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U.S. Committee for  
Human Rights in North Korea

# Legal Strategies for Protecting Human Rights in North Korea

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## Map of North Korea



*Source:* Adapted from Princeton University GIS open source map.

# Legal Strategies for Protecting Human Rights in North Korea

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## **EXECUTIVE SUMMARY**

This handbook describes the options available to human rights NGOs seeking to pursue international legal action against North Korea. North Korea presents an extreme version of the challenge that often faces non-governmental organizations. It has a daunting record of human rights abuses and atrocities. However, at the same time, North Korea is an isolated hermit state, extremely resistant to outside pressure.

Non-governmental organizations (NGOs) tracking human rights abuses around the world are frustrated by the difficulty of doing something about those abuses. However, the international legal system offers a variety of avenues for action which NGOs can pursue. Pursuing these avenues helps link NGOs to the larger framework of international legal institutions.

This report explores these legal avenues. It does so by considering what specific options are available in the case of North Korea, exploring how those options would be pursued, and analyzing the practical advantages and difficulties of each one. The options presented are:

- Referral to the International Criminal Court
- Referral to the U.N. Security Council
- Working with the U.N. Human Rights Council
- Taking action under an international covenant to which North Korea is a party:
  - the International Covenant on Civil and Political Rights
  - the Convention on the Elimination of All Forms of Discrimination Against Women
  - the Convention on the Rights of the Child
  - the International Covenant on Economic, Social, and Cultural Rights
- Pursuing a lawsuit under the Alien Tort Claims Act or similar U.S. law

This is by no means an exhaustive list. For example, other nations have their own domestic analogs to the U.S. Alien Tort Claims Act, and different states are parties to different international treaties and conventions. However, this report illustrates the kinds of considerations necessary when evaluating the options available under international treaties or when suing the officials of one country in the courts of another. For the first four of these options, the report explores:

- General description of the option
- The legal standards for action to be taken
- The violations that North Korea has committed of those standards
- The institutional process involved in that option
- Possible outcomes from the option
- Political considerations

In addition, in the discussion of the Alien Tort Claims Act, the report examines the process of filing a lawsuit for claims of abuse in another country, and explores the advantages and disadvantages of such an action.

The goal of this handbook is to assist NGOs concerned about the human rights situation in North Korea, and also to provide a general resource for NGOs concerned about human rights around the world. Hopefully, NGOs focused on North Korea will be assisted by this report and its consideration of practical ways that NGOs can work with the international legal system. In addition, other NGOs can adapt this report to their own needs. By presenting practical information about international legal options, this report hopes to provide NGOs with the tools to pursue such options themselves. Further, by analyzing the advantages and disadvantages of each option, this report attempts to illustrate how NGOs may conduct their own analysis of which legal options are most helpful in their own situations, and thus help NGOs address the challenge of states, like North Korea, that are not responsive to NGO criticism of abuses of human rights.

## **INTRODUCTION**

For over sixty years, the Democratic People's Republic of Korea has engaged in the systematic, flagrant abuse of nearly every human right recognized by international law. Citizens found guilty of "crimes" against the regime often face imprisonment where they are subjected to torture, below subsistence level food rations, forced labor, and sometimes execution. Despite widespread condemnation of these violations by individuals, states, and non-governmental organizations (NGOs), North Korea's isolation has made it difficult for external forces to have much impact. It is therefore a challenge for NGOs concerned about conditions in North Korea to take productive action.

The extreme situation in North Korea is emblematic of a general problem facing NGOs concerned about human rights. In the face of human rights violations and atrocities around the world, NGOs are a vital safeguard for the oppressed and downtrodden. NGOs, however, have little formal power themselves, and can face challenges in ameliorating the abuses they seek to uncover and document.

The modern system of international law, however, provides myriad avenues for NGOs to pursue against serial human rights abusers and rogue states. This report analyzes this diverse group of options, their respective advantages and disadvantages in the case of North Korea, and presents a brief assessment of their feasibility and effectiveness in today's political climate.

The case of North Korea is used to illustrate methods NGOs in general can follow to defend human rights in other countries. The usefulness of each method will, naturally, depend on the specific facts that apply, and NGOs must exercise their own judgment as to which methods are most likely to be effective. By pursuing these international legal avenues, NGOs can link with the broader international legal system to fight against abuses, overcoming the problem of NGO lack of resources.

After briefly identifying relevant facts regarding North Korean history, politics, and human rights abuses, this report discusses the avenues available to NGOs through international organizations and U.N. bodies, action under human rights treaties, and the possibility of applying domestic law to foreign human rights violations. The report examines the following international legal options: (i) possible referral of North Korea to the International Criminal Court; (ii) referral of the situation in North Korea to the U.N. Security Council;<sup>1</sup> (iii) working with the Human Rights Council; (iii) action under the International Covenant on Civil and Political Rights; (iv) action under the Convention on the Elimination of All Forms of Discrimination Against Women; (v) action under the Convention on the Rights of the Child; (vi) action under the International Covenant on Economic, Social, and Cultural Rights; and (vii) pursuing a lawsuit under the Alien Tort Claims Act or similar U.S. law.

Ultimately, this report describes the most promising course to pursue for each of these possible legal options:

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<sup>1</sup> See DLA PIPER US LLP & U.S. COMM. FOR HUMAN RIGHTS IN NORTH KOREA, FAILURE TO PROTECT: A CALL FOR THE UN SECURITY COUNCIL TO ACT IN NORTH KOREA (2006), *available at* <http://www.dlapiper.com/files/upload/North%20Korea%20Report.pdf> (last visited Oct. 18, 2007), *and available at* <http://www.hrnk.org/failureToProtect-Report.pdf> (last visited Oct. 18, 2007) [hereinafter FAILURE TO PROTECT]. The report explores the possibility of U.N. Security Council action in North Korea in detail.

