



Protect

Security Council

orea

President of the Czech Republic
Former Prime Minister of Norway
ity, Nobel Peace Prize Laureate (1986)



U.S. Committee for
Human Rights in North Korea

Cover Photo

Caption: An unidentified 71-year-old woman carries last year's dried cabbage leaves in Anju, North Korea, April 5, 1997

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Failure to Protect: A Call for the UN Security Council to Act in North Korea

Report Commissioned By:

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Prepared By:



**U.S. Committee for
Human Rights in North Korea**

October 30, 2006

Foreword

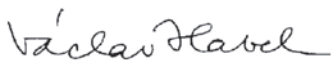
Although in recent weeks the international focus has been on North Korea's nuclear weapons test, the situation in that country is also one of the most egregious human rights and humanitarian disasters in the world today. Yet sadly, because North Korea is also one of the most closed societies on Earth, information about the situation there has only trickled out over time.

With the unanimous adoption by the UN Security Council of the doctrine that each state has a "responsibility to protect" its own citizens from the most egregious of human rights abuses, a new instrument for international diplomacy has emerged. While states retain sovereignty to control their own territory, if they fail to protect their own citizens from severe human rights abuses, the international community now has an obligation to intervene through regional bodies and the United Nations, up to and including the Security Council.

In this context, we commissioned the global law firm DLA Piper LLP to work with the U.S. Committee for Human Rights in North Korea in preparing an objective and definitive report on the failure of the North Korean government to exercise its responsibility to protect its own people.

The evidence and analysis contained in this report is deeply disturbing. Indeed, it is clear that Kim Jong Il and the North Korean government are actively committing crimes against humanity. North Korea allowed as many as one million, and possibly many more, of its own people to die during the famine in the 1990s. Hunger and starvation remain a persistent problem, with over 37 percent of children in North Korea chronically malnourished. Furthermore, North Korea imprisons upwards of 200,000 people in its modern-day gulag, and it is estimated more than 400,000 have died in that system over 30 years.

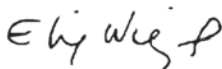
It is on this basis that we strongly urge the UN Security Council to take up the situation of North Korea. Protecting the people of North Korea requires nothing less.



Václav Havel
Former President of the Czech Republic



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Former Prime Minister of Norway



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Approach

The intent of this report is to apply a new doctrine of international law – the responsibility of all states to protect their own citizens from the most egregious of human rights abuses – to the situation in North Korea. Based on a comprehensive review of published information and first-hand interviews, this report concludes that North Korea has violated its responsibility to protect its own citizens from crimes against humanity being committed in the country, that North Korea has refused to accept prior recommendations from UN bodies to remedy the situation, and, therefore, UN Security Council action is warranted.

In addition, the report explains that North Korea also qualifies as a non-traditional threat to the peace. This designation could provide a completely independent justification for Security Council action because of the transnational impact of the internal problems in the country.

This report also describes North Korea's involvement in the production of nuclear, chemical, and biological weapons and related delivery systems. Nevertheless, this information is provided only to present a complete picture of the situation and to explain how North Korea allocates its resources, not as a justification for further Security Council action. Between the Six-Party Talks and prior Security Council action on North Korea's missile launches and nuclear weapon test, substantial work is already being done to address the security threat.

President Havel, Prime Minister Bondevik, and Professor Wiesel commissioned this report because they believe that, for far too long, the security threat posed by North Korea has relegated the human rights concerns in the country to a second-class status. North Korea's nuclear weapons test, conducted on October 9, 2006, demonstrated the fallacy of the argument that not antagonizing its government on human rights concerns would promote successful engagement on security issues. Our clients believe, in the wake of that test, the human rights and humanitarian crisis in North Korea deserves to be treated on a parallel track with the security threat and should no longer be suppressed from international discussions.

It is worth noting that North Korean authorities regularly deny the human rights and humanitarian violations described in this report. Such governmental denials cannot be taken at face value. The only real way for North Korea to contradict or invalidate the claims and stories described in this report and in the cited documents is by inviting United Nations officials, Human Rights Council representatives, or reputable NGOs to verify or invalidate on site the information that has been presented.

Lastly, North Korea's isolation from the outside world makes it difficult to gather verifiable information about the country. Therefore, all statistics cited in this report are best estimates, subject to that important caveat.

Map of North Korea



Source: Adapted from Princeton University GIS open source map.

Table of Acronyms

BW	Biological Weapons
BTWC	Biological and Toxic Weapons Convention
CCL 10	Allied Council Control Law No. 10
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
CW	Chemical Weapons
DMZ	Demilitarized Zone
DPRK	Democratic People's Republic of Korea (North Korea)
EU	European Union
FAO	Food and Agriculture Organization
GDI	Gross Domestic Income
GDP	Gross Domestic Product
HEU	Highly Enriched Uranium
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
KEDO	Korean Peninsula Energy Development Organization
KPA	Korean People's Army (North Korea)
MND	Ministry of National Defense (South Korea)
MT	Metric Tons
NGO	Nongovernmental Organization
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
PDS	Public Distribution System
POW	Prisoner of War
UNHCR	UN High Commissioner for Refugees
UNDP	UN Development Program
UNICEF	UN Children's Fund
USSR	Union of Soviet Socialist Republics (or Soviet Union)
WFP	World Food Programme
WMD	Weapons of Mass Destruction

Executive Summary

The Situation in North Korea

- The human rights and humanitarian situation in the Democratic People's Republic of Korea (North Korea) continues to deteriorate, with no degree of measurable improvement. Members of the international community, including governments, nongovernmental organizations (NGOs), and many United Nations (UN) bodies have reported grave violations of human rights and humanitarian law. Because the North Korean government refuses to implement recommendations made by the UN – including those made by the General Assembly, the former Commission on Human Rights, and the Special Rapporteur on Human Rights in North Korea – the people of North Korea continue to suffer. Therefore, UN Security Council action is both warranted and necessary.

Powers of the UN Security Council

- Charged with the critical mission of maintaining peace and security between nations, the UN Security Council possesses unparalleled authority to make binding decisions that uphold the United Nations' commitment to prevent war, preserve human rights, and promote international political stability.
- According to Chapter VI, Article 34, of the UN Charter, the Security Council may “investigate . . . any situation which might lead to international friction . . . to determine whether the continuance of the . . . situation is likely to endanger the maintenance of international peace and security.” Under Chapter VII, Article 39, the Security Council “shall determine the existence of any threat to the peace . . . and shall make recommendations, or decide what measures shall be taken”
- Security Council action can include the adoption of resolutions requiring action on the part of the offending government to curtail its offending acts. Under Article 25 of the UN Charter, all members of the UN “agree to accept and carry out the decisions of the Security Council.”
- Here, two independent justifications enable the Security Council to act with regard to the situation in the country: (1) the North Korean government has failed in its responsibility to protect its own people from crimes against humanity; and (2) the situation in North Korea constitutes a non-traditional threat to the peace.

Failure of the Responsibility to Protect

- The North Korean government is manifestly failing to protect its own citizens from crimes against humanity, with the government actively committing those crimes against its own people and others. Since prior UN actions have failed to motivate North Korea to address these serious concerns, it is time for the UN Security Council to take up the situation of North Korea.

Background

- On September 20, 2005, during the World Summit, the assembled leaders in the UN General Assembly adopted a statement in which they said: “we are prepared to take collective action, in a timely and decisive manner, through the Security Council . . . [if] national authorities are manifestly failing to protect their populations from . . . crimes against humanity.”
- Subsequently, this statement was unanimously endorsed in Resolution 1674 by the Security Council on April 28, 2006.
- For acts that would ordinarily constitute domestic criminal offenses to be elevated to the level of international “crimes against humanity,” a state and the perpetrators acting on its behalf must be knowingly involved in a series of widespread and systematic attacks directed against a civilian population, such as murder, extermination, torture, imprisonment, or other acts intentionally causing great suffering or serious bodily or mental harm.

Application

- The North Korean government is actively involved in committing crimes against humanity with respect to both: (1) its food policy leading to famine and (2) its treatment of political prisoners.
 - *Food Policy and Famine:* North Korea allowed as many as one million, and possibly many more, of its own people to die during its famine in the 1990s. Hunger and starvation remain a persistent problem in the country. Over 37 percent of children in North Korea are chronically malnourished. Even today, North Korea denies the World Food Programme access to 42 of 203 counties in the country.
 - *Treatment of Political Prisoners:* North Korea imprisons upwards of 200,000 people in its modern-day gulag without due process of law and in near-starvation conditions. More than 400,000 are estimated to have died in that system over 30 years.

Non-Traditional Threat to the Peace

- In addition to North Korea’s violation of the responsibility to protect its own citizens, North Korea is also a non-traditional threat to the peace. “Traditional” threats to the peace are typically caused by military action; so-called “non-traditional” threats to the peace occur when a country’s actions or failure to act result in serious cross-border impacts. Examples of non-traditional threats can include drug trafficking, failing to prevent the spread of communicable diseases, serious human rights abuses leading to mass refugee outflows, and environmental degradation.

Background

- Although there is no precise definition of what represents a non-traditional “threat to the peace,” the Security Council – through its past actions in evaluating other cases – has elucidated a list of factors that collectively can constitute such a threat to the peace. Because the Security Council takes a case-by-case approach, no one factor or set of factors is dispositive. Each past case embodied a unique set of circumstances; in each case, the Security Council considered the totality of circumstances in determining that a threat to the peace was taking place.
- To guide our work, we first reviewed the initial Security Council resolutions adopted in response to internal country situations that the Security Council deemed a threat to the peace previously. This review enabled us to identify the criteria that helped the Council make its decisions. These criteria are used in this report as the determining factors relevant to North Korea. These factors include: (1) widespread internal humanitarian/human rights violations; (2) the substantial outflow of refugees; (3) other cross-border problems (for instance, drug trafficking); (4) conflict among governmental bodies and insurgent armies or armed ethnic groups; and (5) the overthrow of a democratically elected government.

Application

	Human/ Human Rights Violations	Refugee Outflows	Other (Drug Trafficking, Counterfeiting)	Conflict among Factions	Overthrow of Democratic Government
North Korea	✓	✓	✓	-	-

- In the case of North Korea, three of these five determining factors have been met. Satisfying three of five factors was sufficient to justify Security Council involvement in five of the seven case studies we examined, including the situations in Haiti, Yemen, Rwanda, Liberia, and Cambodia. The factors specifically present in North Korea are as follows:
 - *Widespread Internal Humanitarian/Human Rights Violations:* As described above, there are two sets of activities in which the North Korean government is engaging that constitute crimes against humanity and meet this factor: its food policy leading to famine, and its treatment of political prisoners.
 - *Outflow of Refugees:* It is estimated that some 100,000 to 400,000 North Koreans have fled the country in recent years.
 - *Other Cross-Border Problems:*
 - *Drug Production and Trafficking:* It is believed that the North Korean government earns \$500 million to \$1 billion per year from illicit drug production and trafficking. It is estimated that North Korea harvests 30 to 44 tons of opium and manufactures 10 to 15 tons of methamphetamines per year.
 - *Money Counterfeiting and Laundering:* The North Korean government produces and launders high-quality counterfeit US \$100 bills or “supernotes.” It is estimated that North Korea produces between \$3 million and \$25 million in supernotes per year.

Conclusion

- As a result of the severity of the overall situation in North Korea and in consideration of all of the information analyzed in detail in this report, the Security Council has independent justification for intervening in North Korea either because of the government’s failure in its responsibility to protect or because North Korea is a non-traditional threat to the peace. Security Council intervention is a necessary international and multilateral vehicle to alleviate the suffering of the North Korean people.

Recommendations

Initially, the UN Security Council should adopt a non-punitive resolution on the situation in North Korea in accordance with its authority under Chapter VI of the UN Charter and past Security Council precedents.

The resolution should:

- Outline the major reasons for the Security Council intervention, focusing on the North Korean government's failure to protect its own people and the threat to international peace and security caused by the major issues described in this report;
- Urge the North Korean government to ensure the immediate, safe, and unhindered access to all parts of the country for the United Nations and international organizations to provide humanitarian assistance to the most vulnerable groups of the population;
- Call on the North Korean government to release all political prisoners detained in violation of their rights under the International Covenant on Civil and Political Rights, to which North Korea is a state party;
- Insist the North Korean government allow the UN Special Rapporteur on Human Rights in North Korea to visit the country; and
- Request the Secretary-General to remain vigorously engaged in the situation in North Korea and that he report back to the Security Council on a regular basis.

Should North Korea fail to comply with a Chapter VI resolution, the Security Council should consider adopting a binding resolution under Chapter VII.

I. Background on the Situation in North Korea

A. Historical Context of International Concern over the Korean Peninsula

The Korean peninsula has long been a focus of other nations' concern. At the crossroads between China, Japan, and Russia, Korea has been the subject of repeated invasions and occupations, and lingering tensions. Today, it continues to require international attention. The following history is presented here to explain some of the historical cross-currents that have troubled the Korean peninsula, and as a summary of how the international community has often been called upon to intervene to restore peace and stability there.

For centuries, Korea was China's most important tributary state¹ benefiting from Chinese protection but struggling to maintain its independent identity. Japan and China signed the Li-Ito Convention in 1885² after China assisted Korea's king in suppressing a pro-Japanese coup. This tenuous peace broke down when the Korean government invited Chinese forces into the country to assist in a peasant uprising. Japan viewed China's intervention as a breach of the Convention and sent its own troops to Korea, and war broke out between the two powers in August 1894.³ Japan emerged victorious. As a result, China was forced to formally acknowledge Korea's independence and renounce all claims to its territory in the Treaty of Shimonoseki signed by Japan and China on April 17, 1895.⁴

In the early 1900s, Russia moved forces into Korea and Manchuria, leading to war between Russia and Japan.⁵ Japan was again victorious.⁶ The United States was eager to see peace restored and mediated the Treaty of Portsmouth,

¹ See LEE KI-BAIK, *A NEW HISTORY OF KOREA* 20, 73, and 189 (Translated by Edward W. Wagner with Edward J. Shultz, Harvard University Press, 1976); see also *Sino-Japanese War*, *ENCYCLOPEDIA BRITANNICA* (2006) available at <http://search.eb.com/eb/article-9067946> [hereinafter *Sino-Japanese War*].

² This treaty was also known as the Convention of Tientsin. See LEE, *supra* note 1, at 279; see also *Sino-Japanese War*, *supra* note 1 (explaining that under the Li-Ito Convention both Japan and China agreed to troop withdrawals from Korea).

³ See *Sino-Japanese War*, *supra* note 1; LEE, *supra* note 1, at 287.

⁴ See *id.* at 289; see also *History of Korea*, *ENCYCLOPEDIA BRITANNICA* (2006), available at <http://search.eb.com/eb/article-9108454> [hereinafter *History of Korea*].

⁵ See LEE, *supra* note 1, at 306; DON OBERDORFER, *TWO KOREAS* 4-5 (Basic Books 2001); LEE, *supra* note 1, at 306; *Russo-Japanese War*, *ENCYCLOPEDIA BRITANNICA* (2006), available at <http://search.eb.com/eb/article-9064492> [hereinafter *Russo-Japanese War*].

⁶ See OBERDORFER, *supra* note 5, at 5; *History of Korea*, *supra* note 4.

signed in 1905, recognizing Japan's exclusive role in defense of the peninsula.⁷ The Korean king was subsequently forced to sign a treaty establishing Korea as a Japanese protectorate.⁸

Five years later, in 1910, Japan formally annexed Korea as part of its expanding empire.⁹ With international acquiescence, Japan ruled Korea under a governor-generalship administered by military officials.¹⁰ Despite some organized Korean resistance, Japan's dominance of Korea remained unchallenged by foreign powers until the end of World War II.¹¹

By the time Japan surrendered to the Allies, the Allies had considered ways to promote a gradual path to Korean independence. In 1943, the United Kingdom, China, and the United States issued the Cairo Declaration that promised independence for Korea "in due course"¹²; they expected Korea to be a trusteeship under United Nations supervision. These Allied expectations gained further expression in the Potsdam Declaration of 1945.¹³

Japan offered to surrender Korea on August 10, 1945. By that date, 120,000 Soviet troops had already occupied North Korea¹⁴, including some 30,000 Russian-trained troops of Korean ethnic extraction. The Russian-trained forces included an individual who called himself Kim Il Sung, who was eventually to become the dictator of the Communist regime in the North.¹⁵ The terms of the Japanese surrender provided that Japan would yield the Korean territory north of the 38th parallel to the Soviet Union and everything south of the 38th parallel to the United States.¹⁶

⁷ See LEE, *supra* note 1, at 309; OBERDORFER, *supra* note 5, at 5; *History of Korea*, *supra* note 4.

⁸ See LEE, *supra* note 1, at 309; *History of Korea*, *supra* note 4.

⁹ See LEE, *supra* note 1, at 313; *Background Note: North Korea* (U.S. Department of State, Nov. 2005, available at <http://www.state.gov/t/pa/ei/bgn/2792.htm> [hereinafter *Background Note*]).

¹⁰ See LEE, *supra* note 1, at 314; *History of Korea*, *supra* note 4.

¹¹ See *Background Note*, *supra* note 9.

¹² *Id.*; see also CHUCK DOWNS, *OVER THE LINE: NORTH KOREA'S NEGOTIATING STRATEGY* 15 (AEI Press, 1999).

¹³ See *id.*; see also BRADLEY K. MARTIN, *UNDER THE LOVING CARE OF THE FATHERLY LEADER: NORTH KOREA AND THE KIM DYNASTY* 259 (Thomas Dunne Books, 2006) (explaining the circumstances leading to division of the peninsula at the 38th parallel); OBERDORFER, *supra* note 5, at 6 (same).

¹⁴ T.R. FEHRENBACH, *THE FIGHT FOR KOREA: FROM THE WAR OF 1950 TO THE PUEBLO INCIDENT* 38 (Grosset & Dunlap, 1969).

¹⁵ KIM JOUNGWON, *DIVIDED KOREA: THE POLITICS OF DEVELOPMENT, 1945-1972* 86 (Harvard University Press, 1975); see also WILLIAM H. VATCHER, *PANMUNJOM: THE STORY OF THE KOREAN MILITARY ARMISTICE NEGOTIATIONS* 146 n. 16 (Frederick A. Praeger, 1958) (asserting that Kim Il Sung was among those sent by the Russians).

¹⁶ See MARTIN, *supra* note 13, at 50.

Early attempts at unification failed. The US-USSR Commission, established by the Moscow Conference in 1945, ended in disagreement over how to accommodate Korean views in the process.¹⁷ At the request of the United States, the UN General Assembly adopted a resolution providing for peninsula-wide elections in Korea overseen by a UN Temporary Commission on Korea.¹⁸ The goal was to elect a National Assembly that would establish a national government and arrange for both US and Soviet troops to leave the peninsula.¹⁹

Elections were held in the South under UN supervision, but the USSR blocked the UN Commission from entering the North.²⁰ As a result, a constitution was adopted and a president elected by popular vote, but only in the South.²¹ General Assembly Resolution 293 of October 21, 1949, declared that the “Government of the Republic of Korea is a lawfully established government . . . the only such Government in Korea” and that the elections of May 10, 1948, were “a valid expression of the free will of the electorate.”²²

In the North, the Communist Party adopted a constitution and elected a “Supreme People’s Assembly.”²³ The Assembly ratified the constitution in September 1948 and named Kim Il Sung premier.²⁴ He officially established the Democratic People’s Republic of Korea on September 9, 1948, and it was recognized by the USSR as the only lawful government in Korea.²⁵

In an effort to unify the peninsula under Communist control, Kim Il Sung launched an invasion of the South on June 25, 1950, with the approval of the Soviet Union and the People’s Republic of China.²⁶ When word of the Communist invasion reached the United Nations, the Security Council swiftly passed a resolution condemning the invasion, calling for the immediate end of fighting and demanding that “the authorities in North Korea” withdraw north of the 38th parallel “forthwith.” Passed when the Soviet Union was boycotting UN participation, this resolution called upon all UN members to refrain from assisting North Korea.²⁷ A second Security Council resolution on June 27, 1950,

¹⁷ See *id.*; ROBERT A. SCALAPINO & CHONG-SIK LEE, COMMUNISM IN KOREA 365-367 (University of California Press, 1972) (describing the inability of the Soviets and Americans to reach an agreement on how to proceed with Korean unification).

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *id.*

²² UN SECURITY COUNCIL, RESOLUTIONS AND DECISIONS OF THE SECURITY COUNCIL 1950 4 (United Nations, 1965) (referring to UN General Assembly action); see also *A White Paper on South-North Dialogue in Korea* (National Unification Board of the Republic of Korea, 1988), at 16-17.

²³ See *id.*

²⁴ *Id.*

²⁵ See *id.*

²⁶ See MARTIN, *supra* note 13, at 63-64, 66-67.

²⁷ S.C. RES. 82, UN Doc. S/RES/82 (Jun. 25, 1950), *supra* note 22, at 4-5.

called for UN members “to provide such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.”²⁸ Backed by these two UN resolutions, US President Harry Truman committed American forces to turn back the North’s aggression.

By mid-September 1950, 16 nations contributed ground forces to the UN Command.²⁹ UN troops recaptured Seoul on September 28³⁰ and, by October 1, had pushed northern troops back to the 38th parallel and beyond, reaching Pyongyang on October 20 and the Chinese border on October 26.³¹ Fighting continued as the People’s Republic of China entered the war, but, on June 1, 1951, UN Secretary-General Trygve Lie announced that the objectives of the June 25 and June 27, 1950, United Nations resolutions had been carried out.³²

While armistice negotiations began in July 1951, fighting continued for more than two years.³³ At long last, an armistice was signed on July 27, 1953, establishing a military boundary, roughly at the 38th parallel, that would become the *de facto* border between North and South Korea.³⁴ In the end, the war that lasted a little over three years had resulted in approximately four million casualties.³⁵

After the Korean War, Kim Il Sung eliminated domestic opposition and all those believed to pose a threat to his power in the North.³⁶ He became the absolute ruler of North Korea “and set about transforming North Korea into an austere, militaristic, and highly regimented society.”³⁷ Dissent from or criticism of Kim Il Sung became a punishable crime.³⁸ Reports noted that “citizens were arrested, and some even sent off to one of the country’s extensive gulags, for inadvertently defacing or sitting on a newspaper photograph of the Great Leader or his son and chosen successor.”³⁹

²⁸ S.C. RES. 83, UN Doc. S/RES/83 (Jun. 27, 1950), *supra* note 22, at 4-5.

²⁹ The sixteen allied nations to contribute troops to the UN Command were: Australia, Belgium, Canada, Colombia, Ethiopia, France, Greece, Netherlands, New Zealand, Philippines, Republic of Korea, South Africa, Thailand, Turkey, the United States, and the United Kingdom.

³⁰ See MARTIN, *supra* note 13, at 79.

³¹ See *History of Korea*, *supra* note 4.

³² See VATCHER, *supra* note 15, at 18; FEHRENBACH, *supra* note 14, at 94.

³³ See *id.*

³⁴ See *History of Korea*, *supra* note 4; MARTIN, *supra* note 13, at 87; *Background Note*, *supra* note 9 (noting that signatories to the armistice included the North Korean People’s Army, the Chinese People’s Volunteers, and the UN Command).

³⁵ See *History of Korea*, *supra* note 4; LEE, *supra* note 1, at 379-81.

³⁶ See *History of Korea*, *supra* note 4; MARTIN, *supra* note 13, at 94; OBERDORFER, *supra* note 5, at 10-11; SCALAPINO & LEE, *supra* note 17, at 463.

³⁷ *History of Korea*, *supra* note 4.

³⁸ See OBERDORFER, *supra* note 5, at 21.

³⁹ OBERDORFER, *supra* note 5, at 21; see *infra* section II.A.2.

Kim Il Sung relied on the Soviet Union and China for financial and military support.⁴⁰ Especially when the schism developed between the Soviet Union and China in the 1960s, North Korea had to walk a fine line, keeping on good terms with both countries by avoiding complete dependence on either one.⁴¹ In order to do so, Kim Il Sung promulgated an ideology he called *juche*, an independent form of Korean Socialist thought that emphasized a supreme leader's absolute control over his people.⁴²

In the late 1980s and early 1990s, North Korea experienced a precipitous decline in aid as Communism fell in Eastern Europe and the Soviet Union was dissolved.⁴³ Relations with China were strained by China's establishment of diplomatic ties with South Korea in 1992⁴⁴ and China's efforts to put trade with North Korea on a cash basis. Aside from economic and diplomatic impacts, the fall of the socialist bloc and strained relations with China prompted North Korea to abandon its campaign for a single Korean seat at the UN and, in September 1991, North and South Korea were both admitted to the UN as separate nations.⁴⁵

North Korea's original constitution, which was adopted in 1948, was replaced with a new constitution in 1972, establishing Kim Il Sung as president. Revised in 1992 and 1998, the current constitution asserts that the position of president is permanently vested in the deceased Kim Il Sung. Although the head of state is ostensibly the president of the Presidium of the Supreme People's Assembly, North Korea's absolute dictator Kim Jong Il rules from the post of chairman of the National Defense Commission.⁴⁶

Kim Jong Il, the oldest recognized son of Kim Il Sung, was born on February 16, 1942, most likely in the Soviet Union, although the regime claims he was born on Mt. Paektu, a place revered by Koreans as the legendary source of the Korean identity.⁴⁷ During the Korean War, Kim Jong Il lived in exile in China, although he did not interact with Chinese people or learn their language.⁴⁸ After returning to North Korea, where he received his formal education, including graduating from Kim Il Sung University, he was assigned

⁴⁰ See OBERDORFER, *supra* note 5, at 153; *Background Note*, *supra* note 10.

⁴¹ See *id.*; see also SCALAPINO & LEE, *supra* note 17, at 576-587 (describing the development of tensions within the communist world).

⁴² See DOWNS, *supra* note 12, at 13; NICHOLAS EBERSTADT, KOREA APPROACHES REUNIFICATION 132 (Armonk, National Bureau of Asian Research, 1995); KONGDAN OH & RALPH C. HASSIG, NORTH KOREA THROUGH THE LOOKING GLASS 16-24 (Brookings Institution Press, 2000).

⁴³ See *Background Note*, *supra* note 9; *North Korea*, ENCYCLOPEDIA BRITANNICA (2006), available at <http://search.eb.com/eb/article-34951> [hereinafter *North Korea*].

⁴⁴ See *Background Note*, *supra* note 9; *North Korea*, *supra* note 43.

⁴⁵ See *Background Note*, *supra* note 9.

⁴⁶ See SCALAPINO & LEE, *supra* note 17, at 790, MARTIN, *supra* note 13, at 155.

⁴⁷ See MARTIN, *supra* note 13, at 187.

⁴⁸ See *id.* at 216.

to work in the Central Committee of the Workers' Party, "the regime's nerve center."⁴⁹ Due to apparent clashes with his uncle, a contender for leadership of the regime, it is believed that Kim was sent to work for the party chapter in North Hamgyong Province.⁵⁰ He is also believed to have kept information regarding food shortages at that time from coming to his father's attention.⁵¹ His succession was largely assured, however, when he returned to work at the Central Committee and, in 1973, was elected to the politburo and named Party Secretary for Organization and Guidance.⁵² In spite of Marxist ideals to the contrary, Kim Il Sung chose his son as his successor.⁵³ In the mid-1980s, Kim Jong Il took "day-to-day charge of the party, the military, the administration – even international affairs."⁵⁴ In 1993, fearful that he might experience the fate of his family friend Nicolae Ceaușescu, Kim Jong Il utilized his newly granted position as chairman of the party's military commission to transform North Korea from a party dictatorship to a military dictatorship.⁵⁵

International concerns raised by the decisions and policies of Kim Jong Il are discussed in depth in other sections of this report.

B. Economic Development

North Korea has sufficient resources to be a functioning, growing economy that can employ its people and generate significant trade with other nations. However, by 1990 economic mismanagement, political and economic isolation, and over-militarization had left the country in economic shambles.

The northern half of the Korean peninsula is rich in mineral resources, including sizeable, valuable deposits of coal, copper, gold, iron ore, tungsten, and graphite.⁵⁶ Power can be produced both from the country's coal reserves and from several major river systems that support hydropower. North Korea is said to have high rates of literacy but its readers are unable to obtain materials not produced by the regime itself; the people of North Korea are therefore isolated from the outside world and likely ignorant of modern information technologies.⁵⁷

⁴⁹ *Id.* at 236; OBERDORFER, *supra* note 5, at 347.

⁵⁰ See MARTIN, *supra* note 13, at 238-39.

⁵¹ See *id.* at 239.

⁵² See *id.* at 270.

⁵³ See *id.* at 192.

⁵⁴ *Id.*

⁵⁵ See *id.* at 484-85; see also RYO HAGIWARA, KIM JONG IL'S HIDDEN WAR: SOLVING THE MYSTERY OF KIM IL SUNG'S DEATH AND THE MASS STARVATIONS IN NORTH KOREA 7-20 (Saitama, Japan, 2004).

⁵⁶ See Chin S. Kuo, *The Mineral Industry of North Korea* (U.S. Geological Survey-Minerals Information, 1996).

⁵⁷ See HELEN-LOUISE HUNTER, KIM IL-SONG'S NORTH KOREA 207-220 (Praeger Publishers, 1999); CIA WORLD FACTBOOK, *North Korea* (Central Intelligence Agency, 2006).

Japanese colonial rule during the first half of the 20th century industrialized the country. The Japanese concentrated industrial activity in the North, due in part to the proximity to mines, timber, and hydropower.⁵⁸ In addition to mining, industries included steel, chemical, fertilizer, and textile production.⁵⁹ Unfortunately, the Korean War destroyed many of the factories and infrastructure inherited from the Japanese colonial period. Following the war, North Korea rebuilt its industries and infrastructure, largely with subsidies from the Soviet Union.⁶⁰ Today, economic development remains stunted by excess spending on the military combined with the failure to invest in developing substantial domestic industrial capacity.

After the Korean War, the North Korean government imposed a Soviet-styled, centrally planned command economy.⁶¹ Until recently, private trade has been almost entirely prohibited. Following the Soviet model, economic decisions have been implemented through a series of long-range multi-year plans, in which planners decide what industries should be created, what those industries produce and in what quantities.⁶² Distribution of production, including agricultural production, was also centrally controlled. One historian has said, “North Korea offers the best example in the post-colonial developing world of conscious withdrawal from the capitalist world system in a serious attempt to construct an independent, self-contained economy.”⁶³

The country became increasingly dependent on aid and subsidies from the Soviet Union and other socialist bloc countries, as well as illicit economic activity, including drug production and trafficking and counterfeiting that were (and still are) used to generate hard currency.⁶⁴ In the late 1980s, facing its own currency difficulties, the Soviet Union began demanding payment for past and current aid, which North Korea was unable to make. By 1987, aid from the Soviet Union had dropped significantly.⁶⁵

The 1990 collapse of the Soviet Union and Eastern bloc had a devastating impact on North Korea’s economy.⁶⁶ For example, it lost most of its imported coal and refined petroleum.⁶⁷ Between 1990 and 1993, imports from Russia fell by 90 percent. North Korea was unable to respond – or in any event did

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ *See generally* BRUCE CUMINGS, KOREA’S PLACE IN THE SUN: A MODERN HISTORY 430-35 (W.W. Norton & Co., 2005).

⁶¹ *See id.* at 430; *see also* JOSEPH SANGHOON, THE NORTH KOREAN ECONOMY: STRUCTURE AND DEVELOPMENT 70 (Hoover Institution Press, 1974).

⁶² *See id.*

⁶³ *See* CUMINGS, *supra* note 60, at 429.

⁶⁴ *See id.* at 19.

⁶⁵ *See id.* at 20.

⁶⁶ MARCUS NOLAND, FAMINE AND REFORM IN NORTH KOREA 4-5 (Institute for International Economics Working Paper, 2003).

⁶⁷ *See id.*

not respond – and its own economy collapsed. Data suggests that the economy may have shrunk by 30 percent between 1991 and 1996.⁶⁸

Today, North Korean industry is operating at a fraction of capacity.⁶⁹ Unemployment outside the agricultural sector may be as high as 30 percent.⁷⁰ The country remains heavily dependent on foreign assistance, including food aid, from South Korea and China.

North Korea has experimented with modest reforms over the years, including some nascent special economic zones.⁷¹ In July 2002, Kim Jong Il enacted a series of potentially significant measures that included some price reforms. However, given the current political and security climate, the effect of all of these initiatives remains hard to assess, and it is probably too early to do so.⁷² It is also uncertain whether these reforms are transient or whether they will form the initial stages of a longterm overhaul of the North Korean economy along a “Chinese model” or some other pattern.⁷³ Indeed, in October 2005, the government rolled back some of these measures, reinstating the rationing system and banning the private trade of grain.

Apart from these measures, the country’s largely self-imposed isolation from much of the world likely hinders economic progress.⁷⁴ Its recent missile tests, in the face of threats of sanctions, further imperil its fragile recovery. The country continues to export narcotics and counterfeit goods, including cigarettes, pharmaceuticals, and US, Chinese, and European Union currency.⁷⁵

No discussion of the North Korean economy can be complete without highlighting the country’s oversized military. Notwithstanding the collapse of the economy and two decades of chronic food crises, Kim Jong Il has instituted the *Songun Chongch’i* policy, which provides the military with a disproportionate share of the country’s resources.⁷⁶ Official estimates state that approximately

⁶⁸ See Marcus Noland, TESTIMONY BEFORE U.S. SENATE FOREIGN RELATIONS SUBCOMMITTEE ON EAST ASIAN AND PACIFIC AFFAIRS, Jul. 8, 1997.

⁶⁹ See *Background Note: North Korea*, *supra* note 10.

⁷⁰ See STEPHAN HAGGARD & MARCUS NOLAND, HUNGER AND HUMAN RIGHTS: THE POLITICS OF FAMINE IN NORTH KOREA (U.S. Committee for Human Rights in North Korea, 2005), at 21 [Hereinafter HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS].

⁷¹ See generally MARCUS NOLAND, A NEW INTERNATIONAL ENGAGEMENT FRAMEWORK FOR NORTH KOREA? *Political Economy of North Korea: Historic Background and Present Situation*, (International Institute for Economics, 2005), at 20 [hereinafter NOLAND, *Political Economy of North Korea*]; Young-Sun Lee & Deok Ryong Yoon, *The Structure of North Korea’s Political Economy: Changes and Effects* (Korean Institute for International Economic Policy, 2004), at 33-35.

⁷² See NOLAND, *Political Economy of North Korea*, *supra* note 71, at 36; See, e.g., *Economic Reforms Are Changing Hardline North Korea Some Say*, AGENCE FRANCE PRESSE, Sept. 10, 2006.

⁷³ See Lee & Yoon, *supra* note 71, at 38.

⁷⁴ See NOLAND, *Political Economy of North Korea*, *supra* note 71, at 36.

⁷⁵ See *Background Note*, *supra* note 9.

⁷⁶ See Lee & Yoon, *supra* note 71, at 27-29.

15 percent of GDP is devoted to the military, but many analysts believe that the actual amount is between 15 and 25 percent, with some estimates stating it is as high as 30 percent.⁷⁷ If the number is greater than 17.7 percent, it would mean North Korea has the highest military expenditures as a percent of GDP of any country in the world.⁷⁸

The military is, in fact, an entire second economy in North Korea, and is run separately from the rest of the economy. The military is given priority for materials and resources – including food – and the rest of the economy receives the remainder.⁷⁹ It also operates its own defense manufacturing facilities, farms, mines, and banks. The military is estimated to employ over one million soldiers and other support personnel. In addition, the country maintains a massive reserve of 4.7 million people.⁸⁰ North Korea appears willing to maintain the current size of its military and military expenditures, notwithstanding its adverse effects on the rest of the civilian economy.⁸¹ The military economy also plays a role in generating exports and hard currency through its sizeable export sales of weapons.⁸² Arms exports are estimated at approximately \$100 million to \$600 million annually.⁸³

C. Economic and Social Indicators

The population of North Korea is estimated to be approximately 22.7 million.⁸⁴ Conservative estimates of mortality rates during the famine suggest as many as one million and possibly many more people died, or 3 to 5 percent of the pre-famine population.⁸⁵

Because of the insular and isolated stance of the North Korean government, it is difficult to make reliable estimates of the usual socio-economic indicators.⁸⁶ For 2004, the Bank of Korea estimated North Korea's gross domestic income (GDI) at \$20.8 billion, 1/33rd of South Korea's, and its per capita GDI at \$914, approximately 1/15th that of South Korea.⁸⁷

⁷⁷ See *id.* at 27-28 and 27, n. 5.

⁷⁸ See WORLD FACTBOOK, *supra* note 57 (noting military expenditures as percent of GDP, e.g., Eritrea – 17.7 percent; Jordan – 11.4 percent; Saudi Arabia – 10 percent; China – 4.3 percent; US – 4.06 percent; Iran – 3.3 percent; South Korea – 2.6 percent).

⁷⁹ See Lee & Yoon, *supra* note 71, at 29.

⁸⁰ See *id.*

⁸¹ See *id.* at 27.

⁸² See *id.* at 29.

⁸³ See *World Military Expenditures and Arms Transfers* (US Department of State, 2005), available at http://www.state.gov/t/vci/rls/rpt/wmeat/1999_2000/; Jon Herskovitz, *N. Korea's Missiles Find Fewer Buyers*, GULF TIMES, Sept. 6, 2006 (stating a US government study in 2004 found \$560 million in missile sales in 2001 alone).

⁸⁴ See *Background Note*, *supra* note 9.

⁸⁵ See HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70.

⁸⁶ North Korea does not release its own economic statistics. Thus, all information is from estimates and analysis by secondary sources.

⁸⁷ *Gross Domestic Product of North Korea in 2004* (Bank of Korea, May 31, 2005).

GDP is roughly divided as follows: 30 percent agriculture (including food, forestry, and fishing), 34 percent industry, and 36 percent services.⁸⁸ The majority of the industrial production is from mining (18.5 percent of GDP).⁸⁹ Of the services sector, approximately 23 percent represents governmental services.⁹⁰

The Bank of Korea estimated North Korea's trade volume in 2004 amounted to \$2.9 billion, 1/167th of South Korea's trade volume.⁹¹ China is the North's largest trading partner. Bilateral trade between North Korea and China was estimated to be \$1.5 billion in 2005.⁹²

Life expectancy at birth is 63.6 years, the infant mortality rate is 42 deaths per 1,000 live births, and the mortality rate for children under 5 is 55 per 1,000.⁹³ The rate of malnutrition for children under 5 years old is 23.9 percent.⁹⁴ Many other socio-economic indicators are unavailable or unknown, due to the government's failure to release such information or allow outside, independent assessments.

II. The Crisis

A. Major Human Rights Concerns

For years, North Korea has denied that there are any human rights violations in the country. In 1988, for example, the North Korean Ambassador to the United Nations wrote to the Minnesota Lawyers International Human Rights Committee that violations of human rights do not take place and are "unthinkable" in North Korea.⁹⁵ In 1994, an official publication, *The People's Korea*, proclaimed "there is no 'human rights problem' in our Republic either from the institutional or from the legal point of view."⁹⁶

Despite these assertions, however, North Korea is often referred to by knowledgeable observers as one of the worst human rights situations in the

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² "China Raises Its Stake in North Korea," ASIA TIMES, Dec. 17, 2005.

⁹³ See World Bank Group, Democratic People's Republic of Korea Data Profile, available at <http://devdata.worldbank.org/external/CPProfile.asp?PTYPE=CP&CCODE=PRK> (citing World Development Indicators database, Apr. 2006).

⁹⁴ See *id.*

⁹⁵ *Human Rights in the Democratic People's Republic of Korea (North Korea)*, Minnesota Lawyers International Human Rights Committee and Human Rights Watch/Asia, Dec. 1988.

⁹⁶ OH & HASSIG, *supra* note 42, at 134, citing *The People's Korea*, No. 1661 (August 13, 1994), at 8.

world today.⁹⁷ The UN General Assembly recognized this when, on December 15, 2005, it adopted a resolution expressing its deep concern about “systemic, widespread and grave violations of human rights” in North Korea.⁹⁸ But because of the self-imposed isolation of the country, documenting the full extent of the abuses of Kim Jong Il and his regime is an impossible challenge. Only in the last 10 years – with the exodus of North Koreans escaping to flee the famine – has even a partial view of the terrible situation come to light.

North Korea has been highlighted for attention by many human rights organizations and governments because of its human rights record. At the same time, it has also signed – and essentially ignored – many of the key human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR)⁹⁹, International Covenant on Economic, Social, and Cultural Rights (ICESCR)¹⁰⁰, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹⁰¹, and Convention on the Rights of the Child (CRC).¹⁰²

This report is not intended to provide a complete overview of the human rights situation in North Korea.¹⁰³ Instead, by examining the body of existing evidence, this report presents two key groupings of human rights abuses – food policy and famine, and the treatment of political prisoners – that, in their scale, scope, and severity fall clearly within the definition of “crimes against humanity.”¹⁰⁴ In addition, the abduction of foreigners is also examined.

⁹⁷ See, e.g., *Tobacco Firm Has Secret North Korean Plant*, THE GUARDIAN (UK), Oct. 17, 2005 (stating North Korea “is regarded by some as having the worst human rights record in the world”); Nicholas Kristof, *The Hermit Nuclear Kingdom*, NEW YORK TIMES BOOK REVIEW, Feb. 10, 2005 (North Korea is “the worst human rights violator in the world”); Roberta Cohen, *Talking Human Rights With North Korea*, WASHINGTON POST, Aug. 29, 2004 (North Korea “is the world’s worst human rights violator”); Robert Windrem, *Death, Terror in N. Korea Gulag*, NBC NEWS, Jan. 15, 2003 (quoting U.S. Senator Sam Brownback: “It’s one of the worst, if not the worst situation — human rights abuse situation — in the world today.”)

⁹⁸ G.A. RES. 60/173, UN Doc. A/RES/60/173 (Dec. 16, 2005).

⁹⁹ North Korea acceded to the ICCPR on September 14, 1981. See *Status of Ratifications of the Principal International Human Rights Treaties*, Office of the UN High Commissioner for Human Rights, Jun. 4, 2004.

¹⁰⁰ North Korea acceded to the ICESCR on September 14, 1981. See *id.* It is important to note that this predated North Korea’s major problems with food policy and famine.

¹⁰¹ North Korea acceded to CEDAW on February 27, 2001. See *id.*

¹⁰² North Korea ratified CRC on September 21, 1990. See *id.*

¹⁰³ See, e.g., *White Paper on Human Rights in North Korea* (Korean Institute for National Unification, 2006) (providing a highly detailed overview of the human rights situation in North Korea).

¹⁰⁴ See *infra* Appendix III.

1. Food Policy and Famine¹⁰⁵

Between 1995 and 1998, North Koreans suffered through a catastrophic famine that resulted in at least one million deaths, and possibly many more, from starvation and hunger-related diseases.¹⁰⁶ This represented between three and five percent of the population.¹⁰⁷ While the acute famine has passed, the food emergency continues to this day. Some human rights organizations recently warned that North Korea is once again on the brink of famine.¹⁰⁸ As of 2004, out of the population of 22 million, 57 percent of the people do not have sufficient food to stay healthy, 36 percent of the people are undernourished, and 37 percent of children under 6 years old suffer from chronic malnutrition.¹⁰⁹ Perhaps the most striking example of the malnutrition's impact is that in 2003 the Korean People's Army (KPA) was forced to reduce its height requirement for draftees from five feet, eleven inches (150 cm) tall to five feet, two inches (125 cm) tall.¹¹⁰ Even though these statistics are ample evidence to demonstrate that malnutrition is a problem, North Korea continues to inhibit aid distribution and denies access to UN agencies and NGOs to 42 of the 203 North Korean counties. The World Food Programme (WFP) is unwilling to provide food assistance to those counties without appropriate monitoring being in place.¹¹¹

To discuss why UN Security Council action is necessary, the following section first presents the legal context for North Korea's obligations to feed its people. Second, the antecedents of North Korea's food crisis are reviewed.

¹⁰⁵ For comprehensive treatments of the North Korean famine, see HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70; STEPHAN HAGGARD & MARCUS NOLAND, FAMINE IN NORTH KOREA: MARKETS, AID, AND REFORM (Columbia University Press, forthcoming 2007) [hereinafter, HAGGARD & NOLAND, FAMINE], and MARCUS NOLAND, FAMINE AND REFORM IN NORTH KOREA (Institute for International Economics Working Paper, 2003). This section relies heavily on these works.

¹⁰⁶ This is a conservative estimate based on studies accepted by Haggard, Noland, and others. See, e.g., HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 18. Andrew Natsios, former head of the U.S. Agency for International Development, endorsed the view that as many as 2.5 million people died during the famine. See ANDREW NATSIOS, THE POLITICS OF FAMINE (United States Institute of Peace, 1999), at 6, quoting HWANG JONG YUB, NORTH KOREA: TRUTH OR LIES (1998).

¹⁰⁷ See HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 18.

¹⁰⁸ See Kay Seok, *North Korea is Headed Toward Another Famine*, INTERNATIONAL HERALD TRIBUNE, Apr. 5, 2006; A MATTER OF SURVIVAL: THE NORTH KOREAN GOVERNMENT'S CONTROL OF FOOD AND THE RISK OF HUNGER (Human Rights Watch, 2006), at 25 [hereinafter, A MATTER OF SURVIVAL]. Recent flooding has increased the likelihood that North Korea is on the brink of famine once again. See Jon Herskovitz, *UN Food Agency Says North Korea Accepts Aid Offer*, REUTERS, Aug. 17, 2006.

¹⁰⁹ See *North Korea Famine In Detail*, Reuters Foundation Alert Net, available at http://www.alert-net.org/db/crisisprofiles/KP_FAM.htm?v=in_detail.

¹¹⁰ See NOLAND, FAMINE AND REFORM IN NORTH KOREA, *supra* note 105, at 10, n. 16.

¹¹¹ See HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 25; Jeffrey Robertson, *North Korea Plays Politics with Food Aid*, ASIA TIMES, Oct. 1, 2005.

