 (Lynne Rienner Publishers, 2000).

¹⁶⁸ Article 6(1) of the ICCPR.

¹⁶⁹ Article 3 of the ICCPR.

¹⁷⁰ Article 5. of the ICCPR

allowed.¹⁷² Children's right to life is also protected.¹⁷³ States have to ensure to the maximum extent possible the survival of the child.¹⁷⁴

Any sanctions regime imposed during a war is governed by international humanitarian law.¹⁷⁵ The civilian population must be protected from war and its effect. This means that the civilian population must be provided with the essentials for survival such as food.¹⁷⁶ In its Resolution 3318, the General Assembly declared:

Women and children belonging to the civilian population and finding themselves in circumstances of emergency and armed conflict... shall not be deprived of shelter, food, medical aid or other inalienable rights.¹⁷⁷

The right to life has both a negative component, a right not to be arbitrarily deprived of life by the State, and a positive component, meaning state's obligation to take active measures to protect the right.¹⁷⁸ It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population.¹⁷⁹ Further, states are required to "take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics."¹⁸⁰ Sanctions, therefore, must not result in undue

¹⁷¹ General Comment 6, para. 1

¹⁷² Article 4(2) of the ICCPR.

¹⁷³ Article 6(1) of the Convention on the Rights of the Child.

¹⁷⁴ Id. Article 6 (2)

¹⁷⁵ Bossuyt, *supra* note 162, para 33-37.

¹⁷⁶ Some argues that extreme sanctions in the context of armed conflict could be considered a weapon of war in themselves. 26th International Conference of the Red Cross and Red Crescent, "Humanitarian consequence of economic sanctions", in *Principles and Response in International Humanitarian Assistance and Protection* (1995).

¹⁷⁷ GA 3318 (1974).

¹⁷⁸ Sarah Joseph, Jenny Schulz, and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press 109 (2000).

¹⁷⁹ The Protocol I Addition to the Geneva Convention of 1977.

¹⁸⁰ General Comments 6. para 5.

hardships for the people of a country. Sanctions that directly or indirectly cause deaths are likely to a violation of the right to life.¹⁸¹

The U.N. economic sanctions against former Yugoslavia raised the issue of the right to life. The sanctions started from a mandatory arms embargo against it,¹⁸² and through trade embargo,¹⁸³ and a prohibition of fuel shipments,¹⁸⁴ finally resulted in the freezing of the financial assets and overseas property.¹⁸⁵ The sanctions had a substantial impact on the right to life of the civilian population, threatening the right to life of civilian people.¹⁸⁶ The economic elites and militia leaders prospered but the vast majority of the populations suffered.¹⁸⁷

4.2. Right to Food

The Universal Declaration of Human Rights declares that, “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services....”¹⁸⁸ Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) declares a state’s obligation to acknowledge the right to food.¹⁸⁹ The Universal Declaration on the Eradication of Hunger and Malnutrition, adopted in 1974 by the World Food Conference in Rome, declared that freedom from hunger and malnutrition was a basic human right.¹⁹⁰

Food should be available “in a quantity and quality sufficient to satisfy the dietary needs of the individuals, free from adverse substances, and acceptable within a

¹⁸¹ Bossuyt, *supra* note 162, para, 26.

¹⁸² U.N. Doc. S/Res/713 (1991).

¹⁸³ U.N. Doc. S/Res/757 (1992).

¹⁸⁴ U.N. Doc. S/Res/787 (1992).

¹⁸⁵ U.N. Doc. S/Res/820 (1993).

¹⁸⁶ David Cortright, *supra* note 162, at 74.

¹⁸⁷ *Id.*

¹⁸⁸ Article 25 (1) of the Universal Declaration of Human Rights.

¹⁸⁹ Article 11 of the International Covenant on Economic, Social and Cultural Rights.

¹⁹⁰ A. LeRoy Benett, *International Organizations: Principles and Issues* 335 (2002).

given culture,”¹⁹¹ and accessible “in ways that are sustainable and that do not interfere with the enjoyment of other human rights.”¹⁹² Food should be accessible economically, meaning that, “personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised.”¹⁹³ Food should also be available physically, i.e., “everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill can have access to food.”¹⁹⁴

The ICESCR declares the right to be free from hunger as fundamental.¹⁹⁵ It is fundamental because “the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfillment of other human rights.”¹⁹⁶ States parties are obligated to “take steps to achieve progressively the full realization of the right to adequate food.” States parties should “ensure for everyone under their jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.”¹⁹⁷

States must respect, protect and fulfill the right to food.¹⁹⁸ They must not violate the right to food and must protect their citizens against violations by other actors.¹⁹⁹ For example, in 1998 the Sudanese government did not respect or protect the right to food of its people, by turning a blind eye on the looting of grain, abduction of women and children, burning of crops and cattle-rustling by the murahleen militia,

¹⁹¹ General Comments 12, para 8, HRI/GEN/1Rev.4.

¹⁹² Id. para 8.

¹⁹³ Id. para 13.

¹⁹⁴ Id. 13.

¹⁹⁵ Nevertheless, the Special Rapportuer on the right to food notes in his 2006 report that, “global hunger is continuing to increase. At least 852 million children, women, and men are gravely and permanently undernourished.” See E/CN.4/2006/44.

¹⁹⁶ General Comments 12, supra note 192, para 4.

¹⁹⁷ Id. para 14.

¹⁹⁸ E/CN.4/2003/54, para 18.

¹⁹⁹ The obligation to protect, Id.

believed to be a central part of the government's counter-insurgency strategy. This resulted in mass starvation.²⁰⁰ If it had not been for these human rights abuses, “there would have been no famine in the Sudan in 1998.”²⁰¹

Further, states must facilitate the right to food by providing an enabling environment for people to feed themselves, and lastly, they must provide people with food when they cannot feed themselves.²⁰² The right to adequate food is satisfied “when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.”²⁰³

The right to adequate food is violated “when a state fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger.”²⁰⁴ The state must make every effort to use all the resources at its disposal in an effort to satisfy...those minimum obligations.”²⁰⁵ Any discrimination in the access to food, or in the means and entitlements for its procurement, nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights is a violation of the right to adequate food.²⁰⁶

The right to adequate food is not a narrow or restrictive notion that would provide people with a minimum package of calories, proteins and other specific nutrients. Governments must take appropriate actions to prevent hunger.²⁰⁷ The right to food, first of all, should be satisfied by national governments.²⁰⁸ States should protect the work of NGOs who assist the victims in the realization of the right to adequate food.²⁰⁹

²⁰⁰ E/CN.4/1999/38/Add.I, para 49-50.

²⁰¹ Id.

²⁰² General Comments No. 12, supra note 192, para 15.

²⁰³ Id. para. 6.

²⁰⁴ Id., para 17.

²⁰⁵ Id. .

²⁰⁶ Id. para 18.

²⁰⁷ E/CN.4/2003/54, para. 24.

²⁰⁸ Id, para. 26.

²⁰⁹ Id. para 35.

The sanctions against Iraq were often criticized as causing undue harm to the civilian population of Iraq. One report said that 170,000 children under the age of five died in 1991 because of disease and malnutrition.²¹⁰ The United Nations Children's Fund (UNICEF) reported that "the vast majority of the civilian population lives in poverty, and the greatest threat to the health and well-being of the Iraqi people remains the difficult economic conditions created by internationally mandated sanctions."²¹¹ It is undeniable, first of all, that the Iraqi government was responsible for the humanitarian crisis. Clearly, however, the long-lasting comprehensive economic sanctions aggravated the situations into a catastrophic disaster.²¹² It has been argued that the Security Council had to design its economic sanctions in a fashion that minimize their impact on civilians, especially on vulnerable groups such as women and children.²¹³ In 2000, the Secretary Council urged that it should "seek every opportunity to alleviate the suffering of the population, who after all are not the intended targets of sanctions."²¹⁴ One U.N. official commented that economic sanctions against Iraq were destroying the whole society and therefore "illegal and immoral."²¹⁵ As we see in the U.N., economic sanctions against Iraq, comprehensive economic sanctions, whether they are authorized by the Council or not, are likely to threaten the right to life or food.

5. Comprehensive or Smart Sanctions

Comprehensive economic sanctions prohibit all forms of trade and financial transactions with the target country. The Council has adopted in three cases

²¹⁰ Geoff Simons, *The Scourging of Iraq: Sanctions, Law and Natural Justice* 51 (1991).

²¹¹ Eric Hoskins, *UNICEF Children, War and Sanctions, Report on the Effects of the Sanctions on Iraqi Women and Children* (1993), cited in Andrew K. Fishman, *Between Iraq and a Hard Place: The Use of Economic Sanctions and the Threats to International Peace and Security*, 13 *Emory Int'l L. Rev.* 687, 704 (1999).

²¹² David Cortright et al, *supra* note 162, at

²¹³ De Wet, *supra* note 34, at 231.

²¹⁴ Press release SG/SM/7338 (24 March 2000).

²¹⁵ *Independent*, 15 October 1998.

comprehensive economic measures. After the Iraqi invasion of Kuwait, the Council adopted comprehensive economic sanctions against Iraq. It prohibited all forms of trade and financial transactions with Iraq and Iraqi-occupied Kuwait.²¹⁶ The Council banned “the import into the territories of all commodities and products originating in Iraq and Kuwait exported therefrom.”²¹⁷ It also prohibited any activities to promote exports from Iraq and Kuwait as well as arms and financial transactions.²¹⁸ In May 1992, the Council adopted comprehensive economic sanctions against the Former Yugoslavia to deter its military intervention against Bosnia.²¹⁹ In May 1994, when the junta in Haiti refused to return power to civil leadership, the Council imposed comprehensive economic sanctions.²²⁰

The United States has adopted several comprehensive economic sanctions against communist countries under the U.S. legislation.²²¹ Although comprehensive economic sanctions are more effective in harming the target country,²²² it is doubtful that comprehensive sanctions are, in reality, more effective in altering the target country’s behavior. It is because the success of economic sanctions depends on not only the magnitude of economic harm but also “the domestic setting of the target government.”²²³

One of the dilemmas that comprehensive economic sanctions have, as in the U.N. economic sanctions against Iraq, is that they could have a disastrous effect on the oppressed in the target country.²²⁴ In his Millennium Report, the Secretary-General states:

²¹⁶ U.N. Doc. S/Res/661 (1990).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ U.N. Doc. S/Res/757 (1992)

²²⁰ U.N. Doc. S/Res/917 (1994)

²²¹ For example, see the Trading with the Enemy Act (50 U.S. Code App., sec. 1-5).

²²² Bossuyt, *supra* note 162, para 54.

²²³ Neta C. Crawford et al ed, *How Sanctions Work: Lessons from South Africa* 277 (St. Martin’s Press, New York, 1999).

²²⁴ Bossuyt, *supra* note 162, para 12.

When robust and comprehensive economic sanctions are directed against authoritarian regimes a different problem is encountered. Then it is usually the people who suffer, not the political elites whose behavior triggered the sanctions in the first place. Indeed, those in power, perversely, often benefit from such sanctions by their ability to control and profit from black market activity, and by exploiting them as a pretext for eliminating domestic sources of political opposition.²²⁵

It has been argued that comprehensive economic sanctions must have humanitarian exceptions to mitigate civilian suffering, in which humanitarian goods, for example, are exempted from the banning of sanction program. The example of this humanitarian exception is the “oil-for-food” program in Iraq.²²⁶ The first “oil-for-food” program was implemented in December 1996. Resolution 986 (1995) permitted the sale of \$ billion of Iraqi oil over 180 days.²²⁷ About half of revenues from the sale would be used for the purchase of humanitarian goods.²²⁸ The program did not prevent widespread human sufferings and deaths from happening and turned out to be unsuccessful.²²⁹ The lessons from the Iraqi sanctions made opponents of comprehensive sanctions argue for smart or selective sanctions.

Smart sanctions target directly political leaders or those responsible for the breach of peace, without damaging the overall economy and imposing exceptional

²²⁵ Millennium Report of the Secretary-General of the United Nations, “We the Peoples”: The Role of the United Nations in the 21st Century, United Nations Department of Public Information 50 (New York, 2000).

²²⁶ U.N. Doc. S/Res/ 706 (1991) and S/Res/712 (1991). The oil-for-food program authorized by these resolutions were not implemented. The oil-for-food program authorized by Resolution 986 (1995) was implemented in December 1996. See, U.N. Doc. S/Res/986 (1995).

²²⁷ U.N. Doc. S/Res/986 (1995).

²²⁸ Id.

²²⁹ Geoff Simmons, *Imposing Economic Sanctions* 173-178 (Pluto Press, 1999).

hardship on the general public.²³⁰ Smart sanctions, if properly designed and applied, can impose significant pressure on the target country's leadership or the elite, eliminating civilian sufferings.²³¹ For example, smart sanctions target the personal foreign assets and access to foreign financial markets of members of the government, the ruling elite, or members of the military.²³² The assets of government owned or elite controlled businesses may be frozen.²³³ Imports of luxury goods generally consumed by the ruling elite can be prohibited. After the North Korea nuclear test in 2006, the Security Council, rather than adopting comprehensive sanctions, targeted the North Korea's leader Kim Jong-Il and banned the sale of luxury goods to North Korea.²³⁴

Arms embargo is often used as a method of smart sanctions. One purpose of arms embargo is to reduce the flow of weapons to a conflict area. During the 1990s the Security Council, to prevent imported arms from being used to aggravate armed conflicts, imposed several arms embargos to conflict areas.²³⁵ It is clear that, to mitigate unnecessary human sufferings, smart sanctions can be an alternative to comprehensive economic sanctions.

6. Types of Economic Sanctions

If the Security Council determines the existence of a threat to the peace, it may adopt measures to maintain or restore international peace and security under Article 40, 41 and 42. Provisional measures can be adopted under Article 40. Military measures and non-military coercive measures can be adopted respectively under Article 41 and 41. Provisional measures under 40 and military measures under 42, however, will not be

²³⁰ Gary Clyde Hufbauer et al, *Economic Sanctions Reconsidered* 138 (3rd, Peterson Institute for International Economics, 2007).

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ U.N. Doc. S/Res/1718 (2006).

²³⁵ Hufbauer, *supra* note 230, at 139.

discussed in my study. Article 41 stipulates other types of sanctions including the severance of diplomatic relations, which also will not be touched in this part. I will only focus on various types of economic sanctions. Economic sanctions are roughly divided into two groups: comprehensive and partial sanctions. Smart sanctions, designed to focus on the ruling elites of the target country, can be included in partial sanctions. Partial sanctions can be imposed to mitigate or avoid the harmful effect that comprehensive sanctions might cause to happen.

6.1. Financial Sanctions

Financial sanctions include “blocking government assets held abroad, limiting access to financial markets and restricting loans and credits, restricting international transfer payments and restricting the sale and trade of property abroad.”²³⁶ There is substantial overlap between financial and trade sanctions when they are employed comprehensively.²³⁷ The Council, in its Resolution 1267, froze funds and other financial resources owned or controlled by the Taliban when Taliban did not cooperate with international community to turn over Osama bin Laden.²³⁸ In September 2005, the U.S. Department of Treasury designated Banco Delta Asia (BDA), a bank in Macau, as a “primary money laundering concern” under Article 311 of the Patriot Act²³⁹ and restricted U.S. financial institutions from doing financial transactions with it. North Korea has had accounts at BDA. It was not officially a sanction because it aimed at banks rather than countries. However, the designation hampered North Korea’s international transactions, making banks doing international business reluctant to transact with North Korea.²⁴⁰

²³⁶ Bossuyt, *supra* note 162, para 12.

²³⁷ *Id.*

²³⁸ U.N. Doc. S/Res/1267 (1999).

²³⁹ Sec. 311 of the Patriot Act (P.L. 107-56; 31 U.S.C. 5381 A).

²⁴⁰ Hufbauer, *supra* note 230, at 139.

6.2. Trade Sanctions

Trade sanctions restrict imports and exports to and from the target country. Trade sanctions restrictions can be comprehensive or selective only restricting certain goods connected with a dispute.²⁴¹ The Security Council Resolution 1306, which prohibited all states from importing diamonds from Sierra Leone, can be included in a selective trade sanction to reduce the level of armed conflicts and human rights violations funded by diamonds exports.²⁴²

After the North Korean invasion into South Korea in June 1950, the U.S. imposed a total trade embargo against North Korea under Section 3 of the Export Control Act of 1949.²⁴³ The total trade embargo continued in the Export Administration Regulations, where North Korea was classified as the most restricted member of Country Group Z.²⁴⁴

In 1951, North Korea was designated as a communist country under the Trade Agreement Extension Act of 1951, which required the suspension of Most-Favored-Nation trade status. Tariffs on goods imported from North Korea are set at the highest level under the Harmonized Tariff Schedule. Preferential trade treatment under the Generalized System of Preferences (GSP) under the Trade Act of 1974 is denied to North Korea.²⁴⁵ The Export-Import Act of 1945 denies North Korea guarantees, insurance, credit and other Bank funding programs because it is designated as a Marxist-Leninist country under the Export-Import Bank Act.²⁴⁶ Even without sanctions, trade is not likely to rise up dramatically because of the tariff barriers.

²⁴¹ Bossuyt, *supra* note 162, para 12.

²⁴² U.N. Doc. S/Res/1306 (2000).

²⁴³ Sec.3 of the Export Control Act of 1949.

²⁴⁴ Dianne E. Rennack, North Korea: Economic Sanctions (CRS Report for Congress, Order Code 31696).

²⁴⁵ General not 3(b) of Harmonized Tariff Schedule of the United States; Sec 502(b)(1) of P.L. 93-618 (19 U.S.C.2461).

²⁴⁶ Sec. 2(b)(2) of the Export-Import Bank Act of 1945 (P.L. 79-173 :12 U.S.C. 635).

6.3. Aid Restriction

The U.S. has aid program under the U.S. Foreign Assistance Act of 1961 and has used it as a tool of imposing sanctions. Non-humanitarian aid to North Korea is prohibited under the Act because it was designated as a state sponsor of acts of international terrorism,²⁴⁷ and a Marxist-Leninist country by the Export-Import Bank Act of 1945. According to exceptions to the law, however, programs in child survival, conservation and biodiversity, food aid, health and disease prevention, and international disaster assistance may be funded in spite of a country's specific restrictions.

North Korea has been a country of “particular concern” under the International Religious Freedom Act of 1998²⁴⁸ and classified as a Tier 3 (most severe) country for slavery or sex trade under the Trafficking Victims Protection Act of 2000.²⁴⁹ In compliance with these Acts, comprehensive aid restrictions are imposed against North Korea.

6.4. Arms Sales Restrictions

Arms sales restrictions, which could be imposed either by itself or as part of a broader trade embargo, are to prohibit the supply of arms to the target country.²⁵⁰ Specific arms embargos were imposed on Haiti²⁵¹ and arms trade with Iraq were totally prohibited by the comprehensive sanctions after it invaded Kuwait.²⁵² The main goals of arms sales restrictions include: (1) to lessen armed conflicts by restricting the flow of arms to fighting parties; (2) to weaken the military capabilities of a state; (3) to constrain the oppressive abilities of a repressive regime; (4) to stop arms flow to

²⁴⁷ Sec. 620A of the Foreign Assistance Act of 1961 (P.L. 87-195; 22 U.S.C. 2371).

²⁴⁸ P.L. 105-292 (22 U.S.C. 6401).

²⁴⁹ P.L. 106-386 (22 U.S.C. 7101).