- International Criminal Court: an NGO could encourage member states or the U.N. Security Council to refer North Korea for prosecution.
- U.N. Security Council: an NGO could lobby member states to bring a resolution calling for action to be taken regarding human rights in North Korea.
- U.N. Human Rights Council: NGOs can push the Council to continue the focus on North Korean human rights begun by its predecessor, the Commission on Human Rights.
- U.N. Treaty Bodies: for the four treaty bodies of which North Korea is a member, NGOs can file shadow reports on human rights in North Korea, and provide treaty bodies with independent sources of information.
- Alien Tort Claims Act: an NGO could help support a lawsuit under this act by a North Korean victim of abuses, allowing the NGO to use American law to enforce human rights standards.

Two of these methods have already been used by NGOs in the case of North Korea. First, the Commission on Human Rights (the predecessor to the Human Rights Council) has issued three resolutions on human rights in North Korea and has appointed a Special Rapporteur to address the situation. Second, of the four U.N. treaty bodies of which North Korea is a member, three have noted the existence of North Korean human rights concerns: the bodies associated with the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child. These successes demonstrate the possibilities for NGOs to work with the existing international legal system, and point to the need to continue this work.

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## I. THE FACTUAL CASE AGAINST NORTH KOREA

Each of the legal options presented in this report depend heavily on the facts of the case. Therefore, in order to consider the applicability of each of those options to the situation in North Korea, this report will begin with a survey of North Korea's unique history, its current political situation, and an analysis of the atrocities committed by the North Korean state over the decades. An NGO considering one of the international legal options discussed in this report should similarly be aware of and thoroughly consider the relevant facts that apply in its own case.

North Korea (referred to in this report as "North Korea" or the "North" or "DPRK") occupies about 55 percent (approximately 120,410 square kilometers) of the total land area of the Korean Peninsula and is roughly the size of the state of New York or Louisiana.<sup>2</sup>

### A. History

#### 1. *Background*

In the 17th century, the Korean peninsula was cut off by China from the outside world until the Sino-Japanese War of 1894–1895. By 1910, Korea had been annexed by Japan.

After Japan's surrender at the conclusion of World War II, the Korean peninsula was partitioned into two occupation zones, which were divided at the 38th parallel. The USSR controlled the north and the United States controlled the south. In 1948, the division was made permanent with the establishment of the separate regimes of North and South Korea. The DPRK was established on May 1, 1948, with Kim Il-sung as president.

#### 2. *The Korean War*

With an aim to unify the Koreas under a single Communist regime, the North launched a surprise invasion of South Korea on June 25, 1950. In the following days, the U.N. Security Council condemned the attack and demanded an immediate withdrawal. American President Harry Truman ordered U.S. air and naval units into action to enforce the UN's order. British forces joined America's to form a U.N. multinational command ready to back the South Koreans.

North Korean forces seized Seoul and shortly thereafter surrounded the allied forces in the Korean Peninsula's southeast corner. In a bid to reverse North Korea's commanding military position, United Nations Commander General Douglas MacArthur ordered an amphibious landing at Inchon on September 15, 1950. The strategy worked; U.N. forces repelled the North Korean army. In the wake of this successful counterattack, MacArthur's units pushed north across the 38th parallel into North Korean territory.

However, MacArthur's successful counteroffensive spurred China to enter the war, and Chinese forces soon pushed the U.N. troops into retreat. Seoul was lost again for a short period but regained later by U.N. forces. The war stabilized near the 38th parallel but

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<sup>2</sup> Library of Congress, *A Country Study: North Korea* (4<sup>th</sup> ed. 1994), available at <http://history1900s.about.com/gi/dynamic/offsite.htm?site=http://lcweb2.loc.gov/frd/cs/kptoc.html>.

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dragged on for two years while truce negotiations took place. An armistice was agreed to on July 27, 1953.

### 3. *The 1990s*

#### (a) Political Developments

Kim Il-sung's dictatorship over the North outlasted the Soviet era; Kim maintained full political control until his death on July 8, 1994. Kim Il-sung's death introduced a period of uncertainty which ended with his son, Kim Jong-il, assuming the mantle of leadership. While Kim Jong-il dealt with other possible rivals, negotiations over North Korea's suspected possession of atomic weapons began. An agreement was finally reached in mid 1994, which envisioned that North Korea would receive South Korean nuclear reactors for purposes of civil power generation.

In September 1998, North Korea launched a three-stage long-range rocket over Japan, claiming it was simply a scientific satellite.

In 1999 North Korea agreed to allow the United States to conduct ongoing inspections of a suspected nuclear development site at Kumchangri, which North Korea admitted had been built for a "sensitive military purpose." In exchange for access to this site, the United States agreed to increase food aid to North Korea and to launch a program cultivating potato production in the North.

Tension between North Korea and South Korea decreased dramatically in June 2000 when South Korea's president, Kim Dae Jung, met with the North's Kim Jong-il in Pyongyang. The summit marked the first-ever meeting of the two countries' leaders.