Third, background on the “slow motion” famine is provided. Fourth, the famine itself will be described, followed by a short discussion about the famine’s impact. Next, North Korea’s use and misuse of international assistance is reviewed. Finally, the nature of the continuing crisis will be followed by a summary of key findings.

This section concludes, as have many other assessments, that the North Korean famine was not caused by a natural disaster, but rather by the North Korean government’s own failures. Furthermore, the government has failed to address or remedy the fundamental circumstances that led to the prior famine. Instead, Pyongyang continues emphasizing other priorities, such as supporting an oversized military, pursuing weapons of mass destruction (WMD) programs, exerting control over the citizenry, and maintaining its isolation from the outside world.¹¹² North Korea remains heavily dependent on outside food assistance, yet it has demonstrated repeatedly its willingness to jeopardize, sacrifice, or reject that assistance – along with jeopardizing the health and lives of its citizens – in pursuing other priorities.

a. Legal Context: The Fundamental Right to Food

The right to adequate food is central to the ability to enjoy and exercise all other human rights.¹¹³ If a person is chronically hungry and malnourished, he or she cannot meaningfully enjoy the other inalienable rights of life.¹¹⁴

Since its inception, the United Nations and its members have recognized the fundamental nature of the right to food. Initially this right was hortatory, as presented in the Universal Declaration of Human Rights, which states that “everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food.”¹¹⁵ Subsequently, this right was codified in the ICESCR, which reaffirms “the right of everyone to . . . adequate food” and “the fundamental right of everyone to be free from hunger.”¹¹⁶

¹¹² See MARCUS NOLAND, SHERMAN ROBINSON & TAO WANG, *FAMINE IN NORTH KOREA: CAUSES AND CURES* (Institute for International Economics, 2002), at 1-2.

¹¹³ See UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, *Substantive Issues Arising From The Implementation of the International Covenant on Economic, Social, and Cultural Rights*, General Comment No. 12, at ¶ 57 (“The human right to adequate food is of crucial importance for the enjoyment of all rights.”)

¹¹⁴ See *id.*

¹¹⁵ UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. Res. 217A (III), UN Doc. A/810, *adopted* Dec. 10, 1948, at art. 25.

¹¹⁶ INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, G.A. Res. 2200A (XXI), *adopted* Dec. 16, 1966, *entered into force* Jan. 3, 1976, at art. 11. North Korea acceded to the ICESCR on Dec. 14, 1981.

The ICESCR and subsequent instruments recognize that nations have the responsibility not only to recognize the right to food, but also to protect, respect, and fulfill that fundamental right. The ICESCR, for example, states that “[t]he States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.”¹¹⁷ Similarly, the CRC states that “Parties shall . . . take appropriate measures . . . to combat disease and malnutrition . . . through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods.”¹¹⁸ It goes on to say that “States Parties, in accordance with national conditions and within their means . . . shall in case of need provide material assistance and support programs, particularly with regard to nutrition.”¹¹⁹

These international norms recognize that government has the primary responsibility for ensuring the right to adequate food. This is because the nation-state exercises enormous power over all aspects of its people’s lives – even in democratic, market-oriented societies. This does not always mean that nations have an obligation literally to feed their people, except in times of emergency. It does mean, however, that the state is responsible for the conditions that exist in its country – including conditions that may cause or result in hunger – and the state is obligated to adopt policies that respect and satisfy the fundamental right to food.

ICESCR General Comment No. 12 defines the obligations that the state must fulfill in order to implement the right to adequate food at the national level:

- The obligation to *respect* existing access to adequate food requires states parties not to take any measures that result in preventing such access.
- The obligation to *protect* requires measures by the state to ensure that enterprises or individuals do not deprive other individuals of their access to adequate food.
- The obligation to *fulfill* (*facilitate*) means the state must proactively engage in activities intended to strengthen people’s access to and use of resources and means to ensure their livelihood, including food security.¹²⁰

¹¹⁷ *Id.*

¹¹⁸ CONVENTION ON THE RIGHTS OF THE CHILD, G.A. Res.44/25, adopted Nov. 20, 1989, entered into force Sept. 2, 1990, at art. 24. North Korea signed the CRC on Oct. 21, 1990.

¹¹⁹ *Id.* at art. 27.

¹²⁰ ICESCR, *supra* note 116.

Nobel Prize-winning economist Amartya Sen has argued that there is no longer an excuse for famine anywhere.¹²¹ Others have adopted this view as well.¹²² According to this argument, famines or acute food shortages do not result from poor growing conditions, drought, floods, or other natural disasters. Instead, food crises are caused by government policies that fail to respond to a country's agricultural circumstances, fail to respond to natural conditions or events, deny citizens the political rights to influence the government and its policies, and/or hinder the ability of citizens to feed and help themselves.¹²³

Even if this is not universally true, the argument applies to North Korea. Logically, a government that can mobilize and sustain a modern army with over one million soldiers, pursue nuclear weapons, and launch long-range missiles can also successfully adopt and implement policies that protect its citizens from food scarcity and insecurity. But the North Korean government has failed to provide these protections for decades.

Pyongyang has demonstrated repeatedly that keeping its population properly fed is a low priority for the government. For example, an estimated 15 to 30 percent of North Korea's GDP is used to support the army, even during times of famine and food insecurity.¹²⁴ Further, the government has repeatedly put international food aid at risk, both by the restrictions it places on that aid and by actions that threaten to end that aid, such as the launch of missiles and the refusal to participate in the Six-Party Talks. Finally, the government has refused to undertake the fundamental changes necessary to remove the threat of famine, food insecurity, and dependence on foreign food aid – aid which could evaporate at any time.

¹²¹ See, e.g., AMARTYA SEN, FAMINES AND OTHER CRISES, in DEVELOPMENT AS FREEDOM 160, 175 (Anchor, 1999).

¹²² See, e.g., MEREDITH WOO-CUMMINGS, THE POLITICAL ECOLOGY OF FAMINE: THE NORTH KOREAN CATASTROPHE AND ITS LESSONS (Asian Development Bank Institute 2002), at 1 ("Sen has effectively demonstrated that famine is rarely if ever about insufficient stocks of food; it is about the politics of food distribution"); ALEX DE WAAL, FAMINE CRIMES: POLITICS AND THE DISASTER RELIEF INDUSTRY IN AFRICA 117 (Indiana University Press, 1997), at 7. JOACHIM VON BRAUN, TESFAYE TEKLU, & PATRICK WEBB, FAMINE AS THE OUTCOME OF POLITICAL PRODUCTION AND MARKET FAILURES, IDS BULLETIN (No. 4, 1993), at 73.

¹²³ See, e.g., JEAN DREZE & AMARTYA SEN, HUNGER AND PUBLIC ACTION 46 (Oxford University Press, 1989).

¹²⁴ North Korea officially acknowledges that 15 percent of GDP is consumed by the military. Many observers believe that the actual figure is much higher. See LEE YOUNG-SUN & YOON DEOK-RYONG, *The Structure of North Korea's Economy: Changes and Effects*, A NEW INTERNATIONAL FRAMEWORK FOR NORTH KOREA? (American Enterprise Institute, 2005), at 52; Yoel Sano, *Military Holds the Key*, ASIA TIMES, Feb. 18, 2005.

b. Antecedents of the Food Crises

The North Korean government blames the famine of the 1990s on catastrophic flooding that occurred in 1995 and 1996. These natural disasters, however, were not the primary causes of the famine, nor even secondary ones. In reality, the famine was well under way by 1995, rooted in five decades of failed governmental policies that left the population highly vulnerable to food shortages.

So long as Korea is divided, North Korea will face a permanent challenge to feed itself. Korea's historical economic development tended to concentrate agriculture in the South, with its more favorable climate and the majority of the arable land. Because the North is colder, less fertile, and more mountainous, it has been the locus of mostly industrial activity.¹²⁵ Thus, splitting the Korean peninsula deprived North Korea of its historical breadbasket.¹²⁶

As a result, North Korea has had to compensate for this loss. Only between 19 and 22 percent of North Korea, however, is considered arable.¹²⁷ Thus, North Korea would need to develop an economy able to purchase large quantities of imported food – which it has not done. The catastrophic famine of the 1990s and acute food shortages that continue to threaten North Koreans today have their direct roots in the government's failure for five decades to adopt policies addressing the basic fact that North Korea cannot produce sufficient food on its own to feed its population.¹²⁸

Like most Communist countries, North Korea established a centrally planned economy implemented through a series of multi-year industrial plans.¹²⁹ In agriculture, farmers and farmland were organized into collectives and state farms.¹³⁰ All planning and production was centralized.¹³¹ Private production was prohibited, as were private markets and trade.¹³²

While drawing on the Communist planning framework, North Korean founder Kim Il Sung organized North Korean life around the ideological tenet of *juche*, or a “spirit of self reliance.”¹³³ As with other sectors, North Korean agriculture and food policies also came under the same philosophy, with Pyongyang imposing self-reliance not only at the national level, but in a less consistent way at the provincial and county levels as well.¹³⁴

¹²⁵ See HAGGARD & NOLAND, *FAMINE*, *supra* note 105, at 1.

¹²⁶ See HAGGARD & NOLAND, *HUNGER AND HUMAN RIGHTS*, *supra* note 70, at 12-13.

¹²⁷ See WORLD FACTBOOK, *supra* note 57.

¹²⁸ See HAGGARD & NOLAND, *HUNGER AND HUMAN RIGHTS*, *supra* note 70, at 12-13; NOLAND, *supra* note 105, at 2-4.

¹²⁹ See *supra* Section I.C.

¹³⁰ See NOLAND, *supra* note 105, at 2-3; HAGGARD & NOLAND, *FAMINE*, *supra* note 105, at 2.

¹³¹ See HAGGARD & NOLAND, *FAMINE*, *supra* note 105, at 2.

¹³² See HAGGARD & NOLAND, *HUNGER AND HUMAN RIGHTS*, *supra* note 70, at 3.

¹³³ See *supra* Section I.A.

¹³⁴ See NOLAND, *supra* note 105, at 3; HAGGARD & NOLAND, *HUNGER AND HUMAN RIGHTS*, *supra* note 70, at 12.

Claiming that *juche* could be applied to agriculture was both misleading and destructive. The description was misleading because North Korea relied heavily on the Soviet Union – not only for food imports and food subsidies, but also for other necessities of modern agriculture including fertilizer, insecticides, petroleum, and other fuel.¹³⁵ The philosophy was destructive because it resulted in sacrifices by the population whenever *juche* fell short of reality, which the food supply constantly did.¹³⁶

The agricultural form of *juche* often drove the government to adopt shortsighted, ill-advised policies in futile attempts to reach self-reliance. For example, over the years North Korea attempted to create more arable land, but these attempts instead led to a self-defeating cycle: deforestation led to soil erosion and run-off, which in turn caused silting in rivers and eventually flooding, which then destroyed harvests and further reduced available farmland. Also, failure to rotate crops, intensive re-cropping of land, and too heavy a reliance on fertilizers depleted the soil, leading to even more reductions in available fertile land and a steadily declining agricultural output.¹³⁷

Another factor that exposed much of the population to the threat of hunger was the degree to which the government strictly controlled the distribution of food. Food was distributed through two state-controlled channels. While farm workers were allowed to retain an annual small allowance from the harvest, the rest of the population – approximately 13.5 million people and 62 percent of the population – depended entirely on monthly or biweekly rations from the Public Distribution System (PDS).¹³⁸ In particular, city dwellers lived at the mercy of the rationing system.¹³⁹

The PDS allowed the government to exert further control over its citizens and to discriminate against less-favored and disfavored persons. The food a person received depended on that person's government-determined political status – members of the military, party officials, those in favored occupations, and those perceived as loyal to the government received more food, while those deemed less important or less supportive of the regime received less food.¹⁴⁰ Thus, privileged industrial workers received 900 grams of food a day, while ordinary workers received 700 grams, retired citizens 300 grams, and children between the ages of 2 and 4 and prisoners just received 200 grams.¹⁴¹

¹³⁵ See HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 12-13.

¹³⁶ See *id.* at 13.

¹³⁷ See MARCUS NOLAND, SHERMAN ROBINSON & TAO WANG, *Famine in North Korea: Causes and Cures*, ECONOMIC DEVELOPMENT AND CULTURAL CHANGE (University of Chicago Press, Vol. 49(4), 2001), at 741-57.

¹³⁸ See HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 14.

¹³⁹ See *id.* at 22.

¹⁴⁰ See *id.*

¹⁴¹ See A MATTER OF SURVIVAL, *supra* note 108.

In sum, long before the food crises began in the late 80s and early 90s, North Korea faced significant challenges feeding its own people because it had adopted policies that made the country vulnerable to food insecurity and famine and too inflexible to respond to political, economic, or climatic changes.

c. The “Slow Motion” Famine

The North Korean famine is often described as happening in slow motion.¹⁴² The description emphasizes that the famine could and should have been anticipated by the government. It is equally apt to note that the description implies the government ignored or consciously refused to take steps to prevent the catastrophe, or to end it once it was under way, for instance by rapidly seeking external food supplies. This famine did not result from a sudden natural disaster; it was inflicted by the state on its own people.

As discussed above, the country’s geographic limitations and the government’s futile stress on *juche* self-reliance created an agricultural system highly dependent on importing fuel and other inputs. In the late 1980s, when the Soviet Union was faced with its own economic and monetary problems, it began demanding payment from North Korea for past and current aid – amounts North Korea could not repay.¹⁴³ When the Cold War ended and the Soviet Union collapsed in 1991, trade between the two countries ceased altogether and the North Korean economy collapsed.¹⁴⁴ Without Soviet aid, the flow of inputs to the North Korea agricultural sector ended, and the government proved too inflexible to respond.¹⁴⁵ As a result, food production decreased precipitously.

For a time, China filled the gap left by the Soviet Union’s collapse and propped up North Korea’s food supply with significant aid.¹⁴⁶ By 1993, China was supplying North Korea with a staggering 77 percent of its fuel imports and 68 percent of its food imports.¹⁴⁷ Thus, North Korea replaced dependence on the Soviet Union with dependence on China – with predictably dire consequences. In 1993, China faced its own grain shortfalls and need for hard currency, and it sharply cut aid to North Korea.¹⁴⁸

¹⁴² See *id.* at 3.

¹⁴³ See NOLAND, ROBINSON & WANG, *supra* note 137, at 3; HAGGARD & NOLAND, FAMINE, *supra* note 105, at 4.

¹⁴⁴ See *id.*

¹⁴⁵ See NOLAND, *supra* note 105, at 3; see also HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 14; See NOLAND, ROBINSON & WANG, *supra* note 137, at 5.

¹⁴⁶ See HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 14.

¹⁴⁷ See HAGGARD & NOLAND, FAMINE, *supra* note 105, at 4.

¹⁴⁸ See HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 13-14.

While the cutoff in Chinese aid was the immediate trigger for the famine that followed¹⁴⁹, it did not *cause* the famine. Before Chinese aid ended, North Korean food production was in a steady decline; the disaster that followed was largely the result of the government's failure to respond to this decline.¹⁵⁰ Even the catastrophic flooding that occurred in the second half of 1995 and again in 1996¹⁵¹ did not cause the famine. According to WFP estimates, the country was already facing a food deficit at the time the floods hit.¹⁵²

The famine in the mid-1990s was preceded by several years of food shortages. Available data suggests that death rates began to increase in 1993 and 1994, thus marking the famine's beginning.¹⁵³ In 1994, official North Korean broadcasts admitted that widespread hunger existed, though the government was not forthcoming about the scope of the disaster.¹⁵⁴ In May 1995, the government finally acknowledged food shortages and requested assistance from Japan.¹⁵⁵ As Haggard and Noland conclude, the famine cannot be blamed on the floods or on the loss of aid from the Soviet Union and China. Rather, it must be blamed on government actions and inactions:

There is no question that bad weather made a difficult decision worse, but it is not obvious that the floods were the primary or even proximate cause of the North Korean famine It is essential to place the effect of the weather in the context of two other crucial factors: the secular decline in the North Korean economy, and in the agriculture sector in particular; and the failure of the government to respond to this crisis by maintaining adequate commercial imports or by making clear and timely appeals to the international community. The decline in the economy resulted in part from external shocks, but even more from the misguided effort to pursue a strategy of self-sufficiency, including in food.¹⁵⁶

¹⁴⁹ See *id.* at 14; see also *The Worst of Friends*, TIME MAGAZINE, Jul. 17, 2006 (noting "China's reduction of rice supplies to the North—part of a previous effort to force Pyongyang to negotiate over its nuclear-weapons program—contributed to a devastating famine.")

¹⁵⁰ See HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 13.

¹⁵¹ The North Korean government estimated that the flooding caused 5.4 million people to be displaced and 330,000 hectares of land lost with their harvests destroyed, as well as nearly 2 million tons of grain. A second disastrous flood occurred in 1996. In a cruel irony, the floods were followed by some of the worst droughts in the country's history as well as tidal waves that destroyed additional farm land. See NOLAND, *supra* note 105, at 3; OBERDORFER, *supra* note 5, at 370.

¹⁵² See *id.* at 8.

¹⁵³ See NOLAND, *supra* note 105, at 5.

¹⁵⁴ See NOLAND, *supra* note 105, at 5.

¹⁵⁵ See HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 14; NOLAND, *supra* note 105, at 3.

¹⁵⁶ HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 14.

To summarize, the primary causes of the famine included (1) a misguided and futile attempt to force self-reliance in agriculture on a country that is incapable of reliably producing enough food to feed 22 million people; (2) the creation of an agricultural system highly dependent on fuel, fertilizer, and other inputs, subsidized by outside aid; (3) a long-term decline in the economy in general; (4) the loss of trade and subsidies from the Soviet Union and later China; and, most importantly, (5) the government's failure to respond to these circumstances.

d. The Famine

Due to North Korea's insularity and self-imposed isolation, the conditions that existed as the famine unfolded are still difficult to assess. The only sources are refugees and those few scholars and aid workers that were allowed limited access to the country during and after the famine's height. Even those limited sources provide a shocking story. In December 1995, the Food and Agriculture Organization (FAO) and WFP warned that 2.1 million children and 500,000 pregnant women faced immediate starvation, and millions more could face the same the following summer.¹⁵⁷ In January 1996, the International Committee of the Red Cross issued a statement that 130,000 people were on the brink of starvation, and 500,000 more would be in the same position come the fall harvest.¹⁵⁸

The government had created a system in which 62 percent of the population – 13.5 million people – depended on government rations for basic subsistence.¹⁵⁹ In response to problems with procuring food, however, the government proceeded to continually reduce rations. With the shut-off of Soviet aid in 1987, daily grain rations were reduced for the average recipient by 10 percent.¹⁶⁰ In 1992, rations from the PDS were cut an additional 10 percent, and these rations were not distributed to everyone.¹⁶¹

Then, in 1994, the PDS system began to collapse altogether, ultimately becoming meaningless. Rations were cut once again, this time from 450 to 400 grams a day, although there were accounts from some refugees that many people actually were receiving less than 150 grams from the PDS. Other refugees reported that in many provinces there were no PDS rations being distributed at all.¹⁶²

Furthermore, the government completely eliminated PDS shipments to four mountainous northeast provinces (North and South Hamgyong, Yanggang,

¹⁵⁷ See NOLAND, ROBINSON & WANG, *supra* note 137, at 4.

¹⁵⁸ See *id.*

¹⁵⁹ See NOLAND, ROBINSON & WANG, *supra* note 137, at 6.

¹⁶⁰ See NOLAND, *supra* note 105, at 9.

¹⁶¹ See *id.* at 9-10.

¹⁶² See *id.* at 10; HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 14.

and Kangwon), and prohibited shipments from other provinces to these areas.¹⁶³ Residents in these mountainous areas were highly dependent on the PDS, and with the collapse of the industries that had previously employed them, they had little or no ability to barter or purchase food. It is likely that the famine started in these mountainous Eastern provinces at that time, a year before it spread to the rest of the country.¹⁶⁴ By 1997, the government had cut PDS rations to a paltry 128 grams a day, and the PDS system may have been feeding less than 10 percent of the population.¹⁶⁵

Farmers themselves, though capable to a limited extent of coping with the crises, were not immune from the government's measures to tighten and control food supplies. The government reduced the annual allotment that farmers could legally hold back, from 167 to 107 kilograms per person. In addition, the government began seizing grain stores. Predictably, farmers responded by hiding and hoarding grain and cultivating hidden plots, thereby further diverting production from the PDS.¹⁶⁶

Apart from the reduction in PDS rations, the government's other responses were often crude, cruel, and ineffective. For example, the North Korean government encouraged the use of "alternative foods," such as small bricks whose only ingredients were bark, leaves, and grass. This product had no nutritional value, and it caused dysentery, diarrhea, and internal bleeding – all potentially fatal conditions.¹⁶⁷

Furthermore, for a period of time, the North Korean government "continued to criminalize many of the very coping strategies for the famine it had forced on its own population."¹⁶⁸ For example, the right to free movement was heavily curtailed and regulated. This inhibited and at times prevented people from searching for food alone and from relocating to areas experiencing less acute food shortages.¹⁶⁹ Additionally, the private production and trading of food remained illegal. The government subsequently relaxed some of these policies to a minor extent – or at least tolerated their breach – but not soon enough to prevent the tragedy that Pyongyang's policies had now inflicted on its own people.

e. The Famine's Impact

Assessing the impact of the famine and food shortages is made difficult by the lack of information from the reclusive North Korean government and by the lack of independent and first-hand information available to researchers, scholars, and other independent observers.

¹⁶³ See NATSIOS, *supra* note 106, at 5.

¹⁶⁴ See *id.*

¹⁶⁵ See NOLAND, *supra* note 105, at 10.

¹⁶⁶ See HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 18.

¹⁶⁷ See *North Korean Famine In Detail*, *supra* note 109.

¹⁶⁸ HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 20.

¹⁶⁹ See *id.*

Mortality rates are just one measure of the tragedy, and they vary widely in this case. But by any estimate, the rates are grim and shocking. At the low end are estimates by Pyongyang itself. The government has acknowledged that 220,000 North Koreans died of starvation between 1995 and 1998, the height of the catastrophe.¹⁷⁰ At the other end of the spectrum, Hwang Jong Yup, the highest-ranking defector from North Korea, has stated that North Korean agricultural officials estimated internally to the government itself that 2.5 million people perished between 1995 and 1997, including 500,000 in 1995, one million in 1996, and another one million in 1997.¹⁷¹ Andrew Natsios's review of several independent studies concludes that there is significant evidence to support Hwang Jong Yup's estimates.¹⁷² There have been plausible, fact-based estimates as high as 3.5 million deaths, although these estimates are regarded with skepticism by several scholars.¹⁷³

Between the extremes, there is a general consensus that in those years as many as one million people, and possibly many more, lost their lives to famine and famine-related diseases, representing three to five percent of the population.¹⁷⁴ Thus, one need not accept the highest mortality estimates and yet still conclude, based on conservative estimates, that the famine was a terrible human tragedy. The mortality rate is even more shocking in an industrial society with the resources and options that would be available to the government if it were willing to pursue different policies and priorities.

Fatalities, however, are only one statistical measure of the tragedy. The human misery in North Korea during the famine had many terrible dimensions. Death from starvation does not happen overnight, or even over a period of weeks. It happens only after months of malnutrition, pain, disease, and suffering. Even survivors endured severe hunger, malnutrition, gastrointestinal problems, and disease – not to mention mental illness and despair that can result from the anxiety of fighting starvation.

Apart from famine-related diseases, it is likely that thousands of others perished from conditions they might have survived if their bodies had not been ravaged by starvation. For example, many city dwellers may have died when they fled the cities – in some cases voluntarily, in others involuntarily – traveling on foot and exposed to the elements, including the harsh North Korean winter. Even when the famine subsided into the permanent food crisis that still plagues North Koreans today, the population is still so weakened by malnutrition that minor diseases, such as influenza, can be deadly to many.

¹⁷⁰ See A MATTER OF SURVIVAL, *supra* note 108, at 9.

¹⁷¹ See NATSIOS, *supra* note 106, at 6-8.

¹⁷² See *id.*

¹⁷³ See Daniel Goodkind & Lorraine West, *The North Korean Famine and Its Demographic Impact*, POPULATION & DEV. REV. (Vol. 27, No. 2), at 219-38; HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 18; NOLAND, *supra* note 105, at 12-13.

¹⁷⁴ See NOLAND, *supra* note 105, at 11-13.

Nor were the effects of the famine temporary and limited to the 1995 to 1998 timeframe. For example, a study of 1,800 children by researchers from the WFP, UN Children's Fund (UNICEF), and European Union (EU) after the famine found that, because of long-term food shortages, a staggering 62 percent of children under 7 suffered from stunted growth.¹⁷⁵ Illustrating this phenomenon, published accounts by aid workers and foreign residents of Pyongyang in 1998 said children who were 7 years old looked 3 to 4 years old. The same WFP survey found that 30 percent of toddlers suffered from moderate to severe malnutrition.¹⁷⁶ Because of the critical nature of these ages for normal human development, the malnutrition in many children is likely to lead to permanent, lifelong mental impairment.¹⁷⁷

f. International Aid: Hindrances, Diversion, and Misuse

Today, a well-developed system of international institutions exists that regularly mobilizes to respond to food crises throughout the world – including the UN's World Food Programme. Once alerted, these institutions have a proven record of effective intervention.

Nevertheless, the North Korean government failed to take timely and full advantage of available international aid. The North Korean economy collapsed before 1990. Food production plummeted, but the government did not act. Rather than seeking to expand commercial imports or request emergency assistance, it chose to do nothing.¹⁷⁸

As the crisis deepened and information about the ongoing catastrophe leaked out, North Korea ultimately requested emergency aid from Japan and eventually South Korea. These countries began responding in June 1995.¹⁷⁹ Later, the United States and EU nations also contributed massive amounts of assistance, in the form of both food and agricultural aid. Additional aid also came from NGOs such as the Red Cross, and through the WFP.

Until 1994, China had been shipping North Korea 700,000 to 800,000 metric tons (MT) of rice a year¹⁸⁰, but when North Korea proved unable – or unwilling – to pay for the shipments, they largely stopped. In 1996, however, China responded to the crisis with a shipment of 100,000 MT. Apart from humanitarian reasons, China became concerned about the flow of refugees over its borders searching for food and attempting to escape the famine

¹⁷⁵ See Elisabeth Rosenthal, *In North Korean Hunger, Legacy Is Stunted Children*, NEW YORK TIMES, Dec. 10, 1998.

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

¹⁷⁸ See STEPHAN HAGGARD & MARCUS NOLAND, *Hungry for Human Rights*, WASHINGTON POST, Sept. 28, 2005.

¹⁷⁹ See HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 14-15.

¹⁸⁰ The size of the Chinese shipments is further evidence of the scale of the food deficit that North Korea faced before the onset of the food crises and then famine.

altogether. There are unconfirmed reports that China later agreed to resume shipments of 500,000 MT a year.¹⁸¹

According to the WFP, food imports during the famine from all sources totaled as follows:

1995 - 1996	903,374 MT
1996 - 1997	1,171,665 MT
1997 - 1998	1,321,528 MT ¹⁸²

Despite this massive aid, as many as one million people, and perhaps many more, died. Natsios found three explanations for this outcome. First, the government responded slowly to the crisis and aid was delivered at times that did not match the famine's peak. Second, the government shut down the PDS after a poor harvest in 1996. Third, the government actively prevented aid from reaching the four "triaged" provinces in the North, among the most dependent on the PDS and food imports, thereby condemning residents there to the worst circumstances.¹⁸³

When aid did arrive, North Korea interfered with attempts to distribute food assistance that were nondiscriminatory and transparent. The government ignored commonly accepted norms for distribution of aid, which are designed to ensure that the aid reaches those who need it most.¹⁸⁴ Instead, the government pursued several policies designed to control aid distribution, hinder effective monitoring, and create opportunities for manipulating and diverting aid for the government's purposes:

- The government severely limited the number of WFP and NGO workers allowed into the country to deliver the aid, hampering the ability of workers to assess the extent of the famine, what help was needed, and where.¹⁸⁵
- The government prohibited the WFP and NGOs from using Korean speakers and required the use of government interpreters, further obstructing independent information collection and assessments.¹⁸⁶

¹⁸¹ See NOLAND, *supra* note 105, at 11-12

¹⁸² See NATSIOS, *supra* note 106, at 8.

¹⁸³ See *id.* at 8. See also HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 17.

¹⁸⁴ See HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 23-29.

¹⁸⁵ See *id.* at 25-26.

¹⁸⁶ See *id.*

- The government refused to allow international organizations, such as the WFP and NGOs, to set up independent, transparent distribution networks that could ensure the nondiscriminatory distribution of food to all parts of the country and to all members of society on a fair basis according to need. Instead, foreign aid organizations were required to use the PDS network controlled by government and party officials, subjecting the aid to pressures to reallocate and redistribute it and to corruption and theft. The opportunities for “leakage” and diversion were significant.¹⁸⁷
- In addition to hindering the fair distribution of aid, the government refused to allow aid to reach many counties, for reasons that are not yet understood. Even today, aid workers are prohibited from visiting 42 of 203 counties in the country. WFP has been unwilling to provide food aid to those counties without the transparency and monitoring of distribution that it demands of all food aid recipients.¹⁸⁸
- The government restricted the movements of aid workers and required the use of government “handlers” or escorts.¹⁸⁹

Due to the lack of transparency and effective monitoring, there were widespread reports that significant amounts of foreign aid were not reaching the most deserving recipients. Instead, aid was diverted to the same privileged persons the party favored under the PDS, including the military, party officials, and party loyalists.¹⁹⁰ One South Korean NGO estimated that as much as 50 percent of foreign aid was diverted to non-deserving groups, including the military.¹⁹¹

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

¹⁸⁹ *See id.*

¹⁹⁰ Haggard and Noland have questioned whether outright, direct diversion to privileged persons, including the military, occurred on a large scale. They argue that the military and other privileged persons had the means to purchase and acquire food on their own, and presumably they were given the first portions of the aid from China and South Korea, which was given with no monitoring or commitment that the aid be distributed on the basis of need rather than class. Instead, Haggard and Noland have suggested that the diversion that occurred was of WFP and NGO aid into illegal markets, where those diverting the aid could sell it at a profit themselves. Of course, those with sufficient money to make such purchases were not the most needy or vulnerable. *See id.* at 24.

¹⁹¹ *See North Korea Today* (Good Friends Center for Peace, Human Rights, and Refugees, Jan. 2005).

More disturbingly, Pyongyang took advantage of the foreign aid to divert government revenue away from food assistance and used the savings to fund the government's other priorities, such as military weapons programs.¹⁹² As aid began arriving during the famine, North Korea reduced its food imports in a manner disproportionate to the decline in other imports; once the economy was stabilized and began to recover, overall imports began to increase, but Pyongyang kept food imports at their lower levels.¹⁹³

As one illustration, as it was cutting its purchases of food imports in 1999, the North Korean government bought 40 Mig-21 fighters and eight military helicopters from Kazakhstan.¹⁹⁴ Further, the government continued to pursue its expensive nuclear programs during the famine, using resources that should have been used to feed its people. Simply put, even at the height of the famine, the government demonstrated that it prioritizes its military over the basic survival needs of its population.

g. The Continuing Food Crisis

While the acute famine has passed, North Korea remains locked in a perpetual food crisis – one the government refuses to cure. According to the WFP and FAO, North Korean harvests have improved in recent years. But agricultural output has never been sufficient to feed the population, and the country suffers annual widespread food shortages.¹⁹⁵ For 2006, the WFP and FAO estimated that North Korea will need 5.3 million tons of grain to feed its people, while other experts have estimated that as much as 6.5 million tons of grain is required. North Korea, however, is only expected to produce about 3.825 million tons, leaving a deficit of between 1.475 and 2.675 million tons.¹⁹⁶ It is important to note that these estimates were made before the July 2006 flooding that severely damaged arable land and harvests, further aggravating an already fragile state of affairs.¹⁹⁷

Malnutrition rates remain high, particularly among children. The most recent large-scale survey, conducted in 2004 by the WFP and UNICEF, found that 37 percent of children under 6 (*i.e.*, born after the height of the famine)

¹⁹² See HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 16-17.

¹⁹³ See generally HAGGARD & NOLAND, FAMINE, *supra* note 105.

¹⁹⁴ See *id.*

¹⁹⁵ See World Food Programme, World Hunger – Korea (DPR), available at http://www.wfp.org/country_brief/indexcountry.asp?country=408#Facts%20&%20Figures; Special Report – FAO/WCP Crop and Food Supply Assessment – Mission to the DPRK (November 22, 2004).

¹⁹⁶ See A MATTER OF SURVIVAL, *supra* note 108, at 8. The estimates of North Korean grain production include an estimated loss of 15 percent of production due to inefficiencies in the harvesting, collection, and distribution of the grain, such as transportation and storage problems.

¹⁹⁷ See Herskovitz, *supra* note 108.

were stunted, 12 percent were severely stunted, 23 percent underweight, 8.1 percent severely underweight, 7 percent were wasted, and nearly 2 percent severely wasted. The same survey found that one-third of mothers with young children were malnourished and 35 percent were anemic, foreshadowing additional problems with future children.¹⁹⁸ According to UNICEF, such malnourished children are much more likely to die as a result of common childhood diseases. Additionally, malnourished children are more likely to have permanent disabilities, weakened immune systems, and impaired learning abilities.¹⁹⁹ According to Amnesty International, over 60 percent of North Korean children under 5 suffer from acute respiratory diseases and over 20 percent from diarrhea.²⁰⁰

Despite these systemic problems in the years since the famine subsided, the government has not attempted to overhaul its economy in a way that would successfully end 50 years of food insecurity and annual food shortages. In fact, the actions that have been taken by the North Korean government have only made the food crisis worse. Driven by necessity, North Koreans began to privately grow, trade, and barter for food, and small markets for these activities developed.²⁰¹ In the beginning, the government tolerated these coping mechanisms by legalizing some of these activities.²⁰² As a result, private markets have been the primary mechanism for distributing food in North Korea in recent years, while the PDS has been used primarily to distribute (and control) outside aid.²⁰³

These imperfect coping mechanisms, however, have been short lived. In August 2005, North Korea informed the United Nations that beginning in 2006, it would no longer accept WFP “humanitarian assistance,” but would

¹⁹⁸ See *North Korea Famine In Detail*, *supra* note 109; HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 30.

¹⁹⁹ See UNITED NATIONS CHILDREN’S FUND, THE SILENT EMERGENCY (1998), *available at* <http://www.unicef.org/sowc98/silent.htm>.

²⁰⁰ See STARVED OF RIGHTS: HUMAN RIGHTS AND THE FOOD CRISIS IN THE DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA (Amnesty International, 2004), at 25.

²⁰¹ See HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 20.

²⁰² See A MATTER OF SURVIVAL, *supra* note 108, at 14-15.

²⁰³ See HAGGARD & NOLAND, FAMINE, *supra* note 105, at 46.

instead accept “development cooperation.”²⁰⁴ A short while later, the government instructed officials to reinstitute the PDS. At the same time, the government also once again banned private trading in grain. These steps alone make it very difficult for individuals to obtain food outside of government distribution.²⁰⁵

Compounding these self-imposed challenges, North Korea rejected aid from the EU in November 2005 after the EU proposed a UN resolution on human rights in North Korea.²⁰⁶ Objecting to WFP monitoring requirements – specifically, the ten expatriate staff in Pyongyang conducting monitoring trips²⁰⁷ – North Korea shut down WFP operations completely in December 2005. Ultimately, the WFP renegotiated its program under tight North Korean restrictions and, as of January 2006, the new scaled-down operations were estimated to be feeding fewer than half of the targeted 6.4 million North Koreans.²⁰⁸

Human Rights Watch and other observers have warned that these measures are “a recipe for disaster.”²⁰⁹ Recent news reports suggest that six months after the authorities announced they were fully reinstating the PDS, North Koreans in many parts of the country were not receiving rations, and that others were receiving rations that are insufficient to maintain basic health.²¹⁰

h. Summary

North Korea cannot feed itself, and it is unrealistic for the country to remain dependent on infusions of outside aid. North Korea must implement economic changes to make it possible for the country to generate food security. At a minimum, the North Korean economy needs to build – and in some cases rebuild – sufficient industrial and manufacturing capacity to generate

²⁰⁴ See Mark E. Manyin, *U.S. Assistance to North Korea: Fact Sheet* (Congressional Research Service, 2006), at 3. The distinction between humanitarian and development assistance is important. Under U.S. law, “development” or “non-emergency” food aid is subject to some conditions that could be used by the executive branch or Congress as a justification for reducing or cutting off donations. See *id.* The Foreign Operations Appropriations Act § 536b (FOA Act) waives restrictions for non-emergency food assistance imposed under U.S. law. The FOA Act, however, contains two exceptions that will not be waived: (a) statutes that prohibit aid to “countries” on the U.S. list of state sponsors of terrorism; and (b) statutes that prohibit aid to a “government” that “violates internationally recognized norms of human rights.” These prohibitions are contained in the Foreign Assistance Act of 1961, §§ 620A and 116, respectively. Both apply to North Korea. Moreover, since 2002, over 90 percent of the food aid to North Korea has been provided under Title II of the Agricultural Trade Development and Assistance Act of 1954, as amended (P.L. 83-480, also known as P.L. 480). Congress directly appropriates P.L. 480 and therefore could, although it rarely does, direct how the food should or should not be disbursed. See *id.* Assistance deemed to be “humanitarian,” however, generally is exempt from sanctions. See *id.*

²⁰⁵ See A MATTER OF SURVIVAL, *supra* note 108, at 19-23.

²⁰⁶ See Manyin, *supra* note 204.

²⁰⁷ See *id.* at 4. At its peak, WFP had 50 expatriate staff in five regional offices in North Korea.

²⁰⁸ See *id.*

²⁰⁹ *North Korea: Policy Changes May Foster New Hunger* (Human Rights Watch, May 4, 2006).

²¹⁰ See A MATTER OF SURVIVAL, *supra* note 108, at 3.

exports that, in turn, would generate the currency to pay for food imports and for the agricultural inputs necessary for North Korea's own agricultural production.²¹¹ This could be accomplished through reform models, like the "Chinese model," a market economy, or other approaches.²¹² Furthermore, North Korea must reduce its investments in the military and WMD programs and use that revenue to create an economy capable of sustaining and protecting its citizens.

In sum, the hunger and suffering of the North Korean people during the famine of the 1990s remains widespread today because of the government's unwillingness to address the following fundamental causes of the country's chronic food insecurity:

- Fifty years of failed governmental policies, an insistence on the ideology of *juche*, and a disproportionate use of resources for the military have resulted in repeated food shortages and a fragile, inefficient agricultural system that has left the North Korean people vulnerable to famine.
- Those same failed policies made North Korea overly dependent on outside aid both for the tools required for agriculture – fertilizers and fuels – and for food itself.
- When outside aid collapsed, North Korea failed to react with appropriate economic changes, additional commercial food imports, and timely requests for emergency assistance.
- When North Korea finally requested aid, (i) it prevented that aid from reaching significant areas of the country, including the most vulnerable; (ii) it hindered efforts to ensure that aid reached those who needed it most; (iii) it diverted significant aid to the military, party loyalists, and other privileged persons; and (iv) it used aid to reduce commercial imports of food and divert revenue to other priorities, such as WMD programs.
- The food crisis continues, and North Korea likely stands on the brink of another famine. Nevertheless, the government refuses to reform its policies to bring food security to its people. Instead, it relies on significant outside food aid, allowing the government to continue devoting disproportionate resources to the military and its WMD programs.

²¹¹ See HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 34; NOLAND, *supra* note 105, at 26-27.

²¹² See HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 34.

- Recently, the North Korean government instituted a number of steps that increase the level of food insecurity, rather than reduce it, by banning private markets and thereby reducing the opportunity for citizens to acquire food outside the PDS.

2. Treatment of Political Prisoners

Political dissent in North Korea is not tolerated. Real and alleged political offenses are investigated and punished by the State Security Department – an autonomous agency entrusted with carrying out counterintelligence and internal security functions through its secret police force.²¹³ The department’s mandate includes locating and punishing those accused of slandering the political leadership and those engaged in other antigovernment and dissident activities.²¹⁴

Those accused of political offenses are neither arrested nor informed of the offense they are accused of committing by the State Security Department. Instead, the accused is abducted, placed in an interrogation facility, and sometimes tortured until he or she “confesses” to the crime.²¹⁵ Once deemed guilty of a political crime, the criminal is punished in one of two ways – he or she is either executed or incarcerated in a political prison camp, called *kwan-li-so*.²¹⁶

An estimated 200,000 people are now imprisoned in North Korea’s various prison camps.²¹⁷ It is believed that more than 400,000 prisoners have died in these camps over the past 30 years.²¹⁸ This section presents information about: (a) the legal context for North Korea’s obligations in its treatment of political prisoners; (b) the execution of political prisoners; and (c) abuse and maltreatment in the *kwan-li-so*.

a. Legal Context: Rights of Political Prisoners

As described previously, North Korea is a state party to the ICCPR.²¹⁹ As a state party, North Korea “undertakes to respect and ensure all individuals . . . the rights recognized in the present Covenant” and “to take the necessary steps . . . to adopt such laws or other measures as may be necessary to give effect to [these] rights.”²²⁰

²¹³ See *North Korea: The Public Security Apparatus* (Library of Congress, Jun. 1993).

²¹⁴ See *id.*

²¹⁵ See DAVID HAWK, *THE HIDDEN GULAG: EXPOSING NORTH KOREA’S PRISON CAMPS* (U.S. Committee for Human Rights in North Korea, 2003), at 24.

²¹⁶ See *id.*

²¹⁷ See *id.* at 24, fn. 16.

²¹⁸ See CHOI SUNG-CHOL, *THE INTERNATIONAL COMMUNITY AND HUMAN RIGHTS IN NORTH KOREA* (Center for the Advancement of North Korean Human Rights, 1996), at 11. This estimate covers the period of 1972-1995.

²¹⁹ See INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976; see also *supra* note 99.

²²⁰ *Id.* at Art. 2(1)-(2).

Specifically, as documented below and in David Hawk's landmark report *The Hidden Gulag*²²¹, there are systematic and widespread violations of the following provisions of the ICCPR:

- Article 6 (right to life);
- Article 7 (right not to be subjected to torture or to cruel, inhuman, or degrading treatment);
- Article 8 (right not to be held in slavery or servitude);
- Article 9 (right not to be held in arbitrary detention);
- Article 10 (right for all persons deprived of liberty to be treated with humanity);
- Article 12 (right to free movement);
- Article 14 (right to due process and elements thereof including right to fair and public hearing by independent and impartial tribunal, right to counsel, right to presumption of innocence, right to appeal conviction);
- Article 16 (right to recognition as a person)
- Article 17 (right not to be subjected to arbitrary interference with privacy, family, home, or correspondence);
- Article 18 (right to freedom of thought, conscience, and religion);
- Article 19 (right to hold opinions without interference);
- Article 21 (right to peaceful assembly);
- Article 22 (right to freedom of association); and
- Article 26 (right to equal protection and non-discrimination, including on grounds of political or other opinion, birth, or other status).²²²

North Korea revised its criminal code most recently in 2004. The revised code stiffens penalties for anti-state crimes but reduces penalties for those leaving the country for non-political reasons (*e.g.*, economic migrants).²²³

²²¹ See HAWK, *supra* note 215.

²²² See ICCPR, *supra* note 219, at Art. 6-10, 12, 14, 17-19, 21-22, and 26.

²²³ *NK Adopts Market-Friendly Criminal Law*, KOREA TIMES, Aug. 8, 2004.

b. The Execution of Political Prisoners

North Korean citizens have been executed for a broad array of political crimes, including crimes that would not ordinarily be considered “political.”²²⁴ For example, individuals caught fleeing North Korea have been executed for engaging in “treason against the fatherland.” Members of an organized crime syndicate were executed because they shouted the name of their boss. This act was seen as showing respect for their boss, which was deemed to be a political crime. Being in possession of information regarding South Korea is also an act punishable by execution. One individual was executed for being in possession of a gun and a South Korean leaflet. Similarly, a sergeant in the army was executed for fleeing his barracks after reading a South Korean leaflet.²²⁵

Executions are generally conducted in public places to serve as examples to other North Korean citizens. The execution procedure begins with the beating of the prisoner to ensure that resistance to the sentence will be minimal.²²⁶ Once at the execution site, the accused’s personal background is read to the crowd and the crime is described. At that point, a “judge” from the People’s Court sentences the “criminal” to death and the execution takes place immediately, although sometimes the accused is removed and executed elsewhere.²²⁷ North Korean law states that a prosecutor must be present at each execution; however, compliance with this requirement is rare. Similarly, while North Korean law requires the death sentence to be carried out by firing squad, some executions are done by hanging. A prisoner’s family members often are present at the execution.²²⁸

Public executions have been carried out at such locations as schools or farms in the presence of large crowds assembled by advance public notice. As information about these executions began to be reported outside of North Korea, however, the executions have been taking place without advance notice, in marketplaces and other crowded locations, to reduce the chances that the execution will be filmed or videotaped and the evidence then smuggled abroad.²²⁹ Public executions have been reported as recently as September 20, 2006.²³⁰

²²⁴ North Korea revised its penal code in 2004 and reduced the number of crimes punishable by the death penalty from 33 to five. According to the revised penal code, the five acts punishable by death are conspiracy to overturn the state, treason against the fatherland, terrorism, treason against the people and premeditated murder. See *White Paper on Human Rights, supra* note 103, at 25.

²²⁵ Similarly, seemingly simple economic crimes are also punishable by execution. For example, in 1997, a proclamation was issued stating that anyone caught stealing grain from agricultural cooperatives would be punished by execution. See *id.* at 29-31.

²²⁶ See *id.* at 33.

²²⁷ See *id.* at 34.

²²⁸ See *id.*

²²⁹ See *id.*

²³⁰ See *Exclusive: Scene of a Public Execution*, DAILY NK, Sept. 20, 2006.