²⁵⁰ Machael J. Matheson, *Council Unbound: The Growth of UN Decision Making on Conflict and Post-Conflict Issues After the Cold War 69* (United States Institute of Peace Press, Washington, D.C., 2006).

²⁵¹ U.N. Doc. S/Res/875 (1993).

²⁵² U.N. Doc. S/Res/660 (1990).

terrorist groups.²⁵³ In its Resolution 1540, the Council prohibited the supply of weapons of mass destruction and related items to non-state actors.²⁵⁴

The U.S. International Traffic in Arms Regulations (ITAR) authorized by the Arms Export Control Act has denied North Korea “licenses and other approvals for exports and imports of defense articles and defense services” since 1955.²⁵⁵ The ITAR also denies a supporter of international terrorism the export of any munitions item, lease or loan, credits, guarantees, or other financial assistance.²⁵⁶

7. Conclusion

Economic sanctions can be imposed multilaterally under the Chapter VII of the U.N. Charter or unilaterally by individual states. Under the U.N. mechanism, the Security Council must determine the existence of a threat to the peace, breach of the peace or an act of aggression under Article 39 before it adopts mandatory measures under Chapter VII.

During the Cold War, the Council was reluctant to determine that the existence of a humanitarian crisis within a country constituted a threat to peace.

The principle of state sovereignty was more stressed than human rights. The development of human rights after the Cold War II has changed the Security Council’s practice. The Council found that human sufferings in Iraq and a refugee influx in neighboring countries constituted a threat to the peace. Further, it found that the human tragedy in Somalia itself was a threat to the peace. In Haiti case, it also declared that the humanitarian situation in Haiti had constituted a threat to the peace.

Economic sanctions, especially comprehensive ones may cause humanitarian sufferings in a target country. David Cortright has raised the question of whether it is

²⁵³ Matheson, *supra* note 250, at 70.

²⁵⁴ U.N. Doc. S/Res/1540 (2004).

²⁵⁵ Sec. 38 of the Arms Export Control Act (P.L. 90-629; 22 U.S.C. 2778) and 22 CFR Part 126.1.

²⁵⁶ *Id.*

possible to make sanctions both more effective and more humane.²⁵⁷ In a sense, civilian suffering is “an inevitable and even intended result of sanctions.”²⁵⁸ He argues that although there are tensions between enhancing the effectiveness of sanctions and mitigating human sufferings, harmonizing those two objectives is “both possible and necessary.”²⁵⁹ Economic sanctions are limited by humanitarian causes. This argument is not only moral but also enhances the effectiveness of sanctions. David Cortright states:

The greater the attention to minimizing adverse humanitarian impacts, the deeper and broader the support for such sanctions within the coalition of sender states. Also, the more sensitive sanctions designers are to limiting the harm on innocent bystanders, the less likely sanctioned leaders will be able to mobilize support within the targeted state. Efforts to reduce unintended humanitarian impacts also make it more likely that sanctions will be targeted against decision-making elites.²⁶⁰

Many scholars consider humanitarian sufferings caused by sanctions as an issue of effectiveness of sanctions, which is usually termed unintended consequences.²⁶¹ They are, however, a moral or legal issue that should be carefully addressed before imposing economic sanctions. If economic sanctions are found to threaten the right to life and food in the target country, sanctions must be stopped or re-designed.

²⁵⁷ David Cortright & George A. Lopez, *The Sanctions Decade 224* (Lynne Rienner Publishers, 2000), p. 224

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ For example, See, *Id.*, at 225.

CHAPTER FOUR
EFFECTIVENESS OF ECONOMIC SANCTIONS

1. Introduction

Multilateral or unilateral economic sanctions are used to force foreign states to comply with international norms or to change the target country's policy.¹ States and the international community, by applying economic sanctions, also confirm international standards, monitor international behavior, and express dissatisfaction over violations of human rights norms.²

The effectiveness of economic sanctions has been hotly debated. There are four different views on the effectiveness of economic sanctions. The first view is that economic sanctions can be effective in obtaining foreign policy goals. Sarah H. Cleveland argues: “[E]conomic sanctions are an important weapon in the transnational efforts to promote respect for fundamental human rights and can have substantial behavior-modifying potential.”³ The basic assumption of this argument is that economic pressure on civilian population will translate into pressure on the government for change.⁴ A corollary of this argument is that the greater the suffering of the target country, the more the possibility of success of economic sanctions will be. Sanctions should be employed with maximum impact.⁵

The second view is that economic sanctions are ineffective in changing the target country's policy. According to this argument, where political decision-making

¹ Literally, sanctions by one entity are unilateral and all others are multilateral. See, Hossein G. Askari et al, *Economic Sanctions: Examining Their Philosophy and Efficacy* 31 (Praeger, Westport, Connecticut, 2003). For my study, however, I use multilateral sanctions as ones authorized by the U.N. Security Council.

² Sarah H. Cleveland, *Cleveland, Sarah H. Norm Internalization and U.S. Economic Sanctions* 26 *Yale J. Int'l L.* 1 87 (2001).

³ *Id.* 5.

⁴ Marc Bossuyt, Commission on Human Rights, Working Paper on the adverse consequences of economic sanctions on the enjoyment of human rights (E/CN.4/Sub.2/2000/33), para 48.

⁵ Gary Clyde Hufbauer et al, *Economic Sanctions Reconsidered* 168 (Peterson Institute for International Economics, 2007).

in a country is not democratic, the civilian population cannot bring about policy changes in the government by pressuring it.⁶ The ruling regime, usually with a strong grip on the media, may easily take advantage of the economic hardship to unite the population and support the regime in defiance of foreign imposed economic sanctions.⁷ Economic sanctions also may be used to conceal their structural problems and to trigger political extremism in the target country.⁸ Economic sanctions should not be imposed especially against a non-democratic country.⁹ Where economic sanctions are inevitable, they should focus on the activities that bring the sanctions, or on those responsible for the offending behavior, and humanitarian exceptions should be included.¹⁰

The third view tries to find factors that make economic sanctions effective or ineffective. According to the Institute for International Economics (IIE), the effectiveness of sanctions can be measured in points. IIE found that only 34 percent of the analyzed cases were successful in achieving their goals.¹¹ IIE suggests 5 recommendations on the effectiveness of economic sanctions: (1) sanctions are seldom effective in bringing about major policy changes of the target country; (2) economic sanctions on autocratic regimes are not likely to succeed; (3) economic sanctions are likely to succeed when used against friends; (4) there is a better chance to succeed if sanctions are adopted with maximum impact; (5) many sender countries does not necessarily make economic sanctions more likely to succeed; (5) domestic costs must be considered.¹² IIE argues:

⁶ Bossuyt, *supra* note 4, para 48.

⁷ *Id.*, para 49.

⁸ *Id.*

⁹ *Id.*, para 50.

¹⁰ Richard N. Haass, *Economic Sanctions and American Diplomacy* 207-208 (Richard N. Haass ed, A Council on Foreign Relations Book, 1998).

¹¹ Hufbauer et al, *supra* note 5, at 158.

¹² Hufbauer et al, *supra* note 5, at 162-174.

Although it is not true that sanctions never work, they are of limited utility in achieving foreign policy goals that depend on compelling the target country to take actions it stoutly resists. Still, in some instances, particularly situations involving small target countries and relatively modest policy goals, sanctions have helped alter foreign behavior.¹³

According to this argument, sanctioning states are required to evaluate various factors before applying economic sanctions. The selected means of sanctions must be appropriate to the circumstances.¹⁴

The fourth view argues that free trade and economic integration could promote both economic prosperity and political freedom.¹⁵ According to this argument, under economic sanctions, the middle class is eliminated, they get poorer, and the rich get richer.¹⁶ The elite group actually benefits economically from economic sanctions because of the monopoly on illegal trade.¹⁷ In the long run, democratic participation and independent institutions become weakened.¹⁸ Craig Forcese argues that if “constructive engagement” through economic integration strengthens “the staying power of a human rights-abusing regime, or prompts it to engage in additional human rights abuses,” the engagement should not be allowed.¹⁹ He argues, however, that engagement can be tolerated if it does not give rise to “the very human rights ills it is said to cure.”²⁰ Engagement policy posits that economic integration enhances democracy and human rights.²¹ Contact with the outside world is

¹³ Id., 1.

¹⁴ Id., at 178.

¹⁵ Craig Forcese, *Globalizing Decency: Responsible Engagement in an Era of Economic Integration*, 5 Yale H.R. & Dev. L.J.1, 2 (2002).

¹⁶ Bossuyt, supra note 4, para 50.

¹⁷ Forcese, supra note 15, at 2.

¹⁸ Id.

¹⁹ Id. 3.

²⁰ Craig Forcese calls this “responsible engagement.” Id. 3.

²¹ Id. 5.

said to expand “the flow of information”.²² As stated by Forcese, “[A]ll the various forms of popular entertainment and intellectual thought begin to flow, spreading ideas like democracy, human rights, and the rule of law.”²³ In order to force a state to comply with international norms, economic engagement with the target country, rather than sanctions, is encouraged.

One of four theories alone cannot explain the effectiveness of economic sanctions, encompassing all the cases. Each theory has its own value, with its limitations and applicable scope. It seems that finding a suitable theory for a certain situation is more important. In this Chapter, I will discuss the general effectiveness of economic sanctions, but only to the extent that is needed to find an effective strategy against North Korea.

1. 1. Definition of Effectiveness of Sanctions

In order to discuss the general effectiveness of sanctions, I will define what the effectiveness of economic sanctions means. Very often, sanctioning states apply economic sanctions not to change the target country’s policy, but to mainly satisfy domestic constituents. Some scholars argue:

[S]anctions can be imposed for symbolic purposes. These may include deterring future wrongdoing, demonstrating resolve to allies or domestic constituencies, upholding international norms, and sending messages of disapproval in response to objectionable behavior. All these multiple purposes need to be considered in evaluating the political effectiveness of sanctions.²⁴

²² Id.

²³ Id.

²⁴ David Cortright & George A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* 16 (Lynne Rienner Publishers, Boulder Colorado, 2000), p. 16..

The symbolic purposes of sanctions are, of course, important in upholding international norms.²⁵ When it comes to measuring the effectiveness of sanctions, however, the focus should be given on the possibility of changing target countries policy.

First, the effectiveness of sanctions should be evaluated against the professed purpose of the sanction. Malloy argues that the effectiveness of economic sanctions cannot be measured by “a direct and palpable causal relationship between the imposition of specific sanctions and the achievement of broad policy objective.”²⁶ He argues therefore that the U.S. economic sanctions against Vietnam provided necessary bargaining chips for the normalization of relations.²⁷ However, the U.S. economic sanctions against Vietnam cannot be considered effective to the extent that they had not been intended as bargaining chips when initially imposed. In my study, economic sanctions are imposed to alter the target country’s behavior. Where they are not intended to affect the target country’s policy or behavior, it seems there is no need to analyze its effectiveness on the target country’s behavior.

Second, in the same context, the effectiveness of sanctions should be evaluated against their effect on the target country and its change of the policy. Economic sanctions are meant to change the target country’s certain policy, rather than just harming its economy. Therefore, it is critical to evaluate whether the economic sanctions have effectively resulted in the achievement of the proposed policy goals.²⁸ Sanctions inspired primarily by domestic or moral motives are very often weak and therefore can rarely be effective in changing the target country’s behavior. Where sanctioning states impose sanctions mainly because of domestic or moral motives, it

²⁵ Id.

²⁶ Michael P. Malloy, *United States Economic Sanctions: Theory and Practice* 379 (Kluwer Law International, 2001).

²⁷ Id., at 344.

²⁸ David Cortright, however, argues that the other purposes as well as stated policy objectives of sanctions must be considered. Cortright et al, *supra* note 24, at 15.

means either that they do not seriously intend to accomplish the professed foreign policy goals, or that they have simply chosen an inappropriate (ineffective) means of sanctions. For example, on May 7, 1994, after a month of genocide in Rwanda, John Shattuck, Assistant Secretary of State for Democracy, Human Rights, and Labor, stated that, “Rwandan leaders must end all forms of violence against civilians.”²⁹ As a result, the U.S. government refused entry visas into the U.S. to representatives of the genocidal government, a measure, which can be called either too weak or inappropriate to stop the massive genocide.

Third, in assessing the success of economic sanctions, time is also important. The goals of economic sanctions cannot be obtained in a short period of time, and sanctions may become more effective or less effective over time. However, the effectiveness of certain sanctions should be questioned if for a considerable period of time, there is no positive trend in altering the target countries’ behavior. For example, the U.S. sanctions against Cuba have lasted for almost 50 years,³⁰ those against North Korea, almost 60 years.³¹ Do we need more time to know whether those sanctions would succeed or not? In short, economic sanctions, in order to be effective, should achieve the intended policy goals of changing the target country’s behavior within a certain time period.

1. 2. Sanctions Effectiveness and Political Structure

Economic sanctions are likely to result in a policy change in the targeted country through a bottom-up policy change or the dissolution of an elite group. First, in a democratic society, economic hardships or a failure caused by economic sanctions may raise the possibility of a policy change caused by public dissatisfaction or

²⁹ U.S. State Department, “Joint Press Statement by President Museveni of Uganda and U.S. Assistant Secretary of State John Shattuck on the Situation in Rwanda,” Kampala, May 7, 1994.

³⁰ Susan Kaufman Purcell, Cuba, in *Economic Sanctions and American Diplomacy* 37-38 (Richard N. Hass ed, 1998).

³¹ Geoff Simons, *Imposing Economic Sanctions* 140-144 (Pluto Press, 1999).

pressure from the public. Economic sanctions can force the economy in the sanctioned country to collapse. The affected people then apply political pressure on the regime to change the policy that has caused the economic sanctions. In a democratic society, the bottom-up policy change is secured through elections.³² Elections provide “the public with a clear formal opportunity to influence the political process, and also help, directly or indirectly, to determine who will hold government power.”³³ If the regime refuses to change the policy, the public might change the regime itself through elections. The winning party can “reasonably claim that its policies most closely correspond to the interests of the largest group of voters,”³⁴ and adopt new policies.

Second, in a totalitarian state economic failure creates tensions within the ruling elite and may increase the possibility of reforms, coups or even a regime change. Economic sanctions can give rise to dissatisfaction among elite groups, and reduce the loyalty of the political and military elite. A new political group may arise out of the tensions within the elite, which is likely to result in a policy change. For example, a state's military includes “interest groups that seek to shape or influence the content of policy.”³⁵ They try to build up the size and the status of the armed forces, and increase the military budget.³⁶ When the economic sanctions threaten the interests of the military groups, their loyalty tends to dissolve, and a policy or regime change may occur. In a totalitarian state, “political change is more likely to result from a rebellion within the political or military elite than a popular revolution.”³⁷

Analyzing economic sanctions only through economic consequences is mistaken. The political, economical and societal impact that economic sanctions may bring in the target country, especially whether the sanctions strengthen opposition

³² Andrew Heywood, *Politics* 226-227 (1997).

³³ *Id.*, at 222.

³⁴ *Id.*

³⁵ *Id.*, at 363-264.

³⁶ *Id.*, at 364.

³⁷ *Id.*, at 201.

movement against the elite in the target country should be carefully considered. Therefore, in order for sanctions to be effective, there should be a possibility that either the public could change the regime through elections, or elite groups could raise dissatisfactions against the regime. Without the possibility of changing the regime through elections or the hope of showing dissatisfaction from elite groups, there is no hope of changing the target countries' policy by imposing sanctions. I will analyze economic sanctions against Iraq, Cuba, Myanmar and South Africa, and find out what made the sanctions effective or ineffective.

2. The United Nations Sanctions against Iraq

2.1. Economic Sanctions against Iraq

After the Iraqi invasion into Kuwait, on August 6, 1990, the U.N. Security Council imposed comprehensive economic sanctions against Iraq by adopting Resolution 661.³⁸ The U.N. sanction banned all Iraqi imports except food and medicine, and all Iraqi exports, including oil. The resolution created the Sanctions Committee to direct and coordinate the sanction program. Exemptions were made for supplies intended strictly for medical purposes and food stuffs.³⁹ The Security Council imposed marine and air blockades in its Resolutions 665 and 670. Oil embargo was enforced by cutting off pipeline through Turkey and Saudi Arabia and remained in effect until the oil for food program began in 1996.⁴⁰ In its Resolution 678, the Security Council authorized member states to use "all necessary means" to liberate Kuwait.⁴¹ In February, 1991, the U.S. and its coalition partners, using military power, drove Iraqi force out of Kuwait.

³⁸ U.N. Doc. S/Res/661 (1990).

³⁹ Id.

⁴⁰ David Cortright, *supra* note 24, at 39.

⁴¹ U.N. Doc. S/RES/678 (1990).

The U.N. Security Resolution 687 required that, in order for the sanction to be lifted, Iraq must restore Kuwait's autonomy, and cooperate with the United Nations for the monitoring and destruction of Iraqi weapons of mass destruction.⁴² The Sanctions Committee had the authority to permit imports of petroleum originating from Iraq to allow Iraq to pay for imports of food, medicines.

In April 1995, the U.N. Security Council passed Resolution 986, which increased the amount of oil Iraq could export under the "Oil-for-Food" program from \$1.6 billion to \$ 2 billion every six months.⁴³ The resolution was implemented with the signing of a memorandum of understanding between the Secretariat and the Iraqi government. The program was to reduce human suffering caused by the sanctions. Therefore, all civilian items with potential military use were still banned.

In May 2002, the Security Council Resolution 1409 lifted restrictions on shipping goods to Iraq.⁴⁴ While military items were still not allowed to be imported, civilian trade was allowed. On May 22, 2003, the Security Council formally lifted the U.N. economic sanctions against Iraq after Saddam Hussein was removed from power following the U.S. invasion into Iraq.⁴⁵

2. 2. Impact of the Economic Sanctions against Iraq

Before the Gulf War, Iraq imported about two-thirds of its food. Oil accounted for over 90 percent of Iraq's exports amounting to \$13.2 billion before 1990.⁴⁶ In 1989, the U.S agricultural shipments to Iraq totaled about \$1 billion.⁴⁷ The economic sanctions, however, shut off 97 percent of Iraqi exports and more than 90 percent of its imports.⁴⁸ The oil-for-food program did not seem to have mitigated the civilian

⁴² U.N. Doc. S/RES/687 (1991).

⁴³ U.N. Doc. S/RES/986 (1995).

⁴⁴ U.N. Doc. S/RES/1409 (2002).

⁴⁵ U.N. Doc. S/RES/1483 (2003).

⁴⁶ New York Times, August 3, 1990.

⁴⁷ Journal of Commerce, August 9, 1990.

⁴⁸ Washington Post, December 6, 1990.

suffering. Instead of weakening the regime's capacity for threatening international peace and security, the sanctions had a devastating effect on the Iraqi people. Because of the oil export embargo, Iraq could not import food since it had no oil revenue and the Iraqi population faced persistent deprivation and severe hunger. Infant mortality skyrocketed and malnutrition among Iraqi children under five years of age doubled between 1991 and 1996.⁴⁹ It was reported that the sanctions were responsible for the deaths of up to 5,000 children per month.⁵⁰ The Iraqi health care system was significantly impacted and diseases such as malaria became epidemic.⁵¹ The Iraqi sanctions caused severe humanitarian sufferings on Iraqi people.

In general, the Iraqi government did not cooperate with the U.N. for the monitoring and destruction of weapons of mass destruction, a cooperation that was the prerequisite for lifting the economic sanctions. The U.N. economic sanctions were lifted only after the removal of Saddam Hussein in 2003. The economic sanctions failed in the sense that they could not force the Iraqi government to abide by the U.N. Security Council resolutions. On the contrary, the sanctions produced severe humanitarian suffering among innocent and vulnerable Iraqi people.