#### (b) Economic and Social Development

Although the nuclear standoff between North Korea and the outside world defined the North's relationship with its neighbors, a mass famine that struck North Korea in the mid to late 1990s overshadowed all other domestic events. Lack of fuel and machinery parts, as well as weather conditions that encouraged parasites, further eroded the agricultural landscape, leaving approximately 10% of North Korea's rice fields open to cultivation. In total, it is estimated that the famine killed one million (and possibly many more) North Koreans (out of a total population of 24 million). Millions more, particularly children, were left malnourished and stunted. Although aid began trickling into North Korea in 1995, the lion's share of foreign aid did not arrive until late 1998. The staggering food crisis only began to wane in the fall of 1999, although a chronic food shortage problem persists to this day.

## **B. Current Status**

### 1. *Nuclear Brinkmanship*

In January 2002, following the September 11, 2001 attacks on the World Trade Towers and the Pentagon, U.S. President George W. Bush described North Korea as part of an "axis of evil." This confrontational approach marked a distinct change in U.S. policy toward North Korea, reversing the Clinton administration's policy of engagement.

North Korea stunned the world in late 2002 with two admissions. In September, Pyongyang acknowledged that it had kidnapped Japanese citizens in the 1970s and 1980s for the purposes of training North Korean spies. In October of the same year, when formally

confronted with U.S. intelligence, North Korea officially admitted that it had violated the 1994 agreed framework freezing its nuclear-weapons program and had been pursuing weapons based on highly enriched uranium. Since this admission in 2002, North Korea has vacillated between affirming and denying whether it has developed nuclear weapons.

In late December 2002, North Korea expelled U.N. weapons inspectors from the country and announced it would no longer agree to the terms of the nuclear Non-Proliferation Treaty (*NPT*). North Korea officially withdrew from the *NPT* in January 2003. During talks with China and the U.S. in April of that same year, North Korea announced that it had already manufactured nuclear weapons. The North further threatened to test or export these weapons. In July 2003, North Korean officials reported that the country had reprocessed enough plutonium to build six nuclear bombs.

Kim Jong-il has continued to threaten use of the North's nuclear capabilities. The United States took the position that it would not negotiate on a bilateral basis until North Korea dismantled its nuclear program. China accordingly took the lead in "six-party talks" involving North Korea, South Korea, the United States, China, Japan and Russia. A modest breakthrough occurred when officials from the six parties met in late summer of 2003 in Beijing. This diplomatic meeting, however, bore no substantive fruits. These "six-party" talks allowed for subsequent sessions in February and June 2004, but they were also inconclusive. A fourth round of talks in August 2005 similarly ended in deadlock. In February 2007, an agreement was reached under which North Korea will shut down its main reactor and dismantle its weapons program in exchange for aid, principally heavy fuel oil, and talks on normalizing diplomatic relations.<sup>3</sup> It remains to be seen if this accord will be successful.

### 2. Refugees

Chronic food shortages and a repressive political environment drive North Koreans to flee into China's northeastern provinces. Estimates as to the number of North Korean refugees in China vary greatly from between 20,000 and 400,000.<sup>4</sup> The exodus of North Koreans to China spiked in the late 1990s as a result of famine conditions, but continues today due to poverty, continued food shortages, and repression.<sup>5</sup> Most North Korean refugees remain unaccounted for in Chinese cities. Some refugees who openly seek protection have tried to enter foreign diplomatic missions and foreign-run schools.<sup>6</sup> Some of these refugees continue to await permission to leave China for other foreign countries.

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<sup>3</sup> *North Korea's Nuclear Price*, Editorial, CHI. TRIB., Feb. 14, 2007, at C-24.

<sup>4</sup> See U.S. COMM. FOR HUMAN RIGHTS IN NORTH KOREA, THE NORTH KOREAN REFUGEE CRISIS: HUMAN RIGHTS AND INTERNATIONAL RESPONSE (Stephan Haggard & Marcus Noland, eds., 2006), available at <http://www.hrnk.org/refugeesReport06.pdf> (last visited Oct. 18, 2007) [hereinafter NORTH KOREAN REFUGEE CRISIS].

<sup>5</sup> Human Rights Watch, *North Korea: Allow Access for U.N. Rights Monitor*, available at [http://hrw.org/english/docs/2005/04/15/nkorea10489\\_txt.htm](http://hrw.org/english/docs/2005/04/15/nkorea10489_txt.htm) (last visited Aug. 26, 2006).

<sup>6</sup> Amnesty International USA, *Media Advisory-North Korea: Briefing on present situation* (2005), available at [http://www.amnestyusa.org/countries/north\\_korea/document.do?id=80256DD400782B848025704C003EED2F](http://www.amnestyusa.org/countries/north_korea/document.do?id=80256DD400782B848025704C003EED2F) (last visited Aug. 26, 2006).

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The Chinese government claims that the foreign diplomatic missions involved are too tolerant in their treatment of North Koreans inside China.<sup>7</sup> Chinese policy toward North Korean refugees reflects this stance; the government fears that a welcoming reception of North Koreans inside its borders would open the floodgates of North Koreans coming into China and thus destabilize the region bordering North Korea. China labels the North Korean population in China as “illegal economic migrants.”<sup>8</sup> Consequently, it has been arresting and periodically repatriating North Koreans. For example, thousands of North Koreans were reportedly apprehended in northeast China in 2004 and the first half of 2005 and were forcibly returned to North Korea.<sup>9</sup> China’s activities in this regard are in direct contravention of its obligation as a state party to the 1951 Convention on the Status of Refugees to allow all asylum seekers of all nationalities to openly approach the office of the U.N. High Commissioner for Refugees to have their cases assessed, and to be allowed to remain in China pending that determination.<sup>10</sup> The fate of those returned remains unclear. A number of sources have reported that returnees often face long interrogation sessions, torture, and sometimes execution.<sup>11</sup> The North Korean government considers leaving North Korea without state authority to be a criminal offense and an act of treason which may be punishable by death.<sup>12</sup>

In July 2004, 468 North Koreans flew from Vietnam to South Korea, becoming the single largest group of North Korean asylum-seekers to arrive in South Korea since the division of the peninsula.<sup>13</sup> In total, over ten thousand North Koreans have reached South Korea with many thousands more, particularly in China, awaiting the opportunity to do so.