A 1997 Amnesty International media advisory stated that the organization had received reports of at least 23 public executions in North Korea occurring between 1970 and 1992, but it has noted that public executions may be more widespread.²³¹ North Korea itself reported that in 1998 there were six death sentences and five executions, in 1999 there were four death sentences and four executions, and in 2000 there were five death sentences and four executions.²³² Political prisoners who are not executed are ordinarily sent away for life or for lengthy sentences in the political prison camps.

c. Life in the Gulag

North Korea has been operating prison camps since 1947.²³³ The first prisoners included landowners, religious persons, and those who supported the Japanese in its occupation of Korea.²³⁴ In the 1950s, Kim Il Sung's political opponents became the majority of the inmates of the prison camps.²³⁵ Kim Il Sung decreed that these people were so dangerously deluded in their political beliefs that they, along with their families, should be sent to live in rural mountain areas where they could not "contaminate" the rest of the North Korean population. Additional camps were created to house Kim Il Sung's many real or imagined political enemies and their families during the frequent purges that characterized the late 1960s.²³⁶

At the height of the regime's oppression, even statements that did not criticize the regime constituted ideological crimes. For example, expressing exasperation with the difficulty of life generally, even without attributing that difficulty to Kim Jong Il or the regime, was a "verbal reactionary" crime punishable with *kwan-li-so* imprisonment.²³⁷ Similarly, simply singing a South Korean song constituted an act that warranted a prison term.²³⁸

Once Kim Jong Il replaced his father, more political prison camps were needed to house the new leader's detractors.²³⁹ By 1982, the government had sentenced over 100,000 political undesirables to permanent hard labor in North Korea's expanding prison-camp network. The situation worsened when Kim Jong Il began to fear that the Communist collapse and political reform that characterized Eastern Europe in the late 1980s would spread and challenge his rule.

²³¹ See *Public Executions in North Korea* (Amnesty International, Jul. 1997).

²³² See *White Paper on Human Rights*, *supra* note 103, at 27.

²³³ See *id.* at 232.

²³⁴ See *id.*

²³⁵ See *id.*

²³⁶ See *id.*

²³⁷ *Id.* at 245.

²³⁸ See HAWK, *supra* note 215, at 46.

²³⁹ See *id.* at 234.

The number of political prisons or *kwan-li-so* has changed over time. At one point, there were believed to be 12 *kwan-li-so* in existence. Currently, it is believed that several of the camps close to the Chinese border have been closed and that there are now 6 *kwan-li-so*.²⁴⁰ The remaining camps are believed to be No. 14 at Kaechon, South Pyongan Province; No. 15 at Yodok, South Hamgyong Province; No. 16 at Hwasong, North Hamgyong Province; No. 18 at Bukchang, South Pyongan Province No. 22 at Hoeryong, North Hamgyong Province; and No. 25 at Chongjin, North Hamgyong Province.²⁴¹

Although each camp is somewhat unique, they do share some common features. They generally are developed in valleys between high mountains to make escape more difficult. Because the camps contain large numbers of prisoners – from 5,000 to 50,000 people – they are divided into separate sections or “village” compounds. Because of North Korea’s “guilt by association” system, families of the presumed offender are also incarcerated.

A US House International Relations Committee Report notes that the “terrible human rights situation inside North Korea . . . has remained largely hidden from the outside world until the past several years.”²⁴² While anecdotal evidence about North Korea’s prison camps has recently begun to filter out of North Korea, most of that information remains unverifiable. Human rights organizations such as Amnesty International and Human Rights Watch continue to report on the North Korean situation but acknowledge their inability to verify much of the information they relay.²⁴³ The nationwide famine in the mid-1990s, however, caused an unprecedented number of North Koreans to defect. These defectors allowed the international community to hear of the government’s human rights abuses from witnesses. Through this ever expanding group of sources, much more is known today than ever before about the conditions in North Korea’s prison camp system.

The remainder of this section details the conditions in the *kwan-li-so* including (1) incarceration of families of political prisoners; (2) starvation of prisoners; (3) death by labor; (4) use of torture to interrogate and punish; (5) executions of political prisoners; and (6) forced abortions and infanticides.

(1) The Incarceration of the Families of Political Prisoners

In addition to taking the accused individual, the State Security Department also will incarcerate up to three generations of the accused’s family, including mother, father, sisters, brothers, children, and grandchildren. This practice is

²⁴⁰ See *id.* at 26.

²⁴¹ See *White Paper on Human Rights*, *supra* note 103, at 233; HAWK, *supra* note 215, at 19 (satellite images of these camps can be found at 89-117).

²⁴² *The Status of North Korean Asylum Seekers and the U.S. Government Policy Towards Them* (U.S. Department of State, Mar. 11, 2005), *quoting* Report No. 108-478.

²⁴³ See *Democratic People’s Republic of Korea (North Korea): Conditions of Detention* (Amnesty International, Jun. 1999).

believed to have begun with Kim Il Sung's 1972 proclamation "[f]actionalists or enemies of class, whoever they are, their seed must be eliminated through three generations." Like the accused political prisoner, the family members are not granted a trial – they are picked up and transported to a *kwan-li-so* without being provided with any information as to when, if ever, they will be released.²⁴⁴

One defector, Kang Chol-Hwan, who chronicles his ten years in *kwan-li-so* No. 15 (also known as Yodok) in his memoir *The Aquariums of Pyongyang: Ten Years in the North Korean Gulag*²⁴⁵, reported that his grandfather disappeared one day without any explanation or warning. When Kang's grandmother asked her husband's coworkers where he was, they first informed her that he had gone on an urgent business trip. The police told her that they did not know anything about his whereabouts. Weeks later, agents came to Kang's father's home and informed the family that Kang's grandfather had committed a "crime of high treason."²⁴⁶ Because of this unspecified crime, Kang's father, grandmother, uncle, and sister were all immediately taken into custody without being informed where they were going. The family was driven directly to Yodok. On arriving, the family was not told how long they would be imprisoned.

Years later, through a prisoner who had been transferred from another prison camp, the family learned that Kang's grandfather had been arrested and placed in a different prison camp. The family never saw Kang's grandfather again. After ten years of imprisonment under extremely harsh conditions, Kang's family was released unexpectedly from Yodok with no explanation. Kang suspects that the family's release was due to his grandfather's death.

Kang's mother's fate also demonstrates the total control the North Korean government wields over its citizens. Kang's mother was not arrested because her father had been an undercover agent for the Pyongyang regime in Japan and died in Japanese custody. Because of this, the family was considered a "heroic family." She was not sent to Yodok with her husband and children, but she was forced to divorce Kang's father and sever all ties to the family of "traitors" that had been placed in the prison camp.²⁴⁷

(2) Starvation of Prisoners

Once in the camps, political prisoners and their families face numerous impediments to their survival. The first such impediment is that prisoners are provided only "starvation-level" food rations, even though they are forced to

²⁴⁴ HAWK, *supra* note 215, at 25.

²⁴⁵ KANG CHOL-HWAN & PIERRE RIGOULOT, *AQUARIUMS OF PYONGYANG* (Basic Books, 2001).

²⁴⁶ *Id.* at 39.

²⁴⁷ *Id.* at 43.

engage in long and physically demanding labor.²⁴⁸ This combination often turns the labor camps into death camps. A former guard who defected from North Korea expressed his shock at seeing the prisoners for the first time – he said the prisoners looked like “walking skeletons, dwarfs and cripples in rags.”²⁴⁹

The insufficient food rations cannot be attributed to a lack of food, because the below-subsistence rations predated North Korea’s famine of the 1990s. Instead, starving the prisoners helps control them. For example, prisoners are given strict and often unrealistic work quotas each day.²⁵⁰ Failure to meet one’s quota results in reduced food rations. This threat leads prisoners to work as hard as they can to avoid food reductions. As a result of insufficient food rations, death and disease caused by malnutrition is common in the camps. There are numerous stories from defectors documenting terrible conditions facing prisoners in the camps:

- Kang Chol-Hwan reported that in his “village” in the prison, there were 2,000 to 3,000 people. A number of them died each year from malnutrition and disease, mainly from severe diarrhea causing dehydration.²⁵¹
- Ahn Myong Chol, a former prison guard reported that at *kwan-li-so* No. 22, which housed approximately 50,000 prisoners, 1,500 to 2,000 prisoners died from malnutrition each year. He stated that most of the dead were children.²⁵²
- A former prisoner at Yodok, Kim Tae Jin, explained that prisoners were supposed to be allotted 700 grams (25 ounces) of corn, rice, and beans each day. The guards, however, would eat the rice and beans, leaving only 300 grams (11 ounces) of corn per prisoner per day.²⁵³ To stay alive, prisoners report that they would scrounge for food in any place they could find something edible.²⁵⁴
- Another defector, the only person who claims to have survived the total control zone of *kwan-li-so* No. 22, describes the starvation rations of 20 grains of corn per person that were all that was given workers to sustain them in 12 hours of labor-intensive work in the mines. To stave off

²⁴⁸ HAWK, *supra* note 215, at 11.

²⁴⁹ *Id.* at 38.

²⁵⁰ See KANG & RIGOULOT, *supra* note 245, at 9.

²⁵¹ See KANG & RIGOULOT, *supra* note 245, at 86.

²⁵² See *id.* at 39.

²⁵³ See HAWK, *supra* note 215, at 32.

²⁵⁴ See *id.*

death, prisoners dug through cow dung in search of undigested grain. One prisoner who was caught doing so was forced to eat maggot-covered human feces in front of the whole camp.²⁵⁵

- Defector Lee Young Kuk, imprisoned in Yodok, reported that he weighed 207 pounds upon incarceration and, at his release four years later, weighed 128 pounds.²⁵⁶

To ensure that the prisoners stay on the verge of starvation, obtaining unauthorized food – even weeds – is punishable by beatings and execution. One former prisoner reports that his mother was beaten by guards until she was crippled because she had been gathering edible weeds outside of the allotted time given to prisoners to do so.²⁵⁷ Another defector reported that a prisoner by the name of Kim Chul Min was executed for the unauthorized collection of ripe chestnuts that had fallen to the ground from a tree.²⁵⁸ That defector also reported that another starving prisoner named Kal Li Yong died after being beaten by guards with a feces-covered stick because he stole a leather whip, soaked it in water, and ate the leather.²⁵⁹

(3) Death by Labor

All prisoners, including children, are required to engage in very demanding and dangerous labor at the various *kwan-li-so*. The work given to prisoners includes mining, timber-cutting, farming, and sewing. Prison labor conditions in some camps result in 20 to 25 percent of the labor force (*i.e.*, political prisoners) being worked to death *each year*.²⁶⁰ A former guard reported that at *kwan-li-so* No. 22, there were so many deaths from beatings of prisoners who had not met their labor production quotas that guards were instructed to be less violent.²⁶¹

Kang Chol-Hwan reported that mining jobs were considered the worst in the camp because of the high death rate. Prisoners worked in the mines from 6 AM until noon and from 1 PM until 7 or 8 PM. These workers were given no protective gear – not even a hard hat – and cave-ins were common.²⁶² For example, while on assignment at a clay quarry, Kang witnessed a group of children who had been ordered to excavate a ton of earth in a single afternoon –

²⁵⁵ See John Gittelsohn, *Defections and Doubts*, ORANGE COUNTY REGISTER, Jun. 25, 2003.

²⁵⁶ See HAWK, *supra* note 215, at 33.

²⁵⁷ See HAWK, *supra* note 215, at 36.

²⁵⁸ See *id.* at 37.

²⁵⁹ See *id.*

²⁶⁰ See Windrem, *supra* note 97.

²⁶¹ See HAWK, *supra* note 215, at 40.

²⁶² See KANG & RIGOULOT, *supra* note 245, at 106.

an impossible task. They burrowed child-sized tunnels into the foot of a cliff with no adult supervision nor any scaffolding. Inevitably, a cave-in occurred and several children were trapped. The other children worked furiously to free the buried children while camp guards sat by watching. The guards eventually ordered the surviving children to keep working – forcing them back to work before the dead children’s bodies had even been removed from the site.²⁶³

If prisoners are able to avoid death, they still risk being disabled or losing a limb.²⁶⁴ Frostbite from working in freezing conditions with little protection from the elements causes amputations to be commonplace.²⁶⁵ Prisoners were not given clothes that could be called anything other than rags and were only given new shoes every two years. Because the shoes were not of good quality and the work was so demanding, the shoes never lasted more than one year.

As Kang explained, when he was 12, his job was chopping down trees, then carrying them down steep mountains. Only if the temperature dropped below minus 13° Fahrenheit (minus 25° Celsius) would the children be excused from working outside.²⁶⁶ As Kang described it: “imagine us kids, dressed all in rags, trying to chop down a tree . . . with our bodies waist deep in snow, we had to dig evacuation paths in case a tree didn’t fall as planned.”²⁶⁷ In addition to the frostbite threat, the falling trees also killed and maimed many prisoners.

(4) Use of Torture to Interrogate and Punish

Witness testimony has also revealed the systematic use of torture as a means of interrogation and punishment. When arrested, political prisoners are first tortured in an effort to get them to “confess.”²⁶⁸ Once placed in a camp, prisoners are further tortured as a means of punishment. A former North Korean intelligence agent, Kwon Hyok, confirmed that torture took place routinely: “[p]risoners were like pigs or dogs. You could kill them without caring whether they lived or died”²⁶⁹

Ali Lamada, recruited from Venezuela as a translator, was arrested in September 1967 and was tortured until he “confessed” to being a spy. He was placed in solitary confinement in the Ministry of the Interior in a 2 meter by 1 meter by 3 meter (7 feet by 3 feet by 10 feet) enclosure for a year on below-subsistence-level food rations. During this time, he lost 22 kilos (more than

²⁶³ See *id.* at 121-123.

²⁶⁴ See HAWK, *supra* note 215, at 25.

²⁶⁵ See *id.*

²⁶⁶ See KANG & RIGOULOT, *supra* note 245, at 117.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 59.

²⁶⁹ Olenka Frenkiel, *Within Prison Walls*, BBC NEWS, Feb. 2, 2004.

50 pounds) and his body became covered with sores. Subsequently he was moved to a prison camp, where “he was thrown into a punishment cell . . . where, kept handcuffed for three weeks, he slept on the floor without blanket or mattress in freezing temperatures. Transferred to the main prison-camp buildings, he was locked in unheated rooms and suffered frostbite of the feet. His toenails dropped off and his feet became covered with sores.”²⁷⁰

Other former prisoners report that prison guards would engage in beatings so vicious that a prisoner’s eye might fall out or leg bone be exposed.²⁷¹ Another common type of punishment was forcing the prisoner to sit down and stand up repeatedly until he or she could not stand.²⁷² Conversely, prisoners were often punished by being forced to squat motionless for hours at a time and were beaten if they moved.²⁷³ As punishment for more serious offenses, prisoners were forced to squat with a metal bar behind their knees until they lost all circulation in their legs and could not move.²⁷⁴

A harsher variation of this involved solitary confinement in what Kang has called the “sweatbox,” a prison cell so small that a person cannot fully stand up or lie down within it. The sweatbox is so small that the prisoner is unable to move and is forced to kneel in a crouch, hands on thighs, sometimes for months at a time.²⁷⁵ The prisoner’s rear end presses into his heels constantly until the buttocks are solid black with bruising. This cuts off circulation so that, if left in the sweatbox long enough, a prisoner will die.²⁷⁶ Moreover, prisoners in the sweatbox are given almost no food and survive only by eating any bug that crawls through the box. As Kang stated “It is possible to survive [the sweatbox], but the cost is often crippling and the after effects are almost always permanent.”²⁷⁷ Despite the severity of this punishment, it is often used as a method of discipline for even such minor offenses as failing to respond to a guard’s command with sufficient enthusiasm.²⁷⁸

(5) Executions of Political Prisoners

Not only are prisoners tortured, but many are executed for what may seem to be trivial reasons. As former prison guard Ahn Myong Chol stated, “public executions within prisons take place routinely.”²⁷⁹ Kim Yong, a former prisoner at *kwan-li-so* No. 18, said that there were dozens of public executions.²⁸⁰

²⁷⁰ HAWK, *supra* note 215, at 32.

²⁷¹ See Windrem, *supra* note 97.

²⁷² See HAWK, *supra* note 215, at 32.

²⁷³ See *id.* at 33.

²⁷⁴ See *id.* at 36.

²⁷⁵ See KANG & RIGOULOT, *supra* note 245, at 94-96.

²⁷⁶ See *id.*

²⁷⁷ *Id.*

²⁷⁸ See *id.* at 94.

²⁷⁹ Kang Chol-Hwan, *Public Executions Witnessed Personally*, CHOSUN ILBO, Mar. 25, 2001.

²⁸⁰ See HAWK, *supra* note 215, at 38.

He said that rule breakers were shot while attempted escapees were hanged.²⁸¹ A former guard at *kwan-li-so* No. 22 reported that there were approximately 10 executions a year, mostly of people who had been caught eating unauthorized food.

Attempting to escape the *kwan-li-so* results in the harshest reprisals.²⁸² To encourage prison guards to vigilantly guard against such escapes, Kim Jong Il instituted a perverse incentive system wherein any guard who shot a prisoner trying to escape would be relieved of his guard duties and allowed to attend college without paying tuition.²⁸³ Former guard Ahn alleged that a fellow guard forced a political prisoner to “attempt to escape” by climbing the barbed wire fence surrounding the camp, and then shot him when he did so. The guard was rewarded, as promised.

Others report that not only would the guards execute certain prisoners, but they would often mutilate the dead body or even require the prisoner witnesses to mutilate the body.²⁸⁴ Kang reports that after one hanging, the prisoner witnesses were required to hurl stones at the dead until the skin on the corpse’s face began coming off.²⁸⁵ Former prisoner Lee Young Kuk stated that he witnessed the execution of one attempted escapee, who was tied behind a car and dragged to death.²⁸⁶ The prisoner witnesses were then required to place their hands on the bloody body of the dead man. At this execution, a prisoner who witnessed the execution “shouted out against this atrocity.”²⁸⁷ The witness was shot and killed immediately.²⁸⁸

(6) Forced Abortion and Infanticide in Prison Camps

The desperation of starving North Korean women has created a thriving trade in trafficking women. Human trafficking across the North Korea-China border has evolved over the last decade, starting as a fee-based matchmaking service for Chinese men. The system has degenerated into selling North Korean women into the Chinese sex trade or entertainment industry and semi-voluntary “live-in” arrangements in which destitute, illegal North Korean women live with their Chinese purchasers under often deplorable conditions.²⁸⁹

In the event a North Korean “live-in” woman becomes pregnant, her Chinese purchaser may decide whether he wants to keep the baby or if he

²⁸¹ See *id.*

²⁸² See HAWK, *supra* note 215, at 25.

²⁸³ See *Former Guard: Ahn Myong Chol*, NBC NEWS, Jan. 15, 2003.

²⁸⁴ See *id.* at 35.

²⁸⁵ See *id.* at 140.

²⁸⁶ See HAWK, *supra* note 215, at 35.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ See *White Paper on Human Rights*, *supra* note 103, at 263.

would prefer that the child be aborted.²⁹⁰ The trafficked woman has no say in this decision. Some of these North Korean women are married with children at home in North Korea. If the woman stays in China, arrangements often are made to send some of the “purchase” price back to North Korea.²⁹¹

If the Chinese man decides to return the pregnant woman to North Korea, however, her situation becomes far worse. It is reported that pregnant women returned to North Korea are forced to abort their pregnancies to prevent the birth of mixed-race North Korean children. A recent Korean Bar Association survey found that 57.7 percent of the defectors interviewed for the survey reported seeing or hearing that such pregnant women were forced to have abortions.²⁹² While North Korean law states that pregnant women are not to be detained three months before and seven months after childbirth, in reality pregnant returnees from China are treated much more harshly than other returnees. Rather than receiving suspended sentences, pregnant women – when their babies are not forcibly aborted – are assigned hard labor to cause miscarriages.²⁹³

Defectors report that if a woman is less than eight months pregnant, the fetus may be aborted through a syringe of salt water to the uterus.²⁹⁴ One repatriated defector describes an even more brutal form of abortion. Kim Myong Suk was 20 years old and five months pregnant when she was returned to North Korea from her “live-in” arrangement with a Chinese man. After forcing Kim’s sister to come to the prison to observe, the North Korean prison guard attempted to force Kim to abort her own pregnancy. When she refused, he began kicking her in the stomach repeatedly until Kim fell unconscious and the fetus, referred to by the guard only as “the Chink,” aborted.²⁹⁵

If the woman is more than eight months pregnant, the baby is delivered and then killed or abandoned. Eyewitness accounts from defectors forced to act as midwives to pregnant repatriated North Korean women support this. In one instance, a fellow inmate/midwife was forced to give a pregnant woman a labor-inducing shot. After delivery, the baby was suffocated in front of the mother with a wet towel because “no half-Han [Chinese] babies would be tolerated.”²⁹⁶

²⁹⁰ See *id.* at 270.

²⁹¹ For its part, in response to pressure from the international community, North Korea has devoted significant resources to destroying trafficking rings. Interestingly, the North Korean government categorizes human traffickers as political criminals. See *White Paper on Human Rights*, *supra* note 103, at 245.

²⁹² See *Female Inmates in North Face Compulsory Abortion*, KOREA TIMES, Sept. 29, 2006.

²⁹³ See *id.* at 279.

²⁹⁴ *Id.*; Windrem, *supra* note 97.

²⁹⁵ Bill Powell & Donald MacIntyre, *Running Out of Darkness: With the Aid of American Christians, North Koreans Are Risking Their Lives to Reach Freedom*, TIME, May 1, 2006, at 32.

²⁹⁶ See HAWK, *supra* note 215, at 61.

Other prison midwives describe similar experiences. One detainee delivered seven babies and was forced to place each in one box and to leave it there. Several malnourished or premature infants died quickly; however, two were healthy, full-term babies that did not die immediately. Two days later, a guard realized that the infants had not died, so the guard killed them by driving forceps through the soft spots in their skulls.²⁹⁷ Most often, however, infanticide occurred through suffocation or abandonment. Although witness interviews collected in preparing *The Hidden Gulag* document 52 such cases, verifiable evidence has proven elusive.²⁹⁸

3. Abduction of Foreigners

The North Korean government has a long history of abducting foreign nationals, bringing them to North Korea, and keeping them there against their will. Although this report does not classify these acts as constituting crimes against humanity, they are nevertheless a unique and disturbing set of human rights violations.

During the Korean War, North Korea reportedly abducted 84,532 South Koreans and forcibly took them to North Korea; 7,034 South Koreans were later officially registered as “abducted” in a 1956 survey conducted by Korean National Red Cross.²⁹⁹ Between 1955 and 1987, North Korea abducted as many as 3,790 South Koreans, most of whom were fishermen; 480 of these abductees have never returned.³⁰⁰ And although the Japanese government only recognizes the cases of 16 abductees³⁰¹, there may have been as many as 70 to 80 Japanese abducted to North Korea.³⁰² There also are reports of abductions from Austria, Lebanon, Germany, Malaysia, Philippines, Singapore, Thailand, and Norway.³⁰³

This section presents information about: (a) the legal context for North Korea’s obligations in relation to abductions; (b) Korean War abductions; and (c) post-Korean War abductions.

²⁹⁷ See *id.* at 62-63.

²⁹⁸ See *id.* at 72.

²⁹⁹ See *White Paper on Separated Families*, Korean National Red Cross, 1976.

³⁰⁰ These statistics were obtained from Choi Woo-Young, President of the Families of the Abducted and Detained in North Korea, who has extensively documented the statistics and individual stories of abductees; see also SUE CHANG, *LOST IN PURGATORY: THE STORY OF SOUTH KOREAN ABDUCTEES* (2005), available at http://journalism.berkeley.edu/projects/north_korea/2005/10/lost_in_purgatory_the_story_of.html.

³⁰¹ See *Japan: Abduction Row Key to North Korea Ties*, REUTERS, Feb. 7, 2006.

³⁰² See *N. Korean Defector Says 70-80 Japanese Abducted by North*, KYODO, Nov. 25, 2002.

³⁰³ See, e.g., *Condemning the Democratic People’s Republic of Korea for Abductions*, H.CON.RES. 168, RESOLUTION INTRODUCED IN THE U.S. SENATE, Jul. 12, 2005 (describing details of numerous North Korean abductions); Hideko Takayama & Evan Thomas, *Lost, Without a Trace*, NEWSWEEK, Feb. 20, 2006.

a. Legal Context: Abductions

As described previously, North Korea is a party to the International Covenant on Civil and Political Rights, to which North Korea acceded on September 14, 1981.³⁰⁴ Abducting people or continuing their detention after the date North Korea acceded to the ICCPR violates numerous treaty provisions including:

- Article 7 (right not to be subjected to torture or to cruel, inhuman, or degrading treatment);
- Article 8 (right not to be held in slavery or servitude);
- Article 9 (right not to be held in arbitrary detention);
- Article 10 (right for all persons deprived of liberty to be treated with humanity);
- Article 12 (right to free movement); and
- Article 17 (right not to be subjected to arbitrary interference with privacy, family, home, or correspondence).³⁰⁵

Particularly relevant for abductees is Article 12(2), which states that “[e]veryone shall be free to leave any country, including his own.” Therefore, even if individuals were abducted prior to the date of North Korea’s accession to the ICCPR, if they were not allowed to leave North Korea, it would be a clear violation of the treaty.

The UN General Assembly has expressed concern for abductees and other “disappeared” persons. As early as 1978, the General Assembly said it was “deeply moved by the anguish and sorrow which such circumstances cause to the relatives of the disappeared person.”³⁰⁶ It went on to make a series of recommendations on the topic to the international community.³⁰⁷

Subsequently, in 1992, the General Assembly adopted the *Declaration on the Protection of All Persons from Enforced Disappearance*.³⁰⁸ In the preamble of the Declaration, the General Assembly expressed its concern that “often in a

³⁰⁴ See ICCPR, *supra* note 219; see also *supra* note 99.

³⁰⁵ See *id.* at Art. 7-10 and 17.

³⁰⁶ G.A. RES. 33/173, UN Doc. A/RES/33/173 (Dec. 20, 1978).

³⁰⁷ See *id.*

³⁰⁸ See G.A. RES. 47/133, UN Doc. A/RES/47/133 (Dec. 18, 1992).

persistent manner, enforced disappearances occur, in the sense that persons are . . . abducted against their will . . . by officials of different branches or levels of Government.”³⁰⁹ It then codified a series of 21 different articles relating to the topic. Article 1 of the Declaration states, “any act of enforced disappearance is an offence to humanity dignity” and Article 2 says, “no state shall practice, permit, or tolerate enforced disappearances.”³¹⁰ While General Assembly resolutions are not binding international law on states, they are clear evidence of the will of the international community.

Therefore, North Korea has a treaty obligation under the ICCPR to refrain from abducting individuals and to allow anyone who has been abducted to return to their homes, wherever they may be. By refusing to do so, North Korea is also violating the general will of the international community.

b. Korean War Abductions

Although the precise number of abductees is not known, some reports indicate that during the Korean War, North Korea abducted 84,532 South Koreans and forcibly took them to North Korea; 7,034 South Koreans civilian abductees were later officially registered as “abducted” in a 1956 survey conducted by Korean National Red Cross.³¹¹ In addition to civilian abductees, there has also been an ongoing dispute about South Korean prisoners of war (POWs).³¹²

Facing a post-war labor shortage, North Korea refused to release thousands of South Korean POWs and forced them to work in North Korean coal mines.³¹³ Between 1995 and 2005, 38 POWs escaped from North Korea. These escapes garnered little media coverage, in part because the escapees sought to avoid publicity out of fear for their wives and children left behind

³⁰⁹ *Id.*

³¹⁰ *Id.* at Art. 1-2.

³¹¹ See *White Paper on Separated Families*, *supra* note 299. According to the United States government, as of December 19, 1951, it was generally recognized that 20,000 South Korean civilians had been taken to North Korea against their will. See *Foreign Relations of the United States* (Volume VII – Korea and China, 1951).

³¹² In early December 1951, UN forces in Korea estimated that approximately 88,000 South Korean troops were missing in action; however, on December 18 of that year, when North and South exchanged lists of their prisoners of war, North Korea reported that it held only 7,412 South Korean POWs, and, at the end of the war two years later, North Korea repatriated only 8,341 South Koreans. See Heo Man-Ho, *South Korea's Forgotten POWs*, CHOSUN ILBO, Dec. 30, 1999.

³¹³ See “*Forgotten*” *POWs Focus of Korean Talks*, NEW YORK TIMES, Aug. 24, 2005.

but also because South Korea's government-sponsored media outlets seek to avoid antagonizing North Korea.³¹⁴

Today, the South Korean government says that North Korea is holding 542 South Korean POWs and 486 South Korean civilians who were abducted more than 50 years ago during the Korean War.³¹⁵ The North Korean government says that the South Korean civilians in the North from the Korean War “defected voluntarily,” but has refused to provide access to them.³¹⁶

c. Post-Korean War Abductions

In the mid-1970s, while North Korea was still under the rule of his father, Kim Jong Il – then in charge of North Korea's espionage operations – decided that North Korean spies needed to be trained to blend in with capitalists in foreign lands.³¹⁷ North Korea's abduction practices did not focus on foreign officials or persons possessing valuable secret information. Instead, random persons were taken from their families and homelands. North Korean abductors were ordered to bring foreign nationals in *magjabi* (a Korean term meaning “grab anyone”).³¹⁸ The victims were abducted to be used as instructors for North Korean spies.³¹⁹

(1) South Korean Abductees

Between 1955 and 1987, North Korea abducted as many as 3,790 South Koreans, most of whom were fishermen; 480 of these abductees have never returned.³²⁰ While most of the South Korean abductees were ordinary people, there were also some high-profile exceptions.

Following the orders of movie fanatic Kim Jong Il, North Korean agents abducted famous South Korean actress Choi Un-hee.³²¹ Choi had appeared in a variety of Korean television dramas and motion pictures beginning in the

³¹⁴ See *id.* Another South Korean POW, Jun Yong-il, who was captured 50 years earlier, escaped in 2002 at the age of 72 after he swam across North Korea's river border into China. See *S. Korea POW Celebrates Escape*, BBC NEWS, Jan. 19, 2004. In 1997, South Koreans Kim Bok-ki and Park Dong-il, who had both been listed as killed in action during the Korean War, escaped from North Korea, where they had been held as slave laborers for 45 years. See *South Korean POWs Escape After 45 Years*, CBC NEWS, Dec. 14, 1998.

³¹⁵ The same report also noted that the South Korean government lists 542 other South Korean prisoners of war who are also still detained in North Korea. See Hisane Masaki, *Japan Puts More Pressure on North Korea*, ASIA TIMES, Jun. 16, 2006.

³¹⁶ See *id.*

³¹⁷ See Takayama & Thomas, *supra* note 303.

³¹⁸ See *id.*

³¹⁹ See *North Korean Abductions*, CNN, Jun. 28, 2006, available at http://transcripts.cnn.com/TRANSCRIPTS/0606/28/i_ins.01.html.

³²⁰ See *supra* note 300.

³²¹ See Takayama & Thomas, *supra* note 303; Mike Thomson, *Kidnapped by North Korea*, BBC, Mar. 5, 2003, available at <http://news.bbc.co.uk/go/pr/ft/-/2/hi/asia-pacific/2821221.stm>.

late 1950s.³²² She was abducted from her Hong Kong hotel in January 1978 and taken to North Korea.³²³

In July 1978, Choi's husband, South Korean director Shin Sang-Ok, went to Hong Kong to investigate his wife's disappearance, and he too disappeared.³²⁴ Kim Jong Il was said to have been obsessed with the couple's talents for years before they were abducted.³²⁵ The couple later said Kim told them that he personally ordered them "brought" to North Korea to help develop North Korea's film industry.³²⁶ Shortly after arriving in Pyongyang, Shin attempted to escape several times and was imprisoned for four years at Prison No. 6, where he lived on a diet of grass, salt, and rice.³²⁷ He then directed seven films, with Kim Jong Il acting as an executive producer, including *Pulgasari*, a giant-monster film that is supposed to portray the effects of unchecked capitalism.³²⁸ Shin is quoted as saying: "I hated Communism, but I had to pretend to be devoted to it, to escape from this barren republic. It was lunacy."³²⁹ Choi and Shin escaped their North Korean captors in 1986.³³⁰

A more typical story of a North Korean abduction is that of Choi Chong-suk. Choi was captain of a South Korean fishing boat, *Tongjin-ho*, which was captured near the maritime border on the West Sea on January 15, 1987.³³¹ Along with Choi, 11 other fishermen on the boat were also taken to North Korea. Choi's daughter, Choi Woo-Young, now leads the Families of the Abducted and Detained in North Korea and has been a vigorous advocate on behalf of her father and other abductees. "He went out to sea to fish, and it was the last time I saw his face. He is still a 42-year-old father to me although 18 years have passed since his disappearance," she said.³³² Choi learned in 1999 that her father had been seen in a North Korean political prison camp, and she continues to advocate for his freedom.³³³

(2) Japanese Abductees

Although the Japanese government only recognizes the cases of 16 abductees³³⁴, there may have been as many as 70 to 80 Japanese abducted to

³²² See Ahra Cho, *Korean Movie Giant Passes Away*, Embassy of the Republic of Korea (Apr. 2006), available at http://www.dynamic-korea.com/etc/people_new.php?uid=200600023122

³²³ See *id.*

³²⁴ See Tony Rayns, *Shin Sang-Ok*, THE INDEPENDENT, May 6, 2006.

³²⁵ See *Shin Sang-ok, Pioneer of Korean Cinema, Passes Away*, CHOSUN ILBO, Apr. 12, 2006.

³²⁶ See *Filmmaker Abducted by N. Korea*, CHICAGO SUN-TIMES, Apr. 14, 2006.

³²⁷ See John Gorenfeld, *The Producer from Hell*, THE GUARDIAN (UK), Apr. 4, 2003.

³²⁸ See Park Chung-a, *Shin Sang-ok, Pioneer Director, Dies*, KOREA TIMES, Apr. 12, 2006.

³²⁹ Gorenfeld, *supra* note 327.

³³⁰ See *id.*

³³¹ See *Daughter Calls for Abducted Father's Return From North*, KOREA TIMES, Oct. 19, 2005.

³³² See *id.*

³³³ See *id.*

³³⁴ See *Japan: Abduction Row Key to North Korea Ties*, *supra* note 301.

North Korea.³³⁵ In 2002, Kim Jong Il admitted that North Korea's special forces had abducted at least a dozen Japanese nationals during the 1970s and 1980s.³³⁶

Japanese abductees included a beautician, a schoolgirl, and couples on seaside dates.³³⁷ One of the most publicized abductions of a Japanese national is that of Megumi Yokota.³³⁸ Yokota was 13 years old when she disappeared on her way home from badminton practice nearly 30 years ago.³³⁹ The junior high school girl was last seen by a school friend on November 15, 1977.³⁴⁰ Yokota's family initially was told by North Korea that she committed suicide in 1993 and the family was given a jar of ashes supposedly holding her remains.³⁴¹ DNA tests of the ashes, however, showed that the remains were those of two other persons.³⁴² North Korea then stated that, while being held, Yokota had married and given birth to a daughter before dying in 1994.³⁴³

The man identified as Yokota's husband is Kim Young-nam, a South Korean who himself was abducted in 1978 when he was a 16-year-old high school student.³⁴⁴ His parents had believed that he accidentally drowned.³⁴⁵ In 2006, 28 years after he disappeared, he spoke to journalists in Seoul. Kim, now 45 years old, stated that when he was first taken to North Korea, he "was frightened, but little by little [he] became closer to the people of the North, and [his] heart softened."³⁴⁶ He claimed that he was not abducted from a beach, but instead was rescued by a North Korean vessel after he fell asleep on a raft and drifted into open water. He went on to explain that he had "voluntarily" decided to stay in North Korea after learning he could receive free university tuition.³⁴⁷

When questioned about Yokota, Kim stated that he had no knowledge of whether she had been abducted and claimed that, despite being married to her for eight years, the topic never arose.³⁴⁸ DNA tests confirmed that an 18-year-old girl named Kim Hye-gyong is Yokota's and Kim's daughter.³⁴⁹ The Japanese government wants Kim Hye-gyong to be allowed to go to Japan to

³³⁵ See *N. Korean Defector Says 70-80 Japanese Abducted by North*, *supra* note 302.

³³⁶ See *North Korea Apologizes to Japan for Bizarre Tale of Kidnap and Intrigue*, THE GUARDIAN (UK), Sept. 17, 2002.

³³⁷ See *id.*

³³⁸ See Takayama & Thomas, *supra* note 303.

³³⁹ See *id.*

³⁴⁰ See *North Korea Apologizes to Japan for Bizarre Tale of Kidnap and Intrigue*, *supra* note 336.

³⁴¹ See Takayama & Thomas, *supra* note 303.

³⁴² See *id.*

³⁴³ See *It Takes Japan to Find Our Missing in N. Korea*, CHOSUN ILBO, Apr. 11, 2006.

³⁴⁴ See *Parents of Abduction Victims in Emotional First Meeting*, CHOSUN ILBO, May 16, 2006.

³⁴⁵ See *North Korean Abductions*, *supra* note 319.

³⁴⁶ *Kim Young-nam Denies Abduction by N. Korea*, CHOSUN ILBO, Jun. 29, 2006.

³⁴⁷ See *id.*

³⁴⁸ See *Kim Young-nam "Never Asked" if Wife Was Kidnapped*, CHOSUN ILBO, Jul. 6, 2006.

³⁴⁹ See *North Korean Abductions*, *supra* note 319.

live with Yakota's family, but North Korea refuses.³⁵⁰ Kim has stated that Yokota killed herself in 1994 and that Japan's claims regarding DNA tests of her ashes were "clumsy and childish allegations."³⁵¹ This statement regarding the DNA tests is consistent with North Korea's position that the test results are part of a strategy to discredit North Korea.³⁵² Yokota's parents still hold out hope that their daughter is alive.³⁵³

Unlike the South Korean government, which has been criticized heavily by families of abductees for its unwillingness to intervene with North Korea on their behalf, the Japanese government has made the abduction of their nationals a major issue of international concern.³⁵⁴

B. Transnational Effects of the Crisis in North Korea

1. Weapons of Mass Destruction

Disclaimer: This report was not written to take a position on whether North Korea should or should not be allowed to develop, test, or possess WMDs. This section, and the subsequent section on the Six-Party Talks, is included to provide a full context for understanding the situation in North Korea and how it has chosen to allocate its limited resources to different priorities. The report ultimately discusses the implication of these choices for the health and welfare of the people of the country.

North Korea's Dr. Yi Sung-Ki – the "godfather" of North Korea's WMD program – began overseeing the construction of a major chemical weapons facility in South Hwanghae Province as early as 1961.³⁵⁵ This evidence demonstrates that, for nearly its entire existence, North Korea has actively pursued a multi-faceted program to obtain and stockpile WMD.³⁵⁶ North Korea's WMD program includes researching, creating, and purchasing biological weapons, chemical weapons, ballistic missiles, and nuclear weapons.³⁵⁷ North Korea has spent tremendous amounts of money pursuing this program; a reasonable estimate for the amount spent is in the tens of billions of dollars.³⁵⁸ Each part of this program is discussed below.

³⁵⁰ See *A Child of North Korea's Abductions*, CHOSUN ILBO, Jun. 28, 2006.

³⁵¹ *Id.*

³⁵² See *Megumi Yokota Remains "May Have Been Mixed Up,"* CHOSUN ILBO, Jul. 3, 2006.

³⁵³ See *North Korean Abductions*, *supra* note 319.

³⁵⁴ See *Japan: Abduction Row Key to North Korea Ties*, *supra* note 301.

³⁵⁵ See NORTH KOREA CHEMICAL AND BIOLOGICAL WEAPON MILESTONES – 1969-2005 11 (The Risk Report, Vol. 4, Jul.-Aug. 2005) (hereinafter CW & BW MILESTONES).

³⁵⁶ See JOEL S. WIT ET AL., THE SIX PARTY TALKS AND BEYOND: COOPERATIVE THREAT REDUCTION AND NORTH KOREA 5 (Center for Strategic and International Studies, 2005).

³⁵⁷ See UNCLASSIFIED REPORT TO CONGRESS ON THE ACQUISITION OF TECHNOLOGY RELATING TO WEAPONS OF MASS DESTRUCTION AND ADVANCED CONVENTIONAL MUNITIONS, 1-JANUARY-31 DECEMBER 2004 4 (Central Intelligence Agency, 2005) (hereinafter CONGRESSIONAL REPORT ON WMD).

³⁵⁸ See WIT, *supra* note 356, at 5.

a. Biological Weapons (BW)

Beginning in the early 1960s, Kim Il Sung ordered his nation's scientists to develop BW, initially with lackluster results.³⁵⁹ Despite the slow start, North Korea's program did obtain research on the etiological agents for creating anthrax, cholera, plague, smallpox, and yellow fever.³⁶⁰ During this initial period of research, North Korea also imported actual strains of anthrax, plague, and probably typhus as well, presumably from culture collections in Japan.³⁶¹ Not until the early 1980s, however, did the North Koreans actually produce these BW agents themselves.³⁶² According to the South Korean Ministry of National Defense (MND), by the late 1980s North Korea had completed experiments using live strains of BW.³⁶³

On March 13, 1987, North Korea acceded to the Biological and Toxin Weapons Convention (BTWC).³⁶⁴ The BTWC provides in relevant part that signatory nations are "never in any circumstances to develop, produce, stockpile or otherwise acquire or retain (1) [m]icrobial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; (2) [w]eapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict."³⁶⁵ Despite this, North Korea has dedicated significant resources toward the development and weaponization of BW.

Current intelligence from various sources indicates North Korea may have numerous infectious and disease-causing agents in its stockpiles. The MND believes that North Korea *may* have researched and developed cultures of anthrax, botulism, plague, yellow fever, tuberculosis, typhoid, cholera, Korean hemorrhagic fever, tuberculosis, typhus, and smallpox.³⁶⁶ A higher degree of confidence is placed in other assessments that North Korea possesses only anthrax, botulism, and plague.³⁶⁷ For its part, the MND believes that North Korea possesses one or two BW agents; it does not specify which agents, though anthrax and botulism are the most likely BW.³⁶⁸ Reports further claim

³⁵⁹ See CENTER FOR NONPROLIFERATION STUDIES, BIOLOGICAL WEAPONS OVERVIEW (Monterey Institute of International Studies, Feb. 2006) [hereinafter BW OVERVIEW].

³⁶⁰ See *id.*

³⁶¹ See *id.*

³⁶² See *id.*

³⁶³ See CW & BW MILESTONES, *supra* note 355.

³⁶⁴ See *id.*

³⁶⁵ CONVENTION ON THE PROHIBITION OF THE DEVELOPMENT, PRODUCTION AND STOCKPILING OF BACTERIOLOGICAL (BIOLOGICAL) AND TOXIN WEAPONS AND ON THEIR DESTRUCTION, Apr. 10, 1972.

³⁶⁶ See *id.*

³⁶⁷ See *id.*

³⁶⁸ See *id.*

that North Korea has treated its anthrax spore supply with a form of microencapsulation to protect the organisms from ultraviolet light.³⁶⁹

Finally, some US military intelligence indicates that some BW agents have been weaponized for delivery on a limited number of ballistic missiles.³⁷⁰ These missiles, along with the possibility of an invasion force using the BW through a portable spraying system, constitute what former South Korean President Kim Dae-jung believed would be part of North Korea's "attempt to inflict an initial major blow" against South Korea.³⁷¹

The North Korean BW program is considered by most observers to be rudimentary by Western standards.³⁷² In 2004, however, North Korea acquired dual-use bio-technical equipment, supplies, and reagents that could be used to support a BW program.³⁷³

b. Chemical Weapons (CW)

While the BW program is rudimentary, the North Korean CW program is far more advanced in comparison and likely includes both the production and stockpiling of CW.³⁷⁴ North Korea is considered to be among the largest possessors of chemical weaponry in the world, possessing between 2,500 and 5,000 tons of CW³⁷⁵, though even these numbers are only best estimates of a program about which little is known definitively.³⁷⁶ Further, North Korea has not signed the Chemical Weapons Convention, enabling it to continue its proliferation unchecked.³⁷⁷

North Korea's CW program began even before the Korean War, with the KPA manual addressing the theories of CW operational doctrine – such as forcing an enemy to suit up for potential CW attacks and thereby reducing the enemy's fighting abilities.³⁷⁸ Though research on CW began in the early 1960s³⁷⁹, it is not believed that North Korea possessed an offensive CW arsenal until the late 1980s.³⁸⁰ After that time, however, North Korea's CW program

³⁶⁹ *See id.*

³⁷⁰ *See id.*

³⁷¹ *See* CW & BW MILESTONES, *supra* note 355.

³⁷² *See* OFFICE OF THE SECRETARY OF DEFENSE, PROLIFERATION: THREAT AND RESPONSE 10 (U.S. Department of Defense, Jan. 2001) [hereinafter PROLIFERATION].

³⁷³ *See* CONGRESSIONAL REPORT ON WMD, *supra* note 357, at 5.

³⁷⁴ *See* WIT, *supra* note 356, at 6.

³⁷⁵ *See* CENTER FOR NONPROLIFERATION STUDIES, CHEMICAL WEAPONS OVERVIEW (Monterey Institute of International Studies, Feb. 2006) [hereinafter CW OVERVIEW].

³⁷⁶ *See* WIT, *supra* note 356, at 6.

³⁷⁷ *See* NORTH KOREA CHEMICAL AND BIOLOGICAL WEAPONS UPDATE – 2005, *supra* note 363.

³⁷⁸ *See* CW OVERVIEW, *supra* note 375.