Factors that Made the Sanctions Unsuccessful

Before the sanctions, Iraq's economy was heavily dependent on oil exports. The sanctions against Iraq were multilateral and relatively well managed by the international community. Therefore, Iraq was extremely vulnerable to sanctions.⁵² However, it is generally considered that the Iraqi sanctions failed.⁵³ The failure of the

⁴⁹ Report of the Second Panel Established Pursuant to the Note by the President of the Security Council of 30 January 1999(S/1999/100) Concerning the Current Humanitarian Situation in Iraq, U.N. Doc. S/1999/356, Annex II (1999).

⁵⁰ Joseph J. Collins and Gabrielle D. Bowdoin, *Beyond Unilateral Economic Sanctions: Better Alternatives for U.S. Foreign Policy* 8 (CSIS Report, 1999).

⁵¹ *Id.*

⁵² Cortright, *supra* note 24, at 44.

⁵³ *Id.*

sanctions against Iraq can be attributed to several factors. First, the goals of the sanctions were to impair Iraqi military power, forcing it to withdraw out of Kuwait and to accept the inspections of weapons of mass-destruction.⁵⁴ Economic sanctions are not effective “in impairing the military potential of an important power or in bringing about major changes in the politics of the target country.”⁵⁵ The ultimate goal against Iraq was achieved by the military operations.

Second, Iraq was an authoritarian state. An authoritarian state is stronger in resisting sanctions than a democratic state. Iraq was “one of the most ruthless repressive and undemocratic governments on the planet.”⁵⁶ Iraq’s political structure was a strong mitigating factor against the likely effectiveness of sanctions. One of the wrong assumptions in regard to sanctions is that the more economic hardship the sanctions cause, the more likely for the target country to change its behavior. IIE recommended to “impose the maximum cost on your target” to change the policies of the target country.⁵⁷ The Iraqi experience discredits the general notion that the imposition of massive economic harm must necessarily result in an authoritarian regime’s submission.⁵⁸

Third, Iraq maintained a hostile stance against the international community during the entire sanction period. Economic sanctions directed against target countries that have long been adversaries of the sanctioning country, or against countries that have little trade with the sanctioning country, are less successful.⁵⁹ Hostility between those countries makes economic sanctions less effective.⁶⁰ The animosities between Iraq and the West prevented the development of a bargaining dynamic.

⁵⁴ U.N. Doc. S/Res/687 (1991).

⁵⁵ Hufbauer et al, *supra* note 5, at 162.

⁵⁶ Cortright et al, *supra* note 24, at 44.

⁵⁷ Hufbauer et al, *supra* note 5, at 114.

⁵⁸ Alan Dowty, “Sanctioning Iraq: the Limits of the New World Order” *The Washington Quarterly* 17, No. 3, 190 (1994)

⁵⁹ Gary Clyde Hufbauer, *supra* note 5, at 163-164.

⁶⁰ Collins et al, *supra* note 50, at x.

Fourth, the sanctions against Iraq did not strengthen the opposition groups in Iraq.⁶¹ During the sanctions period, unemployment and inflation soared. Market prices for food were beyond the reach of most families. Many Iraqis depended for their survival on the government's food-rationing program.⁶² However, the sanctions did not strengthen the opposition movements in Iraq; this is mostly due to the fact that Iraq was an authoritarian state ruled by Saddam Hussein.

3. The U.S. Economic Sanctions against Cuba

3. 1. Background of the Economic Sanctions against Cuba

In 1960, when the Soviet Union agreed to buy sugar from Cuba and to supply it with crude oil, the U.S. companies refused to refine oil purchased from the Soviet Union, and Cuba nationalized its oil refinery industry,⁶³ the U.S. imposed a unilateral economic embargo against Cuba, banning its export of sugar to the U.S. It was a typical Cold War confrontation. The U.S. severed its diplomatic relations with Cuba and restricted travel to the country. In 1962, Congress tightened up the embargo, prohibiting U.S. aid to any country giving assistance to Cuba.⁶⁴ This prohibition effectively stopped most of Cuba's trade with the U.S. The Cuban embargo was a complete trade and financial embargo.

The U.S. froze all Cuban assets amounting to \$33 million in the U.S. under the Trading with the Enemy Act in 1963.⁶⁵ The U.S. also cancelled the general license permitting the export of food and medicine, and imposed a prior approval requirement for each individual transaction. The U.S. also pursued collective sanctions in the

⁶¹ Economic Sanctions and American Diplomacy 119 (Richard N. Haass ed., 1998).

⁶² Cortright et al, *supra* note 24, at 46.

⁶³ Gary Clyde Hufbauer et al, *Economic Sanctions Reconsidered: Supplemental Case Studies 194* (2nd ed, Institute for International Economics, Washington, DC, 1990).

⁶⁴ The Foreign Assistance Act of 1961, 22 U.S.C.A 2370 (amended 1962).

⁶⁵ Hufbauer, *supra* note 63, at 195.

Organization of American States (OAS). In 1964, OAS adopted a resolution calling for mandatory sanctions covering all trade except food and medicine.

The U.S. economic sanctions against Cuba, however, could not prevent Cuba's active involvements in military activities around the world. In 1975, Cuba deployed 36,000 combat troops in Angola and, in 1978, 20,000 troops in Ethiopia.⁶⁶

In 1992, the U.S. enacted the Cuban Democracy Act, which prohibited foreign subsidiaries of U.S. companies from trading with Cuba and banned any ship that had docked in Cuban harbors from entering U.S. ports for 180 days. The Cuban Democracy Act was not welcome by the international community. The United Kingdom prohibited U.S. subsidiaries located in its jurisdiction from complying with the provisions of the Cuban Democracy Act. Russia signed a trade agreement with Cuba, which enabled Cuba to buy oil from Russia in exchange for sugar.⁶⁷ Between 1994 and 1995, the U.S. loosened its economic sanctions against Cuba. In September 1994, the U.S. and Cuba signed an immigration accord to stem Cuban refugees from entering the U.S. President Clinton eased restrictions on travel to Cuba for educational, religious and human rights purposes.

In March 1996, the Helms-Burton Act⁶⁸ was passed in the U.S. after a Cuban fighter shot down two civilian planes of a Cuban-American exile group, "Brothers to the Rescue."⁶⁹ The Act contains a number of extraterritorial provisions. In Title III, the Act stipulates, inter alia, that Americans with claims to property expropriated by the Cuban government could sue for damages against foreign corporations or individuals that "traffic" such property, and that the U.S. must deny entry to the executive and major shareholders of firms that had such expropriated property. The Act infuriated Canada and Mexico. Both countries adopted a legislation penalizing companies that

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ The formal title of the act is "the Cuban Liberty and Democratic Solidarity Act of 1996."

⁶⁹ Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 Am.J.Int'l L. 419, 419 (1996).

would comply with the Act.⁷⁰ OAS declared that the Helms-Burton Act did not conform to international law. In response to the international community's criticism, President Clinton had to waive the Title III private right of action provision. The U.S. economic sanctions against Cuba were unilateral because they were pursued by the U.S. alone without any U.N. intervention.

The goals of the U.S. sanctions against Cuba are to contain Cuba in response to its promotion of a leftist revolution, especially during the Cold War and ultimately to overthrow the regime.⁷¹

3. 2. Impact of the Economic Sanctions against Cuba

Before the collapse of the Soviet Union, Cuba could maintain its economy by exporting its sugar to, and importing oil from the Soviet Union. The loss of Soviet economic assistance after 1990 caused a severe downturn in the Cuban economy. In the mid-1990s, Cuba could not repay its huge loans. In 1989, sugar exports had accounted for over 75 percent of Cuban foreign currency earnings, and in 1996, for less than 20 percent.⁷² It was estimated that between 1960 and 1992 the embargo damages were over \$40 billion.⁷³ The Cuban Vice President said that the U.S. embargo cost the Cuban economy a minimum of \$800 million in 1998.⁷⁴ The U.S. economic sanctions against Cuba have had a significant impact on the Cuban economy.

However, the U.S. economic sanctions against Cuba did not deter Castro from "meddling in Central America and Africa during the Cold War, nor had [they] provided the leverage required for democratic change in Cuba itself."⁷⁵ Instead, Castro

⁷⁰ Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 Yale J. Int'l L. 1, 58 (2001).

⁷¹ Sergio Roca, Economic Sanctions against Cuba, In *The Utility of International Economic Sanctions*, 87 (David Leyton-Brown., ed. London: Croom Helm, 1987).

⁷² Journal of Commerce, August 25, 1997.

⁷³ UN Economic Commission for Latin America 43 (1997).

⁷⁴ Journal of Commerce, December 23, 1998.

⁷⁵ Madeleine Albright, Madam Secretary 421 (2003).

used the sanctions to perpetuate his power. Sanctions spanning over three decades did not lead to the overthrow of the Castro regime.

3. 3. Factors that Made the Economic Sanctions Unsuccessful

The U.S. sanctions against Cuba had a substantial economic effect on Cuba. The sanctions, however, failed to achieve the proposed goals. The failure of U.S. sanctions against Cuba can be attributed to several factors. First, the goals of the sanctions are containment of communism and ultimately overthrowing of the regime.⁷⁶ The goal of overthrowing a regime cannot be obtained by imposing economic sanctions. Second, there were major trading partners: the Soviet Union.⁷⁷ Where the rest of the major trading partners refuse to join in economic sanctions, sanctioning states cannot achieve their goals. The survival of the Castro regime after the collapse of the Soviet Union needs more explanation. Third, Cuba, like Iraq, is an authoritarian state. Cuba has been ruled by Fidel Castro since he overthrew the Batista regime in 1959. An authoritarian regime is by far stronger in resisting against sanctions than a democratic one. Fourth, Cuba also has been maintaining antagonistic stance against the U.S.⁷⁸ Because of hostility, economic sanctions may simply strengthen the target government at home as they incite nationalism or animosity against the sanctioning states. Fifth, the economic sanctions did not strengthen the opposition movement in Cuba. There is no sign that economic difficulties caused by the sanctions trigger opposition movement in Cuba.

⁷⁶ Hufbeur et al, supra note 63, at 198.

⁷⁷ Hossein G. Askari et al, Case Studies of U.S. Economic Sanctions: The Chinese, Cuban, and Iranian Experience 157 (Praeger, Westport, Connecticut, 2003).

⁷⁸ See, id., at 111-164.

4. Economic Sanctions against Myanmar

4. 1. Human Rights Violations in Myanmar

Burma had been ruled by General Ne Win since 1962, when in the spring of 1988, pro-democracy demonstrations broke out all over the country after 42 students were killed by the police. In 1989, the military regime changed the country's name to Myanmar. In May 1990, Myanmar's National League for Democracy (NLD) led by the 1991 Nobel Peace Laureate Aung San Suu Kyi, won the majority seats in the National Assembly against Myanmar's military regime.⁷⁹ After the election, however, the regime annulled the result and refused to hand over the power to NLD. Aung San Suu Kyi was placed under house arrest for over 6 years. Other NLD leaders were arrested. The regime closed indefinitely all university campuses and colleges, the strongholds of the anti-military movement. The military regime has used widespread forced labor for military purposes and relocated thousands of civilians. In 1991-1992, over 2,000,000 Muslim refugees fled to Bangladesh to escape religious persecution.⁸⁰

4. 2. Sanctions by the International Community

Although the U.N. General Assembly and the Human Rights Commission repeatedly adopted several resolutions condemning Myanmar's human rights violations,⁸¹ the U.N. Security Council has never adopted a mandatory resolution against Myanmar. Instead, individual states took the responsibility of applying sanctions against Myanmar.

After the regime's refusal to hand over power to the opposition, in July 1991, President Bush, under Section 138 of the Customs and Trade Act of 1990, refused to renew the bilateral textile agreement that had lapsed the previous year.⁸² In 1993, the

⁷⁹ Washington Post, May 29, 1990.

⁸⁰ Cleveland, *supra* note 70, 8.

⁸¹ U.N. Doc. A/Res/53/162 (1998), U.N. Doc. E/CN.4/Res/1999/17 (1999).

⁸² Associated Press, July 22, 1991.

U.S. reduced a \$40 million grant to Myanmar to \$18 million.⁸³ In April 1994, Congress placed Myanmar on the list of outlaw states under the Foreign Assistance Act of 1961 and no fund made available under the Act could be used toward financing the U.S. share in international organizations for Myanmar. In October 1996, President Clinton banned Myanmar's government officials' entry into the U.S. In May 1997, President Clinton prohibited new investment in Myanmar, under Section 570 of the Omnibus Consolidated Appropriations Act (OCA) of 1997, while allowing existing contracts to be fulfilled.⁸⁴ He reasoned that the government of Myanmar had committed large-scale repression of the democratic opposition in Burma and the actions of the regime constituted "unusual and extraordinary threat to the national security and foreign policy" of the U.S under the International Emergency Economic Powers Act (IEEPA).⁸⁵

In 1996, Massachusetts adopted legislation that added a 10 percent premium on contracts with state agencies for companies that did business in Myanmar and prohibited those companies from purchasing or leasing state-owned property.⁸⁶ Other states and cities soon followed this by adopting similar restrictions.

In 2003, President Bush signed the Burmese Freedom and Democracy Act of 2003. The Act banned U.S. imports from Myanmar, froze U.S. assets of Myanmar's government, prohibited U.S. firms from providing financial services to any Myanmar entity, expanded the visa ban and opposed to international loans and technical assistance to Myanmar.⁸⁷ In August 2006, President Bush approved a renewal of the sanctions under the Burmese Freedom and Democracy Act of 2003 for another 3 years.

⁸³ Peter G. Peterson Institute for International Economics, Case Studies in Sanctions and Terrorism, Case: 88-1 (US/EU/Japan v. Burma). Available at <http://www.iie.com/research/topics/sanctions/myanmar.cfm> (last visited on January, 2007).

⁸⁴ 62 Fed. Reg. 28, 301 (1997).

⁸⁵ Supra note 83.

⁸⁶ Inside U.S. Trade, January 31, 1997).

⁸⁷ Washington Post, July 17, 2003.

Since 1990, the E.U. has maintained an arms embargo and suspended military cooperation and bilateral aid to Myanmar.⁸⁸ The E.U. put in place economic sanctions against Myanmar in 1996 when Yangon failed to meet E.U. demands for greater democratization. The sanctions restrict travel by Burmese officials and prevent investment in the country. The E.U. has renewed the sanctions annually. In March 1997, the E.U. voted to cancel Myanmar's trade benefits under the Generalized System of Preferences (GSP) because of the existence of 800,000 forced workers.⁸⁹

Companies also participated in the campaign to condemn human rights violations in Myanmar. In July 1994, the U.S. company Levi-Strauss announced its withdrawal from Myanmar, saying that "under present conditions, it is not possible to do business in Myanmar without directly supporting the military government and its pervasive violations of human rights."⁹⁰ In July 1996, Carlsberg of Denmark abandoned its plan to invest in Myanmar and Heineken of the Netherlands announced its withdrawal from a \$30 million venture in Myanmar.⁹¹ Before long, Kodak, Apple, Walt Disney and PepsiCo withdrew from Myanmar.

Asian countries have been less critical of Myanmar. In 1995, Japan provided Myanmar with \$10 million in agricultural assistance and a \$16 million grant as part of Overseas Development Assistance funds.⁹² Japan allowed a \$19.5 million business project to enlarge the Yangon airport in 1998, justifying it as humanitarian aid. In 1998, Japan provided Myanmar with \$16 million in debt relief.⁹³ In 1993, Singapore signed \$465 million in trade and tourism agreements with Myanmar. China has been an important trading partner of Myanmar, as well. Throughout the 1990s, China provided Myanmar with millions in loans for roads and infrastructure development.

⁸⁸ Supra note 83.

⁸⁹ Id.

⁹⁰ Washington Post, July 21, 1994.

⁹¹ Financial Times, July 12, 1996.

⁹² Los Angeles Times, January 4 1996.

⁹³ Supra note 83.

In 1996, the Association of Southeast Asian Nations (ASEAN), ignoring U.S. opposition, granted Myanmar observer status, a first step for full membership in the group.⁹⁴ In May 1997, ASEAN officially accepted Myanmar as its member. When the E.U. called for a United Nations contact group to be established for political reform in Myanmar, Asian countries denounced it as an unwarranted intervention into the affairs of a sovereign state.⁹⁵

Japanese companies such as Nissan and Mitsubishi Motor Companies have pursued business in Myanmar. Unocal and Texaco of the United States continued to do business in energy exploration during the 1990s.⁹⁶ The U.S. sanctions did not harm the existing U.S. oil investments in Myanmar.

4.3. Impact of the Economic Sanctions against Myanmar

Myanmar had pursued a policy of economic isolation over 30 years. Before 1988, the only foreign company allowed to set up joint venture in Myanmar was Fritz Werner, a West German engineering firm, which made machinery for manufacturing weapons.⁹⁷ The isolationist military regime has never heavily relied on the international community for commerce and trade. Myanmar is extremely rich in natural resources such as gems and oil. It has increased its foreign-exchange reserves by selling off rights to exploit its natural resources to foreign interests.⁹⁸ Therefore, the effects of the sanctions against Myanmar have been relatively weak.

Moreover, the economic sanctions adopted by the international community were not multilateral. The U.N. Security Council has not adopted any resolutions relating to human rights violations in Myanmar. In May 2006, the U.S. only called for a non-punitive U.N. Security Council resolution to change Myanmar's human rights

⁹⁴ New York Times, July 22, 1996.

⁹⁵ International Herald Tribune, July 25, 1996.

⁹⁶ Supra note 83.

⁹⁷ Far Eastern Economic Review, February 2, 1989.

⁹⁸ Financial Times, May 19, 1990.

policies.⁹⁹ Therefore, Myanmar has had trading partners including Japan, China, Singapore and Thailand. They were reluctant to abandon economic ties with Myanmar, which contributed to weakening of the effectiveness of the economic sanctions by other countries.

On top of that, even the economic sanctions adopted by the U.S. and E.U. were not comprehensive. The U.S. imports from Myanmar had not been prohibited until 2003. In 2002, the U.S. imports from Myanmar totaled \$356 million.¹⁰⁰ The existing investments of U.S. companies were not prohibited by the sanctions. In October 1996, a consortium of international oil companies, composed of Texaco of the U.S., Premier Oil of the U.K., and Nippon Oil of Japan, signed a memorandum of understanding to supply Thailand with gas from Myanmar.¹⁰¹

The regime's response to international pressure has not been sufficient to meet the expectations of the international community. The regime released Aung San Suu Kyi from her 6-year house arrest when the U.S. Congress was considering sanctions. However, her ability to travel and meet her supporters has been severely restricted. There is no hope that the military regime will hand over power to civilian rule. The sanctions by the international community have not accomplished the desired aim, i.e. promoting democracy by restoring civilian rule and protecting human rights. John J. Brandon concludes that, "U.S. sanctions have not had any success in fostering greater democracy or improving the human rights situation in Myanmar. In fact, conditions worsened."¹⁰²

⁹⁹ Financial Times, June 2, 2006.

¹⁰⁰ Asia Times, June 20, 2003.

¹⁰¹ Financial Times, October 30, 1996.

¹⁰² Journal of Commerce, May 27, 1999.