### 3. Drug Trafficking

North Korea has also emerged as a major player in the international drug trade, particularly in the Asia-Pacific region. On the production side, it is estimated that North Korea produces approximately 40 tons of opium per year.<sup>14</sup> The Australian Navy’s apprehension of a North Korean ship carrying over 100 pounds of heroin worth approximately \$50 million on April 20, 2003 in waters off the coast of Australia highlights the magnitude of North Korea’s trafficking.<sup>15</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> Human Rights Watch, *supra* note 5.

<sup>9</sup> Amnesty International USA, *supra* note 6.

<sup>10</sup> NORTH KOREAN REFUGEE CRISIS, *supra* note 4.

<sup>11</sup> Amnesty International USA, *supra* note 6.

<sup>12</sup> Human Rights Watch, *supra* note 5. See also JOEL R. CHARNY, REFUGEES INT’L, ACTS OF BETRAYAL: THE CHALLENGE OF PROTECTING NORTH KOREANS IN CHINA (2005), available at <http://www.refugeesinternational.org/content/publication/detail/5631> (last visited Oct. 18, 2007).

<sup>13</sup> Amnesty International USA, *supra* note 6.

<sup>14</sup> Larry M. Wortzel, *North Korea’s Connection to International Trading in Drugs, Counterfeiting, and Arms* (2003), available at <http://www.heritage.org/research/asiaandthepacific/test052103a.cfm?renderforprint=1> (testimony before Governmental Affairs Subcommittee) (last visited Aug. 30, 2006).

<sup>15</sup> *Id.* at n.3 (citing The Wall Street Journal, Apr. 20, 2003).

On the distribution side of the drug trade, from the 1970s into the current decade, many North Korean diplomats and other employees of the North Korean government were apprehended abroad while trafficking in narcotics.<sup>16</sup> In 1994, China stopped North Korean embassy employees from smuggling several kilograms of home-grown opium into China. In 1995, officials of the North Korean Ministry of People's Armed Forces were arrested by China for drug-related actions. In January 2002, Japan seized 150 kilograms of methamphetamine from a North Korean vessel; in July 2002, Taiwan apprehended nine men carrying 79 kilograms of heroin onboard a North Korean ship.<sup>17</sup> Even as recently as December 2004, two North Korean government officials in Turkey were arrested for narcotics trafficking.<sup>18</sup> The full extent of North Korea's involvement in the illegal drug industry is unknown, but is by all accounts substantial.

#### 4. Sale of Weapons

North Korea has exported a significant amount of ballistic missile-related equipment and technical expertise to every corner of the globe, and particularly to third-world regions such as South America, the Middle East, South Asia and North Africa.<sup>19</sup> Complicating North Korea's role in international missile sales has been its close partnership with China. The two countries often collaborate in supplying specific "niche" weaponry, particularly missile technology.<sup>20</sup>

While these sales do not violate international law, they are of obvious international concern. For instance, North Korea has sold over U.S. \$580 million in missile technology to the Middle East.<sup>21</sup> The Congo purchased U.S. \$100 million worth of North Korean missiles in 1994.<sup>22</sup> In 1993, Iran paid North Korea U.S. \$500 million for missile development as well as expertise in the development of nuclear technology.<sup>23</sup>

North Korea's weapons trading leaves a particularly large footprint in the Persian Gulf. In 1995, the Central Intelligence Agency confirmed the transfer of a number of Scud transporter-erector-launchers to Iran from North Korea.<sup>24</sup> Persian oil was to serve as payment for the missile technology. Syria also received North Korean technology and a

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<sup>16</sup> North Korea Advisory Group, *Report to the Speaker, U.S. House of Representatives* 39 (Nov. 1999), available at <http://www.fas.org/nuke/guide/dprk/nkag-report.htm>; see also Bureau for International Narcotics and Law Enforcement Affairs, *International Narcotics Control Strategy Report-North Korea* (2006), available at <http://www.state.gov/p/inl/rls/nrcrpt/2006/vol1/html/62110.htm> (hereinafter INSCR).

<sup>17</sup> INSCR-North Korea (2003), available at <http://www.state.gov/documents/organization/18168.pdf>.

<sup>18</sup> INSCR-North Korea (2005), available at <http://www.state.gov/p/inl/rls/nrcrpt/2005/vol1/html/42367.htm>.

<sup>19</sup> Wortzel, *supra* note 14.

<sup>20</sup> *Id.*

<sup>21</sup> North Korea Advisory Group, *Report to the Speaker, U.S. House of Representatives*, *supra* note 16.

<sup>22</sup> Wortzel, *supra* note 14; at n.15 (citing Le Point, Jan. 28, 1995, at 19).

<sup>23</sup> *Id.* at n.14 (citing U.S. News and World Report, Mar. 29, 1993, at 18; The Washington Times, Mar. 19, 1993, at A2).

<sup>24</sup> *Id.* at n.16 (citing Defense Week, May 1, 1995, at 1).