³⁷⁹ *See id.*

³⁸⁰ *See id.*

intensified and expanded its efforts, including some reported CW tests on political prisoners.³⁸¹

At the present time, North Korea's CW capabilities are believed to include the ability to produce bulk quantities of blister, choking, nerve, and blood agents.³⁸² These chemicals include primarily mustard gas and Lewisite (blistering), phosgene (choking), sarin (nerve), V-series nerve agents, and hydrogen cyanide (blood agent).³⁸³ Intelligence reports indicate that North Korea is capable of weaponizing its CW stocks through a variety of delivery vehicles, including ballistic missiles, artillery, aircraft, and possibly other, unspecified conventional means.³⁸⁴ While much of the CW stockpiles is stored in bulk, a significant portion is reported to be loaded into artillery shells and rocket warheads.³⁸⁵

Estimates place the potential output of CW by North Korean facilities at 4,500 tons annually in peacetime and up to 12,000 tons per year in wartime.³⁸⁶ Simple CW agents such as mustard gas are easily produced in bulk due to the wide availability of oil-derived intermediaries such as ethylene oxide.³⁸⁷ Based on the costs of obtaining the materials necessary for production, however, it is unclear how North Korea would be able to manufacture large quantities of nerve agents such as sarin, soman, and VX without putting an even greater burden on its already limited resources.³⁸⁸ Thus, while North Korea's CW stockpile may not include the most sophisticated and lethal nerve agents in great quantities, North Korea may have large quantities of the relatively easy-to-manufacture casualty agents such as mustard, phosgene, and Lewisite.³⁸⁹

c. Ballistic Missiles

(1) Historical Background

North Korea's ballistic missile program began in about 1960, when it reached a long-term agreement with the Soviet Union to modernize North Korea's military arsenal.³⁹⁰ By the late 1960s, North Korea had obtained coastal defense cruise missiles, anti-ship missiles, and artillery rockets from the Soviet Union.³⁹¹

³⁸¹ See NORTH KOREA CHEMICAL AND BIOLOGICAL WEAPONS UPDATE – 2005, *supra* note 363.

³⁸² See PROLIFERATION, *supra* note 372, at 11.

³⁸³ See CW OVERVIEW, *supra* note 375.

³⁸⁴ See PROLIFERATION, *supra* note 372, at 11.

³⁸⁵ See CW OVERVIEW, *supra* note 375.

³⁸⁶ See *id.*

³⁸⁷ See *id.*

³⁸⁸ See *id.*

³⁸⁹ See *id.*

³⁹⁰ See JOSEPH S. BERMUDEZ, JR., A HISTORY OF BALLISTIC MISSILE DEVELOPMENT IN THE DPRK 2 (Center for Nonproliferation Studies Publications, 1999).

³⁹¹ See *id.*

Once Soviet relations with China crumbled in the early 1960s, North Korea turned to China for missile assistance. This help came through a September 1971 agreement for developing ballistic missiles and later a joint program beginning in 1977 to develop the DF-61 missile system.³⁹² Two versions of the DF-61 were intended for production – a domestic version with a 1,000-kilometer range able to carry a 500-kilogram nuclear warhead and an export version able to travel 600 kilometers with a 1,000-kilogram conventional warhead.³⁹³ Importantly, the 600-km range would allow North Korea to reach any point within South Korea.³⁹⁴ The DF-61 program was suspended and cancelled after about a year.³⁹⁵ The 1970s did, however, see North Korea produce its first missile system manufactured with totally indigenous components – the AT-1 Snapper anti-tank guided missile.³⁹⁶

(2) Short-Range Missiles: Hwasong-5 and Hwasong-6 (Scuds)

To overcome the problems that North Korea had in obtaining missile technology from China and the Soviet Union, it is believed that Kim Il Sung's regime turned to Egypt, obtaining the Soviet R-17E – or Scud-B – from Egypt in the late 1970s or early 1980s.³⁹⁷ From these initial shipments, North Korea reverse-engineered its own version of the Scud-B missiles, called the Hwasong-5, and launched its first test missile in 1984.³⁹⁸ The Hwasong-5 missiles have the capability to reach about two-thirds of South Korean territory.³⁹⁹

Shortly after the Hwasong-5 began mass production in 1987, North Korea started developing the Hwasong-6, or Scud-C.⁴⁰⁰ The Hwasong-6 is similar in design to the Hwasong-5 but is made of lighter materials and has a reduced warhead weight; these changes provide the Hwasong-6 with a range of nearly 500 kilometers – enough to reach most parts of South Korea.⁴⁰¹ In total, the North Koreans have deployed over 600 of these Scud-type missiles, likely armed with either high-explosive or CW warheads.⁴⁰²

³⁹² See CENTER FOR NONPROLIFERATION STUDIES, MISSILE OVERVIEW (Monterey Institute of International Studies, Aug. 2006) [hereinafter MISSILE OVERVIEW].

³⁹³ See BERMUDEZ, *supra* note 390, at 8.

³⁹⁴ See *id.*

³⁹⁵ See *id.*

³⁹⁶ See *id.*

³⁹⁷ See MISSILE OVERVIEW, *supra* note 392 (noting Egypt likely provided the first Scud-Bs to North Korea some time between 1976 and 1981).

³⁹⁸ See *id.*

³⁹⁹ CNS SPECIAL REPORT ON NORTH KOREAN BALLISTIC MISSILE CAPABILITIES 2 (Center for Nonproliferation Studies, Mar. 22, 2006) [hereinafter BALLISTIC MISSILE CAPABILITIES].

⁴⁰⁰ See MISSILE OVERVIEW, *supra* note 392.

⁴⁰¹ See BERMUDEZ, *supra* note 390, at 16.

⁴⁰² See BALLISTIC MISSILE CAPABILITIES, *supra* note 399, at 3.

(3) Intermediate-Range Missiles: Nodong (Scud-D)

Also in the late 1980s, North Korea initiated its intermediate-range ballistic missile, or Nodong, program.⁴⁰³ The Nodong was unsuccessfully test fired in May 1990, but was later test fired successfully in May 1993.⁴⁰⁴ The Nodong is believed to have sufficient range so that a missile fired from North Korea could strike a target in Japan.⁴⁰⁵ North Korea has now deployed as many as 200 Nodong missiles.⁴⁰⁶ The Nodong is believed to be capable of carrying a 1,200-kilogram warhead, and likely can be armed with high-explosive, cluster, chemical, or possibly biological warheads.⁴⁰⁷

(4) Long-Range Missiles: Taepodong-1 and -2

Once North Korea developed short- and intermediate-range missiles, it turned its attention to developing long-range missiles capable of traveling several thousand kilometers. The first missile, called Taepodong-1 in the West, was designed to deliver a 1,000- to 1,500-kilogram warhead to a range of 1,500 to 2,500 kilometers; the Taepodong-2 is intended to carry the same warhead 4,000 to 8,000 kilometers.⁴⁰⁸

On August 31, 1998, North Korea tested the Taepodong-1 by firing a missile over northern Japan.⁴⁰⁹ It later claimed that this test launch was actually a failed attempt to launch a satellite.⁴¹⁰ The outcry over this test launch, however, led to North Korea's agreement in September 1999 to a missile flight test moratorium.⁴¹¹ North Korea then circumvented the moratorium by having its missile customers – Iran and Pakistan – perform “surrogate testing” of North Korean missiles.⁴¹²

Even before the Taepodong-1 test launch, development of the Taepodong-2 had begun.⁴¹³ US intelligence sources estimate that the Taepodong-2 is capable of delivering a small payload to the western part of the continental United States.⁴¹⁴ The moratorium on missile testing to which North Korea agreed in 1999 ended on July 5, 2006, when North Korea tested seven ballistic missiles

⁴⁰³ See MISSILE OVERVIEW, *supra* note 392.

⁴⁰⁴ See *id.*

⁴⁰⁵ See BALLISTIC MISSILE CAPABILITIES, *supra* note 399, at 2.

⁴⁰⁶ See *id.* at 3.

⁴⁰⁷ See BERMUDEZ, *supra* note 390, at 21.

⁴⁰⁸ See *id.* at 26.

⁴⁰⁹ See BALBINA Y. HWANG, A NORTH KOREAN MISSILE TEST: IMPLICATIONS FOR THE U.S. AND THE REGION 2, (Heritage Foundation, Jun. 30, 2006).

⁴¹⁰ See NORTH KOREA MISSILE MILESTONES – 1969-2000 6 (The Risk Report, No. 5, Sept.-Oct. 2000).

⁴¹¹ See HWANG, *supra* note 409, at 2.

⁴¹² See LARRY A. NIKSCH, KOREA: U.S.-KOREAN RELATIONS – ISSUES FOR CONGRESS 6 (Congressional Research Service, Apr. 14, 2006) [hereinafter U.S.-KOREAN RELATIONS].

⁴¹³ See MISSILE OVERVIEW, *supra* note 392.

⁴¹⁴ See *id.*

during an exercise; these launches included testing the Taepodong-2, though it failed to launch properly.⁴¹⁵ These missile test launches caused the UN Security Council to unanimously adopt Resolution 1695, condemning the missile launches and imposing a partial arms embargo against North Korea.⁴¹⁶

d. Exporting WMD

North Korea has used its WMD programs to generate foreign trade. With respect to CW and BW, reports state that North Korea provided CW and BW technology to both Syria and Iran in the early 1990s.⁴¹⁷ However, exports of WMD are dwarfed by North Korea's exports of ballistic missiles; a US government study performed in 2004 estimated that North Korea earned \$560 million from missile sales in 2001 alone.⁴¹⁸

North Korea has exported ballistic missiles for at least the last 20 years. For example, in the mid-1980s, North Korea sold Hwasong-5s to Iran, which then used the missiles in the "War of the Cities" against Iraq.⁴¹⁹ Iran's use of the weapons provided North Korea with essentially free performance data that it otherwise could have obtained only with extensive flight testing.⁴²⁰ By June 1987, Iran and North Korea had reached a \$500 million arms agreement that provided 90 to 100 Hwasong-5s to Iran and established a missile assembly facility in Iran.⁴²¹ In December 1990, North Korea sold both types of Hwasong missiles to Iraq.⁴²² North Korea has also sold Hwasong-6 missiles to Iran, Syria, Egypt, Vietnam, Libya, and possibly to Sudan⁴²³ and Yemen.⁴²⁴

In addition to exporting short-range missiles, North Korea has sold the mid-range Nodong missiles to numerous countries, including Libya, Iran, Pakistan, and Syria.⁴²⁵ Pakistan eventually received shipments of Nodong missiles in the mid-to-late 1990s, likely in return for both hard currency and nuclear weapons technology⁴²⁶, as mentioned above. North Korea also sold the

⁴¹⁵ See *id.*

⁴¹⁶ See AFTER NORTH KOREA'S MISSILE LAUNCH: ARE NUCLEAR TALKS DEAD? (International Crisis Group, Asia Briefing No. 52, Aug. 9, 2006), at 1.

⁴¹⁷ See U.S.-KOREAN RELATIONS, *supra* note 412, at 7.

⁴¹⁸ See Herskovitz, *supra* note 83.

⁴¹⁹ See *id.*

⁴²⁰ See *id.*

⁴²¹ See BERMUDEZ, *supra* note 390, at 12. The same source notes that Egypt was providing its Scud missile technology to Iraq during the same war.

⁴²² See CHRONOLOGY OF NORTH KOREA'S MISSILE TRADE AND DEVELOPMENT: 1990-1991 (Center for Nonproliferation Studies) *citing* STEVE EMERSON, WALL STREET JOURNAL, Jul. 10, 1991.

⁴²³ See BERMUDEZ, *supra* note 390, at 18.

⁴²⁴ See BALLISTIC MISSILE CAPABILITIES, *supra* note 399, at 5.

⁴²⁵ See MISSILE OVERVIEW, *supra* note 392.

⁴²⁶ See GAURAV KAMPANI, *Second Tier Proliferation: The Case of Pakistan and North Korea*, THE NONPROLIFERATION REVIEW (Fall-Winter 2002), at 107.

long-range Taepodong-1 missiles to Iran and Pakistan in the late 1990s and early 2000s, where those missiles were test fired.⁴²⁷

e. Nuclear Weapons

Despite signing the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) in 1985⁴²⁸, North Korea has been accumulating plutonium since 1986.⁴²⁹ North Korea's nuclear program was jump-started in the mid-1980s with the building and commissioning of a 5-megawatt atomic reactor in Yongbyon, 60 miles from Pyongyang.⁴³⁰ It is believed that this reactor was shut down in 1989 for 70 days to remove the fuel rods in the reactor and reprocess those rods into plutonium suitable for nuclear weapons.⁴³¹

(1) The Agreed Framework

Concerns regarding the North Korean nuclear program grew in the 1990s. During 1994, tensions between the United States and North Korea were escalating over the Yongbyon reactor and its adjacent reprocessing facility.⁴³² The North Koreans were on the verge of expelling inspectors from the International Atomic Energy Agency (IAEA), pulling out of the NPT, and removing 8,000 nuclear fuel rods from the Yongbyon reactor – once again to reprocess the fuel rods for use in nuclear weaponry.⁴³³ Later intelligence reports indicate that also during 1994, North Korea may have smuggled plutonium from Russia.⁴³⁴ This led former US President Jimmy Carter to travel to Pyongyang in June 1994 to talk with Kim Il Sung.⁴³⁵ An agreement was reached that, once signed on October 21, 1994, became the US-Korean Agreed Framework (Agreed Framework).⁴³⁶

The Agreed Framework provided for suspending the Yongbyon reactor's operations and suspending the construction of larger 50-megawatt and 200-megawatt reactors.⁴³⁷ North Korea reiterated its commitment to the NPT, locked up the fuel rods that had been removed from the reactor, and agreed to let IAEA inspectors monitor the facility.⁴³⁸ Finally, North Korea also agreed to

⁴²⁷ See U.S.-KOREAN RELATIONS, *supra* note 412, at 6

⁴²⁸ See Fred Kaplan, *Rolling Blunder: How the Bush Administration Let North Korea Get Nukes*, WASHINGTON MONTHLY, May 2004.

⁴²⁹ See DAVID ALBRIGHT ET AL., THE NORTH KOREAN PLUTONIUM STOCK MID-2006 1 (Institute for Science and International Security, Jun. 26, 2006).

⁴³⁰ See LARRY A. NIKSCH, NORTH KOREA'S NUCLEAR WEAPONS PROGRAM 8 (Congressional Research Service, May 25, 2006) [hereinafter NUCLEAR WEAPONS PROGRAM].

⁴³¹ See *id.*

⁴³² See Kaplan, *supra* note 428.

⁴³³ See *id.*

⁴³⁴ See U.S.-KOREAN RELATIONS, *supra* note 412, at 12.

⁴³⁵ See Kaplan, *supra* note 428.

⁴³⁶ See *id.*

⁴³⁷ See U.S.-KOREAN RELATIONS, *supra* note 412, at 2.

⁴³⁸ See Kaplan, *supra* note 428.

take steps to implement the 1991 North-South Joint Declaration on the Denuclearization of the Korean Peninsula.⁴³⁹

In return, the United States – with South Korea and Japan providing financial backing – agreed to provide two light-water nuclear reactors for electricity and fuel oil and pledged not to invade North Korea.⁴⁴⁰ Once the first light-water reactor came on line – with a targeted date of 2003 – the North Koreans agreed that they would allow intrusive inspections of all nuclear sites; when the second reactor was finished, North Korea would ship the 8,000 fuel rods out of the country.⁴⁴¹ Finally, the two countries were to normalize political relations.⁴⁴²

(2) Trading Missiles for Nuclear Technology

As mentioned above, North Korea relies heavily on missile exportation for hard currency. But it has also used missile exports, particularly Nodong missiles, as barter to obtain nuclear technology from Pakistan.⁴⁴³ As early as 1992, Pakistani officials visited North Korea to view Nodong missile tests. Sales of Nodong missiles were finalized through high-level meetings – including the visit of Pakistani Prime Minister Benazir Bhutto to Pyongyang in December 1993.⁴⁴⁴

In the late 1990s, the relationship between Pakistan and North Korea deepened, with intelligence reports indicating an increasing frequency of cargo flights between the two countries in the fall of 1997 and early 1998.⁴⁴⁵ At around the same time, it appears that the former head of the Khan Research Laboratories, Dr. A.Q. Khan, provided North Korea with designs for Pakistan's older gas centrifuge uranium enrichment process.⁴⁴⁶ Between 1997 and July 2002, Pakistani cooperation on nuclear weapons technology involved the exchange of nuclear personnel, and the sharing of technical knowledge, design information on gas centrifuges, machinery, and possibly nuclear material.⁴⁴⁷ This type of technology would allow North Korea to produce highly enriched uranium (HEU)⁴⁴⁸, which Pakistan had been producing since the 1980s.⁴⁴⁹ North Korea's HEU program dates at least from 1996.⁴⁵⁰

⁴³⁹ See U.S.-KOREAN RELATIONS, *supra* note 412, at 14.

⁴⁴⁰ See Kaplan, *supra* note 428.

⁴⁴¹ See *id.*

⁴⁴² See *id.*

⁴⁴³ See KAMPANI, *supra* note 426, at 110.

⁴⁴⁴ See *id.*

⁴⁴⁵ See *id.*

⁴⁴⁶ See SHARON S. SQUASSONI, WEAPONS OF MASS DESTRUCTION: TRADE BETWEEN NORTH KOREA AND PAKISTAN 2 (Congressional Research Service, Mar. 11, 2004).

⁴⁴⁷ See KAMPANI, *supra* note 426, at 108.

⁴⁴⁸ See U.S.-KOREAN RELATIONS, *supra* note 412, at 11-12.

⁴⁴⁹ See SQUASSONI, *supra* note 446, at 4.

⁴⁵⁰ See U.S.-KOREAN RELATIONS, *supra* note 412, at 9.

(3) The End of the Agreed Framework

The Agreed Framework disintegrated in late 2002, when the United States claimed publicly that North Korea had revealed a secret nuclear weapons program based on HEU in the course of multilateral talks.⁴⁵¹ Shortly after the Agreed Framework fell apart, North Korea once again expelled IAEA inspectors because there was “no longer justification” for the inspectors to remain.⁴⁵² In early 2003 and effective April 10, 2003, North Korea withdrew from the NPT.⁴⁵³

North Korea immediately denied that an HEU program existed, but then admitted on February 10, 2005, that it had nuclear weapons and stated that it would increase its nuclear arsenal to defend against a hostile US policy.⁴⁵⁴

(4) Current Status of the North Korea Nuclear Program

North Korea has been accumulating plutonium since 1986.⁴⁵⁵ It is likely that North Korea has been using spent nuclear fuel from its reactor at Yongbyon to produce weapons-grade plutonium.⁴⁵⁶ The Yongbyon site was shut down first in 1989, and the intelligence community estimates that North Korea – in a “worst case” scenario – separated up to 10 kilograms of plutonium before 1992 as a result.⁴⁵⁷ After that same reactor was shut down in 1994 and its spent fuel placed in storage, no plutonium was likely produced until 2003, at which time North Korea processed the stored spent fuel.⁴⁵⁸ The Yongbyon reactor was also taken off line in April 2005, again with the likely purpose of unloading the fuel; the reactor core was estimated to contain 10 to 15 kilograms of plutonium at that point.⁴⁵⁹ Based on these three shutdowns, it is estimated that North Korea has produced a total of 43 to 61 kilograms of plutonium, of which 20 to 53 kilograms are usable in nuclear weapons.⁴⁶⁰ It is estimated that a country like North Korea would need six to eight kilograms of plutonium to produce a single atomic bomb.⁴⁶¹

Some reports state that North Korea may have as many as ten nuclear devices in its possession already.⁴⁶² If true, it would seem that the Nodong missiles are the most likely type of missile to carry the nuclear payload, as

⁴⁵¹ See NUCLEAR WEAPONS PROGRAM, *supra* note 430, at 4.

⁴⁵² NORTH KOREA: THE NORTH KOREAN DISARMAMENT TALKS (Council on Foreign Relations, Jul. 25, 2005).

⁴⁵³ See SQUASSONI, *supra* note 446, at 3.

⁴⁵⁴ See International Crisis Group, *supra* note 416, at 2.

⁴⁵⁵ DAVID ALBRIGHT ET AL., THE NORTH KOREAN PLUTONIUM STOCK MID-2006 1 (Institute for Science and International Security, Jun. 26, 2006).

⁴⁵⁶ See *id.*

⁴⁵⁷ See *id.* at 2.

⁴⁵⁸ See *id.* at 3.

⁴⁵⁹ See *id.*

⁴⁶⁰ See *id.*

⁴⁶¹ See NUCLEAR WEAPONS PROGRAM, *supra* note 430, at 9.

⁴⁶² See Scott Stossell, *North Korea: The War Game*, THE ATLANTIC MONTHLY, Jul.-Aug. 2005.

there is little evidence to suggest that North Korea could produce a warhead light enough for the Taepodong-2 missiles.⁴⁶³

With respect to HEU, sources vary in their estimates as to how quickly North Korea could produce a warhead. In December 2002, the CIA estimated publicly that North Korea could produce two atomic bombs annually using HEU, starting in 2005.⁴⁶⁴ In April 2004, a US intelligence official was quoted as saying that the North Korean infrastructure for HEU could produce as many as six atomic bombs annually.⁴⁶⁵ Others estimate that production could not begin until 2006 or 2007.⁴⁶⁶ North Korea recently announced it plans to step up production of nuclear weapons fuel by unloading fuel rods at Yongbyong reactor and extracting plutonium.⁴⁶⁷ In October 2006, North Korea's Foreign Ministry announced the country's intent to conduct a nuclear test.⁴⁶⁸ Shortly thereafter, the UN Security Council unanimously adopted a non-binding presidential statement urging North Korea to refrain from conducting a nuclear test.⁴⁶⁹ Despite this warning, North Korea detonated a nuclear device on October 9, 2006.⁴⁷⁰

2. Refugee Outflows

Estimates of the number of North Korean refugees living in neighboring countries vary widely – from under 100,000 to as high as 400,000.⁴⁷¹ The primary motivation in fleeing North Koreans is either to find a better life or to access food and other basic supplies to bring back to their families in North Korea.⁴⁷² Others flee for political or religious reasons.⁴⁷³ Nevertheless, having

⁴⁶³ See ALBRIGHT, *supra* note 455, at 1.

⁴⁶⁴ See NUCLEAR WEAPONS PROGRAM, *supra* note 430, at 9.

⁴⁶⁵ See *id.*

⁴⁶⁶ See *id.*

⁴⁶⁷ See *North Korea to Challenge U.S. on Nuclear Fuel*, NEW YORK TIMES, Sept. 25, 2006.

⁴⁶⁸ See *North Korea to Conduct Nuclear Test, Government Says*, BLOOMBERG, Oct. 3, 2006.

⁴⁶⁹ See, e.g., *UN Council Presses North Korea to Drop Plans for Nuclear Test*, NEW YORK TIMES, Oct. 7, 2006.

⁴⁷⁰ See, e.g., *N. Korea Conducts Nuclear Weapons Test*, ASSOCIATED PRESS, Oct. 9, 2006.

⁴⁷¹ See KEUMSOON LEE, THE BORDER-CROSSING NORTH KOREANS: CURRENT SITUATIONS AND FUTURE PROSPECTS 18 (Korea Institute for National Unification, 2006) (estimating there are 30,000 to 100,000 North Korean refugees living in neighboring countries); see also ACTS OF BETRAYAL: THE CHALLENGE OF PROTECTING NORTH KOREANS IN CHINA 5 (Refugees International, Apr. 2005) (noting that “the most common estimate” of migrants and asylum seekers in China is 100,000 to 300,000). There is no precise determination of the numbers of refugees who have left North Korea both because data is very difficult to track and the UN High Commissioner for Refugees (UNHCR) is not permitted access to individuals who have fled North Korea.

⁴⁷² See Testimony of Joel Charny, Refugees International, *The Hidden Gulag: Putting Human Rights on the North Korea Policy Agenda*, HEARING BEFORE SENATE FOREIGN RELATIONS COMMITTEE [hereinafter Charny Testimony].

⁴⁷³ See *id.*; see also KEUMSOON LEE, *supra* note 471, at 7-17 (dividing motivations for escape from North Korea into “push factors,” such as food shortages, a sense of deprivation, and expectations for a better life, and “pull factors” including support from Korean communities in China, activities by relief organizations, and job opportunities).

left North Korea, even so-called economic migrants may likely be characterized as *refugees sur place*.⁴⁷⁴

The North Korean economy's collapse in the 1990s, together with the severe famine brought on by agricultural disasters in 1994 and 1995, prompted hundreds of thousands of North Korean refugees to seek help across the border.⁴⁷⁵ Some estimates suggest that a million North Koreans and perhaps many more died in their homeland of sickness and hunger during the food crisis in the 1990s.⁴⁷⁶

North Korean law criminalizes defection from the country, including attempts to gain entry to a foreign diplomatic facility to seek political asylum.⁴⁷⁷ The North Korean regime differentiates between persons who cross the border in search of food – who might only be sentenced for a few months under the revised criminal code adopted in 2004 – and those who cross for political purposes, who may receive heavy sentences.⁴⁷⁸ Individuals who cross the border to defect or seek asylum are subject to “labor correction.”⁴⁷⁹ In serious cases, defectors or asylum seekers are subjected to indefinite terms of imprisonment and forced labor, confiscation of property, or death.⁴⁸⁰ Many refugees who are returned have been imprisoned under harsh conditions, including assignment to hard labor on construction projects or in the fields, with limited rations.⁴⁸¹

Once across the border, refugees are extremely vulnerable to *refoulement* (“forced return”) back to North Korea.⁴⁸² To date, many neighboring countries

⁴⁷⁴ A *refugee sur place*, is a person who becomes a refugee after leaving his or her country of origin because of the treatment he or she might receive if returned. See, e.g., *The North Korean Refugee Crisis: Human Rights and International Response* (U.S. Committee for Human Rights in North Korea, forthcoming 2006); Elisa Massimino, Director, Lawyers Committee for Human Rights (now Human Rights First), *Examining the Plight of Refugees: The Case of North Korea*, SENATE JUDICIARY SUBCOMMITTEE ON IMMIGRATION, Jun. 21, 2002, at 3. It is also worth noting that the Security Council, when considering outflows of “refugees” as part of the transnational impact of an internal country situation, in practice combines refugees who meet the Refugee Convention definition and economic migrants because of the difficulty of distinguishing between them and the irrelevance of the distinction for the purpose of measuring a cross-border impact. See *infra* Appendix IV.

⁴⁷⁵ See LEE, *supra* note 471, at 7.

⁴⁷⁶ See, e.g., THE INVISIBLE EXODUS: NORTH KOREANS IN THE PEOPLE'S REPUBLIC OF CHINA (Human Rights Watch, Nov. 2002) (explaining that, according to the World Food Programme, annual production of rice and maize in North Korea fell from 8 million metric tons in the 1980s to 2.9 million in 2000) [hereinafter THE INVISIBLE EXODUS]. Human Rights Watch also estimates that approximately 57 percent of the population is malnourished, including 45 percent of children under 5. *Id.*

⁴⁷⁷ See *Country Report on Human Rights Practices 2005: North Korea* (U.S. Department of State, Mar. 8, 2006).

⁴⁷⁸ See *id.*

⁴⁷⁹ *Id.*

⁴⁸⁰ See *id.*; see also *Special Report: North Korea Famine and Refugee Crisis*, ASIA TODAY, Jun. 20, 2002.

⁴⁸¹ See *id.*

⁴⁸² While it is appropriate for a government to deport a person with no legal right to stay in its country, the return of persons who have been determined to be refugees or who could be refugees (asylum seekers) is considered *refoulement*. See *The North Korean Refugee Crisis: Human Rights and International Response*, *supra* note 474.

have not given North Korean escapees the status of “refugees” despite significant evidence of abuse in North Korea. Due to pressure from the North Korean government, neighboring countries routinely return North Korean refugees found within their borders in an effort to maintain good relations with North Korea and to deter further migration.⁴⁸³

Even when they are not deported, refugees have little defense against exploitation in their new country. Financial incentives to turn in refugees to the authorities and penalties for harboring refugees have increased the danger to North Korean refugees from everyone they encounter.⁴⁸⁴ Landlords often demand extremely high rent for shelter, make direct demands for payoffs, and charge “departure” fees when refugees finally move on.⁴⁸⁵ Refugees who flee to neighboring countries describe a desperate life in hiding, characterized by violations of their rights to physical integrity, freedom of movement, access to medical care, and recourse to the legal system.⁴⁸⁶

There are also many reports of outright sexual slavery, in which North Korean women escapees are misled or abducted and sold to foreign men.⁴⁸⁷ Other North Korean women, some with husbands and children at home, arrive in their destination country with the full expectation of selling themselves, either to survive and be fed or to send money back home.⁴⁸⁸ In May 2006, six refugees from North Korea, including four women who were sold into sexual slavery or forced marriages, were admitted to the United States as refugees; they then described the devastating abuse they had suffered at the hands of their prior captors.⁴⁸⁹ Other reports have suggested that the trafficking of North Korean women is a significant problem.⁴⁹⁰

The migration of North Korean children has also created significant and growing problems in their destination countries. These children, some of whom have lost one or more parents or who have parents incapable of caring for them, often become beggars in markets, train stations, airports, and karaoke bars.⁴⁹¹ Most appear to be boys, age 10 or older.⁴⁹² Some take refuge in shelters established by missionary or humanitarian groups; others sleep on the streets. Many of these street children have serious psychological trauma

⁴⁸³ See *THE INVISIBLE EXODUS*, *supra* note 476 at 11; see also *Special Report: North Korea Famine and Refugee Crisis*, ASIA TODAY, Jun. 20, 2002; see also Don Kirk, *Refugees Shed Light on North Korea: Pyongyang Works Closely With Beijing to Stem the Flow*, MSNBC, Jan. 24, 2003.

⁴⁸⁴ See *THE INVISIBLE EXODUS*, *supra* note 476, at 11.

⁴⁸⁵ See *id.*

⁴⁸⁶ See *id.*

⁴⁸⁷ *US Grants Asylum to Refugees From North Korea*, ASSOCIATED PRESS, May 7, 2006.

⁴⁸⁸ See Charny Testimony, *supra* note 472.

⁴⁸⁹ See *US Grants Asylum to Refugees From North Korea*, *supra* note 487.

⁴⁹⁰ See Charny Testimony, *supra* note 472.

⁴⁹¹ See *THE INVISIBLE EXODUS*, *supra* note 476, at 15.

⁴⁹² See *id.*

from being raped, confined, or beaten. These children have also been deprived of their right to education, often for years. Typically, the street children are also the first to be rounded up in periodic crackdowns and deported to North Korea.⁴⁹³

The numbers of North Koreans fleeing to South Korea has increased in recent years. There are estimated to be over 8,000 North Koreans living in South Korea as of September 2006.⁴⁹⁴ More than 160 refugees have fled to South Korea by seeking sanctuary in foreign embassies.⁴⁹⁵ Another 468 refugees, the largest group to reach the South since the end of the Korean War, arrived in Seoul in July 2004 aboard military jets. All told, approximately 6,500 North Korean refugees arrived in South Korea between 2000 and 2005, up from approximately 480 who managed to reach the South between 1990 and 1999.⁴⁹⁶ They are part of a growing tide of North Koreans fleeing famine and oppression in their home country, even as South Korea tightens its own border.⁴⁹⁷

Under the South Korean constitution, North Koreans are considered citizens of Korea; they are thus protected by laws and rights in the South and, in theory, are to be welcomed.⁴⁹⁸ Moreover, North Koreans are to be regarded as “brothers and sisters” under South Korea’s “Sunshine Policy,” which seeks reconciliation between the two Koreas.⁴⁹⁹ Nonetheless, reports from Seoul indicate that South Korean citizens and the South Korean government are ambivalent about the suffering of the North Koreans. As the number of refugees arriving in South Korea increases, many South Koreans are increasingly concerned about the economic cost of easing refugees into South Korean life. Some citizens have taken a cautious attitude toward North Korean refugees, fearing economic turmoil if North Koreans are admitted in large numbers.⁵⁰⁰ Other citizens express open dislike of North Korean refugees, who are sometimes unfairly accused of salacious acts, petty crimes, taking jobs from South Koreans, or being lazy and making themselves a burden on South Korean society.⁵⁰¹

⁴⁹³ See *id.*

⁴⁹⁴ See *Swell of North Korean Refugees Could Strain Thailand's Tolerance*, CHRISTIAN SCIENCE MONITOR, Sept. 7, 2006.

⁴⁹⁵ See Donald MacIntyre, *Kim Sang Hun: One Man Against Kim Jong Il*, TIME MAGAZINE, Apr. 28, 2003.

⁴⁹⁶ See Ministry of Unification (South Korea), *Facts and Figures*, available at <http://www.unikorea.go.kr/en/ENK/ENK0301R.jsp>.

⁴⁹⁷ See Donald MacIntyre, *A Whole New World*, TIME MAGAZINE, Aug. 2, 2004.

⁴⁹⁸ See Robert Marquand, *North Korean Refugees Arrive in Seoul*, CHRISTIAN SCIENCE MONITOR, July 28, 2004.

⁴⁹⁹ See *id.*; see also *supra* Section II.C.3.

⁵⁰⁰ See Charny Testimony, *supra* note 472.

⁵⁰¹ See Marquand, *supra* note 498; see also *The North Korean Refugee Crisis: Human Rights and International Response*, *supra* note 474 (noting treatment of North Korean refugees in South Korea in section by Andrei Lankov).

Refugees who are fortunate enough to arrive in South Korea still face major challenges adjusting to a new life. Loneliness, lack of motivation, cultural estrangement, unemployment, and resentment from South Koreans are some of the major issues facing refugees.⁵⁰² The North's educational system lags considerably behind that of South Korea, and most North Koreans have never used a computer.⁵⁰³ Moreover, some have psychological problems from the circumstances of their flight.⁵⁰⁴

3. Drug Trafficking

North Korea's participation in drug production and trafficking began in the 1970s, and accelerated after the reduction in state aid from China and Russia in the early 1990s.⁵⁰⁵ This section discusses the North Korean state policy encouraging and participating in the drug trade. Despite Kim Jong Il's consistent denials, the evidence demonstrates that North Korea engages in drug trafficking – from \$500 million to \$1 billion per year⁵⁰⁶ – as a source of foreign currency to fund its WMD program and other government initiatives.⁵⁰⁷

It is difficult to ascertain North Korea's economic and trade figures with a high degree of accuracy because the country does not release these statistics.⁵⁰⁸ Nevertheless, independent analysts have enough data to conclude that its economy suffered a notable blow in the early 1990s when aid from China and Russia declined.⁵⁰⁹ In 2003, North Korea's annual GDP was estimated to be between \$750 to \$1,000 per capita.⁵¹⁰ While North Korea imports approximately \$2 billion in goods per year, it only exports an estimated \$1.1 billion per year. This leaves an estimated trade deficit of \$900 million.⁵¹¹ To compensate for the trade deficit and to fund other major government expenditures for the military and its WMD programs, North Korea has increased production and trafficking of illegal narcotics.

⁵⁰² See *Special Report: North Korea Famine and Refugee Crisis*, ASIA TODAY, Jun. 20, 2002.

⁵⁰³ See MacIntyre, *supra* note 497.

⁵⁰⁴ See *id.*

⁵⁰⁵ See LCDR CINDY HURST, NORTH KOREA: A GOVERNMENT-SPONSORED DRUG TRAFFICKING NETWORK 3 (Army Foreign Military Studies Office, 2006).

⁵⁰⁶ *Heroin Busts Point to Source of Funds for North Koreans*, WALL STREET JOURNAL, Apr. 23, 2003 (referencing figures from U.S. military command in South Korea).

⁵⁰⁷ See *id.* at 4. According to the U.S. State Department, "it is likely, but not certain, that the North Korean government sponsors criminal activities, including narcotics production and trafficking, in order to earn foreign currency for the state and its leaders." INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT 2006 (U.S. Department of State, Mar. 2006) [hereinafter INCSR REPORT].

⁵⁰⁸ See *id.*

⁵⁰⁹ See *id.*

⁵¹⁰ See Raphael F. Perl, *Drug Trafficking and North Korea: Issues for U.S. Policy* (Congressional Research Service, Mar. 4, 2005), at 3.

⁵¹¹ See *id.*

North Korea began producing narcotic drugs as a secret state policy in the late 1970s; by the late 1980s, Kim Il Sung began producing and selling drugs in greater quantities.⁵¹² As the raw materials and energy resources necessary for producing legitimate exports disappeared in the early 1990s, North Korea became more reliant on illegal sources of foreign currency.⁵¹³ From the beginning and under Kim Il Sung's direction, opium was grown on secret, heavily guarded opium farms, then sent to the government to be processed into heroin.⁵¹⁴ According to South Korea's National Intelligence Service, one such destination is the Nanam drug factory in Chongjin city, which was established by Kim Il Sung in 1993 and is operated by the People's Armed Forces Department.⁵¹⁵

As drug production increased, so did North Korea's production of poppy, the principal ingredient for opium. North Korea has never hid the fact that it cultivates poppies, but claims that it is for pharmaceutical production.⁵¹⁶ In 1997, Kim Jong Il ordered each collective farm in North Korea to grow approximately 25 acres of poppies beginning in 1998; and the United States estimates that North Korea has approximately 10,000 to 17,000 acres of land under poppy cultivation.⁵¹⁷ If this statistic is accurate, North Korea has the potential to harvest 30 to 44 tons of opium.⁵¹⁸ While this is only 10 to 15 percent of the 310 tons of opium produced by a country like Burma⁵¹⁹, North Korea still produces enough opium to manufacture 4.5 tons of heroin per year.⁵²⁰

In addition to opium and heroin, North Korea also produces methamphetamines for export.⁵²¹ In 1996, North Korea began to produce methamphetamines after heavy rains decreased its income from poppy production.⁵²² Today, North Korea's maximum methamphetamine production capacity is estimated to be 10 to 15 tons per year.⁵²³ Again, as with its opium production, North Korea's production of methamphetamine is only a fraction of the total world market, which produces approximately 480 tons per year.⁵²⁴

North Korean diplomats have a long history of dealing in contraband. Almost all of North Korea's diplomatic corps in Scandinavia were expelled in

⁵¹² See *id.* at 3; see also Perl, *supra* note 510, at 11.

⁵¹³ See HURST, *supra* note 505, at 4.

⁵¹⁴ See *id.* at 3-4.

⁵¹⁵ See *id.* at 6.

⁵¹⁶ See *id.* at 5.

⁵¹⁷ See *id.*

⁵¹⁸ See *id.* at 5; see also Perl, *supra* note 510, at 9.

⁵¹⁹ See *Myanmar Opium Survey 2005* (UN Office on Drugs and Crime, Nov. 2005).

⁵²⁰ See HURST, *supra* note 505, at 5.

⁵²¹ See *id.* at 11.

⁵²² See *id.* at 9.

⁵²³ See *id.*

⁵²⁴ See *World Drug Report 2006* 123 (UN Office of Drugs and Crime, Jun. 26, 2006).

1976 for running a smuggling ring for alcohol and cigarettes through Norway, Denmark, and Finland.⁵²⁵ Since that incident, more than 20 North Korean diplomats, agents, and trade officials have been implicated in illicit drug operations in more than 12 countries, including Egypt, Venezuela, India, Germany, Nepal, Sweden, Zambia, Ethiopia, and Laos.⁵²⁶ In addition, since 1976, North Korea has been linked to over 50 incidents involving drug seizures in at least 20 countries.⁵²⁷

With regard to current drug trafficking, Japanese drug officials report that 43 percent of all illegal drugs imported to Japan come from North Korea, providing a large cash profit for the North Korean government.⁵²⁸ Taiwanese police and prosecutors also report an increase in drugs flowing from North Korea to Taiwan, primarily heroin.⁵²⁹ Raids in Taiwan and Japan have uncovered heroin that was packed in the exact same rice bags that were used to ship donated rice to North Korea as famine relief – thus identifying North Korea as the source of the drugs.⁵³⁰

Though North Korea is a closed, secretive regime, independent statements from defectors corroborate each other and all indicate that the North Korean government is actively involved in the country's drug production.⁵³¹ One defector, Kim Dok Hong, was a senior official of North Korea's Workers' Party and the top aide to Kim Il Sung's secretary.⁵³² According to Kim Dok Hong, Kim Jong Il commonly spoke of the use of opium as a means for earning hard currency, and actually traveled to towns to discuss North Korea's strategy for growing opium poppies.⁵³³

Finally, many experts believe that North Korean diplomats cooperate with organized crime groups in other countries, including the Chinese triads, the Japanese yakuza, and the Russian mafia.⁵³⁴ North Korea also has ties with groups based in Southeast Asia's Golden Triangle, the cross-border area where opium and heroin are produced in Burma, Thailand, and Laos.⁵³⁵ The North Korean government's association with these parties is coordinated by Bureau No. 39, a government office created to procure foreign currency for Kim Jong Il

⁵²⁵ Jay Solomon & Jason Dean, *Drug Money: Heroin Busts Point to Source of Funds for North Koreans*, WALL STREET JOURNAL, Apr. 23, 2003.

⁵²⁶ Anthony Spaeth, *Kim's Rackets*, TIME ASIA, Jun. 9, 2003, at 14.

⁵²⁷ Perl, *supra* note 510, at 6.

⁵²⁸ Balbina Y. Hwang, *Curtailling North Korea's Illicit Activities* (Heritage Foundation, Aug. 25, 2003), at 4.

⁵²⁹ See Solomon & Dean, *supra* note 525.

⁵³⁰ See *id.*

⁵³¹ See HURST, *supra* note 505 at 7; see also INCSR REPORT, *supra* note 507 ("As reported in previous INCSRs, North Korean defectors and informants have long asserted that large-scale opium poppy cultivation and production of heroin and methamphetamine occurs in the DPRK").

⁵³² See *id.* at 8.

⁵³³ See *id.*

⁵³⁴ See *id.* at 20.

⁵³⁵ See *id.* at 8.

through both legitimate and illegitimate means.⁵³⁶ Bureau No. 39 is comprised of two parts: one engages in illegal activities and the other in legitimate business under the Daesong Group, its Daesong Bank, and Vienna-based Golden Star Bank.⁵³⁷ Bureau No. 39's illegal activities reportedly include opium and heroin production and trafficking, methamphetamine production and trafficking, counterfeiting, and smuggling.⁵³⁸

North Korea has not been labeled a major drug-producing country because much of the evidence is anecdotal and the available data cannot substantiate North Korea's exact production levels.⁵³⁹ However, clearly North Korea is actively engaging in drug production and trafficking on a significant scale, even if the precise volume remains unknown. It is likely that this activity will continue as long as there is a significant gap between North Korea's consumption of raw and processed materials and the government's ability to purchase or produce those materials.

4. Money Counterfeiting and Laundering

The following section discusses the evolution of North Korea's counterfeiting activities, the evidence linking the North Korean government to these activities, and the involvement of the Banco Delta Asia in Macau in assisting North Korea with its illegal activities. From this discussion, it is evident that North Korea is systematically seeking to undermine the economic stability of the United States and the international monetary system.

The United States has determined that a definitive connection exists between the North Korean government and the high-quality, counterfeit \$100 bills commonly known as "supernotes."⁵⁴⁰ According to the most reliable statistics, North Korea has produced between \$45 million and \$100 million in supernotes since 1989⁵⁴¹, and estimates of its current yearly production range between \$3 million and \$25 million per year.⁵⁴²

Sources indicate that counterfeiting has been Kim Jong Il's passion since the 1970s during his father's reign.⁵⁴³ Upon becoming North Korea's leader, Kim Jong Il endorsed counterfeiting as a means to pay for covert operations and as a way to wage economic warfare against the United States.⁵⁴⁴

⁵³⁶ See Perl, *supra* note 510, at 7-8.

⁵³⁷ See *id.*

⁵³⁸ See *id.*

⁵³⁹ See HURST, *supra* note 505, at 4.

⁵⁴⁰ Raphael F. Perl & Dick K. Nanto, *North Korean Counterfeiting of U.S. Currency* (Congressional Research Service, Mar. 22, 2006), at 8.

⁵⁴¹ See *id.*

⁵⁴² See *id.*

⁵⁴³ See *id.*

⁵⁴⁴ See *id.* at 40.

Despite the original purposes of this counterfeiting, as North Korea's economy has collapsed, the extra currency has become an economic necessity⁵⁴⁵ North Korea reportedly has a \$900 million trade deficit per year due to excessive importing and insufficient exporting⁵⁴⁶, and therefore relies on counterfeiting and other illicit activities to fund its trade deficit.⁵⁴⁷ Counterfeiting produces the hard currency the regime needs to purchase not only necessary imports but luxury items for the country's elite.⁵⁴⁸

Supernotes were first discovered in circulation in December 1989, when an experienced money handler in the Central Bank of the Philippines became suspicious about a \$100 bill that felt different from other bills.⁵⁴⁹ The Central Bank sent the suspicious bill to the US Secret Service, which determined the bill was counterfeit. The bill had been printed on paper consisting of the same three-quarters cotton, one-quarter linen mix used by the United States, and its manufacturer had used technology that is, in theory, only available to governments.⁵⁵⁰

There are several types of supernotes, and each version appears more authentic than the last; the most recent version appears to use an optically variable ink that is manufactured solely for the United States government.⁵⁵¹ North Korea has purchased the closest match to the ink and has manipulated it to resemble the ink used by the United States.⁵⁵²

Additional evidence of North Korea's involvement in the manufacture of supernotes includes instances in which North Korean officials were caught carrying the counterfeit bills.⁵⁵³ In one example, in 2005 a North Korean diplomat was arrested in Belgrade for passing supernotes.⁵⁵⁴ In another, North Korean trading company officials carrying diplomatic passports were arrested after depositing \$250,000 worth of supernotes in a Macau bank.⁵⁵⁵ Furthermore, defectors have identified the buildings in Pyongyang and Pyongsong that contain the counterfeiting equipment.⁵⁵⁶ While documentation is sparse, North Korea's involvement in this counterfeiting activity is widely reported.

⁵⁴⁵ See *id.*

⁵⁴⁶ See Perl & Nanto, *supra* note 540, at 5.

⁵⁴⁷ See *id.*

⁵⁴⁸ See Stephen Mihm, *No Ordinary Counterfeit*, NEW YORK TIMES MAGAZINE, Jul. 23, 2006, at 40.