4.4. Factors that Made the Economic Sanctions Unsuccessful

The failure of the sanctions against Myanmar is due to several factors. First, the goals of the sanctions were to re-establish a civilian rule and to improve human rights situations in Myanmar. The goals are not likely to be achieved by imposing economic sanctions because they are major policy changes for the military regime. Second, the regime is an authoritarian one ruled by military junta. Again, the repressive political system contributed to the failure of the sanctions. Third, Myanmar has not maintained a close diplomatic and economic relationship with the international community. Further, Western states, that have relatively close relationship with Myanmar and therefore whose attitude are critical in the effectiveness of sanctions, have been reluctant to impose stricter sanctions. Fourth, the economic sanctions did not strengthen opposition movement in Myanmar.

5. Economic Sanctions against Apartheid in South Africa

5. 1. The Struggle of the International Community to Abolish Apartheid

In 1946, even before the formal enactment of apartheid in South Africa, India brought a formal complaint in the U.N. against the Union of South Africa for discrimination against persons of Indian origin.¹⁰³ The South African National Government, after winning the 1948 elections, formally established racism based on white privilege and domination,¹⁰⁴ as its official policy. Afterwards, it passed many laws to enforce apartheid.¹⁰⁵ The South African Government challenged the discussion in the U.N. as an improper intervention in its domestic jurisdiction.¹⁰⁶

The General Assembly overrode the South African government's objections, adopting a resolution asking the two governments to report on measures to correct the

¹⁰³ Ibrahim J. Gassama, Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs, and Apartheid, 19 Fordham Int'l L.J. 1464, 1474 (1996).

¹⁰⁴ Id.

¹⁰⁵ Id.

¹⁰⁶ Id.

situation.¹⁰⁷ The resolution was to legitimize international concern on apartheid. All this took place before the adoption of the Universal Declaration of Human Rights.¹⁰⁸ Soon, the U.N. dealt with discrimination against other Asian nationals in South Africa. In 1949, the General Assembly asked South Africa, India, and Pakistan to have discussion and negotiate an amicable settlement based on the principles of the U.N. Charter and the Universal Declaration of Human Rights.¹⁰⁹

However, in 1950, South Africa passed the Group Areas Act which required strict racial segregation for residence and work.¹¹⁰ The General Assembly criticized the law and urged South Africa to repeal it.¹¹¹ The South African government argued that it had internal jurisdiction to impose apartheid but earned little support internationally. Since India and Pakistan were legally interested in the treatment of their nationals in South Africa, the issue was no longer an internal affair.¹¹²

In 1952, the question of the racial discrimination against the native Africans by the South African government was raised in the General Assembly.¹¹³ The objection by South Africa and other Western nations were stronger, because in this case the native Africans had no other states to argue for their rights, and according to the traditional notion in international law, South Africa had an absolute sovereignty over them. Part of the problem was that United Kingdom and France had colonies where they practiced racial discrimination. A commission to study the racial situation in the country submitted to the General Assembly a report declaring apartheid “injurious to human dignity” and impairing “the general welfare or friendly relations among the nations.”¹¹⁴

¹⁰⁷ U.N. Doc. A/44 (1) (1946).

¹⁰⁸ The Universal Declaration of Human Rights was adopted on December 10, 1948. U.N. Doc. A/810.

¹⁰⁹ U.N. Doc. A/Res/265 (1949).

¹¹⁰ Jack Donnelly, *International Human Rights* (3rd ed, 2007), p. 91.

¹¹¹ U.N. Doc. A/Res/395 (1950).

¹¹² *Id.*

¹¹³ 1952 U.N.Y.B. 294, U.N. Sales No. 1953.1.30.

¹¹⁴ U.N. Doc. A/2505/Add.1 (1953).

The U.N. could not frustrate South African apartheid during the 1950's. The Nuremberg Charter, which indicted Nazi leaders, included crimes against humanity as well as war crimes. It was the first formal declaration of the international law of human rights because it made it clear that how a state treated its own people was of international concern.¹¹⁵ The abolition of apartheid is of human rights and international concern; but the traditional notion of state sovereignty was still strong among states.

Many U.N. member states were reluctant to pursue the Security Council resolution on South Africa because it could turn out to be a precedent for a U.N. intervention in the traditionally domestic area of human rights. At that time, many U.N. members de facto discriminated against their racial or ethnic minorities. After the massacre of Sharpeville in March 1960,¹¹⁶ the Security Council condemned the South African government and adopted a resolution urging South Africa to abandon racial discrimination and apartheid.¹¹⁷ In 1962, the General Assembly established a Special Committee on Apartheid while affirming its support of international efforts to end Apartheid.¹¹⁸ The Special Committee recommended a program against apartheid that emphasized a global information and grassroots campaign to establish international support for comprehensive sanctions against South Africa.¹¹⁹

In August 1963, the Security Council adopted a resolution requesting all U.N. members to voluntarily stop the sale and shipment of arms to South Africa.¹²⁰ However, it did not take any further action. France, opposing mandatory economic sanctions, stated that it would distinguish between weapons for internal suppression

¹¹⁵ Paul Gordon Lauren, *The Evolution of International Human Rights* 209 (1998).

¹¹⁶ Sixty-nine people were killed while protesting against pass laws, which banned most blacks from remaining in white areas for more than 72 hours. See International Commission of Jurists, *South Africa: Human Rights and the Rule of Law* (Geoffrey Bindman ed., 1988).

¹¹⁷ U.N. Doc. S/4300 (1960).

¹¹⁸ U.N. Doc. A/Res/1761 (1962).

¹¹⁹ Report of the Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa, U.N. Docs. A/6486 and S/7565 (1966).

¹²⁰ U.N. Doc. S/181 (1963).

and external defense.¹²¹ Adlai E. Stevenson, U.S. Ambassador to U.N. argued that punitive measures against South Africa would only harden the existing situation.

During that time the General Assembly was more active in implementing various programs such as support for various international civic, religious, and educational groups working against apartheid.¹²² In December 1965, the General Assembly adopted the International Convention on the Elimination of All Forms of Racial Discrimination.¹²³

In July 1970, the Security Council recognized “the legitimacy of the struggle of the oppressed people of South Africa in pursuance of their human and political rights as set forth in the Charter of the United Nations and the Universal Declaration of Human Rights.”¹²⁴ The same year the General Assembly declared apartheid a “negation of the Charter” and “a crime against humanity.”¹²⁵

5. 2. From Engagement to Sanctions

Until the mid 1970s, the General Assembly aggressively pursued the abolition of apartheid, by adopting in 1973 the International Convention on the Suppression and Punishment of the Crime of Apartheid,¹²⁶ and in 1974 a resolution on the Decade of Action to Combat Racism and Racial Discrimination.¹²⁷ On the other hand, the Western countries with veto powers in the Security Council, including the U.S., France and the United Kingdom, refused to impose diplomatic, cultural and economic sanctions on South Africa beyond condemnation.¹²⁸ Even after the 1976 massacre of

¹²¹ Mark David, United States-South African Relations 1962-1967, In Economic Coercion and U.S. Foreign Policy: Implications from Case Studies from the Johnson Administration 218 (Sidney Weintraub ed, Westview Press, 1982).

¹²² U.N. Doc. A/Res/282 (1965)

¹²³ U.N. Doc. A/Res/2106A (1965).

¹²⁴ U.N. Doc. S/Res/282 (1970).

¹²⁵ U.N. Doc. A/Res/2671 (1970).

¹²⁶ U.N. Doc. A/Res/3233 (1973).

¹²⁷ U.N. Doc. A/Res/3233 (1974).

¹²⁸ The engagement policy towards South Africa was announced by President Reagan in 1981. Hufbauer et al. supra note 63, at 221.

Soweto that resulted in the deaths of hundreds of people,¹²⁹ the U.S. and the United Kingdom insisted that the killings were still matters within the domestic jurisdiction of South Africa, not allowing further intervention.¹³⁰ As a result, in November 1977, the Security Council only adopted a resolution rendering the 1963 voluntary arms embargo mandatory under Chapter VII under the U.N. Charter.¹³¹ The Security Council declared that “arms trade with South Africa” was “a threat to peace” and illegal. Even at this time, the Security Council did not find that apartheid was threat to peace.

U.S. President Reagan’s policy toward South Africa was called “constructive engagement.”¹³² Regional security was stressed to contain expanding Soviet influence in Africa. South Africa was expected to play a role as a pro-Western regional power against Soviet influence. Its proponents insisted that the white minority in South Africa was the key in introducing any change, and apartheid could and should be abolished gradually.¹³³ The policy included the “relaxation of diplomatic and economic sanctions” imposed previously.¹³⁴ The U.S. goal was “to foster change through enlightened private enterprise and support for moderate forces of social change, such as trade unions and education.”¹³⁵ The Reagan and Thatcher administration refused to impose sanctions on South Africa and kept a close relationship with the regime.¹³⁶ However, the Clark Report in the U.S. Senate Committee on Foreign Relations asserted:

¹²⁹ In June 1976, the protests led by schoolchildren began and lasted several months. Hundreds of people died and thousands of schoolchildren were detained. See Ibrahim J. Gassama, *supra* note 103, at 1491.

¹³⁰ U.N. Doc. S/Res/393 (1976)

¹³¹ U.N. Doc. S/Res/418 (1977).

¹³² Donnelly, *supra* note 110, at 130.

¹³³ *Id.*

¹³⁴ Hufbauer et al. *supra* note 63, at. 221.

¹³⁵ Donnelly, *supra* note 110, at 80.

¹³⁶ *Id.*

Collectively, U.S. corporations operating in South Africa have made no significant impact on either relaxing apartheid or in establishing company policies, which would offer a limited but nevertheless important model of multinational responsibility. Rather, the net effect of American investment has been to strengthen the economic and military self-sufficiency of South Africa's apartheid regime, undermining fundamental goals and objectives of U.S. foreign policy.¹³⁷

The U.S. engagement policy was criticized by black Africans. In January 1985, Desmond Tutu, Nobel Peace Prize Laureate, said that the U.S. could end apartheid "tomorrow" by adopting sanctions.¹³⁸ The U.S. Congress was more responsive than the President to the calls for sanctions against South Africa. In October 1986, it passed the Comprehensive Anti-Apartheid Act, overriding Reagan's veto.¹³⁹ The Act included comprehensive economic sanctions against South Africa. The policy was quickly adopted by some European states. The sanctions banned loans to, new investments in, and imports of iron from, South Africa.¹⁴⁰ Although, the Security Council failed to impose comprehensive sanctions against South Africa, major trading partners with South Africa began to participate in voluntary economic sanctions against apartheid around the mid-1980s.

Along with the U.N. efforts to abolish apartheid, NGOs and corporations began to participate in the campaign against apartheid. In July 1978, Rev. Leon Sullivan published the first version of Sullivan Principles and many companies committed themselves to apply them. The Global Sullivan Principles, which offer a set of business rules abroad, recommend that companies which accept the Principles,

¹³⁷ Hufbauer et al., *supra* note 63, at 234.

¹³⁸ International Herald Tribune, January 4, 1985.

¹³⁹ 22 U.S.C. 5001-117 (1994).

¹⁴⁰ Hufbauer et al., *supra* note 63, at 228.

respect universal human rights, the rights of their employees, the communities within which they operate, and parties with whom they do business.¹⁴¹ NGOs persuaded and forced international corporations to participate in the campaigns against apartheid. Corporations' participation into the campaigns made comprehensive international sanctions effective. Of the approximately 350 U.S. companies with direct investment in South Africa in 1984, 119 U.S. companies committed themselves to Sullivan Principles to repeal all apartheid law and policies.¹⁴² Seven U.S. companies withdrew in 1984 and 39 in 1985. In 1986, forty left and thirteen announced their intention of leaving, including Eastman Kodak, Coca-Cola, Exxon, General Motors and IBM. In 1988, only 136 U.S. companies were still remaining in South Africa.¹⁴³

5. 3. Impact of the Sanctions against South Africa

The South African government faced with growing pressures internally as well as internationally. First, economic sanctions began to threaten the South African economy and white South Africans called for negotiations with the opposition. In August, 1985, South Africa's four main business groups called on the government to negotiate with black leaders, asserting political changes is necessary to solve the economic crisis caused by the economic sanctions.¹⁴⁴ Second, opposition groups in South Africa were strong and vigorously pursued international sanctions against South Africa. Anti-apartheid activities were supported by the international sanctions. These two factors made international sanctions effective.

¹⁴¹ The Sullivan Principles is a voluntary code of conduct to be adopted by companies; it seeks to enhance human rights and social justice in all nations. It was originally suggested to dismantle apartheid in South Africa. It was developed into general principles and formally announced at the United Nations on November 2, 1999. See Reverend Leon H. Sullivan, Sullivan Principles for U.S. Corporations Operating in South Africa, 24 I.L.M. 1464, 1496 (1985). The Global Sullivan Principles are available at <http://www.thesullivanfoundation.org/gsp/principles/gsp/default.asp>.

¹⁴² New York Times, December 13, 1984.

¹⁴³ Merle Lipton, The Challenge of Sanctions. Discussion Paper No. I, 64 (1990)

¹⁴⁴ Financial Times, August 30, 1985.

Amid international pressure against apartheid, South Africa tightened its domestic policy, including the banning of all major nonwhite opposition groups, and declaration of state emergency.¹⁴⁵ This hard-line policy could not last long. The South African regime was losing control and opposition leaders openly challenged the regimes authority. In February 1990, the government declared the end of apartheid and released the anti-apartheid leaders, including Nelson Mandela. The laws supporting apartheid were repealed by the end of June 1991 and the state emergency was lifted. In June 1994, the Security Council lifted its arms embargo imposed against South Africa in 1977. As a result of the multilateral sanctions of the mid 1980s, South Africa experienced economic hardships, including a decrease of foreign trade and capital outflow, and even a financial crisis.¹⁴⁶ The pressure by the international community, especially the economic sanctions imposed by many states obviously played a significant role in abolishing apartheid. Stephen R. Lewis says:

[E]conomic pressures have played a major role in forcing the South African government to change its policies on a wide range of issues from labor reform to the release of political prisoners; and in the absence of fundamental political change, the prospects for economic growth in South Africa are bleak.¹⁴⁷

5.4. Factors that Made the Sanctions Effective

There is no evidence that the economic effect made by the sanctions on South Africa were more severe than that on Iraq and Cuba. South Africa, however, succumbed to the sanctions and abandoned apartheid policy. The demise of apartheid after the sanctions against South Africa can be attributed to several factors. First, the goals of

¹⁴⁵ Hufbauer et al., *supra* note 63, at 229.

¹⁴⁶ *Id.* 232-233.

¹⁴⁷ Stephen R. Lewis, *The Economics of Apartheid* 167 (1990).

the sanctions were to frustrate apartheid. Abolishing apartheid is on the one hand a human rights issue, which means that the blacks would not be discriminated against. On the other hand, for the white South African regime, apartheid must have been a critical policy because the abolition of apartheid meant that the whites might lose their power. In fact, after the official abolition of apartheid, in May 1994, Nelson Mandela was inaugurated as the first democratically elected president of South Africa. Sanctions by the international community brought about the major policy changes in the country. As international sanctions were tightened, however, the white minority began to accept that the abolition of apartheid was a human rights issue and necessary for their survival.

Second, South Africa was not an authoritarian state. The South African regime in time of apartheid was not a democratic one. Democracy, however, was operative anyway in the whites and this made the regime vulnerable to public opinion.¹⁴⁸ The withdrawal of the U.S. support raised concern among white South Africans.¹⁴⁹ They called for negotiations with the opposition. The parliamentary system for whites in South Africa contributed to the demise of apartheid.¹⁵⁰

Third, the close political and economic relationship between South Africa and the major sanctioning states played an important role. White South Africans wanted to rejoin the world community,¹⁵¹ and to see the economic sanctions end by abolishing apartheid. Foreign investment had played a key role in the development of the South African economy and in maintaining a high rate of economic growth. The white regime cared about economic development.¹⁵² Philip L. Levy argues that the international economic actions against South Africa that were most damaging were

¹⁴⁸ Audie Klotz, *Making Sanctions Work*, in *How Sanctions Work: Lessons from South Africa* 277 (Neta C. Crawford & Audie Klotz, St. Martin's Press, New York, 1999).

¹⁴⁹ Donnelly, *supra* note 110, at 132.

¹⁵⁰ Audie Klotz, *supra* note 148, at 277.

¹⁵¹ *Financial Times*, April 18, 1990, 20.

¹⁵² *Journal of Commerce*, September 24, 1991.

taken by private actors.¹⁵³ Since the mid-1980s, many companies withdrew from South Africa or announced their intention of withdrawal.¹⁵⁴ With continuing unrest and economic downturn in South Africa, foreign banks refused to renew loans. In September 1985, South Africa announced a temporary freeze of repayments of its commercial debt principal.¹⁵⁵ The sanctions by the states that had close political and economic relationships with South Africa turned out to be effective in abolishing apartheid.

Fourth, the sanctions did not strengthen the regime at home. Even white South Africans questioned the regime's policy and the sanctions weakened their confidence in this policy.¹⁵⁶ On the contrary, the international sanctions against South Africa actually strengthened domestic opposition groups in South Africa.¹⁵⁷ The South African regime was under strong internal challenge.¹⁵⁸ The African National Congress was a popular opposition group. The regime failed to stop the opposition even with a declaration of a state of emergency, mass arrests, treason indictments and assassinations.¹⁵⁹ The anti-apartheid movement was strengthened by the international assistance and influence. The United Democratic Front (UDF), the African National Congress (ANC), and the Congress of South African Trade Unions (COSATU) supported international sanctions against apartheid.¹⁶⁰

¹⁵³ Philip I. Levy, "Sanctions on South Africa: What did they do?" *The American Economic Review* 89, No. 2 (1999).

¹⁵⁴ Mzamo P. Mangaliso, "Divestment by Multinational Corporations", *supra* note 148, at 145-158.

¹⁵⁵ *Washington Post*, September 3, 1985.

¹⁵⁶ Klotz, *supra* note 148, at 270.

¹⁵⁷ Tshidiso Maloka, "Sanctions Hurt but Apartheid Kill", *supra* note 148, at 189.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 185.

6. *Conclusion*

It has been argued that, “sanctions are seldom effective... in bringing about major changes in the policies of the target country.”¹⁶¹ Whether a certain policy change is major or not is another controversy. For example, in 1974, Congress voted to reduce military assistance to South Korea by \$20 million when the South Korean government stepped up its political repression after the suspension of the constitution in 1972.¹⁶² In 1977, President Carter reduced aid to Argentina because of human rights violations and the U.S. Export-Import Bank refused to authorize a \$270 million loan to Argentina until human rights in Argentina were improved.¹⁶³ In both cases, however, the U.S. sanctions played little role in improving human rights. Although human rights issues have been considered a modest issue, altering human rights policy by imposing sanctions does not seem to be as easy as expected.

The international community succeeded in bringing about the demise of apartheid in South Africa by imposing sanctions. Economic sanctions still remain as “a necessary and important policy instrument.”¹⁶⁴ Sanctions harm certain groups of people or industries in the target country. The economic success of sanctions, however, does not automatically lead to political compliance of the target country.¹⁶⁵ In order for sanctions to be effective, the harmed people or industries should have tools or power to influence a change of the target country’s policy. The existence of a strong private sector such as NGOs, corporations and opposition parties would play a critical role in that process. In a democratic country, this process would be secured through elections. If, in an authoritarian country, sanctions affect the ruling elites’ interests significantly, they are likely to succeed. Where the target country is ruled by a sole absolute power, sanctions are least likely to succeed.

¹⁶¹ Hufbauer et al, *supra* note 5, at 94.

¹⁶² Hufbauer et al, *supra* note 63, at 348.