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wide exchange of expertise flowed between the two countries.<sup>25</sup> The North also cooperates with Pakistan in missile development, particularly the early development of the Ghauri missile, which enjoys a 1,500-kilometer range and can strike targets deep inside India.<sup>26</sup> North Korea's involvement in the Asian subcontinent is well documented – in 1998, India stopped and detained a North Korean ship en route to Pakistan that contained over a hundred crates of blueprints, machinery, and parts for ballistic missile production technology.<sup>27</sup>

### 5. Counterfeiting

North Korea, one of the world's poorest nations with a decaying infrastructure and a general lack of basic services, has invested U.S. \$10 million in an intaglio printing press, the same type used by the United States Bureau of Engraving and Printing. This press is allegedly used in a wide array of counterfeiting operations, particularly of U.S. dollars.<sup>28</sup>

The U.S. Congressional Research Service notes that, according to some reports, North Korea produces and distributes U.S. \$15 million per year in counterfeit currency.<sup>29</sup> In April 1998, Russia apprehended a North Korean with U.S. \$30,000 in counterfeit paper.<sup>30</sup> Although the North's counterfeiting remains small in dollar terms relative to its missile sales and illicit drug trafficking activities, it is a vastly growing source of revenue.

### C. Human Rights

#### 1. Religion in North Korea

North Korea enjoys a rich religious history. Traditionally, Koreans have practiced various religions, including Shamanism, Taoism, Buddhism, Confucianism, and Christianity.<sup>31</sup> From

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<sup>25</sup> *Id.* at n.18 (citing Janes International Defense Review, Feb. 1997, at 1-4).

<sup>26</sup> *Id.* at n.19 (citing The New York Times, Apr. 4, 1998).

<sup>27</sup> *Id.* at n.21 (citing The Times of India, July 5, 1999).

<sup>28</sup> RAPHAEL PERL & DICK N. NANTO, CONG. RESEARCH SERV., NORTH KOREAN CRIME-FOR-PROFIT ACTIVITIES 6-8 (Feb. 16, 2007) (CRS Report for Congress RL 33885), available at <http://fpc.state.gov/documents/organization/81342.pdf> (last visited Oct. 18, 2007). The report notes that \$45-48 million has been detected or seized since 1989 and notes the exceptional quality of North Korean-produced U.S. dollars. *Id.*

<sup>29</sup> Wortzel, *supra* note 14, at n.10 (citing Australian Financial News, June 17, 2000; North Korea Advisory Group Final Report, 1999, at 38).

<sup>30</sup> See INSCR-North Korea (1999), available at <http://www.state.gov/p/inl/rls/nrcrpt/1999/924.htm>.

<sup>31</sup> U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, THANK YOU FATHER KIM IL SUNG: EYEWITNESS ACCOUNTS OF SEVERE VIOLATIONS OF FREEDOM OF THOUGHT, CONSCIENCE, AND RELIGION IN NORTH KOREA 14-15 (2005), available at [http://www.uscirf.gov/countries/region/east\\_asia/northkorea/NKwitnesses.pdf](http://www.uscirf.gov/countries/region/east_asia/northkorea/NKwitnesses.pdf) (last visited Oct. 18, 2007) [hereinafter EYEWITNESS ACCOUNTS]. See also Bureau of Democracy, Human Rights, & Labor, U.S. Dep't of State, *International Religious Freedom Report 2002, Democratic People's Republic of Korea*, available at <http://www.state.gov/g/drl/rls/irf/2002/13876.htm> (last visited Oct. 18, 2007) [hereinafter 2002 Religious Freedom Report]. "The number of religious believers is unknown but has been estimated by the Government at 10,000 Protestants, 10,000 Buddhists, and 4,000 Catholics. Estimates by South Korean church-related groups are considerably higher. In addition the Chondogyo Young Friends Party, a government-approved group based on a traditional religious movement, still exists. According to the Government, the number of practitioners of the Chondogyo religion is approximately 40,000." *Id.* § 1 ¶ 1.

1910 to 1945, North Korea was the center of Protestant Christianity in Asia.<sup>32</sup> However, North Korea forcibly repressed religion after the Korean War. By the late 1950s, no active churches remained in North Korea.<sup>33</sup> Kim Il-sung suppressed autonomous religious activity throughout his reign,<sup>34</sup> instead instituting the official ‘juche’ ideology which centered on worshipping himself, Kim Jong-il, and the Party.<sup>35</sup>

A very small amount of government-controlled religious activity has resurfaced in the last few decades. In 1988, the government allowed a Protestant church to open its doors; presently, two Protestant churches, one Catholic church and one Orthodox church operate in Pyongyang.<sup>36</sup> Buddhism has been the official state religion for a millennium. Critics allege that the leaders of these churches may not be genuine believers, but instead are part of a show put on by the state for the benefit of outsiders.<sup>37</sup>

The current state of religious freedom in North Korea is bleak. The U.N. Human Rights Committee has expressed concern over North Korea’s restrictions on religious freedom.<sup>38</sup> Human Rights Watch testified before the U.S. Senate that “there is no freedom of religion – even private, independent worship is prohibited. No organizations of any kind are allowed to exist independent of the state.”<sup>39</sup> The North Korean Constitution provides for “freedom of religious belief,” but the government permits only religious activity that is tightly controlled by official groups that are linked to the government.<sup>40</sup> Religious proselytizers have been imprisoned.<sup>41</sup> Nevertheless, it has been reported that underground churches continue to function.<sup>42</sup>

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<sup>32</sup> Andrei Lankov, *North Korea’s Missionary Position*, Asia Times, Mar. 16, 2005, available at <http://www.atimes.com/atimes/Korea/GC16Dg03.html>.

<sup>33</sup> *Id.*

<sup>34</sup> EYEWITNESS ACCOUNTS, *supra* note 31, at 16.