⁵⁴⁹ See *id.* at 38.

⁵⁵⁰ See *id.*

⁵⁵¹ See *id.* at 41.

⁵⁵² See *id.*

⁵⁵³ See *id.* at 40.

⁵⁵⁴ Bill Gertz, *North Korea Charged in Counterfeiting of U.S. Currency*, WASHINGTON TIMES, Dec. 2, 2005.

⁵⁵⁵ Perl & Nanto, *supra* note 540, at 4.

⁵⁵⁶ Mihm, *supra* note 548, at 40.

In a move to counteract the circulation of counterfeit US currency, the United States ordered a halt to transactions between US financial institutions and Banco Delta Asia in Macau in September 2005.⁵⁵⁷ Approximately \$24 million was frozen on suspicion that the Macau bank was involved with North Korea in both counterfeiting US currency and money laundering.⁵⁵⁸ This action reportedly prompted other banks to refrain from conducting transactions with North Korea.⁵⁵⁹

North Korea categorically denies its involvement in counterfeiting US currency, and has cited the Banco Delta Asia action as a reason for refusing to return to the Six-Party Talks on its nuclear program.⁵⁶⁰ In truth, all the counterfeit money circulating worldwide only constitutes one percent of the total supply of US currency⁵⁶¹, and the US Secret Service has only removed \$50 million worth of North Korean supernotes from circulation.⁵⁶² However, the United States regards freezing funds at the Banco Delta Asia as justified given its view that counterfeiting threatens any good-faith negotiations between the United States and North Korea⁵⁶³, and that counterfeiting has the potential to undermine the currency system of the United States.⁵⁶⁴ In addition, the discovery of supernotes in a smaller foreign economy (*e.g.*, Peru) that uses US currency “can cause a local crisis of confidence in the dollar.”⁵⁶⁵

Producing counterfeit currency undermines the US currency system and impacts the diplomatic relations between the United States and the rest of the world. Though the current economic threat to the United States is minimal⁵⁶⁶, North Korea’s counterfeiting is an ongoing problem. According to one expert, “even if the counterfeiting is not worthy of being a diplomatic issue unto itself, the fact that North Korea is counterfeiting serves as a grim reminder of the difficulty of good-faith negotiations.”⁵⁶⁷ David Asher, a former advisor in the US State Department, observes: “If [North Korea is] going to counterfeit our currency the entire time they’re engaged in diplomatic negotiations, what

⁵⁵⁷ See Press Release, *Treasury Designates Banco Delta Asia as Primary Money Laundering Concern under USA PATRIOT Act* (U.S. Department of the Treasury, Sept. 15, 2005), available at <http://www.treasury.gov/press/releases/js2720.htm>; see also FINDING THAT BANCO DELTA ASIA SARL IS A FINANCIAL INSTITUTION OF PRIMARY MONEY LAUNDERING CONCERN, 70 Fed. Reg. 55215, Sep. 20, 2005.

⁵⁵⁸ See Krishna Guha, *U.S. Mulls Reimposing Economic Sanctions on N. Korea Over Missiles*, FINANCIAL TIMES, Jul. 31, 2006.

⁵⁵⁹ See *id.*

⁵⁶⁰ See William Gertz, *US Sanctions Cost North Korea Millions*, WASHINGTON TIMES, Jun. 16, 2006.

⁵⁶¹ See William Faries, *Made in South America: New Breed of Fake U.S. Dollars*, CHRISTIAN SCIENCE MONITOR, Apr. 14, 2005.

⁵⁶² See Mihm, *supra* note 548, at 41.

⁵⁶³ See *id.*

⁵⁶⁴ See HWANG, *supra* note 528, at 4.

⁵⁶⁵ Mihm, *supra* note 548, at 41.

⁵⁶⁶ See *id.*

⁵⁶⁷ *Id.*

does that say about their sincerity?”⁵⁶⁸ North Korea will continue to engage in illicit activities as long as its economy remains weak and the country is unable to fund its trade deficit through legitimate means.

C. The International Response

1. The Six-Party Talks

After the Agreed Framework was repudiated and North Korea withdrew from the NPT, bilateral relations between the United States and North Korea deteriorated. As a result, the United States called for multilateral discussions. The Chinese government brokered talks between the two nations in April 2003.⁵⁶⁹ Little progress emerged from these initial talks.⁵⁷⁰ What did emerge, however, was the framework for the Six-Party Talks.

a. Initial Three Meetings

The Six-Party Talks began in August 2003 as an extension of the Three-Party Talks in April of that year.⁵⁷¹ New participants for the Six-Party Talks were South Korea, Japan, and Russia.⁵⁷² Topics for discussion included the dismantlement of the North Korean nuclear programs, weapons, and facilities⁵⁷³ and the US political and economic sanctions imposed on North Korea due to alleged North Korean support of international terrorism and its poor nonproliferation record.⁵⁷⁴ The first three rounds of the Six-Party Talks, held in August 2003, February 2004, and June 2004, produced little in the way of substantive discussion, leading one commentator to state that “the first three rounds of six party talks cannot be considered negotiations.”⁵⁷⁵

b. The Fourth Round

North Korea announced on July 8, 2005, that it wished to resume the Six-Party Talks.⁵⁷⁶ This fourth round of talks took place over two separate periods – first from July 26 through August 7, 2005, and again from September 13 through September 19, 2005. The US representative, Assistant Secretary of State Christopher Hill, engaged the North Korean representative, Vice Minister Kim Gye-Gwan, in direct talks outside the plenary sessions involving all six countries.⁵⁷⁷

⁵⁶⁸ *Id.*

⁵⁶⁹ See CHARLES L. PRITCHARD, SIX PARTY TALKS UPDATE: FALSE START OR A CASE FOR OPTIMISM? at the conference *The Changing Korean Peninsula and the Future of East Asia* (Brookings Institution, Dec. 1, 2005).

⁵⁷⁰ See *id.*

⁵⁷¹ See U.S.-KOREAN RELATIONS, *supra* note 412, at 3.

⁵⁷² See *id.*

⁵⁷³ See *id.*

⁵⁷⁴ See WIT, *supra* note 356, at 16.

⁵⁷⁵ See PRITCHARD, *supra* note 569, at 1.

⁵⁷⁶ See *id.*

⁵⁷⁷ See International Crisis Group, *supra* note 416, at 2.

These substantive discussions led to the issuance of what was called the Statement of Principles on September 19, 2005.⁵⁷⁸ The Statement of Principles included apparent commitments from North Korea to: (a) abandon its nuclear weapons and its existing nuclear programs; (b) rejoin the NPT; and (c) accept IAEA safeguards at an early date.⁵⁷⁹ North Korea also agreed to negotiate a Korea peace accord outside the nuclear discussions, and even allowed an implicit reference to the North Korean kidnapping of Japanese citizens.⁵⁸⁰ A third part of the Statement of Principles called for North Korea to be allowed to pursue a peaceful nuclear energy program through the use of the light-water nuclear reactor.⁵⁸¹ Finally, Pyongyang would receive energy assistance and economic cooperation, including receiving electricity from South Korea.⁵⁸²

Within hours after the Statement of Principles was issued, however, both the United States and North Korea issued statements that served to rebut parts of the Statement of Principles.⁵⁸³ For its part, the North Korean statement said that North Korea refused to abide by the tenets of the Statement of Principles until such time as the United States had completely fulfilled its commitments.⁵⁸⁴ In other words, North Korea refused to abandon its nuclear weapons program until the light-water nuclear reactor was actually completed – a project estimated to take at least ten years.⁵⁸⁵

c. The Fifth Round

The Fifth Round of talks took place from November 9 through November 11, 2005, in Beijing. With the background of both the rebuttals to the Statement of Principles and the intervening US crackdown on banks in Macau, in which the United States required the Macau-based Banco Delta Asia to halt dealings with North Korea or lose access to US financial markets, the Fifth Round of talks produced no substantive agreements on any issues.⁵⁸⁶ Talks ended quickly and with no date set for another round of talks.⁵⁸⁷

d. Possibilities of Future Talks

Since November 2005, no further Six-Party Talks have been held. In March 2006, US officials met with their counterparts from North Korea.

⁵⁷⁸ See LARRY A. NIKSCH, *The Six-Party Statement: Is It a Viable Roadmap or a Road to Nowhere?*, IMPLEMENTING THE SIX-PARTY JOINT STATEMENT AND THE KOREAN PENINSULA 10 (Korea Institute for National Unification, 2005).

⁵⁷⁹ See *id.*

⁵⁸⁰ See *id.* at 11.

⁵⁸¹ See International Crisis Group, *supra* note 416, at 2.

⁵⁸² See *id.*

⁵⁸³ See *id.* at 3.

⁵⁸⁴ See *id.*

⁵⁸⁵ See U.S.-KOREAN RELATIONS, *supra* note 412, at 18.

⁵⁸⁶ See International Crisis Group, *supra* note 416, at 3-4.

⁵⁸⁷ See *id.* at 4.

According to news reports, North Korean officials set four conditions for returning to the Six-Party Talks: the removal of what North Korea termed “financial sanctions,” forming a joint US-North Korean task force to examine the counterfeiting concerns, giving North Korea access to the US banking system, and providing North Korea with technical help on identifying counterfeit bills.⁵⁸⁸ The United States rejected any linkage between actions taken by the Treasury Department to combat counterfeiting, including its actions against Banco Delta Asia, and the Six-Party Talks.⁵⁸⁹

US Assistant Secretary of State Christopher Hill visited Beijing on September 5, 2006, to seek Chinese assistance in pressuring North Korea to rejoin the Six-Party Talks.⁵⁹⁰ Assistant Secretary Hill was not optimistic that the North Koreans would rejoin the talks.⁵⁹¹ The recent nuclear weapons test by North Korea and the quick response from the UN Security Council have seriously heightened tensions.

2. The United Nations

Despite the efforts of various UN bodies to urge North Korea to modify its human rights practices, the North Korean government has refused. The North Korean government has repeatedly been unwilling to engage in substantial discussions regarding human rights or to accept technical assistance from the United Nations with respect to human rights.⁵⁹² Becoming increasingly frustrated with the North Korean government’s obstinacy, the UN General Assembly adopted a resolution expressing the body’s serious concern regarding both the government’s refusal to cooperate with – or even recognize – the Special Rapporteur for Human Rights in North Korea and the reports of “systematic, widespread and grave violations of human rights.”⁵⁹³ The United Nations’ concern, however, has had no effect on the North Korean government, which to this day refuses to engage in serious discussions regarding human rights. Thus, a Security Council resolution is the only mechanism remaining to increase the pressure on North Korea to both stop the human rights violations taking place in the country and provide open access for humanitarian relief.

⁵⁸⁸ *N.K. Sets Terms for Return to Nuclear Talks*, WASHINGTON POST, Mar. 9, 2006.

⁵⁸⁹ *See id.*

⁵⁹⁰ *See China Reconsiders Frayed Ties with North Korea*, WASHINGTON POST, Sept. 4, 2006.

⁵⁹¹ *See U.S., Japan Nuclear Envoys Say North Korea Must Return to Talks*, INTERNATIONAL HERALD TRIBUNE, Sept. 4, 2006.

⁵⁹² For example, North Korea has denied Jean Ziegler, UN Special Rapporteur on the Right to Food, entry to the country on at least five occasions. *See* HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 24.

⁵⁹³ G.A. RES. 60/173, *supra* note 98.

a. UN Attempts to Open Dialogue with North Korea

In 2003, the United Nations' former Commission on Human Rights⁵⁹⁴ adopted its first resolution regarding the reported human rights abuses taking place in North Korea.⁵⁹⁵ The resolution expressed the Commission's "deep concern about reports of systemic, widespread, and grave violations of human rights."⁵⁹⁶ Specifically, the resolution addressed several patterns of human rights abuses including prison camps, restrictions on freedom of thought, the mistreatment of disabled children, the prevalence of infant malnutrition, and the violation of the fundamental freedoms of women.⁵⁹⁷ The resolution called on North Korea to allow NGOs access to the country to ensure that humanitarian assistance was distributed to those in need. The resolution also requested that the UN High Commissioner for Human Rights engage in a dialogue with the North Korean government in an effort to establish technical cooperation programs in the field of human rights.⁵⁹⁸

The Commission on Human Rights passed a second resolution regarding North Korea in 2004 in which it again expressed "deep concern at the precarious humanitarian situation in the country."⁵⁹⁹ In addition to reiterating the concerns that it listed in the 2003 Resolution, the 2004 Resolution noted the sanctions facing North Korean citizens who have been repatriated from abroad, including their treatment as traitors, leading the repatriated citizens to be punished by internment, torture, degrading treatment, and/or the death penalty.⁶⁰⁰ The Resolution also voiced concern about women's human rights⁶⁰¹ and urged the North Korean government to "put an immediate end to maltreatment and infanticide in prison and labour camps."⁶⁰²

The Resolution expressed displeasure that following the 2003 Resolution, the North Korean government failed to allow the international community to examine the reports of human rights abuses independently.⁶⁰³ In trying to bring North Korea to discussions on human rights issues, the 2004 Resolution requested that a Special Rapporteur be appointed to report on the situation of human rights in the country and "to establish direct contact with the Government and with the people of the Democratic People's Republic of

⁵⁹⁴ The Commission on Human Rights was replaced by the Human Rights Council in March 2006. See G.A. RES. 60/251, UN Doc. A/RES/60/251 (Mar. 15, 2006).

⁵⁹⁵ See COMM'N ON HUMAN RIGHTS RES. 2003/10, UN Doc. E/CN.4/2003/L.11 (Apr. 16, 2003).

⁵⁹⁶ *Id.* at ¶ 1.

⁵⁹⁷ See *id.* at ¶¶ 1–2.

⁵⁹⁸ See *id.* at ¶ 6.

⁵⁹⁹ COMM'N ON HUMAN RIGHTS RES. 2004/13, UN Doc. E/2004/23 – E/CN.4/2004/127 (Apr. 15, 2004).

⁶⁰⁰ See *id.* at ¶ 1.

⁶⁰¹ *Id.* at ¶ 1.

⁶⁰² *Id.* at ¶ 2.

⁶⁰³ See *id.*

Korea.”⁶⁰⁴ The North Korean government was urged to provide full and unreserved cooperation to the Special Rapporteur to ensure his free and unlimited access to all persons in North Korea.⁶⁰⁵

b. Special Rapporteur for Human Rights in North Korea

Professor Vitit Muntarbhorn⁶⁰⁶ was appointed Special Rapporteur for Human Rights in North Korea in July 2004.⁶⁰⁷ His first report to the United Nations was issued on January 10, 2005.⁶⁰⁸ In his report, the Special Rapporteur noted several positive actions that North Korea had taken, including being a signatory to four key human rights treaties, occasionally allowing UN agencies and NGOs to enter the country, warming relations between North Korea and other countries, and having some legal and operations infrastructure that can help promote and protect human rights.⁶⁰⁹

The Special Rapporteur also broadly noted the following numerous human rights concerns:

[T]he right to food and the right to life; the right to security of the person, humane treatment, non-discrimination and access to justice; the right to freedom of movement and protection of persons linked with displacement; the right to the highest attainable standard of health and the right to education; the right to self-determination/political participation, access to information, freedom of expression/belief/opinion, association and religion; and the rights of specific persons/groups, including women and children.⁶¹⁰

More specifically, the report discussed the catastrophic food shortages that took place in the mid-1990s and voiced his concern that the food aid was not reaching those who needed it most, but was instead being diverted for other

⁶⁰⁴ *Id.* at ¶¶ 5-6.

⁶⁰⁵ *See id.* at ¶ 8.

⁶⁰⁶ Professor Muntarbhorn is currently a professor of law at Chulalongkorn University in Bangkok, Thailand. He has served in various capacities in the United Nations system, including as Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography (1990-1994) and as expert or advisor to many United Nations organizations. *See Vitit Muntarbhorn Appointed UN Special Rapporteur on Situation of Human Rights in the Democratic People's Republic of Korea*, HR/4786, Aug. 6, 2004.

⁶⁰⁷ *See* SPECIAL RAPPORTEUR FOR THE COMM'N ON HUMAN RIGHTS, *Question of the Violation of Human Rights and Fundamental Freedom In Any Part Of the World: Situation of Human Rights in the Democratic People's Republic of Korea*, UN Doc. E/CN.4/2005/34 (Jan. 10, 2005), at 2.

⁶⁰⁸ *See id.*

⁶⁰⁹ *See id.* at ¶¶ 9 - 18.

⁶¹⁰ *Id.* at 2.

clandestine uses.⁶¹¹ The Special Rapporteur also discussed the lack of an independent judiciary and noted what he called the “disconcerting practice” of collective punishment based upon guilt by association or collective punishment under which the families of political criminals are also punished.⁶¹²

Given what the Special Rapporteur called “a variety of discrepancies and transgressions – several of an egregious nature – in the implementation of human rights,” he issued 12 recommendations to the North Korean government, including a broad request that the country abide by international human rights standards and reform its laws in accordance with those standards.⁶¹³ The Special Rapporteur recommended reforming the administration of justice through promoting an independent and transparent judiciary.⁶¹⁴ And he also addressed North Korea’s abductions of foreigners, requesting that the government act to resolve this specific wrongful activity quickly.⁶¹⁵

c. North Korea’s Response

Before the Special Rapporteur’s January 2004 report was issued, the UN High Commissioner for Human Rights had requested that the Commission be allowed to provide technical cooperation in human rights to the North Korean government.⁶¹⁶

On March 2, 2005, following the issuance of the Special Rapporteur’s report, the North Korean government stated its “resolute rejection” of the 2004 Resolution based on North Korea’s belief that the Resolution was politically motivated and that the EU, which initiated the Resolution, did so because it was “taking sides with the United States policy of hostility against” North Korea.⁶¹⁷ The North Korean government also refused to cooperate with the Commission on technical advice as requested by the Commission on Human Rights.⁶¹⁸

Rebuffed in his requests to visit North Korea, the Special Rapporteur issued his second report in August 2005 following his country visits to Japan and Mongolia to assess the impact the human rights situation in North Korea

⁶¹¹ See *id.* at ¶ 31.

⁶¹² *Id.* at ¶ 34.

⁶¹³ See *id.* at ¶¶ 67 - 69.

⁶¹⁴ See *id.*

⁶¹⁵ See *id.*

⁶¹⁶ See SECRETARIAT OF THE COMM’N ON HUMAN RIGHTS, *Question of the Violation of Human Rights and Fundamental Freedom In Any Part Of the World: Situation of Human Rights in the Democratic People’s Republic of Korea, Note by the Secretariat*, UN Doc. E/CN.4/2005/32 (Dec. 22, 2004).

⁶¹⁷ *Letter dated 28 Feb. 2005 from the Permanent Representative of the Democratic People’s Republic of Korea to the United Nations Office at Geneva Addressed to the High Commissioner for Human Rights*, UN Doc. E/CN.4/2005/G/13 (Mar. 2, 2005).

⁶¹⁸ See *id.*

has had on those countries.⁶¹⁹ His August 2005 report discussed and elaborated on the issues he had raised in his January 2004 report and requested that the North Korean government take “immediate action to prevent abuses and provided redress.”⁶²⁰ The report also detailed North Korea’s military expenditures for the years 1988 through 2004, noting that “the authorities of the Democratic People’s Republic of Korea are also under a responsibility to reduce military/defence expenditure and ensure equitable re-allocation of resources to respond effectively to the food crisis and other areas needing development.”⁶²¹

d. Third Commission on Human Rights Resolution and UN General Assembly Resolution

The Commission passed a third resolution regarding the North Korea situation in April 2005, again expressing its “deep concern about the continuing reports of systematic, widespread and grave violations of human rights.”⁶²² In the resolution, the Commission stated its increasing concern that the North Korean government refused to cooperate with any UN body, including the Commission and the Special Rapporteur.⁶²³ The Commission urged the General Assembly to take up the question of human rights in North Korea if the government did not extend cooperation to the Special Rapporteur and if there was no improvement in the human rights situation within North Korea.⁶²⁴

In defiance of the 2005 Resolution, the North Korean government continued its refusal to engage or even recognize the Special Rapporteur. The Special Rapporteur issued his third report on January 23, 2006, in which he described his numerous attempts to obtain an invitation to visit North Korea.⁶²⁵ The government responded to these requests stating that it did not recognize the mandate of the Special Rapporteur and would not meet with or communicate with him regarding human rights issues.⁶²⁶ In his report, the Special Rapporteur stated that there is “still a huge gap between formal

⁶¹⁹ See SPECIAL RAPPOREUR FOR THE COMM’N ON HUMAN RIGHTS, *Situation of Human Rights in the Democratic People’s Republic of Korea*, UN Doc. A/60/306 (Aug. 29, 2005).

⁶²⁰ *Id.* at p. 2.

⁶²¹ *Id.* at ¶¶ 16-17. Various United Nations agencies, including the WFP, UNICEF, FAO, and UNDP have worked for years to alleviate the effects of the North Korean famine and the ongoing challenges of food insecurity in North Korea. From 1995 to 2005, for example, the WFP provided over \$1.7 billion in food aid to North Korea. For more information about the United Nations involvement in alleviating hunger in North Korea, see *supra* Section II.A.1.

⁶²² COMM’N ON HUMAN RIGHTS RES. 2005/11, ¶ 1, UN Doc. E/CN.4/2005/L.10/Add.9 (Apr. 14, 2005).

⁶²³ See *id.* at ¶ 2.

⁶²⁴ See *id.* at ¶ 13.

⁶²⁵ SPECIAL RAPPOREUR FOR THE COMM’N ON HUMAN RIGHTS, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, Situation of Human Rights in the Democratic People’s Republic of Korea*, UN Doc. E/CN.4/2006/35 (Jan. 23, 2006).

⁶²⁶ See *id.* at ¶ 38.

recognition of human rights and substantive implementation of human rights in the country.”⁶²⁷ He went on to explain that “the situation in the country provides a continuing cause of concern – there are still many transgressions and discrepancies of an egregious nature which require effective redress.”⁶²⁸ The Special Rapporteur issued his fourth report on September 27, 2006, stating that human rights abuses in North Korea remained “rampant” and that the North Korean government had been “uncooperative” with respect to his communications with them.⁶²⁹

The General Assembly acted on the request made by the Commission on Human Rights in Resolution 2005/11 and adopted its own resolution concerning the human rights situation in North Korea⁶³⁰, expressing the body’s “serious concern” about the North Korean government’s refusal to recognize the mandate of the Special Rapporteur and about the “reports of systematic, widespread, and grave violations of human rights” in North Korea.⁶³¹ The General Assembly urged the North Korean government to extend full cooperation to the Special Rapporteur and to allow humanitarian organizations full access to the country to ensure that humanitarian assistance was being delivered to those in need.⁶³² To date, however, the North Korean government has not agreed to engage in discussions with any UN body regarding human rights issues.

e. UN Security Council Action on North Korea

Regarding security questions apart from the human rights and humanitarian concerns that are the focus of this report, it is important to note that the UN Security Council recently adopted a resolution on the security threat posed by North Korea.⁶³³ On July 4, 2006, North Korea launched seven long-range missiles, violating a prior commitment to refrain from further missile tests.⁶³⁴ In response to this missile test, the Security Council met in emergency session. After two weeks of discussions, the Security Council adopted Resolution 1695, which expressed “grave concern at the launch of ballistic missiles” by North Korea breaking the country’s pledge to maintain a moratorium on missile launches.⁶³⁵ The Resolution noted that the North Korean missile

⁶²⁷ *Id.* at p. 2.

⁶²⁸ *Id.*

⁶²⁹ See *UN Expert Says N. Korea Human Rights Abuses Rampant*, ASSOCIATED PRESS, Sept. 27, 2006.

⁶³⁰ See G.A. RES. 60/173, *supra* note 98.

⁶³¹ *Id.* at ¶ 1.

⁶³² See *id.* at ¶¶ 4–5.

⁶³³ See S.C. RES. 1695, UN Doc. S/RES/1695 (Jul. 15, 2006).

⁶³⁴ See, e.g., *North Korea Sparks Crisis by Launching Seven Missiles*, DAILY TELEGRAPH, Jul. 5, 2006.

⁶³⁵ S.C. RES. 1695, *supra* note 633.

launch was capable of delivering nuclear, chemical, or biological payloads.⁶³⁶ The Security Council condemned North Korea's announcement that it had withdrawn from the NPT and urged North Korea to "return immediately to the Six-Party Talks without precondition."⁶³⁷

After North Korea's announcement of its intent to test a nuclear weapon, the Security Council adopted a non-binding Presidential statement urging North Korea to refrain from conducting a nuclear test.⁶³⁸ Nevertheless, North Korea detonated a nuclear device on October 9, 2006 and shortly thereafter the UN Security Council adopted Resolution 1518 imposing sanctions on the country.⁶³⁹

Despite the numerous and escalating attempts to engage North Korea in a dialogue regarding its human rights violations, North Korea has steadfastly refused all efforts made by the various UN bodies. For this reason, a Security Council resolution is needed to bring increased pressure on North Korea to end the human rights abuses taking place within the country.

3. South Korea: Development of the Sunshine Policy

From 1948 to 1970, South Korea's policy toward North Korea was one of absolute disengagement.⁶⁴⁰ Refusing to acknowledge North Korea's very existence, South Korea maintained that it was the only legitimate government on the Korean Peninsula.⁶⁴¹ South Korea's hard-line stance toward the North showed its first signs of softening on the 25th anniversary of Korea's liberation from Japan.⁶⁴² In his August 15, 1970, speech commemorating the occasion, South Korean President Park Chung-hee advocated for North Korea to pursue socioeconomic competition rather than military aggression and indicated for the first time a willingness for South Korea to peacefully coexist with the North.⁶⁴³ President Park's speech led to talks between the two Koreas, resulting in the momentous North-South Joint Communiqué of July 4, 1972 (Joint Communiqué).⁶⁴⁴

The Joint Communiqué states that Seoul and Pyongyang "had an open-hearted exchange of opinions with the common desire to achieve the peaceful reunification of the country at the earliest possible date . . ."⁶⁴⁵ The document

⁶³⁶ For more information on North Korea's nuclear, chemical, and biological weapons program and its development of delivery systems, see *supra* Section II.B.1.

⁶³⁷ S.C. RES. 1695, *supra* note 633.

⁶³⁸ See *UN Council Presses North Korea to Drop Plans for Nuclear Test*, *supra* note 469.

⁶³⁹ See *N. Korea Conducts Nuclear Weapons Test*, *supra* note 470; S.C. RES. 1518.

⁶⁴⁰ See NORMAN D. LEVIN & YONG-SUP HAN, *SUNSHINE IN KOREA: THE SOUTH KOREAN DEBATE OVER POLICIES TOWARD NORTH KOREA* 5 (Rand Center for Asia-Pacific Policy, 2002).

⁶⁴¹ See *id.*

⁶⁴² See *id.* at 6.

⁶⁴³ See *id.*

⁶⁴⁴ See *id.*; see also North-South Joint Communiqué, available at

http://www.nautilus.org/DPRKBriefingBook/agreements/CanKor_VTK_1972_07_04_north_south_joint_communique.pdf.

⁶⁴⁵ *Id.*

also outlines three principles of reunification:

Firstly, reunification should be achieved independently, without reliance upon outside force or its interference;

Secondly, reunification should be achieved by peaceful means, without recourse to the use of arms against the other side; [and]

Thirdly, great national unity should be promoted first of all as one nation, transcending the differences of ideology, ideal and system.⁶⁴⁶

Significantly, the Joint Communiqué also states that “[t]he two sides agreed upon realizing versatile interchange in various fields between the north and the south to restore the national ties now severed, promote mutual understanding and accelerate independent peaceful reunification.”⁶⁴⁷ In the years following the Joint Communiqué, South Korean presidents drafted several policy statements in the spirit of the Joint Communiqué that ultimately evolved into the “Sunshine Policy.”⁶⁴⁸

The term “Sunshine Policy” appears to have been first articulated in a September 30, 1994, speech by Kim Dae-jung to the Heritage Foundation in Washington, DC, prior to his election as president. Kim stated “America must be patient [in its dealings with North Korea] and stick to the ‘Sunshine Policy’ which proved to be the only effective way to deal with isolated countries like North Korea.”⁶⁴⁹ Kim cited a popular Aesop’s fable, “The Wind and the Sun,” in which the Sun and the Wind engaged in a contest to see who could strip a traveler of his cloak.⁶⁵⁰ The Wind tried first, but the harder he blew, the more closely the man wrapped the cloak around himself.⁶⁵¹ When the Sun’s turn came, he warmed the traveler with his rays, prompting the traveler to voluntarily remove his cloak.⁶⁵² The moral of the story is “persuasion is better than force.”⁶⁵³ While Kim’s original articulation of the policy was seemingly directed toward the United States and its dealings with North

⁶⁴⁶ *Id.*

⁶⁴⁷ *Id.*

⁶⁴⁸ These policy documents include the following: (1) President Park’s June 23, 1973, “Special Foreign Policy Statement Regarding Peace and Unification”; (2) Chung Doo-hwan’s 1982 “New Year Policy Statement”; (3) Roh Tae-woo’s July 1988, “Special Presidential Declaration”; and (4) the December 1991 “Agreement on Reconciliation, Non-Aggression, and Exchanges and Cooperation between the South and the North.” LEVIN & HAN, *supra* note 640, at 7-9.

⁶⁴⁹ Moon Chung-in, *The Sunshine Policy and Northeast Asia Regional Order: A South Korean Perspective 2*, in *THE FUTURE OF NORTH KOREA* (Tsuneo Akaha ed., Routledge 2002).

⁶⁵⁰ *Id.*; see also AESOP, *THE COMPLETE FABLES* 117-19 (Robert Temple & Olivia Temple trans., Penguin Classics, 1998).

⁶⁵¹ See AESOP, *supra* note 650, at 117-19.

⁶⁵² See *id.*

⁶⁵³ *Id.*

Korea, after Kim was elected president of South Korea in 1998, he adopted the Sunshine Policy as South Korea's approach to North Korea.⁶⁵⁴

In an April 4, 1998, speech, President Kim stated that his Sunshine Policy “seeks to lead North Korea down a path toward peace, reform and openness through reconciliation, interaction and cooperation with the South.”⁶⁵⁵ The policy is based on three basic tenets and two key guiding principles.⁶⁵⁶ The basic tenets are (1) an intolerance of any armed provocation by North Korea; (2) an acknowledgment that South Korea will not attempt to absorb or undermine North Korea; and (3) a commitment by South Korea to actively seek opportunities for cooperation and reconciliation with North Korea.⁶⁵⁷ These tenets are consistent with Mr. Kim's speech, in that they demonstrate South Korea's desire to engage the North peacefully and constructively while putting Pyongyang on notice that South Korea would defend itself if faced with North Korean military aggression.⁶⁵⁸

The first guiding principle of the Sunshine Policy is the separation of politics from the economy.⁶⁵⁹ This literally means that the day's political environment should not be allowed to become an obstacle to South Korean private sector trade with or investment in North Korea.⁶⁶⁰ South Korea acted on this principle by simplifying procedures and relaxing regulations that were hindering trade with the North.⁶⁶¹ Kang In-duk, South Korea's Minister of Unification under President Kim, believed that by “promot[ing] economic cooperation with the North,” South Korea might help foster the “creat[ion] of a national community in which such universal values of democracy and the principles of the market economy are respected.”⁶⁶²

The second guiding principle of the Sunshine Policy is that the two Koreas should interact with a spirit of reciprocity.⁶⁶³ At the policy's inception, it was intended for there to be a “give and take” between the two countries.⁶⁶⁴ While this principle did not necessarily reflect an expectation that North Korea would engage in equitable trade with the South, it did demonstrate a desire for North Korea to make some efforts in exchange for Seoul providing aid to North Korea.⁶⁶⁵ Any hopes for meaningful reciprocity, however, were quickly

⁶⁵⁴ See Moon, *supra* note 649, at 2-3.

⁶⁵⁵ *Id.*

⁶⁵⁶ See LEVIN & HAN, *supra* note 640, at 24.

⁶⁵⁷ See *id.*

⁶⁵⁸ See *id.*; see also Chae Kyung-suk, *The Future of the Sunshine Policy: Strategies for Survival*, 14 EAST ASIAN REVIEW (No. 4, Winter 2002), at 5.

⁶⁵⁹ See LEVIN & HAN, *supra* note 640, at 24; see also Chae, *supra* note 658, at 5.

⁶⁶⁰ See LEVIN & HAN, *supra* note 640, at 24; see also Chae, *supra* note 658, at 5.

⁶⁶¹ See Chae, *supra* note 658, at 5.

⁶⁶² LEVIN & HAN, *supra* note 640, at 25.

⁶⁶³ See Chae, *supra* note 658, at 5.

⁶⁶⁴ LEVIN & HAN, *supra* note 640, at 25.

⁶⁶⁵ See Chae, *supra* note 658, at 5.

dashed.⁶⁶⁶ Just two months after Kim's inauguration, Pyongyang labeled South Korea "horse traders" and suspended ties with Seoul for suggesting that North Korea allow a center to be established to reunite families that were separated during the Korean War in exchange for fertilizer assistance from the South.⁶⁶⁷ This rebuff led South Korea to amend its second guiding principle in certain circumstances to "flexible reciprocity," a structure that was "flexible, relative, and time-differential," allowing Pyongyang to reciprocate at an unspecified time and in an undetermined fashion in the future.⁶⁶⁸ This new approach only applied to intergovernmental cooperation such as social infrastructure development.⁶⁶⁹ Private assistance and trade and all forms of humanitarian relief were not bound by this new principle.⁶⁷⁰ Kim's hope was that the South's no-strings-attached economic incentives would gradually convince North Korea to engage the outside world.⁶⁷¹

Kim seemed to make strides toward this goal when in June 2000 North Korean leader Kim Jong Il and President Kim held their historic summit talks.⁶⁷² This meeting, coupled with his Sunshine Policy, helped President Kim earn the 2000 Nobel Peace Prize.⁶⁷³ The summit's success was later blighted, however, by allegations that it was bought and paid for by a secret \$500 million transfer to Pyongyang just days before the meeting was to take place.⁶⁷⁴ Even apart from this illicit payment, South Korea's contributions to North Korea have been substantial.⁶⁷⁵ One estimate shows that from 1995 to 2006, South Korean governmental and private organizations have provided around 6.6 trillion *won* (\$6.9 billion) worth of aid to North Korea.⁶⁷⁶ Much of this aid has been in the form of rice and fertilizer; however, 1.37 trillion *won* (\$1.4 billion) of the relief consists of a loan by South Korea to the North for a light-water nuclear power reactor.⁶⁷⁷ Critics of the Sunshine Policy argue that the South's investments in and contributions to North Korea have been unprofitable, with the North giving little in return for the South's generosity.⁶⁷⁸

⁶⁶⁶ See LEVIN & HAN, *supra* note 640, at 26.

⁶⁶⁷ *Id.*

⁶⁶⁸ *Id.*

⁶⁶⁹ *See id.*

⁶⁷⁰ *See id.*

⁶⁷¹ *Korea Backgrounder: How the South Views Its Brother From Another Planet*, International Crisis Group (Asia Report No. 89, Dec. 14, 2004), at 2.

⁶⁷² *See id.*

⁶⁷³ *See id.*; see also Gunnar Berge, Chairman of the Norwegian Nobel Committee, Nobel Peace Prize Presentation Speech (Dec. 10, 2000).

⁶⁷⁴ *See Korea Backgrounder, supra* note 671, at 3.

⁶⁷⁵ See Donald Macintyre, *A Very Expensive Affair*, TIME MAGAZINE, Mar. 24, 2003.

⁶⁷⁶ *See Aid to N. Korea Increased Under Roh*, DONG-A ILBO, Sept. 8, 2006.

⁶⁷⁷ *See id.*

⁶⁷⁸ *See Korea Backgrounder, supra* note 671, at 3.

Despite this criticism, Kim Dae-jung's successor, President Roh Moo-hyun, chose to keep the policy substantively intact when he took office in 2003.⁶⁷⁹ Although President Roh gave the Sunshine Policy a new moniker, the "peace and prosperity policy," he has focused his energy on implementing the agreements reached under his predecessor's administration rather than introducing new proposals.⁶⁸⁰ For example, North and South Korea launched the special economic zone at Kaeseong on June 6, 2003. The zone, located on a nearly barren piece of land just north of the DMZ, is designed to combine management expertise and technology from the South with cheap labor from the North.⁶⁸¹ There are currently 15 factories in the zone with 500 South Korean managers, 7,000 North Korean workers, and their respective families.⁶⁸² By 2012, when the economic zone is completed, it is supposed to house 2,000 companies and 700,000 North Korean workers.

One change that had previously been made to the Sunshine Policy, however, is the relaxation of the South's intolerance of any armed provocation by North Korea. After North Korea conducted a July 2006 missile test, which included a missile believed capable of reaching Alaska, South Korea threatened to halt its aid shipments to the North.⁶⁸³ But on September 8, 2006, President Roh dismissed the tests as being "aimed at achieving political purposes rather than posing military threats."⁶⁸⁴ Accordingly, South Korea's Prime Minister, Han Myeong-sook, indicated that South Korea would continue supplying aid to Pyongyang, notwithstanding the tests.⁶⁸⁵ Similarly, the tests seemed to have had little effect at Kaeseong Industrial Park, where exports increased from \$1.6 to \$1.9 million from June to July 2006.⁶⁸⁶ That said, it is unlikely the Sunshine Policy will remain intact after North Korea's nuclear weapons test.

4. United States of America

In October 2004, the US Congress passed and President George W. Bush signed the North Korean Human Rights Act (the NK Human Rights Act or the Act).⁶⁸⁷ The purpose of the Act is:

- (1) to promote respect for and protection of fundamental human rights in North Korea;

⁶⁷⁹ See Interview with President Roh Moo-hyun, *I Will Do My Best to Remove the Differences*, TIME MAGAZINE, Feb. 24, 2003.

⁶⁸⁰ *Korea Backgrounder*, *supra* note 671, at 3.

⁶⁸¹ See *The Kaeseong Project: The Dream of "Dirt-Cheap" Labor*, JOON ANG DAILY, Nov. 2, 2003.

⁶⁸² See *Koreans Work at Making Unification Real*, NEW YORK TIMES, Jul. 18, 2006.

⁶⁸³ See *S. Korea Suspends North Food Aid*, BBC NEWS, July 7, 2006.

⁶⁸⁴ *S. Korea's Roh Plays Down North's Missile Tests*, AGENCE FRANCE PRESSE, Sept. 8, 2006.

⁶⁸⁵ See *id.*

⁶⁸⁶ See *Mood at Kaeseong Uncharged by Missile Test*, THE HANKYOREH, Aug. 7, 2006.

⁶⁸⁷ See *id.*

- (2) to promote a more durable humanitarian solution to the plight of North Korean refugees;
- (3) to promote increased monitoring, access and transparency in the provision of humanitarian assistance inside North Korea;
- (4) to promote the free flow of information into and out of North Korea; and
- (5) to promote progress toward the peaceful reunification of the Korean peninsula under a democratic system of government.⁶⁸⁸

Among its findings, the NK Human Rights Act states that “the Government of North Korea is ‘a dictatorship under the absolute rule of Kim Jong Il’ that continues to commit numerous, serious human rights abuses.”⁶⁸⁹ The Act notes that public and private religious activities are repressed severely, and that millions of North Korea’s citizens are estimated to have starved to death since the early 1990s.⁶⁹⁰ The Act also found that, in addition to infringing the rights of its own citizens, North Korea has been responsible for abducting numerous citizens of South Korea and Japan, whose condition and whereabouts remain unknown.⁶⁹¹

The NK Human Rights Act has three primary sections. First, Title I addresses promoting the human rights of North Koreans as a key element in future negotiations between the United States, North Korea, and other concerned parties in Northeast Asia.⁶⁹² In addition, Title I sets forth a framework for financial support programs that promote human rights, radio broadcasting to

⁶⁸⁸ 22 U.S.C. §7802 (2004).

⁶⁸⁹ 22 U.S.C. §7801 (2004) (setting forth a long list of known human rights violations and abuses, including but not limited to: strict governmental control of all information, artistic expression, academic works, and media activity; systematic and intensive political and ideological indoctrination of citizens in support of the cult of personality glorifying Kim Jong Il and the late Kim Il Sung; categorization of population based on perceived loyalty to the leadership, which determines access to food, employment, higher education, place of residence, and medical facilities; a draconian Penal Code stipulating capital punishment for a wide variety of “crimes against the revolution”; and an estimated 200,000 political prisoners held in camps imposing forced labor, beatings, human testing of chemical and biological poisons, forced abortions, infanticide, torture, and executions; and in which many prisoners die from disease, starvation, and exposure.).

⁶⁹⁰ *See id.*

⁶⁹¹ *See id.*

⁶⁹² *See* 22 U.S.C. §§ 7811-7817.

North Korea, actions to promote freedom of information, and recognition of the UN Commission on Human Rights.⁶⁹³ Title I also establishes a Special Envoy on Human Rights in North Korea to be appointed by the President and to report to Congress annually on human rights efforts and activities related to North Korea.⁶⁹⁴

Title II of the NK Human Rights Act established the framework for assisting North Koreans in need, both inside and outside North Korea.⁶⁹⁵ Notably, the Act requires that “significant increases above current levels of United States support for humanitarian assistance provided inside North Korea should be conditioned upon substantial improvements in transparency, monitoring, and access to vulnerable populations throughout North Korea.”⁶⁹⁶ Moreover, non-humanitarian assistance to North Korea “shall be contingent on North Korea’s substantial progress” on specific human rights issues, including (a) basic human rights for the North Korean people, including freedom of religion; (b) family reunification between North Koreans and their descendants and relatives in the United States; (c) full disclosure of all information regarding Japanese and South Korean citizens abducted by North Korea; (d) allowing such abductees, along with their families, complete and genuine freedom to leave North Korea and return to the abductees’ original home countries; (e) reforming the North Korean prison and labor camp system, including independent international monitoring; and (f) decriminalizing political expression and activity.⁶⁹⁷

Finally, Title III of the NK Human Rights Act provides a framework for protecting North Korean refugees.⁶⁹⁸ Title III, among other things, requires a one-time assessment of the situation in North Korea and the United States’ policies related to North Korean refugees and asylum seekers in the United States.⁶⁹⁹ Title III also calls for increased levels of humanitarian assistance for North Koreans inside China – if China fulfills its obligations to the UN High Commissioner for Refugees by providing unimpeded access to North Koreans inside China’s borders.⁷⁰⁰

⁶⁹³ See 22 U.S.C. §§7812, 7813, 7814, 7815, and 7816. The Act authorizes \$2 million for each of the fiscal years 2005 – 2008 to support programs by private, nonprofit organizations to promote human rights, democracy, rule of law, and a market economy in North Korea. See 22 U.S.C. § 7812. This money, however, was not appropriated in FY05 or FY06. The Act also authorizes \$2 million for each of the fiscal years 2005–2008 to increase the availability of non-government-controlled sources of information to North Koreans. See 22 U.S.C. § 7814.

⁶⁹⁴ See 22 U.S.C. § 7817.

⁶⁹⁵ See 22 U.S.C. §§ 7831–7833. The U.S. State Department and USAID are to report annually to Congress for three years regarding (1) U.S. humanitarian assistance to North Koreans, (2) any improvements in humanitarian transparency and monitoring inside North Korea, and (3) specific efforts by the United States and U.S. grantees to secure better monitoring and access. 22 U.S.C. §7831.

⁶⁹⁶ See 22 U.S.C. §7832; Manyin, *supra* note 204, at 3.

⁶⁹⁷ See *id.*

⁶⁹⁸ 22 U.S.C. §§7841–7845.

⁶⁹⁹ 22 U.S.C. §7842.

⁷⁰⁰ 22 U.S.C. §7844.

North Korea is generally offended by any reference to its human rights record and has cited the NK Human Rights Act as evidence of the United States' "hostile policy" toward North Korea.⁷⁰¹

Since 1995, the United States has provided over \$1.1 billion in food and energy aid to North Korea on a humanitarian basis.⁷⁰² United States assistance to North Korea, however, has fallen significantly over the past several years because North Korea has been increasingly unwilling to allow outside monitoring of food shipments, a precondition for US support.⁷⁰³

III. North Korea and the UN Security Council

A. Violation of the Responsibility to Protect

The Security Council has declared that it has the responsibility to take action on a case-by-case basis should national authorities in a country fail to protect its own citizens from genocide, war crimes, ethnic cleansing, and crimes against humanity.⁷⁰⁴ This report invokes the responsibility to protect doctrine to assert that the government of North Korea's systematic starving portions of its population, and its operation of a gulag system detaining over 200,000 prisoners constitutes the North Korean government's failure to protect its own citizens from crimes against humanity. Furthermore, the North Korean government has patently refused to address repeated concerns raised by the international community through the UN General Assembly, former Commission on Human Rights, and Special Rapporteur on Human Rights in North Korea. Therefore, it is now the UN Security Council's responsibility to take action to protect the North Korean people.

The Security Council's endorsement of the "responsibility to protect" doctrine⁷⁰⁵ followed the statement made by the 2005 World Summit of the UN General Assembly. At that time, the General Assembly stated:

Each individual state has the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity . . . We accept that responsibility and will act in accordance with it . . . We are prepared to take collective action in a timely and decisive manner,

⁷⁰¹ See Manyin, *supra* note 204.

⁷⁰² See *id.* (About 40 percent of the aid was energy assistance channeled through the Korean Peninsula Energy Development Organization (KEDO), a multilateral organization established in 1994 to provide energy aid in exchange for North Korea's pledge to halt its existing nuclear program. The KEDO program was shut down in January 2006).

⁷⁰³ See *id.*

⁷⁰⁴ See S.C. RES. 1674, S/RES/1674 (2006).