¹⁶³ *Id.*, at 445.

¹⁶⁴ Cortright, *supra* note 24, at 2.

¹⁶⁵ *Id.*, at 3.

Over the decades many world powers, especially the Western powers had economic interests in South Africa and had been reluctant to impose economic sanctions on the country. Not all states were active in the campaign to end apartheid. However, in the mid-1980s, former supporters of the South African regime began to participate in the campaign to abolish apartheid without adopting comprehensive U.N. sanctions.¹⁶⁶ The effect of the sanctions was substantial and the pressure by the international community had never been stronger.

South Africa was ruled by the whites and the economic sanctions threatened their interests. Even though white people in South Africa belonged to an elite group, they had the power to change the regime if their interests would be harmed.¹⁶⁷ They had the power to change South Africa's policy of racial discrimination. In contrast, Myanmar has been ruled by an elite military group, and Iraq and Cuba by an absolute sole leadership, respectively that of Saddam Hussein and Fidel Castro. It would have been almost impossible to change Iraq's or Cuba's behavior because the people could not influence the leaders in order to change the governments' policies. In the Myanmar case, it would be hard to expect any change of human rights policies unless the military elite's interest is significantly harmed.

Further, close political and economic ties when sanctions are imposed will significantly increase the effectiveness of the sanctions. When the major powers joined the sanctions against apartheid after the constructive engagement policy of many years, South Africa could not help but accept the international norms. The economic sanctions after a long-lasting economic engagement with South Africa forced the country to accept more seriously the message of the international community. The close political and economic relationship between South Africa and Western states before sanctions were imposed played a significant role in South

¹⁶⁶ Id.

¹⁶⁷ Klotz, *supra* note 148, at 271.

Africa's abolition of apartheid. The relationship between the sanctioning and the target countries when sanctions were imposed against Iraq, Cuba and Myanmar was hostile rather than close. In establishing an effective strategy toward North Korea, these lessons should be considered.

CHAPTER FIVE
EFFECTIVE STRATEGY REGARDING NORTH KOREA

1. Introduction

Economic sanctions may, when properly tailored, play an important role in changing the human rights policy in the targeted country.¹ Apartheid in South Africa was abolished because of the (economic) sanctions imposed by the international community.² Sanctions are an important tool in foreign policy; however, they are sometimes ineffective and costly. The comprehensive economic sanctions against Iraq were unsuccessful to force the Iraqi government to comply with the Security Council's resolution.³ The key is "to identify circumstances in which economic sanctions can succeed in attaining foreign policy goals."⁴ In chapter 2, I argue that the North Korean weapons of mass destruction program and human rights situations in North Korea are of great international concern that might trigger international intervention. In chapter 3, I argue that economic sanctions may be imposed to force a target country to comply with international norms. Imposing economic sanctions, however, is limited by human rights norms. Right to life and food in a target country should not be violated by imposing sanctions. Comprehensive economic sanctions are likely to threaten the right to life and food. In chapter 4, I argue that, mainly 4 factors, the goals of sanctions, the political structure of the target country, the relationship between sanctioning states and target country, and the sanctions' possibility of strengthening opposition movements

¹ Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 Yale J. Int'l L. 1, 49 (2001).

² Audie Klotz, *Making Sanctions Work*, in *How Sanctions Work: Lessons from South Africa* 280 (Neta C. Crawford and Audie Klotz ed, St Martin's Press, New York, 1999).

³ David Cortright and George A. Lopez, *Sanctions and the Search for Security: Challenges to UN Action 21* (Lynne Rienner Publishers, Boulder Colorado, 2002).

⁴ Gary Clyde Hufbauer et al, *Institute for International Economics, Economic Sanctions Reconsidered: History and Current Policy* 1 (1990).

in the target country, decide sanctions' effectiveness. In this chapter, I will discuss on economic sanctions against North Korea, and what alternatives are available.

2. The Possible Goals of Economic Sanctions against North Korea

2.1. War and Terrorism

After North Korea invaded South Korea on 25 June 1950, the Security Council determined that the North Korean invasion into South Korea constituted a breach of peace.⁵ The following resolution recommended that the Member States assist South Korea to repel the armed attack and to restore international peace and security.⁶ The Council, however, did not adopt economic sanctions against North Korea.⁷

On December 16, 1950, after the North Korean invasion of South Korea, President Truman declared a national emergency under the Trading With the Enemy Act of 1917.⁸ Soon, the Department of Treasury issued the Foreign Assets Control Regulations (FACR) and banned any financial transactions involving North Korea including the access to North Korean assets under U.S. jurisdiction. The North Korean invasion of South Korea, however, ended over 50 years ago. Moreover, the end of the Cold War drastically reduced North Korea's capacity to wage war or commit provocative acts. The security concerns that North Korea may pose to the international community have been over-emphasized. The U.S. has been imposing sanctions against North Korea since the outbreak of the Korean War.

After the destruction of Korean Air Lines Flight 858 in November 1987 by two North Korean agents, in 1988, the U. S. State Department designated North Korea as a state sponsor or supporter of international terrorism under the Export Administration

⁵ U.N. Doc. S/Res/82 (1950).

⁶ U.N. Doc. S/Res/83(1950)

⁷ Id.

⁸ Proclamation No. 2914 (15 F.R. 9029); Sec. 5(b) of the Trading With the Enemy Act (P.L. 65-91; 50 U.S.C. app. 5(b)).

Act of 1979.⁹ Trade, foreign aid, access to sales of items on the U.S. Munitions List, Export-Import Bank assistance, and support through international financial institutions were denied under the Act.¹⁰

In 1989, the U.S. sanctions against North Korea were slightly relaxed. The export of commercially supplied goods for basic human needs would be allowed on a case-by-case basis; travel restrictions to North Korea were also relaxed.¹¹ After the 1994 Agreed Framework,¹² President Clinton lifted some export restrictions against North Korea. Many items that had previously required it were now eligible for export without a license. Donations to North Korea were allowed to reduce the hardship caused by flooding and famine. In 2000, President Clinton lifted many trade and travel sanctions when North Korea stopped its missile testing. Licensing and trade for civilian use were allowed. Most travel restrictions against North Korea were abolished in 2000. Terrorism during the period of the Cold War is also losing ground for international sanctions.

2.2. Weapons of Mass Destruction

The North Korean weapons of mass destruction have been of continuous concern in the Security Council. In 1993, the Council, after North Korea announced its intention to withdraw from the Treaty on the Non-Proliferation of Nuclear Weapons, called upon North Korea to reconsider its withdrawal and honor its non-proliferation obligation under the Treaty.¹³ After the North Korea's launching of ballistic missiles in 2006, which could be used as a means to deliver weapons of mass destruction, the

⁹ Sec. 6(j) of the Export Administration Act of 1979 (P.L. 96-72;50 U.S.C. app.2405).

¹⁰ Id. See also, Sec. 620A of the Foreign Assistance Act of 1961.

¹¹ Id.

¹² It was a framework that would provide North Korea with fuel and light-water reactors in exchange for North Korea's abandonment of its nuclear programs. See, Ian Jeffries, *North Korea: A guide to economic and political developments* 113-114 (Routledge, 2006).

¹³ U.N. Doc. S/Res/825 (1993).

Council demanded North Korea suspend all activities related to its ballistic missile program.¹⁴

In the following resolution, the Council expressed the gravest concern at the claim that North Korea had conducted a nuclear test, posing danger to international peace and security.¹⁵ The resolution prohibited armed trade with North Korea and imports of luxury goods into North Korea.¹⁶ The inclusion of luxury goods in imports prohibition was to target the elite group in North Korea who might use luxury goods. The Council, in the resolution, allowed humanitarian exceptions such as allowing imports of foodstuffs and medicine.¹⁷ The Security Council already found that the North Korean nuclear test had posed danger to international peace. If the nuclear crisis is not solved peacefully, the Council is likely to take further actions under Chapter VII of the Charter.

One difficulty is that North Korea considers its nuclear program as the last tool that would guarantee its survival and the North has already secured nuclear technology and materials, and already has nuclear weapons.¹⁸ It would be almost impossible to denuclearize it simply by imposing economic sanctions.

2.3. Violations of Human Rights

Human rights are of international concern and state sovereignty cannot be a valid defense where gross human rights violations are committed under the acquiescence, or the direct involvement of the regime. The development of international human rights and state practices support the priority of human rights over state sovereignty. For

¹⁴ U.N. Doc. S/Res/1695 (2006)

¹⁵ U.N. Doc. S/Res/1718 (2006)

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ On the history of the North Korean nuclear program, see Bruce Cummings, *Korea's Place in the Sun: A Modern History* 479-491 (2005).

many years, the international community has engaged in the promotion of North Korean human rights.

In 1997 and 1998, the Sub-Commission on Prevention of Discrimination and Protection of Minorities under the Commission on Human Rights adopted two resolutions on the human rights situation in North Korea.¹⁹ These were the first U.N. steps to address the North Korean human rights issue. Those resolutions expressed “concerns on persistent allegations of grave violations of human rights” and “extreme difficulty in obtaining accurate information on the situation of human rights” in North Korea.²⁰

On April 16, 2003, the resolution on North Korea by the UNCHR requested Pyongyang to cooperate with the U.N. system in the field of human rights, in particular the Special Rapporteur on the right to food, the Special Rapporteur on torture, and the Special Rapporteur on religious intolerance.²¹ The resolution also asked for a comprehensive dialogue between Pyongyang and the United Nations High Commissioner for Human Rights.²² Pyongyang complained that using human rights as a political tool was an imperialistic tactic to transform socialism.²³

On April 8, 2004, UNCHR adopted a second resolution,²⁴ which specifically recommended the appointment of a Special Rapporteur on North Korean human rights. Further, it called for all relevant special rapporteurs and special representatives to examine alleged human rights violations in North Korea.²⁵ Consequently, Vitit Muntarbhorn was appointed Special Rapporteur on human rights in North Korea. In

¹⁹ E/CN.4/Sub.2/1997/L.13, 15 August 1997 and E/CN.4/Sub.2/1998/L.7, August 14, 1998.

²⁰ *Id.*

²¹ See, E/CN.4/2003/L.31/Rev.1

²² *Id.*

²³ Korea Institute for National Unification (KINU), White Paper on Human Rights in North Korea 27 (2005).

²⁴ E/CN.4/2004/L.21.

²⁵ *Id.*, para. 11.

April 2005, UNCHR again “expressed deep concern about continuing reports of systematic, widespread and grave violations of human rights” in North Korea.²⁶

Pyongyang did not allow Vitit Muntarbhorn to visit North Korea and investigate alleged human rights violations. Nevertheless, in 2005, he submitted his report “The Situation of Human Rights in the Democratic Peoples’ Republic of Korea” to both the U.N. General Assembly²⁷ and UNCHR.²⁸ The report concluded that, “while there have been some constructive developments... there have been various discrepancies and transgressions-several of an egregious nature-in the implementation of human rights.”²⁹

2. 3. 1. The General Assembly

The General Assembly has an overall authority to deal with all the matters covered by the U.N. Charter, except for matters belonging exclusively to the Security Council.³⁰ The General Assembly often adopts resolutions to encourage or recommend actions on human rights issues by the international community or governments.³¹ While General Assembly resolutions are not legally binding, they may present evidence of state practice and develop into binding customary international law.³²

On March 14, 2006, the U.N. General Assembly adopted a resolution expressing serious concern over human rights and the humanitarian situation in North Korea. The Assembly expressed its serious concern over the refusal of North Korea to cooperate with the Special Rapporteur on North Korean human rights, and “continuing reports of systematic, widespread and grave violations of human rights” in North

²⁶ E/CN.4/2005/L.30.

²⁷ A/60/306.

²⁸ E/CN.4/2005/34

²⁹ Id.

³⁰ Article 12 of the Charter.

³¹ Especially, on the UN General Assembly efforts to abolish South Africa’s apartheid, see, Ibrahim J. Gassama, *Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs, and Apartheid*, 19 Fordham Int’l L.J. 1464 (1996).

³² Ian Brownlie, *Principles of Public International Law* 694 (5th ed, 1998).

Korea,³³ “including torture, public executions, extrajudicial and arbitrary detention, the absence of due process and the rule of law, imposition of the death penalty for political reasons, the existence of a large number of prison camps and the extensive use of forced labor.”³⁴ It urged North Korea to allow the international community full, free, safe and unimpeded access to all parts of the country, and fully respect all human rights and fundamental freedoms.³⁵

The efforts by the General Assembly to address North Korean human rights have continued. On November 17, 2006, the 3rd Committee of the General Assembly again passed a resolution on North Korea.³⁶ It requested that the U.N. Secretary General submit a comprehensive report on the human rights situation in North Korea, expressing deep concern over the humanitarian situation in North Korea.³⁷ In the resolution, the representative of the European Union, noting the EU’s efforts to initiate dialogue with North Korea, said that “so long as [North Korea] continued to refuse the offers of advice, assistance and capacity-building from the United Nations in the field of human rights, the international community had little choice but to continue drawing attention to the deplorable situation there.”³⁸

2. 3. 2. The Security Council

The U.N. Security Council has the primary responsibility of maintaining international peace and security.³⁹ The Council has discretion to determine whether a threat to peace and security under Chapter VII exists. Therefore, the Council can determine whether the human rights situation in a country is a threat to peace and security and

³³ U.N. Doc. A/Res/60/173 (2006).

³⁴ *Id.*

³⁵ *Id.*

³⁶ GA/SHC/3874.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Article 24 of the U.N. Charter.

enforce economic sanctions⁴⁰ or military action.⁴¹ Member states undertake to accept and carry out the decisions of the Security Council.⁴²

The Council has not dealt with the North Korean human rights issue until now. The severity of the violations of human rights in North Korea is as serious as that of the human rights violations against the Kurdish minority in Iraq. It has been argued that the Security Council should deal promptly with the North Korean human rights issue.⁴³ The argument recommends that the Security Council adopt a resolution requesting North Korea to improve human rights based on widespread human rights violations, outflow of refugees, drug trafficking and currency counterfeiting; if it fails, the Security Council should adopt a resolution under Chapter VII.⁴⁴ Economic sanctions would be an option under Chapter VII unless humanitarian intervention or use of force based on human rights is considered. Security Council Resolution 1718, imposing economic sanctions against North Korea for its nuclear test, restricted economic activities related to the nuclear program and the luxury goods trade with North Korea.⁴⁵ China opposes comprehensive economic sanctions against North Korea. First, China stresses “the right of each country to formulate its own policies on human rights protection in light of its own conditions.”⁴⁶ Second, China has its own national security interests on the Korean peninsula. Its strategic goals in the region are to increase its influence and to prevent the North Korean regime from collapsing.⁴⁷ Therefore, it is unlikely that it will vote for a resolution authorizing economic sanctions because of human rights violations.

⁴⁰ Id., Article 41.

⁴¹ Id., Article 42.

⁴² Id., Article 25.

⁴³ U.S. Committee for Human Rights in North Korea, *Failure to Protect: A Call for the U.N. Security Council to Act in North Korea* (2006).

⁴⁴ Id.

⁴⁵ U.N. Doc. S/Res/1718 (2006)

⁴⁶ Statement by H.E. Paper read at the Second World Conference on Human Rights, at Vienna. Quoted in Jack Donnelly, *Universal Human Rights* 108 (2003).

⁴⁷ David Shambaugh, *China and the Korean Peninsula: Playing for the Long Term*, in *Reshaping Rogue States* (Alexander T.J Lennon et al. ed, 2004).

However, the argument that the U.N. Security Council should deal with the North Korean human rights is likely to gain strength. One of the common features in the cases where the Council has ever invoked its power with regard to human rights violations under Chapter VII is that human rights violations are gross in their magnitude and they happened in failed states where central governments lost their control over their populations partially or totally.

In Somalia case, a civil war broke out between rivaling clans and state function ceased to operate.⁴⁸ The civil war resulted in anarchy, massive human rights violations. In Haiti case, after the military coup, violent political turmoil ensued. A considerable number of refugees attempted to escape from Haiti. The Council is not likely to invoke Chapter VII solely because of the North Korean human rights situations. One possibility is that the Council may take actions based on the influx of North Korean refugee into China. Where the Council determines the existence of a threat to the peace because of the gross human rights violations and the flux of refugees into China, it is likely to take measures under Chapter VII of the Charter.

3. Political Structure

In order to analyze whether economic sanctions can frustrate North Korea's nuclear program and force it to respect international human rights norms, I will first study through its constitution the political structure of North Korea.

3. 1. The Constitution of 1948

The initial North Korean Constitution adopted at the First Supreme People's Assembly (SPA) in 1948 was modeled after the 1936 Stalinist Constitution of the

⁴⁸ Erika De Wet, *The Chapter VII Power of the United Nations Security Council* 155 (Hart Publishing, Portland, Oregon, 2004).

former Soviet Union.⁴⁹ It was three years after Japanese rule ended in 1945. Korean peninsular had been already divided into the North and South. SPA representatives were selected by elections⁵⁰ but after carefully being screened and approved by the party. The SPA was entitled to exercise exclusive legislative power. In reality, however, the Presidium of the SPA, comprised of a small group of top members of Korea Worker's Party (KWP) wielded the power of the SPA. The SPA was only a tool to legitimize legislative power of Presidium. The Cabinet exercised executive power. Kim Il Sung held a position as Prime Minister and a member of the SPA.

3. 2. *The Constitution of 1972*

The second Constitution confirmed Kim Il Sung's absolute power over North Korea. Kim Il Sung consolidated his power into an undisputable dictatorship. Private ownership for means of production was eliminated.⁵¹ The taxation system was abolished because the state was responsible for providing the daily necessities through a rationing and public distribution system.⁵² The socialist economic planning system as the principle of collectivity was introduced. The Constitution declared that "class antagonisms and all forms of exploitation and oppression of man by man have been eliminated forever."⁵³ It was based on proletarian dictatorship, and Juche ideology was incorporated in the Constitution as a creative application of Marxism-Leninism.⁵⁴ The collectivist principle of "one for all and all for one," "mass line" and "mass movement" was introduced.⁵⁵ Collectivism became the basic orientation of education.

⁴⁹ Dae-Kyu Yoon, *North Korea: Legal Perspectives and Analyses: The Constitution of North Korea: Its Changes and Implications*, 27 *Fordham Int'l L.J.* 1289, 1292 (2004).

⁵⁰ Article 3 of the 1948 Constitution.

⁵¹ *Id.* Article 22.

⁵² *Id.*, Article 33.

⁵³ Article 6 of the 1972 Constitution

⁵⁴ *Id.* Article 4.

⁵⁵ *Id.*, Article 12, 13 and 49.

3. 3. *The Constitution of 1992*

The end of the Cold War forced North Korea to find its way to survive in a new environment. The amendment of the constitution reflected this change. Juche ideology was institutionalized without referring to Marxism-Leninism.⁵⁶ The leading role of KWP was stipulated.⁵⁷ The National Defense Commission (NDC) was established as a separate constitutional organ and the Chairman of the NDC was provided with the highest military authority.⁵⁸ Kim Jong Il took the position of the NDC chairman. Two years later, North Korean leader Kim Il Sung died.