<sup>35</sup> *Id.* at 3.

<sup>36</sup> 2002 Religious Freedom Report, *supra* note 31, § 1.

<sup>37</sup> Lankov, *supra* note 32; see also EYEWITNESS ACCOUNTS, *supra* note 31, at 11. However, the report states that the majority of worshippers at these churches are pre-WWII Christians and their children. EYEWITNESS ACCOUNTS, *supra* note 31, at 85.

<sup>38</sup> *Concluding Observations of the Human Rights Committee: Democratic People’s Republic of Korea*, U.N. Human Rights Committee, 72nd Sess., ¶ 22, U.N. Doc. CCPR/CO/72/PRK (2001) (Committee referring to “information available to the Committee that religious practice is repressed or strongly discouraged in the Democratic People’s Republic of Korea”), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.72.PRK.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.72.PRK.En?Opendocument) [hereinafter *Concluding Observations*].

<sup>39</sup> Human Rights Watch, Human Rights News, *Testimony by Tom Malinowski before the U.S. Senate Committee on Foreign Relations*, available at <http://hrw.org/english/docs/2004/03/02/usint7793.htm>.

<sup>40</sup> See 2002 Religious Freedom Report, *supra* note 31; see also EYEWITNESS ACCOUNTS, *supra* note 31, at 89 (noting that although North Korea has formally stated that church and state are independent, North Korea’s government-sponsored religious federations are really “emanations of the North Korean party-state”).

<sup>41</sup> 2002 Religious Freedom Report, *supra* note 31, § 2. “Persons engaging in religious proselytizing may be arrested and subjected to harsh penalties, including imprisonment and prolonged detention without charge.” *Id.*

<sup>42</sup> Lankov, *supra* note 32.

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The North Korean government has detained, imprisoned, tortured, and executed members of religious groups. Defectors have provided accounts of people imprisoned for suspected religious beliefs, including possession of a Bible.<sup>43</sup> Numerous accounts exist of people being beaten, tortured, and killed.<sup>44</sup> For example, one defector witnessed five Church leaders crushed beneath a military steam roller.<sup>45</sup>

### 2. Torture and Arbitrary Detention

The North Korean regime routinely commits torture, especially in interrogation facilities operated by the National Security Agency.<sup>46</sup>

Victims of North Korean torture are subjected to:

- Beatings with shovels to the point of unconsciousness or death;
- Electric shock;
- Prolonged periods of exposure;
- Confinement in tiny punishment cells in which prisoners are unable to stand upright or lie down;
- Motionless kneeling, water torture, and facial and shin beatings with rifle butts;
- Hanging by the wrists;
- Forced beatings by fellow prisoners;
- Required to stand up/sit down repeatedly until they collapse or die;
- Forced abortions or infanticide

#### (a) The Prison Camp System

Government security forces routinely arrest and imprison persons, holding them incommunicado without any possibility of a fair trial or judicial review.<sup>47</sup> Prisoners are abducted with no judicial process or explanation, tortured to the point of “confession” and sentenced to a lifetime of hard labor. In many cases, individuals are immediately transported to prison camps without any semblance of a trial.

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<sup>43</sup> EYEWITNESS ACCOUNTS, *supra* note 31, at 4 (North Koreans repatriated from China may be imprisoned for contact with South Korean Christians); *id.* at 9 (imprisonment for possession of a Bible); *id.* at 10 (six repatriated North Koreans detained for religious beliefs; another beaten); *id.* at 32 (a family imprisoned for a father’s Christian beliefs); *id.* at 41-42 (a man imprisoned for a year for Bible possession); *id.* at 44 (20 individuals imprisoned for church membership).

<sup>44</sup> For some examples of executions, *see id.* at 40 (execution for possession of a Bible); *id.* at 41 (soldier who heard of executions of Christians in 1997); *id.* (execution for bringing Bibles back from China). In addition, former prisoners reported they were told by guards that other prisoners were executed, but there is no eyewitness testimony of execution of prisoners for religious belief. *Id.* at 47 n.58. *See also* Bureau of Democracy, Human Rights & Labor, U.S. Dep’t of State, *International Religious Freedom Report – 2005: Democratic People’s Republic of Korea*, available at <http://www.state.gov/g/drl/rls/irf/2005/51515.htm> (last visited Oct. 18, 2007) [hereinafter 2005 Religious Freedom Report].

<sup>45</sup> EYEWITNESS ACCOUNTS, *supra* note 31, at 44-45.

<sup>46</sup> Bureau of Democracy, Human Rights & Labor, U.S. Dep’t of State, *Country Report on Human Rights Practices – 2005: Democratic People’s Republic of Korea*, available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61612.htm> (last visited Oct. 18, 2007) [hereinafter 2005 Country Report].

<sup>47</sup> *Id.* (observing that judicial review exists neither in law nor in practice).