⁷⁰⁵ Appendix II provides a detailed overview of the evolution of the "responsibility to protect" doctrine.

through the Security Council . . . should . . . national authorities manifestly fail to protect their populations.⁷⁰⁶

In sum, the responsibility to protect doctrine entails four key elements:

- Primary responsibility for protecting a state's population from these most egregious of human rights abuses resides with that country's government;
- The international community has a duty to help states in meeting this responsibility;
- When a state manifestly fails in its obligation to protect its own citizens, it is the international community's responsibility to help protect that population; and
- If multilateral action through the UN and regional entities fail to address the problem, it is the Security Council's responsibility to intervene.⁷⁰⁷

Today a comprehensive definition of crimes against humanity only emerges from various statutory definitions and the jurisprudence of the international tribunals for Rwanda and the former Yugoslavia.⁷⁰⁸ As a result, the parameters of the definition under customary international law remain imprecise and are determined by each statutory definition and each international tribunal.

Notwithstanding this imprecision, to bring a claim of crimes against humanity⁷⁰⁹, the following elements must be satisfied under customary international law to elevate an ordinary crime to an international crime:

1. There must be an attack;
2. The acts of the accused must be part of the attack;
3. The attack must be directed against any civilian population;

⁷⁰⁶ *2005 World Summit Outcome*, UN GENERAL ASSEMBLY, Sept. 15, 2005, at ¶ 138 [hereinafter *2005 World Summit Outcome*].

⁷⁰⁷ See, e.g., William R. Pace & Nicole Deller, *Preventing Future Genocides: An International Responsibility to Protect*, WORLD ORDER (Vol. 36, No. 4, 2005), citing UNITED NATIONS, Secretary-General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, Dec. 2, 2004, at ¶¶ 29, 201 [hereinafter High-Level Panel].

⁷⁰⁸ See Appendix III (providing a complete explanation of the evolution of crimes against humanity and a discussion of the current understanding of the crime from the jurisprudence of the international tribunals and Rome Statute's definition).

⁷⁰⁹ There has never been an international tribunal with jurisdiction for adjudicating state responsibility for the commission of crimes against humanity. As a result, one must transpose the jurisprudence about crimes against humanity of the international tribunals as applied to individuals to determine if the government of North Korea is responsible for the commission of crimes against humanity.

4. The attack must be widespread or systematic; and
5. The accused must know⁷¹⁰ that the acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population, know that the accused's acts fit into such a pattern, and intend to commit the underlying prohibited act.⁷¹¹

The “attack” requirement must be understood as a contextual element, rather than as the term is commonly understood.⁷¹² Originally, the London Charter required a nexus with an armed conflict, but this requirement no longer exists; today crimes against humanity may be committed in peacetime or during war.⁷¹³ Therefore, the term “attack” is defined as “a course of conduct involving the commission of acts of violence”⁷¹⁴ and is a contextual element contributing to the circumstances under which a particular act could be elevated to an international crime.

The number of specific acts (*actus reus*) that rise to crimes against humanity, when committed in the ways described above has expanded over the years. Currently, there are nine specific acts falling within the customary international law definition of crimes against humanity: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial, or religious grounds; and other inhumane acts intentionally causing great suffering, or serious injury to body or to mental or physical health. Each of these terms is defined in the jurisprudence of the international tribunals and the Rome

⁷¹⁰ Professor William Schabas has written extensively about the knowledge required to meet the definition of crimes against humanity under customary international law:

Although it is axiomatic that the offender must commit the crime with intent, that is, with the *mens rea* particular to the offense, rarely is there any direct evidence of this element of the crime. In effect, there is an evidentiary presumption that persons who commit acts or omissions do so intentionally, absent indications to the contrary. Thus, it is for the accused person to demonstrate that he or she did not actually intend to commit the act in question. As a general rule, this takes the form of an excuse, such as insanity, intoxication, or duress (emphasis added).

WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS* (Cambridge University Press, 2006), at 295.

⁷¹¹ *Prosecutor v. Kunarac, Kovac, and Vukovic* (Case No. IT-96-23-A & IT-96-23/1-A), Judgment, Jun. 12, 2002, at ¶ 85; *Prosecutor v. Krnojelac*, (Case No. IT-97-25-T), Judgment, Mar. 15, 2002, at ¶ 53; *Prosecutor v. Bisengimana*, (Case No. ICTR-00-60-T), Judgment, Apr. 13, 2006, at ¶¶ 41-57.

⁷¹² See Mohamed Elewa Badar, *From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 SAN DIEGO INT'L L. J. 105 (2004).

⁷¹³ See *Prosecutor v. Tadic* (Case No. IT-94-1-A), Judgment, Jul. 15, 1999, at 251.

⁷¹⁴ See *Krnojelac*, Judgment (TC), *supra* note 711, at ¶ 54.

Statute establishing the International Criminal Court. For analyzing North Korea, this report will use the definitions set forth in the Rome Statute.⁷¹⁵

The following analysis focuses on two areas of conduct in which North Korea is responsible for committing crimes against humanity: food policy and famine, and the treatment of political prisoners. The analysis applies the law set forth above to each of these areas of conduct and concludes that the North Korean government has committed and continues to commit crimes against humanity against its own civilian population.

1. Food Policy and Famine

While the acute famine of the mid-1990s has passed, the food emergency in North Korea continues – Human Rights Watch recently warned that North Korea is again on the brink of famine.⁷¹⁶ Indeed, it is estimated that of the population of 22 million, 57 percent of the people do not have enough food to keep healthy; 36 percent of the people are undernourished; and 30 percent of children under 6 suffer from chronic malnutrition.⁷¹⁷ Perhaps the best example of the malnutrition's impact is that, in 2003, the KPA had to reduce its height requirement for draftees from five feet, eleven inches (150 cm) tall to five feet, two inches (125 cm) tall.⁷¹⁸

North Korea's disastrous food policy includes both intentional and negligent conduct. It is intentional conduct on such a wide and long-term basis that constitutes extermination⁷¹⁹ and other inhumane acts that collectively are crimes against humanity. Specific examples of North Korea's intentional conduct include:

⁷¹⁵ “Extermination” includes the infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population; “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in the persons, in particular women and children; “Deportation [or forcible transfer of population]” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law; (bracketed section is unique to Rome Statute, and is not part of customary international law); “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions; “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity. See ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Jul. 17, 1998, at art. 7(2) [hereinafter ROME STATUTE].

⁷¹⁶ See Seok, *supra* note 108.

⁷¹⁷ See *North Korea Famine In Detail*, *supra* note 109.

⁷¹⁸ See NOLAND, FAMINE AND REFORM IN NORTH KOREA, *supra* note 105, at 10, n. 16.

⁷¹⁹ One should recall that the definition of “extermination” under the Rome Statute is broader than the ordinary understanding of the term. Specifically, “extermination” includes the infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population. See ROME STATUTE, *supra* note 715, at art. 7(2).

Recent History

- In late 2005 and continuing through 2006, the government took a series of steps likely to aggravate the food crisis and threaten the population with the return of famine.⁷²⁰ Observers have warned that these measures – forcing the WFP to radically reduce its food shipments and monitoring, reinstating the PDS, and making it illegal for ordinary North Koreans to buy and sell grain – are “a recipe for disaster.”⁷²¹ In fact, recent news reports suggest that North Koreans in many parts of the country were not receiving rations six months after the authorities announced they were reinstating the PDS fully, and that others were receiving rations insufficient to maintain basic health.⁷²²
- Today, WFP aid workers continue to be prohibited from visiting 42 of 203 counties in North Korea. When the WFP is not allowed to monitor deliveries to ensure they are not diverted, it is unwilling to provide food. As a result, North Korea is responsible for aid being denied to a substantial part of its population.⁷²³

*During the Mid-1990s Famine*⁷²⁴

- Between 1995 and 1998, North Koreans suffered through a catastrophic famine that resulted in as many as one million deaths, and possibly many more, from starvation and hunger-related diseases.⁷²⁵ This represented between 3 - 5 percent of the population.⁷²⁶
- As the famine was approaching, the North Korean government failed to request international assistance in a timely manner.⁷²⁷
- The North Korean government ignored commonly accepted norms for aid distribution, which are designed to ensure that the aid reaches those who need it most.⁷²⁸ Instead, the government pursued several policies

⁷²⁰ See A MATTER OF SURVIVAL, *supra* note 108, at 19-25.

⁷²¹ *North Korea: Policy Changes*, *supra* note 209.

⁷²² See A MATTER OF SURVIVAL, *supra* note 108, at 3.

⁷²³ See *North Korea Plays Politics With Food Aid*, *supra* note 111.

⁷²⁴ North Korea experienced food shortages in 1954-44 and 1970-73, and perhaps other periods unknown to the outside world. See NOLAND, *supra* note 105.

⁷²⁵ See HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70.

⁷²⁶ See *id.*

⁷²⁷ See *id.* at 14.

⁷²⁸ See *id.* at 23-29.

designed to control aid distribution, hinder effective monitoring, and create opportunities for control and diversion of aid for the government's purposes.⁷²⁹

- While receiving international aid, the North Korean government simultaneously reduced the amount that the regime spent on food assistance. In other words, the government did not use the aid to supplement the available food supply. Instead, it used the aid to reduce commercial imports and thus save revenue that could then be used for other purposes, such as WMD programs.⁷³⁰ Even at the height of the famine, the government demonstrated that it prioritized its military over its population's basic needs for survival.⁷³¹
- Furthermore, the North Korean government criminalized many of the coping strategies it had forced on its own population. For example, the right to free movement was heavily curtailed and regulated, preventing people from searching for food themselves or relocating to areas with less acute food shortages.⁷³²

⁷²⁹ For example:

- The government severely limited the number of WFP and NGO workers allowed into the country to deliver the aid, hindering the ability of workers to assess the extent of the famine, what help was needed, and where.
- The government prohibited the WFP and NGOs from using Korean speakers, and required the use of government interpreters, further hindering the collection of independent information and assessments.
- The government refused to allow international organizations, such as the WFP and NGOs, to set up independent, transparent distribution networks that could ensure the nondiscriminatory distribution of food to all parts of the country, and to all members of society on a fair basis, according to need. Instead, foreign aid organizations were required to use the PDS network controlled by government and party officials, subjecting the aid to pressures to reallocate and redistribute it, as well as corruption and theft. The opportunities for "leakage" and diversion were significant.
- Apart from hindering the fair distribution of aid, the government outright refused to allow aid to reach many counties, for reasons that are not yet understood.
- The government restricted the movements of aid workers and required the use of government "handlers" or escorts.

See supra notes 185-189.

⁷³⁰ *See generally* HAGGARD & NOLAND, *FAMINE*, *supra* note 105.

⁷³¹ As it was cutting food imports in 1999, the government purchased 40 MIG-21 fighters and eight military helicopters from Kazakhstan. Furthermore, the government continued to pursue its expensive WMD programs during the famine, using resources that could have been expended to feed its people. Instead, the government purchased centrifuges from Pakistan.

⁷³² *See* HAGGARD & NOLAND, *HUNGER AND HUMAN RIGHTS*, *supra* note 70, at 20.

From the Founding of North Korea

- The imposition of the *juche* ideology, which advocated a spirit of self-reliance, condemned the North Korean people to hunger and famine for five decades because only some 19 to 22 percent of the country's land is considered arable.⁷³³
- Further compounding this problem, the government strictly controlled food distribution and banned private markets.⁷³⁴ The North Korean government further used its control over food distribution to reward those persons deemed favored by the regime and to deny food to the less privileged.⁷³⁵

Conclusion of Sub-Section on Food Policy and Famine

There can be no more fundamental responsibility of a sovereign than to ensure its citizens are adequately nourished. For over 50 years the North Korean government has failed to meet this universal humanitarian imperative. The circumstances that created the famine continue to exist; they are the same problems that have existed for decades. North Korea cannot biologically and ecologically produce food in amounts sufficient to provide nutritious meals to its people and do so reliably every year, including having a reserve to weather natural disasters.

In starving and malnourishing large portions of its population – let alone having been complicit in the deaths of as many as one million, and possibly more, of its own citizens – the North Korean government is committing the following actions: (1) extermination; and (2) other inhumane acts.

It is important to recall that the definition of “extermination” under the Rome Statute includes inflicting life conditions, such as depriving access to food and medicine, calculated to bring about the destruction of part of a population.⁷³⁶ “Other inhumane acts” includes the “causing great suffering, or serious injury to body or to mental or physical health.”⁷³⁷

The acts described in this report committed by the North Korean government – such as preventing access to 42 counties for food aid monitoring, limiting and often banning private markets, controlling food distribution, inhibiting the transparent free distribution of aid, and limiting the number of aid workers allowed in the country – are widespread and systematic actions that result in starving substantial segments of the population. Under customary

⁷³³ See WORLD FACTBOOK, *supra* note 57.

⁷³⁴ See HAGGARD & NOLAND, HUNGER AND HUMAN RIGHTS, *supra* note 70, at 22.

⁷³⁵ See *id.*

⁷³⁶ ROME STATUTE, *supra* note 715, at art. 7(2).

⁷³⁷ *Id.*

international law relating to crimes against humanity “there is an evidentiary presumption that persons who commit acts or omissions do so intentionally, absent indications to the contrary.”⁷³⁸

As a result, there is no requirement to “prove” that North Korea intends its people to starve; rather it is sufficient to prove that the government has taken widespread and systematic actions that lead to that outcome.

Not only do these acts clearly violate North Korea’s obligations under the ICESCR and CRC⁷³⁹, but its refusal to feed substantial segments of its own population constitutes crimes against humanity.

2. Treatment of Political Prisoners

North Korea has been operating prison camps since 1947.⁷⁴⁰ In the 1950s, Kim Il Sung’s political opponents became the majority of the prison camp inmates.⁷⁴¹ More camps were created to house Kim Il Sung’s many real and imagined political enemies and their families during the frequent purges that characterized the late 1960s.⁷⁴² The North Korean government’s intentional operation of its gulag system – including imprisonment, persecution based on political grounds, extermination, enslavement, and torture – constitutes crimes against humanity.

a. Imprisonment

An estimated 200,000 people are now imprisoned in North Korea’s various prison camps.⁷⁴³ It is believed that as many as 400,000 prisoners have died in these camps over the past 30 years.⁷⁴⁴ The number of political prisons or *kwan-li-so* has changed over time. At one point, there were believed to be 12 *kwan-li-so* in existence. Currently, it is believed that there are six *kwan-li-so* after several camps were closed.⁷⁴⁵ This conduct constitutes “imprisonment” because in each case of North Koreans in the gulag, there is the severe deprivation of physical liberty in violation of the fundamental rules of international law, namely the due process protections of the ICCPR.⁷⁴⁶

b. Persecution Based on Political Grounds

The situation for political dissenters worsened in North Korea when Kim Jong Il began to fear that the communist collapse that swept through Eastern

⁷³⁸ SCHABAS, *supra* note 710.

⁷³⁹ See *supra* Section II.A.1.a.

⁷⁴⁰ See *White Paper on Human Rights*, *supra* note 103, at 27.

⁷⁴¹ See *id.*

⁷⁴² See *id.*

⁷⁴³ See HAWK, *supra* note 215, at 24, fn. 16.

⁷⁴⁴ See CHOI, *supra* note 218.

⁷⁴⁵ See HAWK, *supra* note 215, at 26.

⁷⁴⁶ See ROME STATUTE, *supra* note 715, at art. 7(1)(e).

Europe, beginning in 1989, would spread and challenge his rule. As Kim Jong Il's insecurity increased, so did the number of political prisoners housed in North Korea's prisons.

In addition to abducting the accused individual, the State Security Department also detains up to three generations of the accused's family members, including the mother, father, sisters, brothers, children, and grandchildren. This practice is believed to have begun with Kim Il Sung's 1972 proclamation "[f]actionalists or enemies of class, whoever they are, their seed must be eliminated through three generations."⁷⁴⁷ Like the accused political prisoner, the family members are not granted a trial. Instead, they are picked up and transported to political prisons without being provided with any information as to when, if ever, they will be released.

The practice of detaining family members of accused political dissenters constitutes "persecution based on political grounds" because it is the "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."⁷⁴⁸ In North Korea, family members of political dissenters are detained, without the due process of law guaranteed under the ICCPR, merely because of their relation with the accused.

c. Extermination and Enslavement

Starvation of Prisoners

Prisoners are provided only starvation-level food rations despite the fact that they are forced to engage in long and physically demanding labor. It is this combination that often turns the labor camps into death camps. The practice of starving prisoners is a mechanism intended to assist in keeping control over the inmates. For example, prisoners are given strict and often unrealistic work quotas each day.⁷⁴⁹ Failure to meet one's quota results in reduced food rations. This threat leads prisoners to work as hard as they can to avoid food reductions. Because of insufficient food rations, diseases and death caused by malnutrition are common in the camps.

Eyewitness accounts establish that, in one case, out of 2,000 to 3,000 people in one section of one prison, 100 people died per year from malnutrition and disease, mainly from severe diarrhea leading to dehydration.⁷⁵⁰ A former prison guard reported that at Prison Camp No. 22, which housed approximately 50,000 prisoners, 1,500 to 2,000 prisoners died from malnutrition each year. That same guard stated that most of those who died were children.⁷⁵¹ To

⁷⁴⁷ HAWK, *supra* note 215, at 25.

⁷⁴⁸ ROME STATUTE, *supra* note 715, at art. 7(2)(g).

⁷⁴⁹ See HAWK, *supra* note 215, at 9.

⁷⁵⁰ See KANG & RIGOULOT, *supra* note 245, at 86.

⁷⁵¹ See *id.* at 39.

ensure that prisoners stayed near starvation, attempts to obtain unauthorized food, even weeds, were punished by beatings and execution.⁷⁵²

As described previously, the starvation of prisoners in this manner constitutes “extermination” because it is the “intentional infliction of conditions of life, *inter alia* the deprivation of access to food . . . calculated to bring about the destruction of part of a population.”⁷⁵³

There is an evidentiary presumption under customary international law with regard to crimes against humanity that “persons who commit acts or omissions do so intentionally, absent indications to the contrary.”⁷⁵⁴ Therefore, the widespread starvation of prisoners on itself is sufficient evidence to demonstrate that this is intentional conduct of the North Korean government.

Death by Labor

Prisoners, including children, are required to engage in very demanding and dangerous labor at the prison camps. Prison labor conditions in some camps result in 20 to 25 percent of the labor force (*i.e.*, political prisoners) being worked to death each year.⁷⁵⁵

Prisoner work includes mining, timber cutting, farming, and sewing. In addition to prisoners dying, many prisoners end up as amputees or otherwise are disabled in work-related accidents.⁷⁵⁶ Partial amputations also are common because of frostbite from working in freezing conditions with sparse clothing inadequate to protect prisoners’ extremities from the elements.⁷⁵⁷

Forced labor constitutes “enslavement” because the North Korean government is “exercis[ing] . . . the powers attach[ed] to the right of ownership over a person,” namely forcing prisoners to work under appalling conditions reduced to servile status.⁷⁵⁸

d. Torture

In addition to near starvation and forced labor, the North Korean government systematically uses torture to interrogate prisoners and as punishment in the political prisons. Political prisoners are tortured when they are first detained, in an effort to get them to “confess.”⁷⁵⁹ Once placed in a camp, prisoners are further tortured as punishment. Many prisoners report that prison guards would engage in beatings so vicious that prisoners’ eyes may

⁷⁵² See *id.* at 37; See HAWK, *supra* note 215, at 26.

⁷⁵³ ROME STATUTE, *supra* note 715, at art. 7(2)(b).

⁷⁵⁴ SCHABAS, *supra* note 710.

⁷⁵⁵ See Windrem, *supra* note 97.

⁷⁵⁶ See HAWK, *supra* note 215, at 25.

⁷⁵⁷ See *id.*

⁷⁵⁸ ROME STATUTE, *supra* note 715, at art. 7(2)(c).

⁷⁵⁹ See HAWK, *supra* note 215, at 59.

fall out or leg bones may be exposed.⁷⁶⁰ Prisoners are also placed in solitary confinement in very small enclosures. A harsher variation of solitary confinement involves a “sweat box,” a prison cell so small that a person cannot fully stand or lie down within it. A prisoner sealed in a sweatbox is not allowed to move and is given almost no food, surviving only by eating bugs that crawl through the box.⁷⁶¹ Prisoners often suffer frostbite and their bodies become covered with sores.⁷⁶²

This conduct constitutes torture because it is the “intentional infliction of severe pain or suffering, whether physical or mental, upon . . . person[s] in the custody” of the North Korean government.⁷⁶³

Conclusion of Sub-Section on Treatment of Political Prisoners

In unjustly imprisoning over 200,000 of its own citizens in inhumane conditions – let alone having caused 400,000 others to die – the North Korean government is committing the following actions: (1) imprisonment; (2) persecution on political grounds; (3) extermination; (4) enslavement; and (5) torture. The North Korean government is committing these acts knowingly (noting the presumption of knowledge under customary international law related to crimes against humanity), against civilians, and in a widespread and systematic fashion. As a result, not only do these acts clearly violate North Korea’s obligations under the ICCPR⁷⁶⁴, but the North Korean government’s ongoing operation of the gulag system itself constitutes crimes against humanity.

Invocation of Responsibility to Protect Doctrine

As described in this report, North Korea is systematically starving portions of its population and operating a gulag system with over 200,000 prisoners. The acts constitute the government’s failure to protect its own citizens from crimes against humanity.

Furthermore, the North Korea government has patently refused to address repeated concerns raised by the international community through the UN General Assembly, former Commission on Human Rights, and the Special Rapporteur.⁷⁶⁵ Therefore, it is now the responsibility of the UN Security Council to take action to protect the people of North Korea.

⁷⁶⁰ See Windrem, *supra* note 97.

⁷⁶¹ See KANG & RIGOULOT, *supra* note 245, at 94-96.

⁷⁶² See HAWK, *supra* note 215, at 32.

⁷⁶³ ROME STATUTE, *supra* note 715, at art. 7(2)(e).

⁷⁶⁴ See *supra* Section II.A.2.a.

⁷⁶⁵ See *supra* Section II.C.2.

B. “Non-Traditional” Threat to the Peace

The North Korean government’s violation of its responsibility to protect its own citizens from crimes against humanity creates a need for Security Council intervention. An equally compelling reason for intervention is that the situation in North Korea constitutes a non-traditional threat to the peace.

Chapter VI of the UN Charter describes the role the UN Security Council may play in a country-specific situation that could endanger the maintenance of international peace and security. The Security Council “may investigate . . . any situation which might lead to international friction . . . to determine whether the continuance of the . . . situation is likely to endanger the maintenance of international peace and security.”⁷⁶⁶ Any member of the United Nations “may bring . . . any situation of the nature referred to in Article 34, to the attention of the Security Council . . .”⁷⁶⁷ Subsequently, having examined the situation, the Security Council “may, at any stage . . . of a situation of like nature, recommend appropriate procedures or methods of adjustment.”⁷⁶⁸

Recommendations made under Chapter VI are non-binding.⁷⁶⁹ Nevertheless, the adoption of such a resolution by the Security Council would send a clear message to the North Korean government that the UN is no longer willing to tolerate one of its own members ignoring resolutions of the General Assembly, the former Commission on Human Rights, and the Special Rapporteur. If the North Korean government should fail to engage with the United Nations after such a resolution is adopted, the Security Council then may decide to proceed to a resolution under Chapter VII, binding under international law on all members of the UN.⁷⁷⁰

Appendix IV sets forth a list of determining factors evaluated by the Security Council in justifying its *initial* resolutions where the Council found a more serious “threat to the peace” existed under Chapter VII of the UN Charter. Applying these determining factors to the situation in North Korea demonstrates that it actually represents a threat to the peace – not just a

⁷⁶⁶ UN CHARTER, art. 34.

⁷⁶⁷ UN CHARTER, art. 35(1).

⁷⁶⁸ UN CHARTER, art. 36(1).

⁷⁶⁹ It is generally accepted that recommendations made under this chapter are not binding on UN members. See, e.g., Stefan Talmon, *The Security Council as World Legislature*, AM. J. INT’L L., Vol. 99, Jan. 2005, at 175 (discussing the limit of decisions made under Chapter VII to those that are binding citing *Prosecutor v. Tadic*, Appeal on Jurisdiction, No. IT-94-1-AR72, ¶ 44, Oct. 2, 1995); But see BAILEY & DAWES, *supra* note 809, at 268 (discussing International Court of Justice Advisory Opinion in *Namibia* case from Jun. 21, 1971).

⁷⁷⁰ See Kurt Herndl, *Reflections on the Role, Functions and Procedures of the Security Council of the United Nations*, in *RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 323 (Martinus Nijhoff Publishers, 1997); see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 52 (Advisory Opinion of Jun. 21).

situation that might lead to international friction – and that Security Council action is both justified and warranted.

In the case of North Korea, three of these five determining factors have been met. Satisfying three of five factors was sufficient to justify Security Council involvement in five of the seven case studies we examined in Appendix IV, including the situations in Haiti, Yemen, Rwanda, Liberia, and Cambodia.

As the situation in North Korea meets the criteria for the Security Council to potentially intervene under its Chapter VII powers, it therefore meets the lower standard for intervention under Chapter VI.

Application of Determining Factors to Situation in North Korea

	Human./ Human Rights Violations	Refugee Outflows	Other (Drug Trafficking, Counterfeiting)	Conflict among Factions	Overthrow of Democratic Government
North Korea	✓	✓	✓	-	-

1. Widespread Internal Humanitarian/Human Rights Violations

Security Council resolutions generally cite gross human rights violations in situations of conflict. Severe human rights violations have been an important factor considered by the Security Council, whether the abuses are perpetrated by the ruling regime, as in Haiti, Sierra Leone, and Afghanistan, or whether they are occurring due to conflict and are being committed by insurgent parties, as in Yemen, Liberia, and Rwanda.

In the cases discussed in Appendix IV, there is no question that the Security Council acted in part from concern for those countries’ civilian populations, hoping to protect those people from further suffering. The Security Council has repeatedly demonstrated its commitment to prevent gross human rights violations even when the human rights violations have occurred wholly within a country itself. This is because especially severe and systematic human rights abuses create general instability and result in refugee flows to neighboring countries, thus threatening regional peace and security.

According to the most recent Resolution adopted by the former Commission on Human Rights, “systemic, widespread and grave violations” of human rights in North Korea reportedly include:

- (a) Torture and other cruel, inhuman or degrading treatment or punishment, 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 labour;

(b) Sanctions on citizens of the Democratic People's Republic of Korea who have been repatriated from abroad, such as treating their departure as treason leading to punishments by internment, torture, inhuman or degrading treatment, or the death penalty;

(c) All-pervasive and severe restrictions on the freedoms of thought, conscience, religion, opinion and expression, peaceful assembly and association and on access of everyone to information, and limitations imposed on every person who wishes to move freely within the country and travel abroad;

(d) Continued violation of the human rights and fundamental freedoms of women, in particular the trafficking of women for prostitution or forced marriage, ethnically motivated forced abortions, including by labour-inducing injection or natural delivery, as well as infanticide of children of repatriated mothers, including in police detention centres and labour training camps. . . .⁷⁷¹

Although information on the situation in North Korea is often hard to obtain, the combination of both the severity of the abuses in North Korea and the length of time these violations have persisted leads to an inevitable conclusion: compared to many countries where the Security Council has taken action in the past, the situation in North Korea is more grave. The most disturbing features of the situation in North Korea have already been examined in detail in this report.

2. Substantial Outflow of Refugees

Refugee outflow is an important factor considered by the Security Council in determining whether a threat to the peace exists. In many of the cases considered by the UN Security Council, a substantial refugee outflow was one of the primary reasons that the Council determined that there was a threat to the peace warranting action.⁷⁷² In Sierra Leone, Afghanistan, Haiti, and Rwanda, the Security Council specifically cited its concern over refugees as a factor in the "threat to the peace and stability of the region."⁷⁷³

⁷⁷¹ See COMM'N ON HUMAN RIGHTS RES. 2005/11, *supra* note 622.

⁷⁷² See *infra* Appendix IV.

⁷⁷³ See S.C. RES. 812 (Rwanda); S.C. RES. 1076 (Afghanistan); S.C. RES. 1132 (Sierra Leone); S.C. RES. 841 (Haiti).

Refugee statistics for cases presented in Appendix IV at the time of Security Council action (excluding Yemen, which had minimal flows) were:

- *Afghanistan* – approximately two million refugees fled to neighboring countries.⁷⁷⁴
- *Liberia* – some 750,000 refugees fled to Guinea, Côte d’Ivoire, and Sierra Leone.⁷⁷⁵
- *Sierra Leone* – approximately 361,000 refugees sought refuge in Sierra Leone’s neighboring countries, primarily in the Republic of Guinea and Liberia.⁷⁷⁶
- *Rwanda* – approximately 300,000 refugees fled to neighboring countries.⁷⁷⁷
- *Cambodia* – 300,000 refugees fled to three major camps in Thailand.⁷⁷⁸
- *Haiti* – approximately 40,000 refugees fled to Cuba and the Dominican Republic.⁷⁷⁹

North Korea fits well within the ranges that justified previous Security Council actions. Today there are as many as 30,000 to 100,000 North Korean refugees living in neighboring countries.⁷⁸⁰ During the peak of refugee outflow in the 1990s, the number of North Korean defectors was estimated at between 100,000 and 400,000.⁷⁸¹

3. Other Cross-Border Problems

Drug Trafficking

To compensate for the trade deficit and to fund other major government expenditures for the military and its WMD programs, North Korea has increased its production and trafficking of illegal narcotics. It is estimated that

⁷⁷⁴ *Situation of Human Rights in Afghanistan 1975/74*, Commission on Human Rights, United Nations, chap. XII. E/CN.4/1995/176, Mar. 8, 1995.

⁷⁷⁵ Foday Fofanah, *Stranded Liberian Refugees Head for Home*, REUTERS, Mar. 30, 1992.

⁷⁷⁶ *Id.*; see also UN Doc. S/PV.3797 (1997) (stating that refugees also had fled to Ghana, Nigeria, Côte d’Ivoire, Gambia, and other countries in the subregion).

⁷⁷⁷ *Populations of Concern to UNCHR: A Statistical Overview*, Office of the United Nations High Commissioner for Refugees, 1994. Note, we are examining refugee flows before the genocide because this was the relevant point of reference when the Security Council first decided to get involved.

⁷⁷⁸ *Cambodians Won’t be Forced to Return*, BANGKOK POST, Mar. 8, 1990; see also Elizabeth Pisani, *Cambodian Refugees Kept in Limbo in Effort to Keep Numbers Low*, REUTERS, Nov. 7, 1990 (citing 2,000 Cambodian refugees in camps in Indonesia).

⁷⁷⁹ See UN Doc. S/PV.3238 (1993); see also UN Doc. S/25942 (1993).

⁷⁸⁰ See LEE, *supra* note 471.

⁷⁸¹ See *id.*

North Korea earns between \$500 million to \$1 billion per year from these activities.⁷⁸²

Little doubt exists that drug trafficking has a tremendous negative effect on international stability. In fact, when the Security Council adopted Resolution 1076 regarding the situation in Afghanistan, it made specific note regarding its concern over opium trafficking in the region, stating that the conflict in Afghanistan “provides fertile ground for . . . drug trafficking which destabilizes the region and beyond.”⁷⁸³ This statement is also applicable to North Korea.

Japanese drug officials report that 43 percent of all illegal drugs imported to Japan come from North Korea⁷⁸⁴, and Taiwanese police and prosecutors report an increase in the number of drugs flowing from North Korea to Taiwan, primarily heroin.⁷⁸⁵ Further, North Korean diplomats have a long history of dealing in contraband. Almost all the members of North Korea’s diplomatic corps in Scandinavia were expelled in 1976 for running a smuggling operation for alcohol and cigarettes through Norway, Denmark, and Finland.⁷⁸⁶ Since that incident, more than 20 North Korean diplomats, agents, and trade officials have been implicated in illicit drug operations in more than 12 countries, including Egypt, Venezuela, India, Germany, Nepal, Sweden, Zambia, Ethiopia, and Laos.⁷⁸⁷ In addition, since 1976, North Korea has been linked to over 50 incidents involving drug seizures in at least 20 countries.⁷⁸⁸

Overall, the United States estimates that North Korea has approximately 10,000 to 17,000 acres of land under poppy cultivation – enough to harvest 30 to 44 tons of opium and manufacture 4.5 tons of heroin per year.⁷⁸⁹ Further, North Korea also produces methamphetamines for export with a production capacity of 10 to 15 tons per year.⁷⁹⁰

It is likely that North Korea’s drug production and trafficking activity will continue as long as there is a significant gap between its consumption of raw and processed materials and the government’s ability to purchase or produce those materials.

Money Counterfeiting and Laundering

To fund its trade deficit and purchase imports, North Korea has built up an extensive counterfeiting and money laundering operation. The United

⁷⁸² See *Heroin Busts Point to Source of Funds for North Koreans*, *supra* note 506.

⁷⁸³ S.C. RES. 1076, S/Res/1076 (1996).

⁷⁸⁴ See HWANG, *supra* note 528, at 4.

⁷⁸⁵ See Solomon & Dean, *supra* note 525.

⁷⁸⁶ See *id.*

⁷⁸⁷ See Spaeth, *supra* note 526.

⁷⁸⁸ See Perl, *supra* note 510, at 6.

⁷⁸⁹ See HURST, *supra* note 505, at 5; see also Perl, *supra* note 510, at 9.

⁷⁹⁰ See HURST, *supra* note 505, at 9-11.

States has determined that a definite connection exists between the North Korean government and the high-quality, counterfeit \$100 bills commonly known as “supernotes.”⁷⁹¹ It is estimated that North Korea has produced more than \$45 million in supernotes since 1989, with a current yearly production range between \$3 million and \$25 million per year.⁷⁹² Much of this counterfeit currency is laundered outside of North Korea. For example, a North Korean diplomat was arrested in Belgrade for passing supernotes⁷⁹³, and in 2005 the United States halted transactions between US financial institutions and Banco Delta Asia in Macau on suspicion that the bank was involved with the North Korean government in both counterfeiting and laundering approximately \$24 million in US currency.⁷⁹⁴

While the Security Council has not previously considered counterfeiting and money laundering in a Chapter VII analysis, the international community has a long history of addressing these issues. The International Convention for the Suppression of Counterfeiting Currency and Protocol was signed by members of the League of Nations on April 20, 1929, and came into force on February 22, 1931.⁷⁹⁵ The Convention remains the operative document on counterfeiting, with approximately 80 countries ratifying, acceding to, or succeeding to the Convention.⁷⁹⁶ The Convention establishes national offices in signatory countries to address the issue of counterfeiting and also discusses counterfeiting across borders.⁷⁹⁷ While North Korea is not a signatory to this treaty, the Convention’s existence is itself evidence of broad international concern about the impact of counterfeiting and money laundering.

The international community has similarly made efforts to combat money laundering, especially in the wake of the September 11, 2001, terrorist attacks. The Financial Action Task Force, an organization established in 1989 at the G-7 Summit and comprised of 33 members, is responsible for establishing universal anti-money laundering standards.⁷⁹⁸ Additionally, the UN Office on Drugs and Crime is addressing the issue through a global program against money laundering.⁷⁹⁹

⁷⁹¹ See Perl & Nanto, *supra* note 540.

⁷⁹² See *id.*

⁷⁹³ See Gertz, *supra* note 554.

⁷⁹⁴ See Press Release, *supra* note 557; Guha, *supra* note 558.

⁷⁹⁵ Apr. 20, 1929, 112 L.N.T.S. 371.

⁷⁹⁶ The most recent to accede to the treaty was Slovenia on May 9, 2006.

⁷⁹⁷ See INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF COUNTERFEITING CURRENCY, *supra* note 795, at art. 3 (describing punishable crimes), art. 8 (discussing extradition), and art. 12 (calling for the establishment of central offices in each signatory state).

⁷⁹⁸ See *Fact Sheet - The IMF and the Fight Against Money Laundering and the Financing of Terrorism* (International Monetary Fund), available at <http://www.imf.org>.

⁷⁹⁹ See United Nations, Global Program Against Money Laundering, available at http://www.unodc.org/unodc/en/money_laundering.html.

Conclusion

As described above, applying these determining factors to the situation in North Korea demonstrates that it represents a threat to the peace – not just a situation that might lead to international friction – and that Security Council action is both justified and warranted. As the situation in North Korea meets the criteria for the Security Council potentially to intervene under its Chapter VII powers, it therefore meets the lower standard for intervention under Chapter VI as well.

Recommendations

Initially, the UN Security Council should adopt a non-punitive resolution on the situation in North Korea in accordance with its authority under Chapter VI of the UN Charter and past Security Council precedents.

The resolution should:

- Outline the major reasons for the Security Council intervention, focusing on the North Korean government's failure to protect its own people and the threat to international peace and security caused by the major issues described in this report;
- Urge the North Korean government to ensure the immediate, safe, and unhindered access to all parts of the country for the United Nations and international organizations to provide humanitarian assistance to the most vulnerable groups of the population;
- Call on the North Korean government to release all political prisoners detained in violation of their rights under the International Covenant on Civil and Political Rights, to which North Korea is a state party;
- Insist the North Korean government allow the UN Special Rapporteur on Human Rights in North Korea to visit the country; and
- Request the Secretary-General to remain vigorously engaged in the situation in North Korea and that he report back to the Security Council on a regular basis.

Should North Korea fail to comply with a Chapter VI resolution, the Security Council should consider adopting a binding resolution under Chapter VII.

Appendix I: Background, Duties, and Operations of UN Security Council

With maintaining peace and security between nations as its mission, the UN Security Council plays a key role in achieving the United Nations' larger goals of preventing war, upholding human rights, and promoting international political stability.⁸⁰⁰ When carrying out its critical duty of maintaining peace and security, the Security Council possesses unparalleled authority to make decisions that may bind both members and non-members of the UN.⁸⁰¹ With this power to harness the political will of the international community and to channel such determinations toward real change, the Security Council is perhaps the most important organization working for international peace and security in modern times. This Appendix provides a concise introduction to the Security Council's structure, duties, and procedures, which is the framework within which the Security Council should act with respect to the situation in North Korea.

A. Security Council Overview⁸⁰²

1. Composition

As provided in Article 23 of the UN Charter, the Security Council is composed of 15 members of the United Nations.⁸⁰³ The five permanent Security Council members – the People's Republic of China, France, the Russian Federation, the United Kingdom, and the United States of America – are joined by ten members elected by the General Assembly for two-year terms, five of which are replaced each year.⁸⁰⁴ The selection of Security Council members is based not only on geographic representation but also on the significant responsibility of maintaining peace and security, a task designated to each member of the Security Council.⁸⁰⁵ The current non-permanent members for 2005-2006 are Argentina, Denmark, Greece, Japan, and Tanzania. The non-permanent members for 2006-2007 are Ghana, Peru,

⁸⁰⁰ See UN CHARTER, preamble; UN CHARTER, art. 4(1).

⁸⁰¹ See UN CHARTER, art. 2(5); art. 25; and art. 49 (binding members); see also UN CHARTER art. 2(6) (binding non-members to Charter principles "so far as may be necessary for the maintenance of international peace and security.") It is important to note this obligation is explicitly reinforced with regard to the finding of a "threat to the peace, breach of the peace, or act of aggression" in which "[t]he Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council." UN CHARTER, art. 49. By contrast, the UN General Assembly can only recommend action.

⁸⁰² See generally, UN CHARTER, Chapter V.

⁸⁰³ UN CHARTER, art. 23(1).

⁸⁰⁴ See *id.* at art. 23(2).

⁸⁰⁵ See *id.* at art. 23(1).

Republic of the Congo, Slovakia, and Qatar.⁸⁰⁶ Each member is assigned a specific month to sit as Security Council president.⁸⁰⁷

2. Basic Duties and Functions

The UN Charter explains the Security Council's important mission to act on behalf of UN members to maintain peace and security and articulates the Council's powers to do so.⁸⁰⁸ The Security Council is empowered with three broad approaches it can utilize to achieve its mission: (1) recommendations to the General Assembly; (2) recommendations involving any situation or dispute that might lead to international friction; and (3) binding decisions.⁸⁰⁹ This report focuses on the second as the best approach for an initial consideration for the situation in North Korea.

The Security Council's unparalleled power and limited membership has created a historical tension with the General Assembly's full UN membership with respect to the Council's power to recommend action.⁸¹⁰ The Charter addresses this friction, stating that when the Security Council exercises its power in relation to disputes, the General Assembly may not make any further recommendation regarding that dispute unless the Security Council so requests.⁸¹¹ Furthermore, the Secretary-General must notify the General Assembly about those matters relative to maintaining international peace and security that are being dealt with by the Security Council.⁸¹²

B. Security Council Power under Chapter VI of the UN Charter

The protection of humanitarian needs and human rights has become increasingly necessary for maintaining peace and security between nations in this modern age, where ongoing civil conflict poses transnational consequences to interdependent nations.⁸¹³ The goal of protecting humanitarian needs and

⁸⁰⁶ Updated membership lists are available at http://www.un.org/Docs/sc/unsc_members.html. Profiles of ambassadors serving on the Security Council are *available at* <http://www.globalpolicy.org/security/indexamb.htm>.

⁸⁰⁷ *Id.*; *see also*, UN CHARTER, art. 30 (providing the Security Council the ability to "adopt its own rules of procedure, including the method of selecting its President"). For list of past presidents see UN web site, *available at* <http://www.un.org/Depts/dhl/resguide/scpres.htm>.

⁸⁰⁸ UN CHARTER, art. 24(2) (referencing the powers of Chapters VI, VII, VIII, and XII).

⁸⁰⁹ *See* SYDNEY D. BAILEY & SAM DAWS, *THE PROCEDURE OF THE UN SECURITY COUNCIL* 18-20 (Clarendon Press, 3d Ed., 1998). With respect to recommendations to the General Assembly, these include such issues as the admission or expulsion of members (UN CHARTER, art. 4 and 6); appointment of the Secretary-General (UN CHARTER, art. 97); and issues surrounding the International Court of Justice (*see e.g.*, UN CHARTER, art. 97 and art. 94(2)).

⁸¹⁰ *See* BAILEY & DAWS, *supra* note 809 at 3-4.

⁸¹¹ *See* UN CHARTER, art. 12(1).

⁸¹² *See* UN CHARTER, art. 12(2).

⁸¹³ *See* Lois E. Fielding, *Taking a Closer Look at Threats to Peace: The Power of the Security Council to Address Humanitarian Crises*, U. DET. MERCY L. REV., Vol. 73, 1995, at 552; *see also* Nancy D. Arnison, *International Law and Non-Intervention: When Do Humanitarian Concerns Supersede Sovereignty?* FLETCHER F. WORLD AFF., Vol. 17, 1993, at 199.

human rights is explicitly stated in the UN Charter, which provides that “[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all.”⁸¹⁴

The UN has commented often on the transnational effect of otherwise internal country situations, culminating in the endorsement by the 2005 World Summit and the UN Security Council of each state’s “responsibility to protect” its citizens from genocide, crimes against humanity, war crimes, and ethnic cleansing.⁸¹⁵

Chapter VI of the Charter describes the role the UN Security Council may play in a country-specific situation that could endanger the maintenance of international peace and security. The Security Council “may investigate . . . any situation which might lead to international friction . . . to determine whether the continuance of the . . . situation is likely to endanger the maintenance of international peace and security.”⁸¹⁶ Any member of the United Nations “may bring . . . any situation of the nature referred to in Article 34, to the attention of the Security Council . . .”⁸¹⁷ Subsequently, having examined the situation, the Security Council “may, at any stage . . . of a situation of like nature, recommend appropriate procedures or methods of adjustment.”⁸¹⁸

Recommendations made under Chapter VI are non-binding.⁸¹⁹ Nevertheless, the adoption of such a resolution by the Security Council would send a clear message to the North Korean government that the UN is no longer willing to tolerate one of its own members ignoring resolutions of the General Assembly, former Commission on Human Rights, and the Special Rapporteur. If the North Korean government should fail to engage with the United Nations after the adoption of such a resolution, the Security Council then may decide to proceed to a resolution under Chapter VII, which is binding under international law on all members of the UN.⁸²⁰

⁸¹⁴ UN CHARTER, art. 55(c).

⁸¹⁵ See *infra* Appendix II.

⁸¹⁶ UN CHARTER, art. 34.

⁸¹⁷ UN CHARTER, art. 35(1).

⁸¹⁸ UN CHARTER, art. 36(1).

⁸¹⁹ It is generally accepted that recommendations made under this chapter are not binding on UN members. See, e.g., Talmon, *supra* note 769; but see BAILEY & DAWES, *supra* note 809, at 268 (discussing International Court of Justice Advisory Opinion in *Namibia* case from Jun. 21, 1971).

⁸²⁰ See Kurt Herndl, *Reflections on the Role, Functions and Procedures of the Security Council of the United Nations*, in *RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 323 (Martinus Nijhoff Publishers, 1997); see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 52 (Advisory Opinion of Jun. 21).

C. Operations of the Security Council

1. Voting

As dictated by the Charter, each member of the Security Council is allowed one vote.⁸²¹ The number of votes needed to pass a particular measure depends on whether the issue in question is procedural or substantive in nature.⁸²² Any decisions made regarding procedural issues may be made by the affirmative vote of nine members.⁸²³ Decisions on substantive matters, however, such as actions in response to a threat to the peace, require nine affirmative votes, including the concurring or abstaining votes of the five permanent members.⁸²⁴ Because of this requirement, the five permanent members of the Security Council each hold veto power over substantive decisions.

Whether a particular item or action is procedural or substantive is a debatable issue. A discussion surrounding this issue was held at the original UN Conference on International Organization held in San Francisco in April 1945, ultimately leading to the Yalta Formula being adopted.⁸²⁵ Discussed more fully below, including items on the agenda, ordering the agenda items, and deferring consideration of items on the agenda are generally understood to be procedural matters that may be adopted by an affirmative vote of any nine members and are not subject to a veto.⁸²⁶

Once an item is on the agenda, any one of the five permanent members may use its veto power to prevent any substantive action from being adopted, including resolutions.⁸²⁷ The permanent members' ability to veto has been widely debated and is a key issue discussed in relation to reforming the Security Council.⁸²⁸ Excluded from the veto's scope are the consideration and discussion of a particular matter.⁸²⁹ Also, if a permanent member withholds its vote by abstaining, or not being present at a meeting, the veto power is not implicated. Thus, a permanent member may refrain from taking a viewpoint on a particular resolution while still allowing the substantive issue to pass.