3. 4. *The Constitution of 1998*

The 1998 Constitution declares itself “Kim Il Sung Constitution” which embodies his Juche ideology and achievement. Kim Il Sung was idolized as “the founder of North Korea and originator of the Socialist North Korea.” Kim Il Sung was given the title of “the Eternal President of the Republic.”⁵⁹ Kim Jong Il, his son, could inherit his father’s formidable authority through the Constitution. NDC became the highest military leading organ of the state and the chairman of NDC has the power to direct and command all of the armed forces.⁶⁰ Presidential power concerning foreign and external affairs as the Head of State was transferred to the Presidium of SPA. The Cabinet became the general state management organ. The 1998 Constitution confirmed that military force is the backbone of Kim Jong Il’s leadership and supported Kim Jong Il’s absolute authority as top leader of the state. He became the General Secretary of the KWP, the Chairman of the NDC and the Chief Commander of the Korean People’s Army.

⁵⁶ Article 3 of the 1992 Constitution

⁵⁷ Id. Article 11.

⁵⁸ Id., Article 111-116.

⁵⁹ Preamble of the 1998 Constitution.

⁶⁰ Article 100, 102 of the 1998 Constitution.

In North Korea, the rule of law does not govern. Therefore, the directives of the administration very often override the law. Although the constitution has provisions for the protection of citizens' rights, it is a tool of propaganda. North Korea is under the absolute rule of Kim Jong Il and therefore, as in Iraq and Cuba, economic sanctions are not likely to force North Korea to comply with international norms.

4. The Juche Ideology

Kim Il Sung waged his fight for the liberation of Korea from the Japanese as communist. He became North Korea's leader after Japan's surrender in 1945 and the immediate division of the Korean peninsula by the Soviet Union and the United States,⁶¹ and remained so until his death in 1994.⁶² He developed a unique ideology called "Juche," which first emerged in 1955 as Pyongyang moved away from Moscow, and then re-appeared in the mid-1960s as Kim tried to keep his distance from both Moscow and Beijing.⁶³

Juche can be translated as "self-reliance. The 1998 Constitution defined it without mentioning Marxism-Leninism.⁶⁴ Juche's stresses independence from foreign influence. Juche means independence from foreign rule and influence, and autonomy of the state.⁶⁵ In practice it translates to, "putting Korean things first, always"⁶⁶ and therefore it is "a type of nationalism" in its North Korean version.⁶⁷ Self-reliance is not just an empty slogan.⁶⁸ North Korea, after the Korean War, consciously withdrew from the capitalist world system and attempted to construct an independent, self-

⁶¹ On the division of the Korean Peninsula and the Korean War, see Bruce Cummings, *Korea's Place in the Sun* 185-298 (2005).

⁶² *Id.*, at 404-447.

⁶³ *Id.*, at 413.

⁶⁴ Preamble of the Constitution.

⁶⁵ Gavan McCormack, *Target North Korea: Pushing North Korea to the Brink of Nuclear Catastrophe* 65 (2004).

⁶⁶ Cummings, *supra* note 61, at 414.

⁶⁷ *Id.*

⁶⁸ *Id.* at 429.

contained economy. Bruce Cummings states that, “unlike Albania in the socialist world and Burma in the free world, two countries that “withdrew” to no apparent purpose as their economies idled along or got worse, North Korea never idled but always raced.”⁶⁹

Given the total isolation from the outside world and the lack of freedom of religion and thought, the effect of the dominant Juche ideology was enormous. North Korea was able to remain strong after the collapse of the Eastern bloc and China’s shift toward capitalism, because it was governed by the Juche ideology, and not by communism. North Korea is “a socialist fatherland of Juche, which embodies the idea and guidance of the Great Leader Kim Il Sung.”⁷⁰ The entire North Korean population is required to defend and carry forward his ideas and complete the Juche revolution.⁷¹ The Constitution itself legally embodies the Juche ideology and achievements. One North Korean defector testifies:

I also thought Kim Il Sung was the greatest man who created such a great ideology [Juche]. I believed that Kim Il Sung provided for all of our needs. Therefore, I could not even imagine being disloyal to Kim Il Sung. When he died, I was sad as much as when my father died.⁷²

The absolute charismatic order made possible the hereditary succession of his son, Kim Jong-Il. Another defector testifies:

We were educated often in the deification of Kim Il Sung.... We were taught Juche beginning in the primary school. During middle school, we

⁶⁹ Id. at 429-430.

⁷⁰ Preamble of the Constitution.

⁷¹ Id..

⁷² U.S. Commission on International Religious Freedom, Thank You Father Kim Il Sung: Eyewitness Accounts of Severe Violations of Freedom of Thought, Conscience, and Religion in North Korea 40.

learned about Kim Il Sung's revolutionary history. Intensive study on ideology was provided in college. From the moment they learn to speak, children are taught to say 'Thank you Kim Il Sung, wonsunim (Venerable Great Leader).' Parents help children learn to say this well. We were educated to clean the portraits of Kim Il Sung and Kim Jong Il every day. Through this education we had no doubts about Kim Il Sung and Kim Jong Il, or the Party. [The Korean Workers' Party]⁷³

As stated above, the North Korea has an extremely authoritarian political structure and the power is centered on the sole leader Kim Jong Il. This regime structure of North Korea would make economic sanctions less effective.

5. Relationship between North Korea and the International Community

Pyongyang insists that the U.S. should be using the nuclear issue and the human rights issue as leverage in its policy of isolation of North Korea⁷⁴ Pyongyang claims that the U.S. does not intend to renounce its hostile policy towards North Korea, nor is it willing to co-exist with it.⁷⁵

Pyongyang denounced the U.S. North Korean Human Rights Act of 2004 as "interference in [their] internal affairs and building justification to invade the North".⁷⁶ North Korea denounced the U.N. human rights resolution as "falsehood and fabrications." It argued that the EU and U.S. were "abusing human rights issues for their political purposes and pursuing interference in internal affairs and regime change."⁷⁷

⁷³ Id. at 42.

⁷⁴ Korea Central News Agency, July 27, 2004.

⁷⁵ Id.

⁷⁶ Rodong Sinmun, August 7, 2004, on U.S. Human Rights Offensive, available at <http://www.kcna.co.jp/item/2004/200408/news08/09/html#12>. (last visited November 20, 2006)

⁷⁷ Id.

Therefore, the U.S. allegation that North Korea is violating human rights is “a psychological warfare” to tarnish the image of North Korea and to lay an “international siege” on it.⁷⁸ Nuclear and human rights issues are, according to Pyongyang, used to isolate and stifle North Korea.⁷⁹ The country denounced the U.N. General Assembly resolution on the North Korean human rights, saying that the concern of the international community was “to use aid as leverage for spying” on what was really going on in North Korea, not to enhance human rights.⁸⁰ At the adoption of the resolution on North Korea by the U.N General Assembly, the North Korean representative said that “[the resolution] was a political plot of the United States and its satellite countries.”⁸¹

If a sanctioning country has little economic interests engagement in the target country, economic sanctions are not the most effective means of compelling the target country to comply with international norms.⁸² The U.S. has little leverage to impose economic sanctions because it has only minor economic relations with North Korea. The U.S. imposed a total economic embargo on North Korea⁸³ after the invasion of the North Korean forces into South Korea in June 1950. The U.S. embargo on the trade with North Korea still remains active today.⁸⁴

North Korea’s relationship with the international community also has been far from being close. In response to the growing international pressure for the improvement of the human rights situation in North Korea, in 1997, Pyongyang gave notification that it was withdrawing from the Covenant on Civil and Political Rights

⁷⁸ Korean Central News Agency, July 4, 2003.

⁷⁹ Korean Central News Agency, July 27, 2004.

⁸⁰ Korea Central News Agency, November 21, 2005.

⁸¹ GA/SHC/3874.

⁸² Cleveland, *supra* note 1, at 85.

⁸³ Hufbauer et al., *Institute for International Economics, Economic Sanctions Reconsidered: Supplemental Case Histories 110-114* (2nd ed, Washington, DC, 1990).

⁸⁴ On the overall U.S. economic sanctions against North Korea see, Julia Choi and Karin Lee, *North Korea: Economic Sanctions and the U.S. Department of Treasury Actions, 1955-September 2006* (National Committee on North Korea); *North Korea: Economic Sanctions*, CRS Reports for Congress Order Code RL 31696 .

and that it would also withdraw from other international human rights agreements.⁸⁵ However, the U.N. Human Rights Committee informed Pyongyang that withdrawal was not possible, and the Committee on Covenant Economic, Social and Cultural Rights also notified North Korea that withdrawal was not possible.⁸⁶ Pyongyang has responded to the international pressure by denying or countering the accusations of human rights violations.

The North Korean delegate commented that the U.N. resolution was “an illegal document to debase his country’s sacred sovereignty,” and “a typical example of politicization, selectivity and double standards.”⁸⁷ One North Korean delegate insisted:

The main obstacle in the efforts of the international community to improve the effective enjoyment of human rights and basic freedom is actions to infringe on sovereignty, and change the system and interfere in the internal affairs of other countries under the signboard of democracy and protection of human rights.⁸⁸

He claimed that human rights abuses by the U.S. and British troops had been occurring in Iraq. Pyongyang reaffirmed its will “to consolidate even more the Korean-style, man-centered system of ensuring socialist human rights under the banner of the Juche.”⁸⁹ North Korea’s relationship with the international community is far from being close. It is rather hostile. This hostility makes it difficult for North Korea to accept international norms implied by economic sanctions.

⁸⁵ KINU), supra note 23, at 24.

⁸⁶ Id.

⁸⁷ GA/SHC/3874.

⁸⁸ Statement of a North Korean delegate at the 3rd Committee of the 59th UN General Assembly on October 26, 2004.

⁸⁹ Id.

In South Africa, there were many foreign invested companies in the mid-1980s and under the growing international pressure to pull out from South Africa, they began to abandon doing business in that country.⁹⁰ This affected the regime's policy change on apartheid. The North Korean Constitution of 1992 stipulated that foreign investments were permitted in special economic zones, and the Rajin-Sunbong Free Economic and Trade Zone was created. The investment law and regulations related to the Zone were heavily state-regulated.⁹¹ Rajin-Sunbong was not successful in attracting foreign investments. Today, there are two major foreign investments in North Korea, the Mt Keumgang Tourism Project and the Kaesong Industrial Complex Project. Both are implemented by the South Korean government and South Korean companies, which are the best source of cash for the North Korean government. Except for those two projects, there is no considerable foreign investment or corporate activities in North Korea. Sanctions might contribute directly to the economic hardship of North Koreans, without harming the cash source of the North Korean government because of the lack of foreign investment and corporate activities in North Korea.

6. No Possibility of Opposition Movement

In North Korea the sovereignty resides "in the workers, peasants, working intellectuals and all other working people,"⁹² and not in all people. Only one candidate in each electoral district, carefully selected by the Korean Workers' Party, is nominated for election.⁹³ Voters are instructed to cast a yes-or-no vote for a single candidate.

⁹⁰ Mzamo P. Mangaliso, Disinvestment by Multinational Corporations, in *How Sanctions Work: Lessons from South Africa* 145-158 (Neta C. Crawford and Audie Klotz ed, St Martin's Press, New York, 1999).

⁹¹ Bryan Greyson et al., *Foreign Investment Law and Regulations of the Democratic People's Republic of Korea*, 21 *Fordham Int'l L. J.* 1677 (1998).

⁹² Article 4 of the Constitution.

⁹³ KINU, *supra* note 23, at 180.

In North Korea elections are not a part of the democratic political process where various political factions freely contend based on their policies, but are a political mobilization of the population to sanction the regime's power.⁹⁴ After Kim Il Sung died in 1994, North Korea, as part of its tribute to Kim Il Sung, suspended for three years all events related to political participation, including the Supreme People's Assembly, Party Congress, and elections at all levels.

Free expression of opinion by citizens is impossible in the candidate nominating process and casting votes. After, the election of deputies for the 11th Supreme People's Assembly on August 3, 2003, the North Korean Central Election Committee announced that 99.7 percent of those listed on the eligible voter registry voted in the election and 100 percent of those voted for the candidate nominated by the district.⁹⁵ There is no political party except the Korea Worker's Party.

In general, the harm caused by sanctions would pressure the target country's behavior through corporations, NGOs and oppositions groups. Without them, it is hard to expect that the economic hardship caused by the sanctions might change the government policy. There is no hope that sanctions may strengthen NGOs, opposition groups or movements in North Korea because the freedom of association and assembly is not allowed and opposition groups or movements in North Korea simply do not exist at all.

7. Humanitarian Limitations of Economic Sanctions against North Korea

Sanctions against authoritarian countries are likely to cause human sacrifice; and the poor and the unemployed are the most seriously affected. For example, except in rare cases, economic sanctions often have little impact on government behavior, "because sanctions add to the misery of a society's most oppressed citizens."⁹⁶ While the

⁹⁴ Id., at 181.

⁹⁵ Id., at 182.

⁹⁶ Debra Liang-Fenton, Implementing U.S. Human Rights Policy 443 (2004).

leaders of the targeted country are responsible for the actions that lead to the sanctions, the common citizens suffer the most.⁹⁷ Economic sanctions very often inflict suffering on the already much-abused people without punishing the elite decision-makers.⁹⁸

Economic sanctions result in some economic hardship, but this impact is often insufficient or incapable of producing the desired political change in the targeted country. In an authoritarian state like North Korea, wealth and food are distributed according to the degree of power. The elite and the military do not suffer while the rest of the population starves.

The effect of the economic sanctions imposed by the international community has been, and will be disastrous for the North Korean population. One to three million North Koreans are estimated to have died of starvation during the famine in the mid-1990s, and hundreds of thousands of refugees fled, mostly to China. The North Korean Core Class, however, mainly living in Pyongyang, was not harmed.⁹⁹ Harold Hongju Koh notes:

In evaluating the consistency of [U.S.] action with international law and human rights, the best single benchmark will be the number of innocent civilians - of whatever nationality - who are killed, injured, or whose human rights are violated by acts committed on all sides.¹⁰⁰

⁹⁷ Jeong Hwa Pires, *North Korean Time Bomb: Can Sanctions Diffuse It? A Review of International Economic Sanctions as an Option*, 24, GA. J. Int'l & Comp. L. 307, 337.

⁹⁸ Craig Forcese, *Globalizing Decency: Responsible Engagement in an Era of Economic Integration*, 5 Yale H.R. & Dev. L.J. 1, 4 (2002).

⁹⁹ Pyongyang began the classification based on family background and the degree of loyalty to the regime in 1958. Between 1967 and 1970, there was 3 classes and 51 subclasses in North Korea. The 3 classes are Core, Wavering and Hostile. The discrimination policy affects every aspects of people's lives, such as education, housing, hiring and medical benefits. Family background is the key to life in North Korea. See, KINU, *supra* note 85, at 103-104.

¹⁰⁰ Harold Hongju Koh, *Childress Lecture: A United States Human Rights Policy for the 21st Century*, 46 St. Louis L.J. 293, 336 (2002).

North Korea out-powered South Korea in every sector of the economy until the end of the 1970s.¹⁰¹ It was producing enough food to feed its people or at least had the capability to purchase food from the outside world until the beginning of the 1990s. In September 1995, however, the North Korean government appealed for food aid to the United Nation's World Food Program (WFP) and the international community. Pyongyang claimed that the food shortage was caused by severe flooding and drought.¹⁰² The collapse of the Eastern-bloc economic system and natural disasters are allegedly the main reasons for North Korea's food shortage.¹⁰³

The Eastern economic bloc collapsed around 1990-1991.¹⁰⁴ With the dissolution of the Eastern economic bloc North Korea also lost its market for goods through which it could earn foreign currency.¹⁰⁵ This reduced its buying capabilities. Further, severe flooding occurred in successive years and a drought followed in 1997.¹⁰⁶ The country had to cope with the catastrophic famine years of 1995-98, which claimed hundreds of thousands of lives. Natsios argues:

[P]unishing the common people in a totalitarian regime as a means of forcing their government to change its behavior has seldom been successful given that that the people have not control over their government's

¹⁰¹ L. Gordon Flake et al. eds., *Paved with Good Intentions: The NGO Experience in North Korea* 5 (2003).

¹⁰² Andrew S. Natsios, *The Great North Korean Famine* 5 (2001).

¹⁰³ Amnesty International, *Starved of Rights: Human Rights and the Food Crisis in Democratic People's Republic of Korea (North Korea)* 4 (2004); the WFP lists droughts, flooding, typhoons, deforestation, economic downturn, lack of agricultural inputs and lack of foreign currency as the causes of food shortages. See *Food Security Overview of North Korea* at http://www.wfp.org/country_brief/indexcountry.asp?country=408#Overview (last visited on November 22, 2006); on the other hand, some argue that "the fundamental failure of the North Korean government to respond to its changed circumstances in a timely and appropriate way" was the cause of the famine. See Stephan Haggard and Marcus Noland, *Hunger and Human Rights: The Politics of Famine in North Korea* 11 (U.S. Committee for Human Rights in North Korea, 2005).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

behavior, and their government cares little what happens to them. The government officials eat and the people die.¹⁰⁷

The great North Korean famine in the mid-1990s was not due to economic sanctions from abroad. Considering that North Korea has not fully recovered from the devastated economy during the mid-1990s, however, comprehensive economic sanctions could devastate the North Korean economy and might threaten ordinary North Koreans' lives.

8. Alternative: Engagement

Craig Forcese argues that “trade with, and investment in, repressive countries will promote political liberalization and greater respect for human rights by exposing populations to liberal, human rights-supporting values.”¹⁰⁸ The argument that the international community should adopt engagement policy with North Korea is based on several practical reasons.

First, an economic engagement would strengthen reformer groups within the North Korean government, empower entrepreneurs, produce a middle class and interest groups, and eventually stimulate some form of civil society that would demand more social, political and economic rights.¹⁰⁹ Even if the North Korean elite or military would benefit in the reform process, for example by setting up their own companies, their doing business in and outside North Korea, and their interaction with international financial institutions would give them the experience of a market economy and the opportunity to conform to international law and order.¹¹⁰ Engagement can be a catalyst for those changes.

¹⁰⁷ Id., at 145.

¹⁰⁸ Forcese, *supra* note 98, at 3.

¹⁰⁹ Id.

¹¹⁰ John Feffer, Human Rights in North Korea and the U.S. Strategy of Linkage, <http://www.zmag.org/content/showarticle.cfm?ItemID=9531>

Second, an engagement with North Korea will weaken the regime's authority to control the people. The repeated indoctrination of the Juche ideology under a total isolation from the outside world and the lack of freedom of religion and thought contribute to the regime's absolute control over the people. North Koreans can gather information on the development of South Korea and the world through their communication with various business companies' representatives. With engagement, there is hope that North Koreans can access the Internet. In an isolated country like North Korea, this kind of flow of information would have enormous impact upon the way of thinking about the regime. It is a long-term process, but an effective one.¹¹¹

Third, engagement would directly secure the right to food by providing North Koreans with food and jobs. They are still experiencing economic hardship. If foreign invested corporations could hire North Koreans directly, their right to food could be drastically improved. Further, engagement policy would facilitate the humanitarian aid to North Korea.

Fourth, engagement expands the international community's alternatives as far as North Korea is concerned. The failure of the sanction strategy against North Korea is in part due to the lack of leverage available to the international community. In order for sanctions to be effective, the existence of the private sector and close economic and diplomatic ties are necessary. If engagement with North Korea is sufficiently developed, when the country fails to protect the international human rights norms, the international community will impose economic sanctions against it and they will be effective in making it conform to international norms.

After the U.S. decision to adopt an engagement strategy toward China, the two countries cooperate on major international issues including combating terrorism and solving the North Korean nuclear crisis. China has moved from a state-controlled to a

¹¹¹ Joseph J. Collins and Gabrielle D. Bowdoin, Executive Summary, *Beyond Unilateral Economic Sanctions: Better Alternatives for U.S. Foreign Policy* (CSIS Reports, the Center for Strategic and International Studies, 1999).

market economy and has become engaged with the outside world. It has begun to recognize the norms of universal human rights. It is getting more and more responsive to international pressure to improve its human rights situation. As a result of the engagement policy, the international community now has leverage toward China for the promotion of human rights. In conclusion, engagement is a much more effective way for enforcing international norms.