The North Korean incarceration system includes three categories: political penal-labor colonies called *kwan-li-so*, prison-labor facilities called *kyo-hwa-so*, and a separate detention system for North Koreans forcibly repatriated from China.<sup>48</sup>

(i) *Kwan-li-so*

These numerous encampments, surrounded by barbed wire fences and guard towers, house somewhere upwards of 200,000 prisoners.<sup>49</sup> Several of these camps are gargantuan in size: one is several times larger than the District of Columbia.<sup>50</sup> Such size and scale accurately reflects the true purpose of these camps – to eradicate multiple generations of political dissidents. Unique to the *kwan-li-so* system is the idea of “collective responsibility,” whereby multiple generations of the offender’s family are also imprisoned; the number of family members abducted depends on the severity of the offense.<sup>51</sup>

Officials keep large numbers of prisoners in close quarters without any space to move. According to the U.S. State Department’s 2006 Report on Human Trafficking, which discusses the camps in detail, “thousands of North Koreans live in slave-like conditions . . . receiving very little food and no medical assistance.”<sup>52</sup> At one camp, the North kills 20% to 25% of the inmate population every year.<sup>53</sup> During the summer months, disease runs rampant. Extremely meager food rations and harsh labor personifies the daily life of prisoners,<sup>54</sup> including logging, mining, or tending crops under severe conditions.<sup>55</sup> The camps subject some prisoners to life-threatening projects such as working in water-driven electric power plants where they must wade waist-deep into frozen water to gather stones.<sup>56</sup> Many prisoners die from starvation or accidents.

The camp system does not tolerate “rule infractions,” which include trying to find food or working too slowly. Such infractions result in severe punishments such as reduced food rations and detention in solitary confinement cells too small to permit lying or standing. The latter leads to loss of circulation, atrophy of the muscles, and ultimately death.<sup>57</sup> The system gives prisoners incentives to report each other’s infractions, creating hostility and animosity.

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<sup>48</sup> DAVID HAWK, U.S. COMM. FOR HUMAN RIGHTS IN NORTH KOREA, *THE HIDDEN GULAG: EXPOSING NORTH KOREA’S PRISON CAMPS* 15 (2003), available at <http://www.hrnk.org/HiddenGulag.pdf> (last visited Oct. 18, 2007).

<sup>49</sup> *Id.* at 24; see also Library of Congress, *supra* note 2.

<sup>50</sup> Robert Windrem, *Death, terror in N. Korea gulag: NBC News investigation uncovers horrific, extensive atrocities*, Jan. 15, 2003, available at <http://msnbc.msn.com/id/3071466>. See also HAWK, *supra* note 48, at 39.

<sup>51</sup> HAWK, *supra* note 48, at 17.

<sup>52</sup> U.S. Dep’t of State, *2006 Trafficking in Persons Report* 194, available at <http://www.state.gov/g/tip/rls/tiprpt/2006/> [hereinafter Report on Human Trafficking].

<sup>53</sup> Windrem, *supra* note 50.

<sup>54</sup> HAWK, *supra* note 48, at 25.

<sup>55</sup> 2005 Country Report, *supra* note 46.

<sup>56</sup> HAWK, *supra* note 48, at 28 (outlining An Hyuk’s testimony of being subject to construction work at a power plant, whereby his “duties entailed breaking ice and wading waist-deep into a frozen stream to gather stones, and laying boards to re-channel the water.” Scores of people died from the exposure and others lost appendages due to frostbite.).

<sup>57</sup> *Id.* at 38.

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Prisoners are driven to fight for scraps of food or deceased inmates' s clothing. They are kept in a state of semi-starvation and are driven to fight for scraps of food or deceased inmates' clothing. Prisoners attempt to eat plants, grass, rats, snakes, and frogs; such attempts can elicit beatings and punishments by guards.<sup>58</sup>

Other forms of torture include sleep deprivation and forcing prisoners to kneel motionless for several days. The prisoners are not allowed to clean themselves, resulting in flea and lice infestations that produce infections, sores, and diseases such as paratyphoid, a lice-borne disease that produces severe and prolonged diarrhea leading in turn to dehydration and eventual death.<sup>59</sup> In attempts to extract confessions, prisoners are suspended by handcuffed wrists from prison-cell bars and submerged waist-deep for extended periods of time in cold water-filled tanks.<sup>60</sup>

More serious infractions, such as attempts to escape, are sometimes punished by public execution. While there are public executions by hanging and firing squad, there are also reports of worse means, such as the case of a prisoner who was "tied and dragged behind a car in front of assembled prisoners until dead, after which time the other prisoners were required to pass by and place their hands on his bloodied corpse."<sup>61</sup> After one execution by a firing squad, other prisoners were required to further mutilate the corpse.<sup>62</sup> One prisoner was beaten to death with a stick covered in feces, as punishment for stealing a leather whip, soaking it in water, and attempting to eat it.<sup>63</sup>

### (ii) *Kyo-hwa-so*

*Kyo-hwa-so* literally means "a place to make a good person through re-education."<sup>64</sup> For the North's authorities, it means a place to rehabilitate criminals. In the *kyo-hwa-so*, prisoners are forced to memorize Kim Il-sung and Kim Jong-il speeches and undergo self-criticism sessions. Such exercises are aimed at purging individuals of any potential anti-North Korean mentality.<sup>65</sup>

The distinction between this type of imprisonment and the *kwan-li-so* is that in the *kyo-hwa-so* presumed offenders receive some sort of judicial process with a set sentence, rather than the life imprisonment of the *kwan-li-so* system.<sup>66</sup> Although the possibility of leaving within a certain time period is real, prison conditions are equally harsh and dangerous in the *kyo-hwa-so*.

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<sup>58</sup> *Id.* at 29.

<sup>59</sup> *Id.*

<sup>60</sup> See *id.* at 33, Kim Yong's testimony regarding imprisonment in *kwan-li-so* No. 14 and No. 18; see also Library of Congress, *supra* note 2.

<sup>61</sup> HAWK, *supra* note 48, at 35.

<sup>62</sup> *Id.*

<sup>63</sup> See *id.* at 37 (citing the hunger-crazed prisoner, Kal Li Yong).

<sup>64</sup> *Id.* at 41.

<sup>65</sup> *Id.* at 42; see also Library of Congress, *supra* note 2.