⁸²¹ See UN CHARTER, art. 27(1); see also, *Security Council's Official Voting Record*, available at <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&menu=search&submenu=power#focus>.

⁸²² The issue of what is procedural versus what is substantive is a discussion in and of itself, but remains outside the scope of this report. See BAILEY & DAWES, *supra* note 10, at 225-7.

⁸²³ *Id.* at ¶ 2.

⁸²⁴ *Id.* at ¶ 3. (Further noting "in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.")

⁸²⁵ See *Yalta Formula on Voting in the Security Council*, Jun. 8, 1945, UNCIO, Vol. XI, at 710-14 (outlining the framers' intentions as to substantive versus non-substantive questions). See also BAILEY & DAWES, *supra* note 809 at 240-42 (discussing the merits of the "Yalta Formula").

⁸²⁶ See BAILEY & DAWES, *supra* note 809, at 226.

⁸²⁷ *Id.* at 240-42.

⁸²⁸ See, e.g., *Global Policy Forum: Articles on the Veto*, available at <http://www.globalpolicy.org/security/veto/articles.htm> (list of opinion and analysis pieces as well as news articles dealing with the debate surrounding the veto).

⁸²⁹ See BAILEY & DAWES, *supra* note 809, at 227.

Resolutions are customarily adopted by a recorded vote that expresses the position of each member.⁸³⁰ Press releases are published immediately after Council meetings, which provide the public an unofficial record of any resolutions passed.⁸³¹ Official records of the Security Council meetings are available at a later date.⁸³² Finally, an annual report is published and submitted to the General Assembly.⁸³³

2. Procedure

The procedures of the Security Council are challenging to understand because they are based on both formal rules and informal precedent. Article 30 of the Charter enables the Security Council to “adopt its own rules of procedure, including the method of selecting its President.” Tasked with formulating these rules, the Executive Committee of the Preparatory Commission was divided into those that favored a strict set of rules and those that preferred to use practical experience along with more moderate guiding principles.⁸³⁴ In 1946, after several meetings, the Council adopted 60 Provisional Rules of Procedure (Rules), which have sustained only minor changes in the subsequent decades.⁸³⁵ The recorded evolution of the Rules from daily practice is relatively unknown because most debate occurs in private.⁸³⁶

The president presides over meetings of the Council.⁸³⁷ In conjunction with the Rules, the Council has developed a range of customs and types of meetings. The Council may hold public gatherings in the form of formal

⁸³⁰ See *UN Documentation: Research Guide on Security Council Voting Information*, available at <http://www.un.org/Depts/dhl/resguide/scvote.htm>, last visited Sept. 1, 2006.

⁸³¹ See *id.*; see also, *Global Policy Forum: Veto Use in the UN Security Council, 1946-2004*, at <http://www.globalpolicy.org/security/data/vetogph2.htm>, last visited Sept. 1, 2006 (graphic representation of the exercise of veto by each permanent member).

⁸³² Meeting records from 1994 to the present are available at <http://www.un.org/Depts/dhl/resguide/scact.htm>. Most earlier records can be found through the Official Document System of the United Nations, available at <http://www.un.org/documents>. The text from all passed resolutions may be found on the Security Council web site, available at http://www.un.org/Docs/sc/unsc_resolutions.html. For more detail, speeches made before the Security Council (and background information) are available at <http://www.un.org/Depts/dhl/resguide/scspeech.htm>.

⁸³³ Recent Annual Reports may be found through the Official Document System of the United Nations, *supra* note 832. Earlier reports can be available at a UN depository library, available at <http://www.un.org/depts/dhl/deplib/countries/index.html>.

⁸³⁴ See BAILEY & DAWS, *supra* note 809 at 9; see also Benedetto Conforti, *The Legal Effect of Non-Compliance with Rules of Procedure in the UN General Assembly and Security Council*, AM. J. INT'L L., Vol. 63, 1969, at 479.

⁸³⁵ See generally, PROVISIONAL RULES OF PROCEDURE OF THE SECURITY COUNCIL, S/96/Rev.7 [hereinafter Rule]. Electronic version available at <http://www.un.org/Docs/sc/scrules.htm>, last visited Sept. 1, 2006. See also BAILEY & DAWS, *supra* note 809, at 13-16.

⁸³⁶ See BAILEY & DAWS, *supra* note 809, at 18.

⁸³⁷ See Rule 19.

meetings, debates, or briefings; meetings may be either open to the public or closed private gatherings.⁸³⁸ Under the Rules, the president holds the responsibility for convening public meetings.⁸³⁹

The Secretary-General has the obligation to bring matters forward for the Council's consideration.⁸⁴⁰ In addition, many items on the agenda may be brought to the attention of the president and other members of the Security Council through means of informal gatherings.⁸⁴¹ In some settings, such as "Arria formula" meetings, individuals who are not members may have the opportunity to address the members of the Security Council.⁸⁴² Typically, as these meetings are private and informal, no official records are kept.⁸⁴³ Any state or UN organ or the Secretary-General may propose items for the Security Council agenda, and such requests must be "immediately" communicated to representatives on the Council.⁸⁴⁴

The proposed issues to be discussed in a Security Council meeting make their first public appearance in a "provisional agenda" containing "the list of matters suggested for the consideration of the Council at a specific meeting."⁸⁴⁵ Typically, this provisional agenda is then communicated to the Council members within three days of the meeting.⁸⁴⁶ When possible, it is also published

⁸³⁸ See Glossary of Meetings of the United Nations Security Council, *available at* http://www.mfa.gov.sg/unsc/unsc_glossary.html, last visited Sept. 1, 2006 (Singapore Ministry of Finance outline of different types of meetings; also noting gatherings such as informal consultations and meetings and closed consultations of the whole).

⁸³⁹ See BAILEY & DAWES, *supra* note 809, at 21.

⁸⁴⁰ See Rule 6.

⁸⁴¹ See generally BAILEY & DAWES, *supra* note 809, at 60-74.

⁸⁴² See *id.* at 73; see also Rules 37, 38 and 39. According to Global Policy Forum scholar James Paul:

The formula is named for Ambassador Diego Arria of Venezuela who devised it. In 1992, during the crisis in former Yugoslavia, a Bosnian priest came to New York and asked to meet with various Council members individually. Only Ambassador Arria agreed to meet him. Ambassador Arria was so impressed with the priest's story that he felt all Council members should hear it too. Obviously, it was impossible to get the Council to agree to hear this testimony in its official sessions. So Arria simply invited Council members to gather over coffee in the Delegates' Lounge. Many attended, the meeting was a great success and the Arria Formula was born.

Global Policy Forum, *Arria Formula*, *available at*

<http://www.globalpolicy.org/security/mtgsetc/arria.htm>.

⁸⁴³ *Id.* Recently, UN Special Envoy Anna Tibajuka spoke to the Security Council regarding the situation in Zimbabwe, which was not on the UN Security Council agenda. The United Kingdom invoked the rule to vote on procedural matters by a simple majority, and was joined by eight other members to discuss Ms. Tibajuka's report. See Zimbabwe report discussed at UN, BBC NEWS, Jul. 27, 2005, *available at* <http://news.bbc.co.uk/2/hi/africa/4721189.stm>.

⁸⁴⁴ Rule 6.

⁸⁴⁵ BAILEY & DAWES, *supra* note 809, at 76; see also Rule 7 (noting this 'provisional agenda' is drafted by the Secretary-General and approved by the Council's president).

⁸⁴⁶ Rule 8 (but providing an allowance in urgent circumstances for matter to be communicated simultaneously with the notice of the meeting).

in the *UN Journal*.⁸⁴⁷ Additions or changes to this provisional agenda may be made up to five days before the meeting or, if “urgent circumstance[s]” are found, may be made during the meeting.⁸⁴⁸

Adopting the provisional agenda as a formal agenda is the first item discussed at any gathering.⁸⁴⁹ If there is contention over a particular agenda item, a country may call for a vote to have the item excluded. Considered a procedural vote, an item will be eliminated unless nine countries vote to keep the item on the agenda. Any items not discussed, or held for discussion at later meetings, are found on the “summary statement of matters of which the Security Council is seized.”⁸⁵⁰ This document lists those matters which have not been disposed of at previous meetings, and are communicated to the Council members on a weekly basis.⁸⁵¹

The Security Council president determines whether to place the matter on the formal agenda by consensus or by a majority vote. As discussed above, although the Council’s practice is not always uniform, it is generally accepted that motions regarding the addition of items to the agenda are procedural, and thus are not open to veto by permanent members.⁸⁵² Characterizing a particular action as procedural or substantive often comes down to the vote, and whether the votes of the five permanent members were necessary for passage.⁸⁵³ Generally, with regard to putting items on the agenda, the voting record confirms the procedural nature of the matter.⁸⁵⁴ Other procedural motions include proposals changing the wording of items (which are usually adopted without vote); including an item on the agenda but postponing consideration;

⁸⁴⁷ See BAILEY & DAWS, *supra* note 809, at 76.

⁸⁴⁸ *Id.*

⁸⁴⁹ See *id.*; Rule 9 and 10.

⁸⁵⁰ Rule 11.

⁸⁵¹ BAILEY & DAWS, *supra* note 809, at 76.

⁸⁵² BAILEY & DAWS, *supra* note 809, at 85. This issue was addressed by the UN Conference on International Organization in San Francisco in April 1945. At this initial meeting, the Soviet representative argued that the veto power should apply to *any discussion* of an item on the agenda. This argument was defeated in discussions with the future permanent members. This understanding was reiterated in the conference plenary sessions in response to queries from smaller states.

⁸⁵³ The power of the “hidden veto” or “pocket veto” should, however, be mentioned. This situation refers to instances in which a procedural matter is open to a simple majority vote, but a permanent member uses the threat of its ultimate veto power to circumvent the passage of the matter. For example, even if one permanent member could not veto the inclusion of an item on the agenda, the threat of an ultimate veto of the final resolution may bring the issue to a premature end. This device is mainly used in private, non-formal meetings; because there are no formal records of such meetings, it is impossible to know the number of hidden vetoes used by the permanent members. See Céline Nahory, *The Hidden Veto*, The Global Policy Forum (May 2004), available at <http://www.globalpolicy.org/security/veto/2004/0519hiddenveto.htm#5>; see also BAILEY & DAWS, *supra* note 809 at 249-50.

⁸⁵⁴ See e.g., *UN Security Council Repertoire* (11 Supplement, Chapter IV, 1989-1992) at 5-6 (listing the passage of the inclusion of items on the agenda by a simple majority vote).

adding an item to the provisional agenda; or changing the order of items on the agenda.⁸⁵⁵

Once an issue such as a draft resolution is on the agenda, the matter is undeniably substantive and is open to the permanent member veto. At this point, the Security Council votes to pass or reject each item in order of its appearance on the agenda. As a practical matter, it is customary to include only one substantive matter on each agenda.⁸⁵⁶ In this manner, the Council often avoids procedural delays.⁸⁵⁷

⁸⁵⁵ See BAILEY & DAWS, *supra* note 809, at 85.

⁸⁵⁶ *See id.*

⁸⁵⁷ *See id.*

Appendix II: The New “Responsibility to Protect” Doctrine under International Law

The 21st century presents new and fundamentally different challenges from those faced in 1945, when the UN was founded. As new realities have emerged, so too have new standards of conduct in national and international affairs.⁸⁵⁸ Human rights now have been fully embraced in international law, and respect for human rights has become a central tenet and responsibility of states.⁸⁵⁹

In his Millennium Report to the UN General Assembly, Secretary-General Kofi Annan challenged UN members to reconcile their need for the preservation of sovereignty, with the need for protection of global human rights. The Secretary-General asked “if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond . . . to gross and systematic violations of human rights that offend every precept of our common humanity?”⁸⁶⁰ For the better part of the last decade, the UN has been grappling with balancing the preservation of members’ sovereignty rights with the international community’s obligation to protect a member’s citizens when the member cannot or chooses not to protect its citizens.

Sovereignty is the fundamental basis for nations co-existing.⁸⁶¹ But as the Secretary-General stated, some violations of human rights are so repugnant as to demand attention and action by the world community. In that regard, traditional notions of sovereignty have been evolving to include not just the rights of states, but also their duties.⁸⁶²

This appendix focuses on the sovereign’s responsibility to protect its populations from genocide, crimes against humanity, ethnic cleansing, and war crimes and the obligation of the UN, up through and including the Security Council, to intercede where states are failing to meet their obligations. First, a description of the evolving conception of state sovereignty is provided.

⁸⁵⁸ See, e.g., INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, *The Responsibility to Protect*, Dec. 2001, at ¶ 1.10 [hereinafter ICISS Report].

⁸⁵⁹ See *id.*

⁸⁶⁰ Secretary-General Kofi Annan, *We the Peoples: The Role of the United Nations in the Twenty-First Century*, UN Doc. No. A/54/2000, Apr. 3, 2000, ch. 4, at 48.

⁸⁶¹ The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality. If international law exists, then the dynamics of state sovereignty can be expressed in terms of law and, as states are equal and have legal personality, sovereignty is in a major aspect in relation to other states (and to organizations of states) defined by law. The principal corollaries of the sovereignty and equality of states are: (i) a jurisdiction, *prima facie* exclusive, over a territory and the permanent population living there; (ii) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (iii) the dependence of obligations arising from customary law and treaties on the consent of the obligor. See IAN BROWNLIE, *PRINCIPALS OF PUBLIC INTERNATIONAL LAW* (6th ed., 2003), at 287.

⁸⁶² See Kofi A. Annan, *Two Concepts of Sovereignty*, *THE ECONOMIST*, Sept. 18, 1999.

Second, an explanation of how the doctrine of sovereignty and the corresponding rights associated with sovereignty is now counter-balanced by a state's obligation to protect its citizenry is detailed. Lastly, the development of the doctrine of the responsibility to protect is presented.

A. Sovereignty Involves Both Rights and Responsibilities

1. Historical Development of Sovereignty as Responsibility

The concept of sovereignty signifies the legal identity of a state in international law.⁸⁶³ Sovereign states are regarded as equal, regardless of comparative size or wealth.⁸⁶⁴ A condition of any one state's sovereignty is a corresponding obligation to respect every other state's sovereignty.⁸⁶⁵ The UN Charter is grounded in this traditional conception of state sovereignty. Each state that is a member of the UN enjoys equal sovereignty⁸⁶⁶ and each state has a duty not to use force against⁸⁶⁷, or intervene in the purely internal affairs of another state.⁸⁶⁸

2. United Nations' Acknowledgement of Need to Protect Civilian Populations from Crimes Against Humanity

The traditional understanding of sovereignty emphasized a state's duty of non-interference in the internal affairs of other countries. Nevertheless, the world's experiences with the tragic consequences of otherwise internal conflicts and systematic violations of human rights have raised serious questions about how this concept should be understood.

As early as 1992, then UN Secretary-General Boutros Boutros-Ghali observed that:

Civil wars are no longer civil, and the carnage they inflict will no longer let the world remain indifferent. The narrow nationalism that would oppose or disregard the norms of a stable international order and the micro-nationalism that resists healthy economic or political integration can disrupt a peaceful global existence. Nations are too interdependent

⁸⁶³ See ICISS Report, *supra* note 858, at ¶ 2.7.

⁸⁶⁴ See *id.*

⁸⁶⁵ See *id.* at ¶ 2

⁸⁶⁶ See UN CHARTER, art. 2(1) ("The Organization is based on the principle of the sovereign equality of all its Members.")

⁸⁶⁷ See UN CHARTER, art. 2(4) ("All Members shall refrain from the threat or use of force against territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.")

⁸⁶⁸ See UN CHARTER, art. 2(7) ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are *essentially within the domestic jurisdiction of any state . . .*") (emphasis added).

and national frontiers are too porous and transnational realities . . . too dangerous to permit egocentric isolationism.⁸⁶⁹

In his Millennium Report to the UN General Assembly in 2000, Secretary-General Annan challenged the world community to reconcile its need for the preservation of sovereignty, with the need for the protection of global human rights. The Secretary-General asked “if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to gross and systematic violations of human rights that offend every precept of our common humanity.”⁸⁷⁰

Heeding the call from the Secretary-General, the Canadian government created the International Commission on Intervention and State Sovereignty (ICISS) in September 2000.⁸⁷¹ ICISS sought to balance the interests of state sovereignty and the protection of human rights, much as the UN Charter affirmed the principle of non-interference in domestic affairs of sovereign states while embracing the importance of achieving international cooperation in promoting human rights.⁸⁷²

3. The ICISS Report on the Responsibility to Protect

The ICISS was the first to enunciate a clear conception of the “responsibility to protect.”⁸⁷³ In its report *The Responsibility to Protect*, the ICISS cited the Secretary-General’s address to the General Assembly in 2000 as the catalyst for developing a formal doctrine to guide future UN actions while reconciling the need for both human security and state sovereignty.⁸⁷⁴ The drafters of the ICISS Report sought to “develop a global public consensus on how to move from polemics – and often paralysis – toward action within the international system, particularly through the United Nations.”⁸⁷⁵

According to the ICISS, “members of the broad community of states do have a responsibility to protect both their own citizens and those of other states as well.”⁸⁷⁶ This responsibility was expressed as a comprehensive and

⁸⁶⁹ UN SECURITY COUNCIL, *Security Council Summit Statement Concerning the Council’s Responsibility in the Maintenance of International Peace and Security*, UN Doc S/23500, Jan. 31, 1992, at 8-10.

⁸⁷⁰ *We the Peoples*, *supra* note 860, Ch. 4, at 48.

⁸⁷¹ ICISS was during the UN Millennium Summit in response to Secretary-General Kofi Annan’s challenge to member states to address dilemmas posed by humanitarian crises where intervention to protect human lives and the sanctity of states’ sovereignty are in conflict. See Pace & Deller, *supra* note 707.

⁸⁷² See UN CHARTER, art. 27 & preamble.

⁸⁷³ See ICISS Report, *supra* note 858.

⁸⁷⁴ See *id.* at ¶¶ 1.6, 1.7 (“The Government of Canada responded to the Secretary-General’s challenge by announcing the establishment of this independent International Commission on Intervention and State Sovereignty.”)

⁸⁷⁵ ICISS Report, *supra* note 858, at ¶ 1.7

⁸⁷⁶ *Id.* at ¶ 2.27.

normative expectation for states and the international community to protect human populations from the most egregious violations of human rights.⁸⁷⁷

The ICISS explained that by joining the community of nations through the UN, signatory states voluntarily cede their sovereignty in certain ways by accepting specific duties as members of the institution.⁸⁷⁸ No longer are states merely the monopolists of power over a political area. The old model of “sovereignty as control” is therefore re-interpreted as “sovereignty as responsibility.”⁸⁷⁹ This reformulation of sovereignty provides the legal justification of the “responsibility to protect.”

The ICISS did not invent the notion of sovereignty as responsibility.⁸⁸⁰ States have numerous affirmative duties arising from a variety of sources. Many multilateral treaties, UN resolutions, and other international agreements create affirmative obligations on states.⁸⁸¹ Certainly, the UN Charter affirms the sovereignty of signatory states. However, signing the Charter requires that states participating in the international community conform to the other obligations as described in the Charter as well.⁸⁸²

While the ICISS Report recognizes that the UN Charter affirmatively protects state sovereignty, other sources of authority from within the Charter also support a responsibility to protect.⁸⁸³ Article 24 of the UN Charter confers upon the Security Council the “primary responsibility for the maintenance of international peace and security,” setting forth the ability of the UN to act affirmatively on the world stage. “Maintenance of peace and security” includes more than merely the prevention of outright war. The Security Council has interpreted Article 24 to provide authority to prevent or remedy instability caused by humanitarian crises.⁸⁸⁴ With this broad interpretation afforded Article 24, the failure to protect activates the Security Council’s authority because human security is included within the broader meaning of international peace and security.⁸⁸⁵ When the Security Council acts, UN

⁸⁷⁷ See Graham Day & Christopher Freeman, *Operationalizing the Responsibility to Protect – The Policekeeping Approach*, 11 GLOBAL GOVERNANCE 139 (2005) (“The Responsibility to Protect represents the most sophisticated attempt at establishing a moral guideline for international action in the face of humanitarian emergency.”).

⁸⁷⁸ See ICISS Report, *supra* note 858, at ¶ 2.14.

⁸⁷⁹ *Id.*

⁸⁸⁰ See, e.g., FRANCIS M. DENG, SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA 1-33 (Brookings Institution, 1996); Annan, *supra* notes 860, at 4.

⁸⁸¹ See ICISS Report, *supra* note 858, at ¶ 2.26; See also, e.g., UN GENERAL ASSEMBLY, UNIVERSAL DECLARATION ON HUMAN RIGHTS, Dec. 10, 1948; ICCPR, *supra* note 219; ICESCR, *supra* note 116.

⁸⁸² See ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 26-28 (Harvard University Press, 1995) (“[S]overeignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life.”).

⁸⁸³ See ICISS Report, *supra* note 858, at ¶¶ 6.2-6.12.

⁸⁸⁴ See DENG, *supra* note 880.

⁸⁸⁵ See ICISS Report, *supra* note 858, at ¶ 2.21.

member states must abide by the decisions by the Security Council.⁸⁸⁶ This structure provides the theory under which the Security Council may take action if and when a state is unwilling or unable to fulfill its responsibility to protect.

The ICISS also cited the UN General Assembly's "fallback responsibility" to maintain international peace and security.⁸⁸⁷ General Assembly resolutions are non-binding⁸⁸⁸ and it cannot consider issues concurrently discussed by the Security Council.⁸⁸⁹ Nonetheless, the General Assembly maintains a moral and normative responsibility to protect as an organ of the UN and the world community. The General Assembly can be a powerful diplomatic tool to organize international opinion and to pressure states to fulfill their responsibility to protect.⁸⁹⁰

The ICISS Report concludes that where a population is suffering serious harm, as a result of internal war, insurgency, repression, or state failure, and the state in question is unwilling or unable to halt or avert it "then it becomes the responsibility of the international community to act in its place," and "the principle of non-intervention yields to international responsibility to protect."⁸⁹¹

While the ICISS Report was an important milestone in the international debate about the protection of civilian populations facing serious human rights abuses within countries, it is important to recall that ICISS was merely a Canadian government-funded commission. As a result, its report and recommendations had no binding international legal effect and was merely hortatory and aspirational. Nevertheless, the ICISS is given substantial credit for having developed and articulated a clearer understanding of the responsibility to protect doctrine.

B. The Evolution of the Responsibility to Protect Doctrine in the UN

The goal of protecting human rights and humanitarian needs is explicitly stated in the UN Charter, which provides that "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all."⁸⁹² In furtherance of its goal of protecting human rights, the UN addressed the subject in its Millennium Declaration.

⁸⁸⁶ See UN CHARTER, art. 25 ("Members of the United Nations agree to accept and carry out the decisions of the Security Council" in accordance with the present charter.")

⁸⁸⁷ ICISS Report, *supra* note 858, at ¶ 6.7, *citing* UN CHARTER, art. 11.

⁸⁸⁸ *See id.*

⁸⁸⁹ *See* UN CHARTER, art. 12.

⁸⁹⁰ This report and appendix does not take a position on the General Assembly use of "Uniting for Peace" procedures to justify international intervention, as favorably discussed by ICISS Report, *supra* note 858, at ¶ 6.7.

⁸⁹¹ ICISS Report, *supra* note 858, at synopsis & ¶ 2.29.

⁸⁹² UN CHARTER, Art. 55(c).

The United Nations declared in its Millennium Declaration:

V. Human rights, democracy and good governance

24. We will spare no effort to . . . strengthen the rule of law as well as respect for internationally recognized human rights.

25. We resolve therefore:

- To respect fully the Universal Declaration of Human Rights.
- To strengthen the capacity of all countries to implement the principles and practices of democracy and respect for human rights.⁸⁹³

In the wake of the ICISS Report, the UN, through a series of steps, has adopted a more narrow version of the responsibility to protect doctrine.⁸⁹⁴ On September 23, 2003, Secretary-General Annan announced that he was forming a High-Level Panel to “focus primarily on threats to peace and security,” and to recommend needed changes to the structure and operations of the UN.⁸⁹⁵ The High-Level Panel issued its report in December 2004, entitled *A More Secure World: Our Shared Responsibility*.⁸⁹⁶ The High-Level Panel’s report provided numerous recommendations to strengthen the international security framework and explicitly endorsed the responsibility to protect doctrine.⁸⁹⁷ The High-Level Panel reaffirmed “there is a collective international responsibility to protect, exercisable by the Security Council . . . in the event of genocide and other large-scale killings, ethnic cleansing or serious violations of international humanitarian law which sovereign governments have proved powerless or unwilling to prevent.”⁸⁹⁸

The report endorsed the theoretical underpinnings of the doctrine articulated by the ICISS – that sovereignty is more than merely the undisputed power over a political entity, but also includes responsibilities.⁸⁹⁹ The report interprets the UN Charter and sovereignty to protect states “not because they are intrinsically good but because they are necessary to achieve the dignity, justice,

⁸⁹³ G.A. RES. 55/2, *United Nations Millennium Declaration*, Sept. 8, 2000.

⁸⁹⁴ ICISS also articulated a series of guiding principles to apply when the United Nations would consider armed intervention for humanitarian purposes. The entire question of armed intervention was ultimately not addressed in the articulation of the responsibility to protect doctrine by the United Nations.

⁸⁹⁵ Secretary-General Kofi Annan, *Address to the General Assembly*, New York, Sept. 23, 2003.

⁸⁹⁶ See High-Level Panel, *supra* note 707.

⁸⁹⁷ See *id.* at ¶ 203.

⁸⁹⁸ See *id.* at ¶ 203.

⁸⁹⁹ See *id.* at ¶¶ 29-30.

worth and safety of their citizens.”⁹⁰⁰ By stating that sovereignty “carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community,”⁹⁰¹ the report transforms the meaning of UN membership and participation in the international community.⁹⁰²

In adopting the responsibility to protect, the High-Level Panel:

- Affirmed that with state sovereignty comes the “obligation of a State to protect the welfare of its own peoples;”
- Declared that the international community has a responsibility to protect peoples when states are “unable or unwilling to do so;”
- Defined responsibility as “spanning a continuum involving prevention, response to violence, if necessary and rebuilding shattered societies;”⁹⁰³ and
- Stated the responsibility to protect doctrine applies to “every state when it comes to suffering from avoidable catastrophes – mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease.”⁹⁰⁴

Like the ICISS before it, the High-Level Panel’s recommendations reflected an important perspective of a well-regarded group of experts, but were not binding under international law. Subsequently the Secretary-General endorsed much of the work by the High-Level Panel in his recommendations for the agenda of the 2005 World Summit and initiated the process of having the international community formally recognize the doctrine. In his report entitled *In Larger Freedom: Towards Development, Security and Human Rights for All*⁹⁰⁵, the Secretary-General described his goals for the World Summit, and challenged the world’s governments to “embrace the ‘responsibility to protect.’”⁹⁰⁶ While the High-Level Panel had discussed the responsibility to protect as a subset of its discussion of “Collective Security and the Use of Force,” the Secretary-General separated the discussion of the responsibility to protect from the discussion of the use of force.⁹⁰⁷ Instead, the Secretary-General made clear that the responsibility to protect was a “normative and moral undertaking

⁹⁰⁰ See *id.* at ¶ 30.

⁹⁰¹ See *id.* at ¶ 29.

⁹⁰² Anne-Marie Slaughter, *Note and Comment: Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, 99 A.J.I.L. 619, 627 (2005) (describing the High-Level Panel, *supra* note 707, at 29-30, as a “tectonic shift, reinterpreting the very act of signing the Charter”).

⁹⁰³ See Pace & Deller, *supra* note 707, at 23, citing High-Level Panel, *supra* note 707, at ¶¶ 29, 201.

⁹⁰⁴ See *id.* at ¶ 201 (emphasis added).

⁹⁰⁵ See Report of the Secretary-General, *In Larger Freedom: Towards Development Security, and Human Rights for All*, Mar. 21, 2005.

⁹⁰⁶ *Id.* at Annex, III.7(b).

⁹⁰⁷ See Pace & Deller, *supra* note 707, at 25, referring to the High-Level Panel, *supra* note 707, at ¶ 183-209, and *In Larger Freedom*, *supra* note 905, at ¶¶ 122-26, 135.

requiring a state to protect its own citizens,” not merely a justification for international collective action.⁹⁰⁸

The *World Summit Outcome Document*, adopted unanimously by the heads of states and governments attending the opening of the 60th General Assembly, endorsed the responsibility to protect doctrine. Specifically, the General Assembly determined:

Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.
139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.⁹⁰⁹

⁹⁰⁸ *See id.*

⁹⁰⁹ 2005 World Summit Outcome, *supra* note 706, at ¶¶ 138-39 (emphasis added).

The General Assembly agreed that individual sovereigns have a responsibility to protect their own populations, and that “[t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means . . . to help protect populations from . . . crimes against humanity.”⁹¹⁰ For the first time, the leaders of the world definitively endorsed the responsibility to protect doctrine. They expressed their readiness, should states manifestly fail to protect their populations, “to take collective action, in a timely and decisive manner, through the Security Council”⁹¹¹

In the *World Summit Outcome Document*, world leaders also pledged that the international community, acting through the Security Council, was “prepared to take collective action in a timely and decisive manner” when states are “manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”⁹¹² In essence, UN members pledged to hold its own members accountable if a civilian population was threatened by massive and systematic violations of human rights.⁹¹³

With regard to the responsibility to protect, the *World Summit Outcome Document* departed in one substantial way from the recommendations of the High-Level Panel, a departure that has had significant impact on governmental acceptance of the World Summit Outcome agenda.⁹¹⁴ The High-Level Panel considered the responsibility to protect a subset of its discussion of “Collective Security and the Use of Force” describing the subject as “Using Force: Rules and Guidelines.”⁹¹⁵ As a result of being placed in the context of “using force,” many governments viewed the High-Level Panel’s recommendations about the responsibility to protect as re-characterizing the humanitarian intervention concept, a concept that many governments had rejected as unlawful interference in the internal affairs of another state.⁹¹⁶ In contrast, the *World Summit Outcome Document* only discussed the normative aspects of the responsibility to protect and substantially reduced any discussion about of the use of force to protect civilian populations.⁹¹⁷

⁹¹⁰ *Id.*

⁹¹¹ *Id.* at ¶ 139.

⁹¹² Responsibility to Protect – Engaging Civil Security R2PCS Features, at p. 3, *available at* www.responsibilitytoprotect.org/index.php.features/465?

⁹¹³ *See id.*

⁹¹⁴ *See* Pace & Deller, *supra* note 707.

⁹¹⁵ High-Level Panel, *supra* note 707, at ¶¶ 183-209.

⁹¹⁶ Pace & Deller, *supra* note 707.

⁹¹⁷ The *World Summit Outcome Document* makes clear that the issue is not merely about the use of force; it is also about a *normative and moral undertaking* requiring a state to protect its own civilians. If a state fails to do so, the international community must deploy a range of peaceful, diplomatic, and humanitarian measures, with force to be employed only as a last resort. *See* Pace & Deller, *supra* note 707.

On April 28, 2006, the Security Council unanimously adopted Resolution 1674 on the *Protection of Civilians in Armed Conflict*. Resolution 1674 contains the first Security Council endorsement of the responsibility to protect doctrine. In reference to the responsibility to protect, Resolution 1674 states the Security Council's reaffirmation of support for:

The provisions of paragraphs 138 and 139 of the World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁹¹⁸

Both the UN General Assembly and UN Security Council have agreed to take collective action in a timely and decisive manner when states are failing to protect their own populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. The *World Summit Outcome Document* makes clear that the Security Council has discretion as to when it may act to invoke the responsibility to protect doctrine. In employing the responsibility to protect, the international community must first apply a range of peaceful diplomatic and humanitarian measures through various regional organizations and UN entities before turning to the Security Council. This report implores the United Nations, through the Security Council, to invoke the responsibility to protect doctrine because all other efforts to engage with North Korea through the UN system to address the sets of activities which comprise crimes against humanity (*i.e.*, food policy and famine, and the gulag system) have failed to protect the civilian population of the country.

⁹¹⁸ S.C. RES. 1674, *supra* note 704, ¶ 4.

Appendix III: Crimes Against Humanity

The definition of the international category of crimes known as crimes against humanity has undergone several revisions since the concept was first defined in the 1945 London Charter. Unlike with other international crimes such as genocide, no specialized convention exists for crimes against humanity that articulates a universally recognized definition of the crime. Instead, two definition choices may be used in assessing a claim: the definition under customary international law and the Rome Statute of the International Criminal Court (ICC) definition.

The current definition of crimes against humanity cannot be understood or appreciated without reference to the definition's historical evolution⁹¹⁹; therefore, this appendix traces its evolution from 1945 to the present. First, the historical evolution of the definition of crimes against humanity is discussed. Second, the definition of crimes against humanity in customary international law as derived from the jurisprudence of the International Criminal Tribunal of Yugoslavia (ICTY) and the International Criminal Tribunal of Rwanda (ICTR) is presented. Third, the Rome Statute's definition of crimes against humanity, codifying customary international law with some additional elements is described. Lastly, an analysis of the appropriate definition of crimes against humanity in assessing a claim against a state that is not a signatory to the Rome Statute is explained.

This appendix concludes that a comprehensive definition of crimes against humanity emerges from customary international law and the Rome Statute, though its parameters remain imprecise and are determined by each statutory definition and each international tribunal. Notwithstanding this imprecision, this appendix identifies the elements that must be satisfied in any jurisdiction to elevate an ordinary crime to an international crime against humanity.

A. The Evolution of the Definition of Crimes Against Humanity

The London Charter of 1945 formalized the definition of crimes against humanity for the first time in Article 6(c)⁹²⁰, though the concept had existed in international law well before World War II.⁹²¹ Soon thereafter, the Tokyo

⁹¹⁹ Margaret McAuliffe deGuzman, *The Road from Rome: The Developing Law of Crimes Against Humanity*, 22 HUM. RTS. Q. 335 (2000).

⁹²⁰ Article 6: The following acts . . . are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: . . . (c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on personal, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

⁹²¹ The concept of crimes against humanity had already been expressed in the 1907 Hague Convention, the Versailles Treaty, and the Report of the 1919 Commission on the Responsibilities of the Laws and Customs of War. See M. Cherif Bassiouni, *Crimes Against Humanity: The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 465 (1993-1994).

Charter and the Allied Control Council Law No. 10 (CCL 10) presented their own definitions of the crime. In each formulation, crimes against humanity were considered to be an extension of war crimes and crimes against the peace, thus requiring a connection with an armed conflict.⁹²²

The Allied Powers of World War II drafted the London Charter as an international agreement to prosecute Nazi war criminals at Nuremberg and signed the Charter on August 8, 1945.⁹²³ The Tokyo Charter and the CCL 10 also defined crimes against humanity. Though the definitions differed slightly from the London Charter, the same legal issues pertain to all three. General Douglas MacArthur adopted the Tokyo Charter by proclamation in 1946, rather than via an international agreement like the London Charter, to prosecute war criminals before the International Military Tribunal for the Far East⁹²⁴; and Article 5(c) defined crimes against humanity.⁹²⁵ The Tokyo Charter's definition is slightly different from the London Charter's definition, in that the Tokyo Charter both specifies categories of persons to be held responsible and does not make persecution subject to religious grounds. The Allied Control Council was a joint body formed by the Allied occupying powers to administer Germany after World War II. CCL 10 was adopted in 1945, and was a hybrid between international law and national law.⁹²⁶ Article II(c) defined crimes against humanity.⁹²⁷ The CCL 10 was not intended to be an international instrument but instead was drafted as national legislation.⁹²⁸

There are three principal differences between the CCL 10 and the London and Tokyo Charters. The CCL 10 defines crimes against humanity first as "atrocities and offenses," which are very broad terms, and then lists examples of what constitute such "atrocities and offenses."⁹²⁹ Second, the CCL 10 adds

⁹²² M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* (Kluwer Law International, 1999).

⁹²³ *See id.* at 1.

⁹²⁴ *See id.* at 2.

⁹²⁵ Article 5: . . . The following acts . . . are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: . . . (c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

⁹²⁶ *See* BASSIOUNI, *supra* note 922, at 3.

⁹²⁷ Article II: Each of the following acts is recognized as a crime: . . . (c) Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial, or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

⁹²⁸ *See* BASSIOUNI, *supra* note 922, at 34.

⁹²⁹ *Id.*

the prohibited acts of imprisonment and rape, even though they are included in the words of “other inhumane acts” in both the London Charter and the Tokyo Charter.⁹³⁰ Finally, the CCL 10 removes any connection between the specific crimes listed in Article II(c) and “crimes against peace” or “war crimes”; whereas the London Charter and the Tokyo Charter limit the finding of crimes against humanity to those prohibited acts committed in connection with any crime within the jurisdiction of the tribunal.⁹³¹ By doing so, the CCL 10 arguably overreaches and strains the “principles of legality” by disconnecting crimes against humanity from war crimes and crimes against the peace.⁹³²

The London and Tokyo Charters connected all crimes against humanity to war crimes or crimes against the peace because international customary law at the time deemed crimes against humanity to be an extension of these two crimes. However, “crimes against humanity” has evolved to become its own distinct category of international crime, even though it has never been the subject of its own specialized convention.⁹³³ The London and Tokyo tribunals’ statutes and jurisprudence provided the basic concept for crimes against humanity, but left the crime’s precise contours vague and overlapping with that of war crimes.⁹³⁴

B. Customary International Law’s Current Definition of Crimes Against Humanity

Customary international law’s definition of crimes against humanity today is derived from the jurisprudence of the ICTY and the ICTR.⁹³⁵ The ICTY is a United Nations body established to prosecute crimes against humanity in the former Yugoslavia. The ICTR is an international court under the United Nations’ auspices for prosecuting offenses committed in Rwanda during the conflict in 1994. Both tribunals have adopted similar definitions of crimes against humanity in their respective statutes.

Beginning with the London Charter, each definition of crimes against humanity shares a common structure: enumerated prohibited *actus reus* (“guilty acts”) of a domestic criminal nature that become international crimes when committed under certain circumstances. Each definition contains similar *actus reus*, but the circumstances that elevate the crime to an international status have evolved over time. The following discussion will center on the evolution of these circumstances (*i.e.*, international or jurisdictional elements)

⁹³⁰ *Id.*

⁹³¹ *Id.*

⁹³² *See id.*

⁹³³ *See id.* at 41.

⁹³⁴ *See id.* at 32, fn. 68.

⁹³⁵ The International Criminal Tribunal for Sierra Leone has also been established by a United Nations Security Council Resolution and will be a future source of jurisprudence, but has yet to issue a judgment.

contained in the *chapeau* of the statutes to demonstrate which circumstances elevate a domestic crime to an international status under today's customary international law.

Both the ICTY⁹³⁶ and the ICTR⁹³⁷ statutes and jurisprudence hold that the following five elements must exist for the crime to be a crime against humanity:

1. There must be an attack;
2. The acts of the accused must be part of the attack;
3. The attack must be widespread or systematic;
4. The attack must be directed against any civilian population; and
5. The principal offender must know of the wider context in which his acts occur and know that his acts are part of the attack.⁹³⁸

Other than the five requisite elements above, the statutes from each tribunal require additional elements that establish the jurisdictional boundaries unique to each tribunal and do not reflect customary international law.⁹³⁹ In fact, statutory provisions defining the crimes within the tribunal's jurisdiction

⁹³⁶ Article 5. The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- a) murder;
- b) extermination;
- c) enslavement;
- d) deportation;
- e) imprisonment;
- f) torture;
- g) rape;
- h) persecutions on political, racial, and religious grounds;
- i) other inhumane acts.

⁹³⁷ Article 3. The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds:

- a) murder;
- b) extermination;
- c) enslavement;
- d) deportation;
- e) imprisonment;
- f) torture;
- g) rape;
- h) persecutions on political, racial, and religious grounds;
- i) other inhumane acts.

⁹³⁸ *Prosecutor v. Kunarac, Kovac, and Vukovic* (Case No. IT-96-23-A & IT-96-23/1-A), Judgment, Jun. 12, 2002, ¶ 85; *Prosecutor v. Krnojelac* (Case No. IT-97-25-T), Judgment, Mar. 15, 2002, ¶ 53; *Prosecutor v. Bisengimana*, (Case No. ICTR-00-60-T), Judgment, Apr. 13, 2006, ¶¶ 41-57.

⁹³⁹ See Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 FORDHAM INT'L L. J. 457 (1998-1999).

always should be interpreted as reflecting customary international law, unless an intention to depart from customary international law is expressed in the terms of the statute or from other authoritative sources, *e.g.*, armed conflict requirement.⁹⁴⁰ The ICTY requires that the crimes be “committed in armed conflicts, whether international or internal in character.”⁹⁴¹ The ICTR, on the other hand, requires all prohibited acts to be committed on discriminatory grounds, not just the prohibited act of persecution.⁹⁴² These differences are discussed below in light of their place in today’s customary international law.

To fully assess customary international law’s definition of crimes against humanity, six separate international or jurisdictional elements must be considered: 1) the ICTY’s armed conflict requirement; 2) the ICTR’s discriminatory grounds; 3) what constitutes an attack; 4) whether an attack is directed against any civilian population; 5) what constitutes a widespread or systematic attack; and 6) the requisite *mens rea* (“guilty mind”).

Armed Conflict Requirement

The ICTY’s definition is closer to the London Charter’s Article 6(c) than the ICTR’s definition, but the ICTY’s requisite connection to an armed conflict goes beyond customary international law as it stands today.⁹⁴³ As mentioned above, the ICTY requires that an armed conflict exist, whether international or internal in nature⁹⁴⁴, and much of the ICTY’s jurisprudence has considered whether this constitutes a substantive or jurisdictional element for the crime. In *Tadic*, the ICTY Appeals Chamber held that “an armed conflict is not a condition for a crime against humanity, but [exists] for its punishment by the Tribunal.”⁹⁴⁵ In other words, the armed conflict requirement is merely a jurisdictional element, and “in fact runs contrary to customary international law.”⁹⁴⁶ Finally, under current customary international law, crimes against humanity may also be committed in times of peace; therefore, one need not prove that there was an armed conflict.⁹⁴⁷

“An armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a state.”⁹⁴⁸ The armed conflict requirement is satisfied by proof that there was an armed conflict at the

⁹⁴⁰ See *Prosecutor v. Tadic* (Case No. IT-94-1-A), Judgment, Jul. 15, 1999, at ¶ 296.

⁹⁴¹ Article 3 of the ICTR Statute and Article 5 of the ICTY Statute.

⁹⁴² See BASSIOUNI, *supra* note 922, at 194.

⁹⁴³ See *Tadic*, *supra* note 940, at ¶ 251.

⁹⁴⁴ See BASSIOUNI, *supra* note 922, at 194.

⁹⁴⁵ See *Tadic*, *supra* note 940, at ¶ 251; *Prosecutor v. Blaskic* (Case No. IT-95-14-T), Judgment, Mar. 3, 2000, at ¶ 66.

⁹⁴⁶ See *id.*

⁹⁴⁷ See *id.*

⁹⁴⁸ *Prosecutor v. Tadic* (Case No. IT-94-1-A), Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, at ¶ 70; *Prosecutor v. Kunarac, Kovac, and Vukovic* (Case No. IT-96-23-T & IT-96-23/1-T), Judgment, Feb. 22, 2001, at ¶ 412.

relevant time and place⁹⁴⁹, and that the accused's acts were closely related to that conflict.⁹⁵⁰ The recent *Stakic* decision held that “the nexus need not be a causal link, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit the crime, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.”⁹⁵¹

In addition, the decision maker should consider whether the accused is a combatant, the victim is a non-combatant, the victim is a member of the opposing party, the act may be said to serve the ultimate goal of a military campaign, and the crime is committed as part of or in the context of the accused's official duties.⁹⁵² No one criterion is dispositive, but each may assist the determination. Thus, the ICTY jurisdictional prerequisite is satisfied by proof that there was an armed conflict and that objectively the accused's acts are linked both geographically and temporally with the armed conflict.⁹⁵³

Discriminatory Grounds

The ICTR Statute is the only international instrument to explicitly require discrimination for the commission of all crimes against humanity “on national, political, ethnic, racial, or religious grounds.”⁹⁵⁴ This jurisdictional element limits the ICTR's jurisdiction to a narrower category of crimes, but it does not alter the definition of crimes against humanity in customary international law.⁹⁵⁵ In contrast and consistent with customary international law, the ICTY Statute limits the discriminatory intent requirement to the prohibited act of persecution, rather than extending it to cover the other prohibited acts – the “murder-type” acts.⁹⁵⁶

Under the ICTR, the attack must be committed on one or more discriminatory grounds – namely national, political, ethnic, racial, or religious grounds.⁹⁵⁷ In *Akayesu*, the Appeals Chamber held that, except for persecution, a discriminatory intent is not required by customary international law as a legal ingredient for all crimes against humanity.⁹⁵⁸ This was also supported by the ICTY Appeals Chamber in *Tadic*.⁹⁵⁹ In addition, “acts committed against persons outside the discriminatory categories need not necessarily fall out with

⁹⁴⁹ *Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (AC), at ¶ 70; *Kunarac, Kovac, and Vukovic (TC)*, *supra* note 948, at ¶ 413.

⁹⁵⁰ *Prosecutor v. Stakic*, (Case No. IT-97-24-A), Judgment, Mar. 22, 2006, at ¶ 342.

⁹⁵¹ *Id.*; see also *Kunarac, Kovac, and Vukovic (AC)*, *supra* note 938, at ¶ 58.

⁹⁵² See *Kunarac, Kovac, and Vukovic (AC)*, *supra* note 938, at ¶ 83.

⁹⁵³ See *id.*

⁹⁵⁴ See McAuliffe deGuzman, *supra* note 919, at 364.

⁹⁵⁵ *Prosecutor v. Kajelijeli* (Case No. ICTR-98-44A-T), Judgment, Dec. 1, 2003, at ¶ 877.