The validity of engagement in promoting human rights and democracy, and maintaining international peace security is shown by the U.S. engagement with China. I will analyze this in terms of human rights.

8. 1. U.S. Engagement with China

8. 1. 1. From Hostility to Engagement

The U.S. has the experience of engaging with a previously adversarial country. The most prominent instance is the engagement policy toward China since the early 1970s. The U.S. did not recognize the People's Republic of China for twenty years after its official establishment in 1949.¹¹² Instead, it recognized the Nationalist government of Taiwan as the true representative of China. The U.S. imposed a complete trade embargo against China after its military support of North Korea in the Korean War in 1950.¹¹³ U.S. oil companies embargoed petroleum shipments to China. Travel to mainland China was prohibited. The U.S. continued to prevent China from having a seat in the U.N. Ideological hostility dominated the relations between the U.S. and China, and China was almost isolated from the rest of the world.¹¹⁴

In 1969, the U.S. eased restrictions on trade with and travel to, China, signaling the administration's desire to improve relations. Most of the communications were relayed through a back channel, not through official and institutional

¹¹² Hufbauer et al, *supra* note 83, at 100.

¹¹³ *Id.*

¹¹⁴ *Id.*

processes.¹¹⁵ Henry Kissinger visited Beijing in 1970 and President Nixon in 1972, paving the road to the normalization of relations between the two countries in 1979.¹¹⁶ Of course, the U.S. engagement with China was not for the promotion of human rights. Rather, it needed an ally against the Soviet Union, as well as access to the vast Chinese market.¹¹⁷ Therefore, China's human rights abuses did not prevent the U.S. from pursuing diplomatic normalization.

The U.S. decision to adopt an engagement strategy toward China seems to be quite successful. The U.S. and China cooperate on major international issues including combating terrorism and solving the North Korean nuclear crisis. China has moved from a state-controlled to a market economy and has become engaged with the outside world. Engagement has contributed to the change of the Chinese economic system to capitalism. The 1993 Chinese Constitution stipulates that, "the state practices a socialist market economy."¹¹⁸ China has adopted market economy system. China is now one of the U.S. leading trading partners. In 2005, the U.S. exports to China totaled \$41.8 billion and the U.S. imports from China, \$243.5 billion.¹¹⁹

8. 1. 2. *Impact on Human Rights*

The Western engagement with China has contributed to the promotion of human rights in China. China was going through the Cultural Revolution (1966-1976) when the normalization began. The period witnessed some of the worst political persecutions in Chinese history. Obviously, the record of human rights in China has not been satisfactory. The U.S. Country Reports on Human Rights Practices of 2006 estimated that China's human rights record remained poor and China is "an authoritarian state",

¹¹⁵ Id.

¹¹⁶ Id.

¹¹⁷ Id.

¹¹⁸ Article 15 of the People's Republic of China Constitution.

¹¹⁹ Fact Sheet, Bureau of East Asian and Pacific Affairs, released on April 18, 2006. available at <http://www.state.gov/p/eap/rls/64718.htm> (last visited on May 3, 2007).

where “the Chinese Communist Party is the paramount source of power.”¹²⁰ The Chinese people do not have the right to change their government. Severe limitations on civil and political rights exist when “such rights are deemed by the government to threaten the regime and stability.”¹²¹

China is tightening its restrictions on the freedom of speech and the press. NGOs are under strict government control. Extrajudicial killings, torture and coerced confessions of prisoners, as well as forced labor have been widely reported.¹²² The rule of the law is obstructed because of a lack of due process and restrictions on lawyers. China is still implementing its coercive birth control policy. The government is repressing minorities in Tibet and Xinjiang. It imposes more death sentences than any other nation, with Amnesty International confirming 1,639 death sentences in 2003.¹²³ China also imposes content-based restrictions on religious beliefs and practices.¹²⁴

However, political discussion is possible and scholars can publish works that criticize the government and call for more civil and political rights. Voices for legal reforms including judicial independence have been raised.¹²⁵ The socialist ideology is still an official commitment but is not a matter of everyday life. The Chinese can access the Internet even though the government tries to block sites that are deemed to be dangerous to the regime. Choosing jobs and one's residence, as well as travel, are now possible. Elections for village leaders and village councils were first allowed in 1987 and spread drastically throughout the country.¹²⁶

¹²⁰ U.S. Country Reports on Human Rights Practices of 2006, <http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm>.

¹²¹ *Id.* at 97.

¹²² *Id.*

¹²³ Amnesty International Report 2004: China (2004).

¹²⁴ *Id.*

¹²⁵ Merlin Goldman, Monitoring Human Rights in China, in *Implementing U.S. Human Rights Policy* 97 (Debra Liang-Fenton, ed, 2004).

¹²⁶ *Id.* 117.

The Chinese perspective on human rights also changed drastically. During the 1970s, the concept of national sovereignty was the core of all Chinese international law issues.¹²⁷ However, in 1981, China became a permanent member of the Commission on Human Rights and its sub-commission. Through the 1980s and 1990s China began to recognize the norms of universal human rights. In 1988, its foreign minister stated that the Universal Declaration of Human Rights had exerted “a far-reaching influence on the development of the post-war international human rights activities and played a positive role in this regard.”¹²⁸ China signed the Covenant on Economic, Cultural, and Social Rights in 1997 and the Covenant on Civil and Political Rights in 1998. It has actively participated in the international human rights regime and approved of sanctions against the former apartheid regime of South Africa.

How should we then consider the Tiananmen Square massacre of 1989? Firing at unarmed protesters and killing hundreds of people is obviously a gross human rights violation. However, I find a light of hope in the Tiananmen demonstration itself. The Chinese people stood against their government for democracy. During the 10-year period of the Cultural Revolution, millions were persecuted and killed and no opposition against Mao was raised. In 1989, pro-democracy demonstrations continued from April 22 to June 3. By May 17, over 1 million people had participated in the street demonstrations.¹²⁹ The energy for democracy and human rights changes “more frequently comes from the inside, bottom-up, than from the outside, top-down.”¹³⁰ China is getting more and more responsive to international pressure for improving human rights situation. In 1990, it released two hundreds detainees, prior to Bush’s

¹²⁷ Id. 118.

¹²⁸ Id. 119.

¹²⁹ Jack Donnelly, *International Human Rights*, 152-153.

¹³⁰ Harold Hongju Koh, *Childress Lecture: A United States Human Rights Policy for the 21st Century*, 46 *St. Louis L.U.J.* 293, 316 (2002).

MFN decision.¹³¹ The overall situation of human rights in China is improving at a speed that otherwise could not have been expected.

One of the important lessons to remember is that, as a result of the engagement policy, the international community now has leverage toward China for the promotion of human rights. After the Tiananmen Square massacre, the U.S. imposed an arms embargo and suspended new aid.¹³² The E.U. also imposed economic sanctions against China.¹³³ The World Bank suspended loans to China.¹³⁴ Japan froze its aid program amounting to \$7 billion. China lost about \$11 billion in bilateral aid alone for four consecutive years.¹³⁵ In 1990, China desperately tried to block any resolution against it in the Human Rights Commission.¹³⁶ Now, it is more sensitive about its image in the international community, which in turn has an effective mechanism to impose economic or multilateral sanctions for human rights violations. If China had not joined the international community and had not had a close economic engagement with the rest of the world, as was the case in the 1960s, the international community would not have had any leverage in the Tiananmen Square massacre, and China would not have cared what the outside world thought of it.

9. Limitations of Engagement Policy

Economic engagement, however, does not always promote the human rights in a targeted country. It can be “a key component of an effective human rights implementation strategy” when adopted appropriately.¹³⁷ Engagement policy can augment the staying power of repressive regimes. In other words, engagement may

¹³¹ Id. at 158.

¹³² Donnelly, supra note 129, at 153.

¹³³ Id.

¹³⁴ Id.

¹³⁵ Id.

¹³⁶ Goldman, supra note 125, at 122.

¹³⁷ Liang-Fenton, supra note 96, at 443.

prolong dictatorships rather than undermine them.¹³⁸ Therefore, several factors should be considered before adopting an engagement policy to promote human rights.

First, the economic integration should not encourage “the regime to increase its repressive activity and engage in human rights abuses that would otherwise not occur.”¹³⁹ A company’s activities may bolster the repressive capacity and the staying power of a regime that systematically violates human rights.¹⁴⁰ For example, companies may be a major source of revenue that increases a regime’s repressive capacity.¹⁴¹ According to Forcese, “the firm may create infrastructure in the form of roads, railways, power stations, oil refineries, communications or the like, that increases a regime’s repressive capacity.”¹⁴² Moreover, foreign companies may provide “international credibility to an otherwise discredited regime.”¹⁴³ The U.S. engagement in South Africa was based on the belief that “the government of P.W. Botha was pragmatic and committed to managing an ongoing transition from apartheid.”¹⁴⁴ However, “[t]he Botha government was willing to modernize apartheid but not to eliminate it.”¹⁴⁵

Second, economic engagement should overcome the moral question of helping the oppressors. The ultimate goal of economic engagement is to promote democracy and human rights. Seeking engagement with rogue regimes such as North Korea is morally not appealing to policy-makers and constituents alike. Therefore, economic engagement should formulate clear strategies to improve human rights. Sandy Rios states that “any negotiating with the North Korean regime” cannot be tolerated as long as the regime “continues to starve and torture” the people, because this is un-

¹³⁸ Forcese, *supra* note 98, at 11.

¹³⁹ *Id.* 12-13

¹⁴⁰ *Id.* 15.

¹⁴¹ *Id.*

¹⁴² *Id.* 15-16.

¹⁴³ *Id.* 16.

¹⁴⁴ Donnelly, *supra* note 129, at 130.

¹⁴⁵ *Id.* 131.

American.¹⁴⁶ She demanded that, “the South cease to aid and abet the murderous regime of the North.”¹⁴⁷

10. Evaluation of the South Korean Engagement Policy

The South - North engagement has continued on a wide range of economic, cultural, sports, and transportation fronts. Seoul’s “Sunshine Policy” is believed to be slowly accomplishing something once thought impossible: the restoration of a measure of trust between the North and the South.¹⁴⁸ The hostility between the North and the South has been dramatically reduced and the possibility of war also has been curtailed. However, the engagement policy pursued by the South has been followed without a clear strategy to promote North Korean human rights.

According to data released by the South Korean Reunification Ministry, from March 1998 to August 2006 South Korea, including the government and the private sector, paid North Korea nearly \$1 billion in cash.¹⁴⁹ The payment included \$500 million paid in June 2000 for securing the exclusive right to run the Keumgang Tour Project, \$21 million in relation to the Kaesong Industrial Complex, including the wages of the North Korean workers, and several million dollars for some South Koreans to attend the Arirang Festival. Other humanitarian aid, such as food or medicine, was not included in the data.

The South Korean economic engagement with North Korea has several problems. First, it has not been carefully calculated whether the economic gains obtained by the North Korean regime through economic cooperation with the South

¹⁴⁶ Testimony of Sandy Rios, Chairman of the North Korean Freedom Coalition before the Committee on Foreign Relations, the Subcommittee on East Asian and Pacific Affairs of the U.S. Senate, November 4, 2003. available at <http://www.senate.gov/foreign/testimony/2003/RiosTestimony031104.pdf> (last visited on October 15, 2006).

¹⁴⁷ Id.

¹⁴⁸ McCormack, *supra* note 65, at 112.

¹⁴⁹ JoongAng Daily, October 17, 2006, available at <http://joongangdaily.joins.com/200610/17/200610172216021909900090309031.html>

are helping the North Koreans to enjoy civil, political and economic rights. For example, the Hyundai Group paid North Korea \$500 million without any mechanism of monitoring that the money not be diverted to military uses.¹⁵⁰ Further, the South Korean special prosecutor who looked into the secret payment concluded that it had been made to induce Pyongyang to agree to the historic South - North summit talks on June 15, 2000.¹⁵¹

Second, Pyongyang has compartmentalized the economic cooperation into blocks and has placed it under heavy regulations. For example, the South Korean tourists visiting Mt. Keumgang are not allowed to have tours outside of the iron fence surrounding the tour area. They can communicate with only a few well-trained North Korean guides. Pyongyang places strict regulations on the tourists. On January 6, 2000, a South Korean tourist visiting Mt. Keumgang was detained for several hours for criticizing the North Korean government and showing the guide her mobile phone made in South Korea.¹⁵²

Third, Seoul does not take full advantage of the economic cooperation to let the North Koreans experience the market economy. Although the Kaesong Industrial Complex Project is more effective than the Mt. Keumgang Tour Project in giving the North Koreans the experience of market economy,¹⁵³ the South Korean companies at the Complex are not allowed to hire or pay North Korean workers at their discretion. The workers are provided by the regime and wages are paid by North Korea. On top of that, the working conditions at the Kaesong Industrial Complex are not good enough to secure the workers' rights, the standards of South Korean labor regulations, and the international human rights.¹⁵⁴

¹⁵⁰ Id.

¹⁵¹ Id.

¹⁵² Asian Political News, January 10, 2000.

¹⁵³ U.S. assistant Secretary of State Christophor Hill once said that Kaesong could be a reform project, but Keumgan tour project was a way to give money to North Korea. Chosun Ilbo, October 18, 2006, available at <http://www.english.chosun.com/w21data/html/news/200610/200610180017.html>.

¹⁵⁴ Human Rights Watch, North Korea: Workers' Rights at the Kaesong Industrial Complex (2006).

Fourth, Seoul's reluctance to raise the North Korean human rights issues undermines the basis of the engagement policy within the international community. The engagement policy itself does not guarantee the promotion of human rights in North Korea. It should be carefully designed to encourage democracy and promote human rights. Seoul should support the international efforts to promote North Korean human rights and should participate in the discussion within the international community. Further, Seoul should include the human rights issues in the dialogue or the economic cooperation with North Korea.

11. The Engagement Is Necessary, but with Human Rights Components

Mike Mochizuki suggested that international community should “engage diplomatically with Pyongyang and initiate confidence-building measures such as continuation of food aid without conditionality and avoid sanctions.”¹⁵⁵ As Albright stated, “there is no automatic connection between trade and democracy, but people can't help being shaped by their own experiences and observations.”¹⁵⁶ In an isolated country like North Korea information and knowledge, once they begin to flow in and be disseminated, are hard to block and can be a violent force in changing the society. In fact, “[t]he dynamics of politics on the divided Korean peninsula are ultimately a lasting contest for pan-Korean legitimacy.” South Korea's engagement would eventually swallow up North Korea “no matter how sunny and benign the South's façade might be.”¹⁵⁷ Engagement with North Korea should be encouraged, but with the human rights component in it.

¹⁵⁵ Towards a Grand Bargain with North Korea including Human Rights Agenda, Testimony before the Subcommittee on East Asian and Pacific Affairs of the Senate Foreign Relations Committee, on November 4, 2003. available at <http://www.senate.gov/foreign/testimony/2003/MochizukiTestimony031104.pdf> (last visited on October 5, 2006).

¹⁵⁶ Madeleine Albright, Madam Secretary 552 (2003).

¹⁵⁷ Sung-Yoon Lee, India, China, and North Korea: A New Understanding: The Mythical Nuclear Kingdom of North Korea 29 Fletcher F. World Aff. 125, 141 (2005).

The engagement policy may send the wrong message to human rights violators such as the North Korean leaders that their tactics are succeeding without consequences for their actions.¹⁵⁸ Engagement should not be the same as endorsement. Therefore, the engagement strategy with an authoritarian state must make sure that the policy promotes the economic and social rights of the people, and leads to the enhancement of their civil and political rights. After all, “[a]ll human rights are universal, indivisible, and interdependent and interrelated.”¹⁵⁹ As Sen stated, “political freedom in the form of participatory opportunities as well as civil rights and liberties are ultimately crucial even for economic rights and for survival.”¹⁶⁰ Providing an authoritarian regime with economic benefits without encouraging democracy and improving human rights is helping the regime oppress the people.

The economic engagement with North Korea must have a clear message and purpose, that it is designed to promote North Korean human rights. For example, the South Korean government should make sure that the South Korean companies at the Kaesong Industrial Complex provide their North Korean workers with internationally recognized human rights such as the right to freedom of association and the right to collective bargaining.¹⁶¹ The South Korean companies should not be allowed to make money by simply paying the North Korean regime.

Engagement policy has been criticized for contributing to the survival of the regime responsible of human rights violations. This argument arose during the North Korean famine. Noland argues: “[W]hile we are ethically obligated to feed starving North Koreans, we are not obligated to do so in ways that strengthen the existing

¹⁵⁸ Victor D. Cha, assessing the North Korean threat: The Logic of Preemption, Prevention, and Engagement: North Korea and Northeast Asia 235 (Kim et al. ed.).

¹⁵⁹ Article 5 of the 1993 Vienna Declaration, U.N. Doc. A/CONF.157/24 (Part I) at 20-46 (1993).

¹⁶⁰ Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* 187 (Oxford University Press, 1982).

¹⁶¹ Jay Lefkowitz expressed his concern on the working conditions at Kaesong, especially on the low wages and the indirect payment. Jay Lefkowitz, “Free for all Koreans,” *The Wall Street Journal*, April 28, 2006.

political regime there.”¹⁶² The engagement policy should be implemented in a responsible way and reviewed regularly through careful monitoring. Further, after reviewing the results of such monitoring, a new strategy to address the special problems arising from carrying out the engagement policy should be developed and implemented. It turned out that the South Korean Keumgang Tour Project, in which South Korean citizens take a tour in a restricted area and pay fees to North Korea, did not contribute to the promotion of North Korean human rights; therefore, it should be reduced, revised or abandoned.

12. North Korea’s Willingness to Accept Engagement

If engagement could force North Korea to comply with international norms including international human rights and democracy, not strengthening the basis of the regime, will the regime accept the engagement, an apple with poison? One of the aims of the South Korean engagement toward North Korea is to change the North Korean system. As for Pyongyang, this change, however, may mean replacing the present leadership with new leaders with close economic ties with Seoul.¹⁶³ For this reason, although Pyongyang wants to get cash, investment and economic help from Seoul, it scrutinizes each transaction to minimize economic dependency on the South.¹⁶⁴ Pyongyang allows isolated economic projects that provide the foreign currency necessary for its survival but tries to keep North Koreans away from foreign contacts as much as possible. This is the North Korean version of the separation of economics from politics.¹⁶⁵ One scholar explains the dilemma that North Korea now faces: “North Korea is still caught helplessly between the necessity for an economic opening to

¹⁶² North Korea: the Politics of Regime Survival 11 (Young Hwan Kihl et al ed, 2006).

¹⁶³ Oknim Chung, Security Outlook of the Korean Peninsular, in Perspectives on Korean Unification and Economic Intergration (Young Back Choi & Edward Elgar ed, 2001).

¹⁶⁴ Id.

¹⁶⁵ Id.

salvage its faltering economy and the threat that capitalistic contamination could pose, leaving the regime's legitimacy in doubt."¹⁶⁶

Pyongyang appears not to have embarked upon "a path to reform and opening."¹⁶⁷ Contrary to widespread understanding, however, it does appear that Pyongyang is trying to engage with Seoul and Washington.¹⁶⁸ For example, the Agreed Framework of 1994 stipulated that in return for a freeze in North Korea's nuclear program, with substantial economic aid to North Korea, North Korea wanted to normalize its diplomatic relations with the U.S., and requested the U.S. to reduce trade and investment barriers.¹⁶⁹ The primary goal of North Korea is to secure the regime survival.¹⁷⁰ The regimes' survival can be secured by political and economic stability.

First, North Korea finds that the only way to ensure its security is to change its relationship with the U.S. from hostility to reconciliation.¹⁷¹ It pursues diplomatic normalization with the U.S. and Japan. Second, the collapse of communism of former Soviet Union and the economic transformation of China force North Korea to maintain normal economic relationship, for aid and investment, with capitalist countries. Security concerns and economic interests are the main forces that drive North Korea to come forward for engagement with South Korea, the U.S. and Japan.

¹⁶⁶ Id. 15.

¹⁶⁷ Nicholas Eberstadt, *The North Korean Economy: Between Crisis & Catastrophe*, Transaction Publishers, New Brunswick (U.S.A) and London (U.K.) (2007), at 305.

¹⁶⁸ Leon V. Sigal, *Politics, Economics, and the Agreed Framework*, In *Perspectives on Korean Unification and Economic Integration*, at 23.

¹⁶⁹ Ian Jeffries, *North Korea: A guide to economic and political developments* 113 (Routledge, New York, 2006).

¹⁷⁰ Hy-Sang Lee, *North Korea: A Strange Socialist Fortress* 230 (Praeger Publishers, 2001).

¹⁷¹ Id., at 24.

13. Conclusion

Harold Koh notes that an isolationist approach is unlikely to affect North Korea because it is already “the most isolated country on earth.”¹⁷² According to Koh, “Sanctions and the fear of sanctions may spur short-term compliance, but will just as likely incur long-term resentment and non-cooperation.”¹⁷³ Audie Klotz comments that countries with high degrees of cultural autonomy are not responsive to international normative pressures.¹⁷⁴ North Koreans are extremely indoctrinated with the self-reliance philosophy and not likely to be responsive to sanctions. A state is not a homogeneous entity, and an authoritarian state consists of the oppressor and the oppressed. Where a ruthless leader rules the target country, sanctions cannot change its policy while inflicting the population. This lesson can be drawn from the study on the economic sanctions against Iraq and Cuba.

Where the sanctions are applied because of human rights violations, the population is likely to be victimized even more.¹⁷⁵ Katarina Tomasevski points out, “[t]he hardships imposed upon the populations in the target country can be hidden behind legal rhetoric, whereby sanctions are imposed against the state rather than its population.”¹⁷⁶

A strategy to prevent or remedy violations of human rights can succeed only with “considering the values, strengths, and vulnerabilities of the specific nation or leader being targeted.”¹⁷⁷ Strategies toward a country, especially for promoting human rights should take into account the unique history, culture, psychology, and politics of the target country.

¹⁷² Harold Hongju Koh, *On American Exceptionalism*, 55 *Stan. L. Rev.* 1479, 1492, (2003).

¹⁷³ Koh, *supra* note 130, at 315.

¹⁷⁴ Klotz, *supra* note 2, at 275.

¹⁷⁵ Katarina Tomasevski, *Sanctions and Human Rights*, *Human Rights: International Protection, Monitoring, Enforcement* 303 (Janusz Symonides ed, 2003).

¹⁷⁶ *Id.* 315.

¹⁷⁷ *Effective Strategies for Protecting Human Rights* 14 (David barnhizer ed, 2001)..

An effective international strategy to force North Korea to respect international norms such as for the promotion of human rights as well as for international security is to fully engage the country, and help it become a part of the community of nations. Economic engagement will contribute to the dismantling of North Korean isolation. Moreover, the collapse induced through the application of sanctions, can create a social and economic nightmare for the South, leaving it with 22 million starving people at its borders, and with an army of 1 million just across the border that could spin out of control. An engagement policy with North Korea can be an alternative to a sanctions strategy.

An engagement policy may be the first step to solve the North Korean human rights crisis. Economic engagement can go side by side with a policy of promoting human rights. The EU's foreign policy may be a good example. The E.U. "is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."¹⁷⁸ The relatively active human rights policy toward the outside world can be attributed to the effective human rights mechanism in the European Union. The E.U. has conducted human rights talks with third countries or regional groups.¹⁷⁹ The talks take place at the level of senior human rights officials or at the local level. According to the E.U. foreign policy the respect for human rights and democracy is a condition for signing trade and other agreements with third countries.¹⁸⁰ Since 1995, the E.U. has required that all agreements on trade or cooperation with third countries have a clause according to which human rights are an essential element in the relations between the

¹⁷⁸ Article 6 (1) of the Treaty on European Union.

¹⁷⁹ Id.

¹⁸⁰ Id.

parties.¹⁸¹ In case the agreements are breached, the E.U may sanction the country or suspend the agreement.¹⁸² The E.U. approach to the improvement of human rights abroad is cooperative and long-term based. The E.U. approach could be summarized as economic engagement with human rights components in it.

In dealing with the North Korean issues such as regional and global security, nuclear, humanitarian, and human rights issues, there are two different approaches: the individual or the comprehensive one. The individual approach, espoused by most states and the international community, aims at solving the issues one by one according to their priority. For example, the United States considers denuclearizing North Korea a priority. South Korea, on the other hand, views humanitarian aid and economic cooperation as a priority and argues that human rights can be pursued after the peninsula is stabilized through the building of mutual trust.

However, the regional and global security including the nuclear crisis and the refugee and human rights issues in Northeast Asia are closely interrelated, and a more comprehensive approach should be contemplated. Vladimir Petrovsky argued that “the problems of military security, economic development, human security and human rights on the Korean peninsula could be resolved only as a package deal, as a set of mutual obligations.”¹⁸³ Michael O’Hanlon suggests a “Grand Bargain” with North Korea: diplomatic ties, end of economic sanctions, a binding promise not to use weapons of mass destruction first, a non- aggression pledge and a formal peace treaty ending the Korean War.¹⁸⁴ Given that the most pressing issues include military

¹⁸¹ E.U. Document, Promotion of Human Rights and Democratization in the European Union’s External Relations, available at http://ec.europa.eu/comm/external_relations/human_rights/intro/index.htm (last visited on Nov.28, 2006).

¹⁸² Id.

¹⁸³ Freedom House, Is Helsinki the Answer? Materials are available at <http://www.nkfreedomhouse.org/wp-content/uploads/2006/10nk-freedom-watch-issue-6-2.pdf> (last visited on Dec 4, 2006).

¹⁸⁴ Alexander T.J. Lennon et al. eds. Reshaping Rogue States 167-168 (2004).

security, economic development, and human rights, a comprehensive approach, similar to the Helsinki Accords, should clearly be considered as an alternative.

The Helsinki Final Act of 1975 can be a model strategy against North Korea by the international community.¹⁸⁵ The Helsinki process enabled the Soviet Union and the East European countries to make concessions on human rights provisions in return for security guarantees and economic aid from the Western countries.¹⁸⁶ It contributed to the collapse of the Soviet bloc by promoting democracy in the Eastern bloc.¹⁸⁷ Whether the Helsinki model can be applied to the current security and human rights situation in North Korea has been hotly debated. As Youngho Kim argues, “[b]ilateral and multilateral security guarantee and assurances are necessary for North Korea to accept the human rights agenda in the Northeast Asian version of the Helsinki process.”¹⁸⁸ After all, the Agreed Framework of 1994 focused on resolving the nuclear issue; therefore, it lacked sufficient structure to secure the success of the agreement. A comprehensive strategy to deal with North Korea, which includes the nuclear, the security, the human rights and the refugee issues should be contemplated.

¹⁸⁵ The Act is known as the Helsinki Accords consisted of a set of agreements among 35 nations including the U.S. and the former Soviet Union. See, *supra* note 183.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

CHAPTER SIX

CONCLUSION

The international community has been engaged in the efforts to promote North Korean human rights. The international mechanism, including the Human Rights Commission and the U.N. General Assembly, has shown the international commitment to addressing the North Korean human rights crisis. However, North Korea has made no significant progress in its human rights practices and its legal reforms seem to be minimal and in fact, not operative or enforced as norms. The severity of the North Korean human rights situation demands that the international community tackle the issue more seriously and urgently.

The North Korean nuclear program is another issue that the international community has been tackling for many years. The Agreed Framework of 1994, in which North Korea promised to abandon its nuclear program, and South Korea, the U.S. and Japan promised to provide energy aid and diplomatic normalization with North Korea, collapsed when George W. Bush named North Korea as “an axis of evil” in his January 2002 State of the Union speech. In October 2006, North Korea announced its successful nuclear test. Although the U.N. Security Council imposed selective economic sanctions against North Korea, North Korea does not seem to succumb to the international sanctions. In February 2007, North Korea agreed to close its main nuclear facilities in return for 50,000 tons of fuel oil. The future of the North Korean nuclear crisis remains to be seen.

Economic sanctions can force a state to comply with international norms. The controversy also applies to the North Korean crises. Can the international community force North Korea to comply with international norms by imposing sanctions?

During the Cold War, the United States actively imposed unilateral economic sanctions. After the Cold War, the U.S. has refrained from imposing unilateral

sanctions; it is in part because the number of multilateral economic sanctions adopted by the U.N. is dramatically increasing.¹ The collapse of the Cold War has made it possible for the Security Council to act on a common ground. The Security Council has the authority to maintain international peace and security under the Chapter VII of the Charter. The Council has used this power to protect human rights, which was traditionally considered as domestic affairs.

In its Resolution 794, the Council determined that the magnitude of the human tragedy in Somalia constituted a threat to the peace and security, and authorized the use of force to facilitate humanitarian aid.² In its Resolution 940, the Council determined that a military coup and non-democratic system of government in Haiti pose a threat to international peace.³ The resolution authorized the formation of a multinational force, and use of all necessary means to facilitate the departure from Haiti of the military leadership and the restoration of the legitimate authorities in Haiti.⁴ Today, the Council tends to consider gross human rights violations as a threat to the peace under Chapter VII of the Charter.

It is well established that comprehensive economic sanctions are likely to produce unintended and undesirable consequences.⁵ Comprehensive economic sanctions do not discriminate within the target country and therefore tend to cause undue sufferings to those not responsible for making the policy.⁶ This raises a legal and moral issue, where innocent people, not the elite, in the target country are affected and the target country does not change its policy that triggers the sanctions. In this situation, a middle class and civil society are weakened, and the regime is

¹ Hossein G. Askari et al, *Economic Sanctions: Examining Their Philosophy and Efficacy* 32 (Praeger, Westport, Connecticut, 2003).

² U.N. Doc. S/Res 794 (1992).

³ U.N. Doc. S/Res/940 (1994).

⁴ Id.

⁵ Richard N. Hass, *Conclusion: Lessons and Recommendations*, in *Economic Sanctions and American Diplomacy* 201 (Richard N. Hass ed, A Council on Foreign Relations Book, 1998).

⁶ Id.

strengthened. Gross humanitarian sufferings caused by sanctions undermine domestic and international support for sanctions.⁷ This was clearly shown in the sanction against Iraq. Economic sanctions should be designed to avoid causing undue sufferings in the target country. This is not only a moral issue but also a legal issue that limits the scope of economic sanctions.

Economic sanctions are an important weapon in the transnational efforts to enforce international norms and can have a substantial behavior-modifying potential. However, the conventional assumption that sanctions against small countries or sanctions to accomplish modest policy goals are likely to succeed might be wrong. In many cases, small countries have resisted sanctions and it is hard to distinguish between major policy goals and modest policy goals. The dichotomy between major policy goals and modest goals does not work in reality and improving human rights abroad is often more difficult than changing other so-called major policies.

In order for sanctions to be effective, there should be a possibility that either the public could change the regime through elections, or elite groups could raise the dissatisfaction with the regime. In a democratic society, economic hardships or a failure caused by economic sanctions may raise the possibility of policy changes by public dissatisfaction or pressure from the public. In a totalitarian state, economic failure creates tensions within the ruling elite and may increase the possibility of reforms, coups or even a regime change. Economic sanctions can give rise to dissatisfaction among elite groups, and reduce the loyalty of the political and military elite. In a state ruled by an absolute dictator, economic hardships are not likely to result in policy changes.

The magnitude of economic hardship caused by sanctions, or whether sanctions are unilateral or multilateral is not determining factors for the effectiveness of sanctions. Economic sanctions were able to bring about the abolition of apartheid in

⁷ Id., at 202.

South Africa. At least within the white minority its democracy was operative. The close economic and diplomatic relationship between South Africa and major sanctioning states when sanctions were imposed played an important role. Economic sanctions directed against target countries that have long been adversaries of the sanctioning country, or against countries that have little trade with the sanctioning country, are less successful. The demands and supports for sanctions within South Africa did not strengthen the regime at home when sanctions were imposed.

In other sanctions cases such as the sanctions against Iraq, Cuba and Myanmar, the goals of sanctions were beyond human rights issues; military issues in Iraq case, restraining communism or regime change in Cuba case, and restoring democracy in Myanmar case.

Since 1990s, especially after the sanctions against Iraq and Haiti that caused severe human sufferings, the Security Council has taken steps to improve sanctions design, “applying more targeted measures, strengthening monitoring and enforcement, and prioritizing humanitarian concern.”⁸ The Council has developed more limited measures such as “arms embargoes, travel restrictions, and asset freezes.”⁹ Restrictions on trade were limited to strategic commodities such as oil and diamonds.¹⁰ These types of sanctions, so-called smart sanctions, can be an alternative to comprehensive sanctions in the future.

The effect of comprehensive economic sanctions imposed by the international community would be disastrous for the North Korean population because sanctions against an authoritarian country cause serious human sacrifice and the poor and the unemployed are the most deeply affected. The elite and the military do not suffer while the rest of the population starves. Several factors can be noted.

⁸ Id., at 201.

⁹ Gary Clyde Hufbauer et al, Peterson Institute for International Economics, *Economic Sanctions Reconsidered* 132 (3rd ed, Washington, DC, 2007).

¹⁰ Id.

First, disarming the North Korea's nuclear program by imposing economic sanctions would be almost impossible.¹¹ The North Korean regime considers its nuclear program as the last resort that would guarantee its survival.¹² North Korea has already secured nuclear technology and materials, and already has nuclear weapons, it would be almost impossible to denuclearize it by imposing economic sanctions unless the very threat that has caused it to engage in the nuclear program has been completely removed. The Security Council Resolution 1718, which aims at forcing North Korea to abandon the nuclear program, is not likely to bear fruits.

Second, North Korea is an authoritarian state completely controlled by a sole absolute leadership. North Korea maintains strict government control over "the flow of information, the movement of people, and the means of production,"¹³ and they are important tools to control the people, isolating them internally and internationally.¹⁴ Contacts with foreigners or foreign information are completely banned or controlled by the central government. The government has an absolute monopoly of mass media.¹⁵ Information is provided, omitted, exaggerated or fabricated by the government. Sale of foreign newspapers and magazines are prohibited in North Korea.¹⁶

Third, where sanctioning states and the target country stand hostile to each other, economic sanctions often result in an unintended bolstering of an authoritarian regime. No state has any substantial political and economic relationship with North Korea because Pyongyang has not maintained substantial diplomatic and economic relations with other countries. Where a sanctioning state has little economic interest in the target country, economic sanctions are not the most effective means of compelling

¹¹ Hufbauer et al, *supra* note 9, at 162.

¹² Cummings, *supra* note 61, at 479-491.

¹³ L. Gordon Flake et al., *The Experience of U.S. NGOs in North Korea, Paved with Good Intentions: The NGO Experience in North Korea* 36 (2003).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

the target country to comply with international norms. North Korea's stance toward the international community has been hostile. In response to the Security Council Resolution 1718, North Korea insisted that the nuclear test was attributable to the U.S. and called the resolution "gangster-like."¹⁷ The North Korea's hostile stance against the international community, in combination of government propaganda of the threats from foreign forces, strengthens the people's reliance on the current regime.¹⁸

Fourth, economic sanctions against North Korea are not likely to strengthen opposition movement in North Korea. Social associations and groups in North Korea are not interest groups or pressure groups, but "primary control mechanisms over the people."¹⁹ Employment assignments, food rationing, and travel constraints were all tied to a political system of comprehensive surveillance.²⁰ North Koreans are classified in 3 classes and 51 categories according to their family background and loyalty to the regime.²¹ The social classification in North Korea has contributed to the enhancing of the loyalty of core class to the regime. The regime seems to be maintaining the full control over the population. Further, there are various kinds of prison or detention camps in North Korea. It is estimated that approximately 200,000 prisoners are detained in all the Gwalliso throughout North Korea.²² In reality, there is no private sector in North Korea to be stimulated by economic sanctions.

The effective strategies to resolve the North Korean crises, I think, should be to engage fully with North Korea. If necessary, smart sanctions can be adopted. Comprehensive economic sanctions should not be imposed. For a fundamental change in domestic institutions and attitudes, for example, the promotion of human rights, "a

¹⁷ UN and governments statements on UN resolution 1718. Security Council SC/8853, <http://www.un.org/News/Press/docs/2006/sc8853.doc.htm> (last visited on March 3, 2007).

¹⁸ Yun-Jo Cho, The Sources of Regime Stability in North Korea: Insights from Democratization Theory, *Stanford Journal of East Asian Affairs*, 97 (2005 Volume 5)

¹⁹ *Id.* at 149.

²⁰ McCormack, *supra* note 65, at 74.

²¹ KINU, *supra* note 23, at 101-127.

²² *Id.*

slower process of socialization” is necessary to strengthen “reformist actors and promote peaceful solutions to international conflicts.”²³

Engagement strengthens the private sector such as corporations, NGOs and promotes democracy in North Korea. It also reduces the level of isolation from the outside world, and provides North Koreans with information on democracy and universal values and beliefs.

Engagement policy will contribute to the solution of the North Korean nuclear crisis. Providing North Korea with a non-aggression treaty, food aid, foreign aid and investment, cultural exchange, and normalization of economic and diplomatic relations, could solve the North Korean nuclear crisis. Further, an engagement strategy will contribute to the solution of the North Korean human rights crisis.

Economic engagement would strengthen reformer groups within the North Korean government, empower entrepreneurs, produce a middle class and various interest groups and will weaken the regime’s authority over the people. Further, engagement will expand the international community's alternatives in dealing with North Korea. As shown in the sanctions against South Africa, sanctions against a state with a close relationship engaged with the world would be most effective. Where engagement with North Korea progress substantially and the North Korea’s hostile attitude against the international community is reduced, the international community would have a very powerful tool to force North Korea by imposing sanctions.

In conclusion, as effective strategies to force North Korea to respect international norms, I suggest several recommendations. First, the international community must fully engage with North Korea for a substantial period of time to stimulate the development of a private sector such as NGOs, corporations, in North Korea. Second, the international community must maintain close political and economic relationships with North Korea. Third, humanitarian aid toward North

²³ Audie Klotz, *supra* note 2, at 275.

Korea should be continued and sanctions against North Korea, where economic sanctions are inevitable, should have humanitarian exceptions. Fourth, a package deal with North Korea can be considered. The Helsinki Final Act of 1975 can be a model strategy against North Korea by the international community, which enabled the Soviet Union and the East European countries to make concessions on human rights provisions in return for security guarantees and economic aid from the Western countries.²⁴ It contributed to the collapse of the Soviet bloc by promoting democracy in the Eastern bloc.²⁵ Engagement policy with human rights components toward North Korea should be adopted.

²⁴ Id.

²⁵ Id.

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