⁹⁵⁶ See BASSIOUNI, *supra* note 922, at 26; Mohamed Elewa Badar, *From the Nuremberg Charter to the Rome Statute: Defining The Elements of Crimes Against Humanity*, 5 SAN DIEGO INT'L L. J. 100 (2004).

⁹⁵⁷ See *Bisengimana (TC)*, *supra* note 938, at ¶ 41-57.

⁹⁵⁸ *Prosecutor v. Akayesu* (Case No. ICTR-96-4-A), Judgment, Jun. 1, 2001, ¶ 464-465.

⁹⁵⁹ See *Tadic (AC)*, *supra* note 940, at ¶ 292.

the jurisdiction of the [ICTR], if the perpetrator's intention in committing these acts is to support or further the attack on the group discriminated against on one or more of the enumerated grounds."⁹⁶⁰

An Attack

ICTY and ICTR jurisprudence have defined "attack" to be a course of conduct involving the commission of violence of the type enumerated as the *actus reus* of the crime.⁹⁶¹ The underlying offense need not constitute the attack, but must form part of the attack or comprise part of a widespread or systematic pattern of crimes directed against a civilian population.⁹⁶² The term is not limited to conducting hostilities, but "it may also include situations of mistreatment of persons taking no active part in hostilities, such as someone in detention."⁹⁶³

Directed Against Any Civilian Population

All codifications of the definition of crimes against humanity have included a requirement that these acts be "directed against any civilian population."⁹⁶⁴ To establish whether the attack was "directed against any civilian population," "a sufficient number of individuals [must be] targeted in the attack, or . . . targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian population and not only against a limited number of individuals who were randomly selected."⁹⁶⁵

An attack is "directed against" a civilian population if the civilian population was the attack's primary object.⁹⁶⁶ In determining whether the civilian population was the primary object of the attack, "the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war" will be considered.⁹⁶⁷

The entire population of a geographical entity in which an attack is taking place need not be subjected to the attack – only a significant number needs to be involved.⁹⁶⁸ The civilian population includes "[p]eople who are not taking

⁹⁶⁰ See *Bisengimana (TC)*, *supra* note 938, at ¶ 41; *Kajelijeli (TC)*, *supra* note 955, at ¶ 878.

⁹⁶¹ See *Krnjelac (TC)*, *supra* note 938, at ¶ 54; *Kajelijeli (TC)*, *supra* note 955, at ¶ 867.

⁹⁶² See *Tadic (AC)*, *supra* note 940, at ¶¶ 248 and 251; See *Kunarac, Kovac, and Vukovic (TC)*, *supra* note 948, at ¶ 417.

⁹⁶³ *Kunarac, Kovac, and Vukovic (TC)*, *supra* note 948, at ¶ 416.

⁹⁶⁴ McAuliffe deGuzman, *supra* note 919, at 360.

⁹⁶⁵ *Prosecutor v. Simic, Tadic, and Zaric* (Case No. IT-95-9-T), Oct. 17, 2003, at ¶ 42.

⁹⁶⁶ *Prosecutor v. Naletilic and Martinovic* (Case No. IT-98-34-T), Judgment, Mar. 31, 2003, at ¶ 235; *Prosecutor v. Semanza* (Case No. ICTR-97-20-T), Judgment, May 15, 2003, at ¶ 330.

⁹⁶⁷ *Kunarac, Kovac, and Vukovic (AC)*, *supra* note 938, at ¶ 91.

⁹⁶⁸ See *Naletilic and Martinovic (TC)*, *supra* note 966, at ¶ 235.

any active part in the hostilities, including members of the armed forces who laid down their arms and those persons *hors de combat* by sickness, wounds, detention, or any other cause.”⁹⁶⁹ Finally, the presence of certain non-civilians in the area does not change the character of that population so long as the targeted population is predominantly civilian in nature.⁹⁷⁰

Further, customary international law does not require the existence of an armed conflict. Therefore, the term “civilian” must be understood within the context of both war and relative peace; this is considered customary international law.⁹⁷¹ When determining the victim’s status as a civilian, the victim’s specific situation at the moment the crimes were committed, rather than the victim’s possible employment in the military, must be considered.⁹⁷²

Widespread or Systematic

“The ‘widespread or systematic’ requirement is fundamental in distinguishing crimes against humanity from common crimes,”⁹⁷³ and has been implicit in every iteration of the definition since the London Charter.⁹⁷⁴ In fact, the ICTY Statute does not explicitly include the requirement that the attack be “widespread or systematic.” However, the Appeals Chamber in *Tadic* recognized that crimes that are unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity.⁹⁷⁵ Thus, the phrase “directed against any civilian population” should be interpreted to mean that the “acts must occur on a widespread or systematic basis.”⁹⁷⁶ Importantly, only the attack – not the accused’s individual acts – must be widespread or systematic.⁹⁷⁷

The term “widespread” has been interpreted to refer to the large-scale nature of the attacks and number of victims.⁹⁷⁸ “Systematic” refers to the organized nature of the violent acts and the improbability that the violence was random.⁹⁷⁹

⁹⁶⁹ *Kajelijeli (TC)*, *supra* note 955, at ¶ 873; *Prosecutor v. Akayesu* (Case No. ICTR-96-4-T), Judgment, Sept. 2, 1998, ¶ 582; *Blaskic (TC)*, *supra* note 945, at ¶ 214.

⁹⁷⁰ See *Kajelijeli (TC)*, *supra* note 955, at ¶ 873; *Prosecutor v. Kayishema and Ruzindana* (Case No. ICTR-95-1-T), Judgment, May 21, 1999, at ¶ 128.

⁹⁷¹ See *Kayishema and Ruzindana (TC)*, *supra* note 970, at ¶ 127.

⁹⁷² See *Bisengimana (TC)*, *supra* note 938, at ¶ 49.

⁹⁷³ *Badar*, *supra* note 956, at 109.

⁹⁷⁴ McAuliffe deGuzman, *supra* note 919, at ¶ 376.

⁹⁷⁵ See *Tadic (AC)*, *supra* note 940, at ¶ 271.

⁹⁷⁶ *Prosecutor v. Tadic*, (Case No. IT-94-1-T), at ¶ 644.

⁹⁷⁷ See *Kunarac, Kovac, and Vukovic (TC)*, *supra* note 948, at ¶ 431.

⁹⁷⁸ See *Kunarac, Kovac, and Vukovic (AC)*, *supra* note 938, at ¶ 94; *Bisengimana (TC)*, *supra* note 938, at ¶ 44.

⁹⁷⁹ See *Kunarac, Kovac, and Vukovic (AC)*, *supra* note 938, at ¶ 94; *Bisengimana (TC)*, *supra* note 938, at ¶ 45; *Prosecutor v. Kamuhanda* (Case No. ICTR-95-54A-T), Judgment, Jan. 22, 2004, ¶ 666.

There has been some debate in the jurisprudence of the ICTY and ICTR⁹⁸⁰ and the literature⁹⁸¹ about whether the existence of a plan or policy is an independent legal element of crimes against humanity. In its most recent opinions, the tribunals have held that “whilst the existence of a policy or plan may be evidentially relevant, the existence of such a plan is not a separate legal element of the crime.”⁹⁸² Such plan or policy may nevertheless be relevant to the requirement that the attack must be widespread or systematic and that the accused’s acts must be part of that attack.⁹⁸³

Mens rea

Neither statute specifically includes the *mens rea* for the crime, but both tribunals’ jurisprudence has articulated the standard. In order to satisfy the requisite *mens rea* requirement for the commission of crimes against humanity, “the accused must have the intent to commit the underlying offense(s) with which he is charged, and he must have actual or constructive knowledge that there is an attack on the civilian population and that his acts comprise part of that attack,” or at least that he took the risk that they are part thereof.⁹⁸⁴ This does not require knowledge of the attack’s details.⁹⁸⁵ In addition, the accused must know or have considered that the victim of his crime was a civilian.⁹⁸⁶ Finally, the accused does not need to share in the motive, intent, or purpose of those involved in the attack.⁹⁸⁷

There is no requirement of discriminatory intent for all crimes against humanity in customary international law.⁹⁸⁸ As stated above, the ICTY Statute, like the London and Tokyo Charters, distinguishes between “murder-type” prohibited acts and the crime of “persecution.”⁹⁸⁹ “Murder-type” acts do

⁹⁸⁰ See *Kunarac, Kovac, and Vukovic (AC)*, *supra* note 938, at ¶ 98; *Kamuhanda (TC)*, *supra* note 979, at ¶ 665; *Kajelijeli (TC)*, *supra* note 955, at ¶ 872; *Semanza (TC)*, *supra* note 966, at ¶ 329; *Krnojelac (TC)*, *supra* note 938, at ¶ 58; *Simic, Tadic, and Zaric (TC)*, *supra* note 965, at ¶ 44.

⁹⁸¹ See BASSIOUNI, *supra* note 922, at ¶ 243 (stating that crimes against humanity occur as a result of state action or policy is consonant with the present state of international law); McAuliffe deGuzman, *supra* note 919, at ¶ 374 (discussing the confusion surrounding the significance of a policy element); Badar, *supra* note 956, at ¶ 114 (stating that under customary international law it is no longer required that the policy is the policy of a state).

⁹⁸² *Kunarac, Kovac, and Vukovic (AC)*, *supra* note 938, at ¶ 98; *Kamuhanda (TC)*, *supra* note 979, at ¶ 665; *Kajelijeli*, *supra* note 955, at ¶ 872; *Semanza (TC)*, *supra* note 966, at ¶ 329; *Krnojelac (TC)*, *supra* note 938, at ¶ 58; *Simic, Tadic, and Zaric (TC)*, *supra* note 965, at ¶ 44.

⁹⁸³ See *Prosecutor v. Blaskic* (Case No. IT-95-14-A), Judgment, Jul. 29, 2004, 100; *Kunarac, Kovac, and Vukovic (AC)*, *supra* note 938, at ¶ 98; *Krnojelac (TC)*, *supra* note 938, at ¶ 58; *Simic, Tadic, and Zaric (TC)*, *supra* note 965, at ¶ 44.

⁹⁸⁴ *Kunarac, Kovac, and Vukovic (AC)*, *supra* note 938, at ¶ 102; *Kajelijeli (TC)*, *supra* note 955, at ¶ 880; *Semanza*, Judgment (TC), ¶ 332; *Kayibema and Ruzindana (TC)*, *supra* note 970, at ¶ 134.

⁹⁸⁵ See *Krnojelac (TC)*, *supra* note 938, at ¶ 59.

⁹⁸⁶ See *Kunarac, Kovac, and Vukovic (TC)*, *supra* note 948, at ¶ 435.

⁹⁸⁷ See *Simic, Tadic, and Zaric (TC)*, *supra* note 965, at ¶ 45; *Semanza (TC)*, *supra* note 966, at ¶ 332.

⁹⁸⁸ See *Tadic (AC)*, *supra* note 940, at ¶ 292.

⁹⁸⁹ *Id.* at ¶ 275.

not require discriminatory intent, while the prohibited act of “persecution” does require discriminatory intent.⁹⁹⁰ Please see the discussion above for the discriminatory intent requirement under the ICTR.

Actus Reus: Enumerated Prohibited Acts

As mentioned above, only the jurisdictional or international elements are being discussed in this appendix. For reference, the ICTY and the ICTR share in prohibiting the same acts: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial, and religious grounds, and other inhumane acts. The jurisprudence from each tribunal references the other tribunal, as well as domestic criminal law, in determining what constitutes each of these crimes.⁹⁹¹

Conclusion

This historical evolution of the definition of crimes against humanity in ICTY and ICTR jurisprudence paved the way for the Rome Statute’s definition of crimes against humanity, which enlarges the specific content in the definition. Even though the customary international law definition is well supported in the jurisprudence and is already deemed part of *jus cogens* (“preemptory norm of international law”) and raises obligations *ergo omnes*⁹⁹² (“to international community as a whole”), the legal developments since 1945 of the definition of crimes against humanity remains complex, and many scholars have suggested this international category of crimes needs its own specialized convention.

C. International Criminal Court Statute’s Definition of Crimes Against Humanity

The Rome Statute establishes an international criminal court with jurisdiction over the state parties to a treaty. As a consequence, its provisions are applicable only to the contracting parties.⁹⁹³ Therefore, though the Rome Statute’s definition of crimes against humanity in Article 7 clearly derives from the customary international law definition articulated in the ICTY and ICTR

⁹⁹⁰ *Id.* at ¶ 289.

⁹⁹¹ See McAuliffe deGuzman, *supra* note 919, at 378.

⁹⁹² See BASSIOUNI, *supra* note 922, at 199.

⁹⁹³ *Id.* at 202.

jurisprudence in 1998⁹⁹⁴, it does not adequately serve as a substitute for a specialized convention for crimes against humanity. Nevertheless, the 1998 Statute does codify existing customary international law, and adds additional elements agreed to by the state parties.

Article 7(1) of the Rome Statute is divided into two parts: the international or jurisdictional elements and the enumerated prohibited acts. The *chapeau* of Article 7(1) identifies the five international or jurisdictional elements that constitute the requisite circumstances that elevate a domestic crime to the international level:

1. There must be an attack;
2. The acts of the accused must be part of the attack;
3. The attack must be widespread or systematic;
4. The attack must be directed against any civilian population; and
5. The accused must have knowledge of the attack.⁹⁹⁵

In addition to these five elements, the Rome Statute explicitly defines what constitutes an “attack directed against any civilian population,” which potentially places its definition in conflict with that of current customary international law. The term “attack” is defined as “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit

⁹⁹⁴ “1. For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- a) Murder;
- b) Extermination;
- c) Enslavement;
- d) Deportation or forcible transfer of population;
- e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f) Torture;
- g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- i) Enforced disappearance of persons;
- j) The crime of apartheid;
- k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

⁹⁹⁵ Article 7(1) of the ICC Statute.

such attack.”⁹⁹⁶ The acts need not constitute a military attack; it is understood that “policy to commit such attack” requires that the state or organization actively promote or encourage such an attack against a civilian population.⁹⁹⁷ In addition, this explanatory note defining an “attack directed against any civilian population” potentially requires both a widespread and systematic attack – rather than requiring only one or the other – by requiring the commission of multiple acts pursuant to a policy to commit such an attack.⁹⁹⁸ To date, there is no jurisprudence from the ICC interpreting this requirement; however, a plain reading of the Rome Statute indicates that “widespread” and “systematic” are disjunctive and not cumulative requirements.⁹⁹⁹

The *chapeau* of Article 7(1) defines the requisite *mens rea* for the crime to be knowledge of the attack. The Preparatory Commission for the International Criminal Court (PrepComm) states that the requirement that the accused have knowledge of a widespread or systematic attack against any civilian population “should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.”¹⁰⁰⁰ In addition, the PrepComm states that “in the case of an emerging widespread or systematic attack against a civilian population . . . this mental element is satisfied if the perpetrator intended to further such an attack.”¹⁰⁰¹ Therefore, the accused must have either known that the conduct was part of a widespread or systematic attack, or must have intended the conduct to be part of a widespread or systematic attack.¹⁰⁰² This latter interpretation of the *mens rea* requirement is “in the nature of ‘general intent’ and not ‘specific intent’ as required in the Genocide Convention.”¹⁰⁰³

Finally, the Rome Statute expands the discriminatory grounds on which someone may be found guilty of persecution as a crime against humanity to include cultural, national, ethnic, and gender-based grounds. On the other hand, customary international law requires only that the persecution be committed on political, racial, or religious grounds. In addition, the Rome Statute requires that the accused intends to commit the underlying prohibited acts with the requisite knowledge.

⁹⁹⁶ Article 7(2) of the ICC Statute.

⁹⁹⁷ Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II (Finalized draft text of the Elements of Crimes), Nov. 2, 2000, at 8.

⁹⁹⁸ See Hwang, *supra* note 939, at 502.

⁹⁹⁹ See Kumarac, Kovac, and Vukovic (AC), *supra* note 938, at ¶ 97.

¹⁰⁰⁰ Addendum: Part II - Finalized draft text of the Elements of Crimes, *Report of the Preparatory Commission for the International Criminal Court*, p. 8, UN Doc. PCNICC/2000/1/Add.2, Nov. 2, 2000.

¹⁰⁰¹ *Id.*

¹⁰⁰² *Id.*

¹⁰⁰³ See BASSIOUNI, *supra* note 922, at fn. 76; See Tadic (AC), *supra* note 940, at ¶ 292-296 (overruling Trial Chamber’s finding that crimes against humanity in customary international law contained an express requirement of a discriminatory intent, and distinguishing the Secretary General’s Report which also stated the requirement).

D. Analysis of the Choice of Definitions for Crimes Against Humanity

To bring a claim of crimes against humanity, the following elements must be satisfied under customary international law:

1. There must be an attack;
2. The acts of the accused must be part of the attack;
3. The attack must be directed against any civilian population;
4. The attack must be widespread or systematic; and
5. The accused must know that the acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population, know that the accused's acts fit into such a pattern, and intend to commit the underlying prohibited act.¹⁰⁰⁴

Although the Rome Statute's definition binds only state parties and the ICC, it serves as a compelling statement of customary international law.¹⁰⁰⁵ The Rome Statute's definition of crimes against humanity "reflects the development of customary international law requiring neither a nexus between crimes against humanity and armed conflict, nor a requirement of discriminatory intent."¹⁰⁰⁶ In addition, the Rome Statute requires the same elements listed above to bring a claim of crimes against humanity under the Statute. However, it enumerates more prohibited acts and provides additional grounds for discrimination for the crime of persecution. Both of these additions expand the scope of the Rome Statute beyond the boundaries of customary international law. The one exception to the Rome Statute being broader than customary international law is the requisite policy element inserted in the definition of "attack directed against a civilian population."¹⁰⁰⁷ Each of these differences is discussed below.

Expansion of Prohibited Acts

The Rome Statute adds enforced disappearance of persons and the crime of apartheid to the list of enumerated prohibited acts that would constitute a crime against humanity if committed under the requisite circumstances. In

¹⁰⁰⁴ See *Kunarac, Kovac, and Vukovic (AC)*, *supra* note 938, at ¶ 85; *Krnjelac (TC)*, *supra* note 938, at ¶ 53; *Bisengimana (TC)*, *supra* note 938, at ¶ 41-57.

¹⁰⁰⁵ Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 795 (1998-1999).

¹⁰⁰⁶ See Badar, *supra* note 956, at 91.

¹⁰⁰⁷ Article 7(2)(a).

addition, the Statute explicitly defines what constitutes each of the enumerated acts; conversely, the ICTY and the ICTR statutes had to reference international and domestic criminal law to define these acts.

Expansion of Discriminatory Grounds for Persecution

The discriminatory grounds for persecution under the Rome Statute are not limited to “political, racial, or religious grounds” as they are under customary international law.¹⁰⁰⁸ The Rome Statute expands the scope of the definition beyond customary international law to include national, ethnic, cultural and gender-based grounds.¹⁰⁰⁹

New Policy Element

The term “attack directed against a civilian population,” defined in Article 7(2)(a), is a “course of conduct involving the multiple commission of acts referred to in paragraph 1 against a civilian population, pursuant to or in furtherance of a State or organizational policy to commit such an attack.”¹⁰¹⁰ Further, the Rome Statute restricts the definition of “attack” to “multiple commission of acts,” while in customary international law, committing single prohibited acts in the correct circumstances constitute an attack.¹⁰¹¹

Current customary international law does not require that a policy or plan exist as an element of crimes against humanity, though it may be relevant evidentially in demonstrating that the attack was widespread or systematic.¹⁰¹² Older jurisprudence indicates that customary international law when the Rome Statute was drafted did include a requisite policy element.¹⁰¹³ However, as demonstrated above, the definition of crimes against humanity has evolved since 1945, and it has continued to evolve since 1998. Initially, crimes against humanity in customary international law arguably required the existence of a state plan or policy.¹⁰¹⁴ Eventually, crimes against humanity evolved to require the existence of a policy or plan by either a state or a non-state entity.¹⁰¹⁵

¹⁰⁰⁸ Payam Akhavan, *Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda to Development of Definitions of Crimes Against Humanity and Genocide*, 94 AM. SOC'Y INT'L L. PROC. 281 (2000).

¹⁰⁰⁹ See Article 7(1).

¹⁰¹⁰ See Article 7(2).

¹⁰¹¹ See Badar, *supra* note 956, at 107.

¹⁰¹² See *Kunarac, Kovac, and Vukovic (AC)*, *supra* note 938, at ¶ 98; *Kamuhanda (TC)*, *supra* note 979, at ¶ 665; *Kajelijeli (TC)*, *supra* note 955, at ¶ 872; *Semanza (TC)*, *supra* note 966, at ¶ 329; *Krnojelac (TC)*, *supra* note 938, at ¶ 58; *Simic, Tadic, and Zaric (TC)*, *supra* note 965, at ¶ 44.

¹⁰¹³ See, e.g., *Akayesu (TC)*, *supra* note 969, at ¶ 580 (finding that “[t]here is no requirement that this policy must be adopted formally as the policy of a state . . . There must however be some kind of preconceived plan or policy.”); *Kayishema and Ruzindana (TC)*, *supra* note 970, at 124 (holding that “for an act of mass victimization to be a crime against humanity, it must include a policy” or plan developed by either state or non-state actors); *Prosecutor v. Musema (Case No. ICTR-96-13-A)*, Judgment, Jan. 27, 2000, at ¶ 204 (following *Akayesu* and *Kayishema and Ruzindana*).

¹⁰¹⁴ See *Kayishema and Ruzindana (TC)*, *supra* note 970, at ¶ 125.

¹⁰¹⁵ See *id.* at 124.

Similarly, customary international law no longer requires a plan or policy element.¹⁰¹⁶ However, the recent jurisprudence does not consider the provisions of Article 7(2)(a) of the Rome Statute; therefore, it remains uncertain whether future tribunals will require the existence of a policy or plan in accordance with the Rome Statute.

Conclusion

Though no universally recognized definition of crimes against humanity exists, a comprehensive definition of crimes against humanity emerges from analyzing the ICTY and ICTR jurisprudence and Rome Statute with regard to the circumstantial elements of the crime, but with somewhat imprecise parameters. The 1998 Rome Statute codified international law's customary definition of crimes against humanity and added its own additional elements. These additional elements expand the scope of the crime to include additional prohibited acts and discriminatory grounds for persecution. Despite these differences between the Rome Statute's definition and customary international law's definition of crimes against humanity, the significant commonality between them identifies the elements that must be satisfied in order to bring a claim of crimes against humanity against a state that is not a signatory to the Rome Statute.

¹⁰¹⁶ See *Semanza (TC)*, *supra* note 966, at ¶ 329 (following the ICTY Appeals Chamber).

Appendix IV: Lessons from Past Security Council Interventions

Article 39 of Chapter VII authorizes the Security Council to intervene in matters within the domestic jurisdiction of a state where a “threat to the peace, breach of the peace, or act of aggression” is occurring¹⁰¹⁷

Accordingly, the Security Council may take those measures necessary “to maintain or restore international peace and security”¹⁰¹⁸ By definition, if a country-specific situation is deemed a “threat to the peace” under Chapter VII, then it would also meet the lower threshold for a Chapter VI intervention. Under Chapter VI, the Security Council “may investigate . . . any situation which might lead to international friction . . . to determine whether the continuance of the . . . situation is likely to endanger the maintenance of international peace and security.”¹⁰¹⁹ This report concludes that the situation in North Korea constitutes a non-traditional threat to the peace; therefore, it is a situation that may lead to international friction that would provide support for the Security Council adopting a resolution under its Chapter VI powers.

Relying on Chapter VII, the Security Council has intervened in countries when it regarded the situations in those countries as a threat to the peace requiring action by the Security Council to protect and preserve international stability. While the Security Council has no set criteria defining what constitutes a threat to the peace, a review of initial resolutions¹⁰²⁰ passed by the Security Council in response to particular situations may provide guidance about the conditions or combinations of conditions the Council perceives and defines as a “threat to the peace.”

In reviewing all cases in which the Security Council determined that a threat to peace existed, it is clear that each case has varying circumstances. However, the Council’s past actions in such countries as Sierra Leone, Afghanistan, Yemen, Haiti, Rwanda, Liberia, and Cambodia reveal clear patterns.

Reviewing the case histories and the initial Security Council resolutions for the aforementioned countries helps to identify the following list of factors (Determining Factors) that encompass the Security Council’s primary reasons

¹⁰¹⁷ UN Charter, art. 37.

¹⁰¹⁸ *Id.*

¹⁰¹⁹ UN CHARTER, art. 34 (emphasis added).

¹⁰²⁰ This report only examines the justification for initial intervention by the Security Council in a particular situation in a country. In assessing the appropriateness of action in North Korea, it is necessary to review the initial Security Council intervention when it adopted a resolution responding to a particular situation in a particular country, not subsequent action which would have responded to a further deterioration in the situation. For example, even though the situation in Rwanda ultimately resulted in a genocide being committed by the government and the insurgent army actually acted to put it down, we are only discussing the facts that existed at the time of the Security Council’s initial resolution, responding to the conflict stemming from the insurgency in 1990.

for determining that a “threat to the peace” exists warranting Council action: (1) widespread internal humanitarian/human rights violations; (2) substantial outflow of refugees; (3) other cross-border problems – for instance, drug trafficking; (4) conflict among governmental bodies and insurgent armies or armed ethnic groups; and (5) the overthrow of a democratically elected government.¹⁰²¹

In the various initiatives taken by the Security Council with respect to these countries, no single factor was dispositive to its decision to intervene. Instead, the Security Council considered the totality of the circumstances of each country’s situation in determining that a threat to the peace existed.

Assessment of Initial Factors Resulting in UN Security Council Intervention

	Resolution	Human/ Human Rights Violations	Refugee Outflows	Other (Drug Trafficking)	Conflict among Factions	Overthrow of Democratic Government
Sierra Leone	S.C. 1132 (1997)	✓	✓		✓	✓
Afghanistan	S.C. 1076 (1996)	✓	✓	✓	✓	
Yemen	S.C. 924 (1994)	✓			✓	
Haiti	S.C. 841 (1993)	✓	✓			✓
Rwanda	S.C. 812 (1993)	✓	✓		✓	
Liberia	S.C. 788 (1992)	✓			✓	
Cambodia	S.C. 668 (1990)				✓	

A. Sierra Leone

Sierra Leone has a tumultuous history. In 1996, after suffering a succession of military coups, the country’s situation appeared to be improving. For example, parliamentary and presidential elections were held for the first time, resulting in a democratically elected government under President Ahmad Tejan Kabbah.¹⁰²² Moreover, the rebel group Revolutionary United Front (RUF) signed a peace agreement, known as the Abidjan Agreement, with the new democratic Government of Sierra Leone.¹⁰²³ These positive steps, however, were short lived. Talks relating to the Abidjan Agreement broke down when the RUF refused to negotiate.¹⁰²⁴ In 1997, the RUF overthrew the democratically

¹⁰²¹ These resolutions include S.C. RES. 1132, S/RES/1132 (1997) (Sierra Leone); S.C. RES. 1076, S/RES/1076 (1996) (Afghanistan); S.C. RES. 841, S/RES/841 (1993) (Haiti); S.C. RES. 924, S/RES/924 (1994) (Yemen); S.C. RES. 812, S/RES/812 (1993) (Rwanda); S.C. RES. 788, S/RES/788 (1992) (Liberia); S.C. RES. 668, S/RES/668 (1990) (Cambodia) [hereinafter S.C. RES. (Number)].

¹⁰²² *Id.*

¹⁰²³ UN Doc. S/PV.3643 (1996); UN Doc. S/PV.3720 (1996).

¹⁰²⁴ UN Doc. S/PV3809 (1997).

elected government, sending President Kabbah into exile.¹⁰²⁵ The RUF took control of Sierra Leone, suspended the constitution, banned demonstrations, and abolished all other political parties.¹⁰²⁶

The ensuing conflict between the RUF and the ousted government resulted in mass human rights violations by the ruling RUF, including rape and murder of civilians.¹⁰²⁷ The destruction of schools, health facilities, water supply systems, and transportation infrastructure compounded the humanitarian crisis.¹⁰²⁸

More than 1.5 million people were displaced due to the conflict and the mass human rights violations.¹⁰²⁹ Approximately 361,000 refugees sought asylum in Sierra Leone's neighboring countries, primarily in the Republic of Guinea and in Liberia.¹⁰³⁰ This onslaught of refugees "overstretched the economy of Guinea and posed great difficulties to the political and social stability of the nation."¹⁰³¹

The Security Council determined that the deteriorating situation in Sierra Leone posed a threat to international peace and security in the region. In response, the Security Council adopted Resolution 1132, demanding among other things that "the military junta take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically elected Government and a return to constitutional order."¹⁰³² Moreover, the Security Council noted that it was "[g]ravelly concerned at the continued violence and loss of life in Sierra Leone following the military coup . . . the deteriorating conditions in that country, and the consequences for its neighbors." The Security Council called upon the junta "to end all acts of violence and to cease all interference with the delivery of humanitarian assistance to the people of Sierra Leone."¹⁰³³

B. Afghanistan

Following the Soviet Union's withdrawal from Afghanistan in 1989, fighting among various factions ensued and the country became divided into several

¹⁰²⁵ See UN Doc. S/PV.3797 (1997) (stating that after seizing power, the group involved in the coup released convicts from prisons and allowed the RUF into Freetown, where they looted property and murdered and raped civilians).

¹⁰²⁶ *Timeline Sierra Leone*, BBC NEWS, at http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1065898.stm, last updated Nov. 11, 2004

¹⁰²⁷ UN Doc. S/1997/80 (1997).

¹⁰²⁸ *Id.*

¹⁰²⁹ UN Doc. S/1997/80 (1997).

¹⁰³⁰ *Id.* See also UN Doc. S/PV.3797 (1997) (stating that refugees also had fled to Ghana, Nigeria, Côte d'Ivoire, Gambia, and other countries in the subregion).

¹⁰³¹ See UN Doc. S/PV.3797 (1997) (explaining that the Republic of Guinea was already overburdened by the number of refugees it had received from Liberia).

¹⁰³² See S.C. RES. 1132, *supra* note 1021 (expressing in the Resolution that the Security Council "deplor[es] the fact that the military junta has not taken steps to allow the restoration of the democratically elected Government and a return of constitutional order").

¹⁰³³ S.C. RES. 1132, *supra* note 1021.

independent zones, each ruled by its own faction.¹⁰³⁴ In 1996, although a weakly secured government existed in Afghanistan, one faction, the Pakistani-supplied Taliban, invaded and took control of Kabul, declaring itself the legitimate government of the Islamic Emirate of Afghanistan.¹⁰³⁵ After invading Kabul and taking over most of the country, the Taliban carried out mass human rights violations. More than two million refugees fled to neighboring countries.¹⁰³⁶

On October 22, 1996, the Security Council adopted Resolution 1076, expressing concern over hostilities in Afghanistan that had caused civilian casualties and an increase in refugees and displaced persons – all of which the Security Council believed seriously endangered the region's stability and peaceful development.¹⁰³⁷ The resolution urged all Afghan parties to resolve their differences through peaceful means and achieve national reconciliation through political dialogue.¹⁰³⁸ It also called on all states to refrain from outside interference in Afghani internal affairs, including the involvement of foreign military personnel and the supply of arms and ammunition to parties to the conflict in Afghanistan, and instead to use their influence to encourage cooperation by the Afghan parties with the UN Special Mission to Afghanistan.¹⁰³⁹ Furthermore, the Security Council expressed concern about the abuses of human rights and called upon the leaders of the Afghan parties to halt such activities as terrorism and drug trafficking, which endangered the stability of the region.¹⁰⁴⁰

C. Republic of Yemen

The Republic of Yemen fell into crisis on May 5, 1994, when separatist rebels launched a civil war against the Government of Yemen.¹⁰⁴¹ The rebels were members of the former totalitarian regime that had lost Yemen's first parliamentary elections in April 1993. They sought to "establish a State in the south under the leadership of the rebel Ali Salim al-Bidh."¹⁰⁴² These rebels took control of Aden, the economic and commercial hub of Yemen, and halted the operations of the country's government.¹⁰⁴³ Consequently, "the country almost fell into a state of complete anarchy, the economic, social and health situation deteriorated, the security situation worsened, and the most heinous violations of human rights took place in the prisons of Aden that these

¹⁰³⁴ Country Study: Afghanistan, Federal Research Division, Library of Congress, at <http://lcweb2.loc.gov/frd/cs/aftoc.html#af0126>, last visited Sept. 1, 2005.

¹⁰³⁵ *Id.*

¹⁰³⁶ *Situation of Human Rights in Afghanistan 1975/74*, UN Commission on Human Rights, E/CN.4/1995/176, Mar. 8, 1995.

¹⁰³⁷ See S.C. RES. 1076, *supra* note 1021.

¹⁰³⁸ *See id.*

¹⁰³⁹ *See id.*

¹⁰⁴⁰ *See id.*

¹⁰⁴¹ UN Doc. S/PV.3394 (1994).

¹⁰⁴² UN Doc. S/1994/642 (1994).

¹⁰⁴³ *Id.*

persons subjected to their direct control.”¹⁰⁴⁴ During the armed conflict, large numbers of innocent civilians were killed and property was destroyed.¹⁰⁴⁵

Yemen’s political parties, however, objected vociferously to proposals of outside intervention, believing this would only complicate matters and would constitute an “assault on territorial unity and sovereignty of the Republic of Yemen” and an alleged “violation of international law.”¹⁰⁴⁶ Despite Yemeni protests, the Security Council adopted Resolution 924 on the grounds that the continuance of the situation could pose a threat to peace and security in the region.¹⁰⁴⁷ In the resolution’s text, the Security Council noted its deep concern for the tragic deaths of innocent civilians and requested that the parties cease hostilities immediately and negotiate a peace.¹⁰⁴⁸

D. Haiti

As in Sierra Leone, a *de facto* military regime in Haiti overthrew President Jean-Bertrand Aristide’s democratically elected government one year after his election.¹⁰⁴⁹ Under the regime’s rule, the people of Haiti were subjected to “repression, persecution, arbitrary detention and torture.”¹⁰⁵⁰ The regime systematically denied fundamental human rights and created a situation “where political choice [was] exercised only in the dangerous act of seeking

¹⁰⁴⁴ *Id.*

¹⁰⁴⁵ UN Doc. S/PV.3386 (1994) (relaying the statement from Mr. Li Zhaoxing, the Permanent Representative from China, regarding China’s concern about the conflict in Yemen).

¹⁰⁴⁶ UN Doc. S/1994/641 (1994); UN Doc. S/1994/642 (1994). In anticipation of the Security Council’s meeting regarding the situation in Yemen, the Permanent Representative of Yemen transmitted two letters expressing the views of the Yemeni political parties and organizations. The letters pleaded with the Security Council to refrain from intervening in Yemen:

We wish to call your attention . . . to our absolute rejection of any intervention by the Council in what is taking place in our country. This is an internal matter, and what is happening is an endeavor by the entire people to preserve the unity that guarantees its stability and the stability of the region in the face of a separatist rebellion aimed against the country’s unity, constitutional legitimacy and stability.

See also UN Doc. S/1994/642 (1994) (“What is happening in Yemen is not a war between north and south, as some claim, or between one State and another. It is a war between the people as represented by its lawful and constitutionally elected leadership and a small rebel separatist group of Socialist Party leaders.”)

¹⁰⁴⁷ *See* S.C. RES. 924, *supra* note 1021 (calling for an immediate ceasefire and urging the parties to resume negotiations).

¹⁰⁴⁸ *Id.*

¹⁰⁴⁹ *See* UN Doc. S/25942 (1993) (Letter from the Permanent Representative of Cuba).

¹⁰⁵⁰ UN Doc. S/PV.3238 (1993).

refuge elsewhere.”¹⁰⁵¹ Some 40,000 Haitians fled the country as a result of the repression, with many seeking refuge in Cuba.¹⁰⁵²

On October 11, 1991, the General Assembly adopted a resolution calling on the military regime to re-establish constitutional order in Haiti and reinstate President Aristide.¹⁰⁵³ The Organization of American States (OAS) attempted to engage the regime in negotiations, but the regime rejected its proposals.¹⁰⁵⁴ To provide support to the efforts of the OAS and the UN General Assembly, the Security Council adopted Resolution 841 in 1993, in which the Security Council stated that it “[d]eplor[ed] the fact that, despite efforts of the international community, the legitimate Government of President Jean-Bertrand Aristide has not been reinstated.”¹⁰⁵⁵ Noting the humanitarian crisis in the text of the Resolution, the Security Council expressed its concern that “the persistence of this situation contributes to a climate of fear of persecution and economic dislocation which could increase the number of Haitians seeking refuge in neighboring member states and convinced that a reversal of this situation is needed to prevent its negative repercussions on the region.”¹⁰⁵⁶ The Security Council thus determined that the situation in Haiti posed a threat to international peace and security in the region.¹⁰⁵⁷

E. Rwanda

On October 1, 1990, the Rwandese Patriotic Front (RPF) launched a civil war against the government of Rwanda that resulted in the massacres of large numbers of civilians and mass human rights violations.¹⁰⁵⁸ In 1992, the RPF and the government of Rwanda signed a ceasefire agreement at Arusha, Tanzania.¹⁰⁵⁹ Despite the ceasefire agreement, fighting between the parties

¹⁰⁵¹ *Id.*

¹⁰⁵² *Id.*; see also UN Doc. S/25942 (1993) (explaining that “Cuba, as one of Haiti’s closest neighbors, has received thousands of refugees from this long-suffering country, perhaps more than any other State of the region, and has never considered that this flow threatened peace and security in the geographical area in which it is situated, but has viewed it as a purely humanitarian question which must be resolved, as it has been doing to date, through the international organizations and bodies which deal with refugees and displaced persons”).

¹⁰⁵³ UN Doc. S/PV.3238 (1993).

¹⁰⁵⁴ See *id.* (commending His Excellency Mr. Dante Caputo, Special Envoy of the Organization of American States, and the United Nations for its efforts in attempting to achieve a settlement with the regime).

¹⁰⁵⁵ S.C. RES. 841, *supra* note 1021 (imposing a trade embargo on the country).

¹⁰⁵⁶ *Id.*

¹⁰⁵⁷ *Id.*

¹⁰⁵⁸ See UN Doc. S/PV.3183 (1993) (providing examples of human rights violations, such as “calling farmers to a meeting before massacring them with machine-gun fire; shutting-up scores of people in a house before killing them with grenades or explosives; disemboweling women and old people; shootings in displaced-persons camps; dismemberment, gouging out of the eyes and cutting-off breasts; binding people hand and foot; and so on.”)

¹⁰⁵⁹ See UN Doc. S/25363 (1993) (explaining that the N’sele ceasefire agreement was amended at Gbadolite on Sept. 16, 1991, and at Arusha on Jul. 12, 1992).

resumed.¹⁰⁶⁰ The fighting ultimately resulted in the displacing approximately one million people and left one-seventh of the population without shelter.¹⁰⁶¹

After listening to Rwanda's Permanent UN Representative's plea for assistance, in March 1993, the Security Council passed Resolution 812, the first resolution adopted on Rwanda, on the basis of its "[g]rave concern [over] the fighting in Rwanda and its consequences for international peace and security."¹⁰⁶² The Security Council asserted that it was "[a]larmed by the humanitarian consequences of the latest resumption of the fighting in Rwanda, in particular the increasing number of refugees and displaced persons, and by the threats to the civilian population."¹⁰⁶³ The resolution called on the government and the RPF to refrain from interfering with the provision of humanitarian aid and the return of displaced persons and to comply strictly with international humanitarian law.¹⁰⁶⁴ The resolution also "[s]tressed the need for a negotiated political solution, in the framework of the agreements signed by the parties in Arusha" and set forth a framework for beginning a settlement to the conflict.¹⁰⁶⁵

F. Liberia

In 1989, Liberia became engulfed in a civil war between the National Patriotic Front of Liberia (NPFL), led by Charles Taylor, and the United Liberation Movement of Liberia (ULIMO). Much of the fighting was "inspired by the memory of the former President of Liberia," who was killed during the war.¹⁰⁶⁶ As both sides struggled to seize political power, thousands of civilians were killed, raped, tortured, and taken hostage.¹⁰⁶⁷ Those who survived endured sickness and famine and were often forced to "wander the forest for days, ferreting for food while fleeing from the fugitive warlord Charles Taylor and his rebel fighters."¹⁰⁶⁸

¹⁰⁶⁰ *Id.*

¹⁰⁶¹ *Id.*

¹⁰⁶² S.C. RES. 812, *supra* note 1021.

¹⁰⁶³ The Security Council became particularly concerned about the destabilizing effects of the situation in Rwanda in light of the ongoing crisis in Somalia. *See id.* (stating that the Morocco delegation was particularly concerned that the "tragic developments . . . could lead to a greater deterioration of the situation in that country, as we remember all too well the past and present horrors experienced by the people of the brotherly country of Somalia").

¹⁰⁶⁴ *Id.*

¹⁰⁶⁵ *See id.* (asserting that the UN should examine the steps it could take to assist in facilitating a political settlement and in avoiding the onset of further fighting).

¹⁰⁶⁶ S.C., *Provisional Verbatim Record of the 3138th Meeting*, UN Doc. S/PV.3138 (1992).

¹⁰⁶⁷ *See id.* (asserting that Charles Taylor and the NPFL had committed numerous war crimes and crimes against humanity, including murdering five American nuns and over 160 schoolchildren).

¹⁰⁶⁸ *Id.* According to the Permanent Representative of Sierra Leone: "our national economy is in ruins, as the government has had to spend hard-earned resources to defend our country from Charles Taylor, who for more than a year now has been occupying and ravaging some of the most productive areas of my country in terms of agriculture and diamond production, looting and smuggling those products to acquire arms to continue his armed aggression and to enrich himself personally."

Neighboring countries expressed concern that “the war will spread to the entire West African sub-region if the protagonists continue . . . to speak the language of arms”¹⁰⁶⁹ rather than “dialogue and reason.”¹⁰⁷⁰ West Africa also contains a prosperous drug trade, and other states in the region feared that Liberia would be turned into a regional “narcocenter for drug trafficking.”¹⁰⁷¹ The situation in Liberia posed a particularly severe threat for neighboring Sierra Leone, which received thousands of the refugees who fled from Liberia.¹⁰⁷² When Sierra Leone permitted Liberian peacekeeping forces to use its country as a base, the NPFL instigated an armed attack on Sierra Leone.¹⁰⁷³

The Economic Community of West African States (ECOWAS) and other international organizations attempted to broker a peaceful settlement between the parties, such as facilitating the execution of a ceasefire agreement. These attempts failed and the situation deteriorated.¹⁰⁷⁴ Finding that the situation in Liberia clearly threatened international peace and security, the Security Council passed Resolution 788 on November 19, 1992¹⁰⁷⁵, denouncing the violations of the ceasefire agreement and demanded that the parties abide by the already established settlement framework.¹⁰⁷⁶ The Council also noted the deterioration of the situation hindered the “creation of conditions conducive to the holding of free and fair elections.”¹⁰⁷⁷

¹⁰⁶⁹ *Id.* Countries in the region feared that the conflict was “transforming West Africa into an arms market.”

¹⁰⁷⁰ *See id.* (providing the statement of Mr. Holo, Permanent Representative of Benin, regarding the crisis in Haiti).

¹⁰⁷¹ *See id.* (relaying the statement of Mr. Koroma, Permanent Representative of Sierra Leone, who stated that “[t]oday it is Sierra Leone that is under attack, but there are other small and equally vulnerable countries in the subregion that should not be allowed to fall prey to a fugitive warlord [(Charles Taylor)] whose aim is to make Liberia a narcocentre for drug trafficking in our region if he is once able to shoot his way into power in Monrovia”).

¹⁰⁷² *See id.* (explaining that Sierra Leoneans welcomed Liberian refugees into their homes, schools, hospitals, and places of employment).

¹⁰⁷³ *See id.* (asserting that Charles Taylor launched this attack because Sierra Leone refused to allow him to use their country for his weapons trade).

¹⁰⁷⁴ UN Doc. S/PV.3138 (1992). In May 1990, the Standing Mediation Committee of ECOWAS took steps to establish a ceasefire, formed a group to monitor the ceasefire, created a transitional government, gathered emergency funds for ECOWAS, and created an observer group to monitor elections. Six months later, ECOWAS established a peace plan for Liberia and the sub-region. In the following two years, ECOWAS held meetings in Yamoussoukro and Geneva to solidify the settlement framework. Despite these, and various subsequent efforts on the part of ECOWAS, the NPFL refused to adhere to the peace process.

¹⁰⁷⁵ S.C. RES. 788, *supra* note 1021.

¹⁰⁷⁶ *See id.* (noting that these accords are the Yamoussoukro IV Accord and the Final Communiqué of the Informal Consultative Group Meeting of ECOWAS Committee of Five on Liberia and asserting the Security Council’s conviction that the Yamoussoukro IV Accord provided the most comprehensive framework for a peaceful settlement; the Accord sought to establish the conditions conducive to allowing free and fair elections).

¹⁰⁷⁷ *See id.*

G. Cambodia

The Security Council issued a variety of resolutions in the 1980s requesting warring factions in Cambodia to end the conflict and reach a peaceful settlement. In 1990, the Council stepped beyond a simple acknowledgement of the situation and adopted Resolution 668 in which the Council specifically tried to facilitate the peace process in Cambodia by providing guidance.¹⁰⁷⁸ Resolution 668 endorsed a framework for a political settlement and encouraged the parties to adhere to an agreement to form a “Supreme National Council as the unique legitimate body and source of authority in which, throughout the transitional period, the independence, national sovereignty and unity of Cambodia is embodied.”¹⁰⁷⁹

¹⁰⁷⁸ See S.C. RES. 668, *supra* note 1021 (stating that the Security Council was “[c]onvinced of the need to find an early, just and lasting peaceful solution to the Cambodia conflict”).

¹⁰⁷⁹ See *id.* (urging the parties to “exercise maximum self-restraint” during the peace process).



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