<sup>66</sup> HAWK, *supra* note 48, at 42.

(iii) *Repatriation Camps*

China, as previously discussed, sends many North Korean refugees back to North Korea, where they face harsh punishment.<sup>67</sup> North Korean officials interrogate returned refugees regarding possible contact with South Koreans and visits to churches. Detainees are rarely believed; beating and starvation to extract confessions remain commonplace.<sup>68</sup> Refugees are often incarcerated in short-term detention facilities and forced to work in life-threatening environments with little or no food. These short-term facilities leave an overwhelming number of returned refugees dead. *Jip-kyul-so* are short-term hard labor detention facilities for prisoners with up to six month sentences. *Ro-dong-dan-ryeon-dae* are facilities geared to accommodate the overflow of returned refugees.<sup>69</sup>

(iv) *Abduction*

North Korea has a long history of abduction. Reports suggest that thousands of South Koreans, both soldiers and civilians, were abducted during the Korean War. It is believed that North Korea still holds around 600 South Korean POWs.<sup>70</sup> Tragically, North Korea has continued with this pattern in the years following the war, kidnapping citizens of South Korea and Japan.<sup>71</sup> Five Japanese citizens were allowed to return in 2002, although some claim that others remain in North Korea.<sup>72</sup> It is unknown how many foreign citizens are currently held against their will in North Korea.

3. *Infanticide*

North Korea engages in systematic forced abortion and infanticide involving returned refugees. Witnesses have reported that, where babies were born to women returned from China and it was determined that the baby was conceived by a Chinese father, immediately after the birth the babies were either suffocated with a wet towel in front of the mother<sup>73</sup> or thrown into a basket with other babies, covered with a vinyl cloth and left to die.<sup>74</sup> In one instance, where healthy babies failed to die after two days in a basket, a North Korean agent

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<sup>67</sup> *Id.* at 56.

<sup>68</sup> *Id.* at 58.

<sup>69</sup> *Id.*

<sup>70</sup> U.S. Dept. of State, *U.S. Lawmaker Says China Returns North Korean Asylum Seekers* (Apr. 28, 2006), available at <http://usinfo.state.gov/eap/Archive/2006/Apr/28-891407.html>. Representative Christopher Smith noted that reports indicate North Korea abducted over 7,000 civilians during the Korean War and still holds 542 POWs and 485 civilians. *Id.*

<sup>71</sup> U.N. General Assembly, *Situation of Human Rights in the Democratic People's Republic of Korea*, ¶¶ 17-18, U.N. Doc. A/61/349 (Sep. 15, 2006) (Vítit Muntarbhorn, Special Rapporteur), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N06/525/88/PDF/N0652588.pdf> [hereinafter Special Rapporteur's Third Report]. See also Andrei Lankov, *Body snatching, North Korean style*, ASIA TIMES, Feb. 26, 2005, available at <http://www.atimes.com/atimes/Korea/GB26Dg01.html> (last visited Oct. 18, 2007). Lankov suggests that North Korea has abducted 486 South Korean civilians – mostly fishermen – since the war. He also notes that estimates for the number of Japanese abducted range up to 60. *Id.*

<sup>72</sup> *North Korea to Face Japan Sanctions*, BBC News Online, June 13, 2006, available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/5074234.stm> (last visited Oct. 18, 2007).

<sup>73</sup> See HAWK, *supra* note 48, at 61 (illustrating Choi Yong Hwa's testimony about the baby suffocation method).

<sup>74</sup> *Id.* at 62.

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stabbed them with forceps at a soft spot in their skulls to kill them.<sup>75</sup> Authorities force women to return to hard labor the day after these forced abortions.<sup>76</sup>

The goal of this policy is to preserve North Korean racial purity by preventing the birth of babies of possible half-Chinese ethnicity.<sup>77</sup> In practice, however, this policy has been aimed at all pregnant women repatriated to North Korea from China, regardless of whether the father was ethnically Chinese.<sup>78</sup> The U.S. State Department has reported on these accounts.<sup>79</sup> Information about this practice is naturally difficult to confirm, and the North Korean government has denied reports of infanticide.<sup>80</sup> However, there are a number of accounts from refugees confirming such practices.<sup>81</sup>

### 4. *Forced Labor and International Trade*

Reports indicate that the North Korean regime exports workers as low-skilled contract laborers to Mongolia, Russia, and the Czech Republic.<sup>82</sup> While technically no longer subject to the North Korean political system, these expatriate workers are not entirely free – North Korean “minders” may track their every move.<sup>83</sup>

Lately, international attention has focused on the Kaesong Industrial Complex, a joint economic venture between the North Korean regime and South Korean manufacturers. At Kaesong, corporations lease manufacturing space from North Korea and use North Korean labor. According to the U.S. State Department, 15 companies have leased space, with 11 manufacturing operations already established.<sup>84</sup> The South Korean government endorses the project as “a cooperative project benefiting both the South and the North, and at the same time, a peace project overcoming the wall of the Cold War through economic

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 66.

<sup>77</sup> *Id.* at 59.

<sup>78</sup> *Id.* Hawk notes that this policy is also used in the case of babies where the fathers are Chinese citizens of Korean ethnicity.

<sup>79</sup> Bureau of Democracy, Human Rights, and Labor, U.S. Dep’t of State, *Country Reports on Human Rights Practices – 2001, Korea, Democratic People’s Republic of (2002)*, available at <http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8330.htm>.

<sup>80</sup> James Brooke, *N. Koreans Talk of Baby Killing*, N.Y. Times (June 10, 2002), available at <http://query.nytimes.com/gst/fullpage.html?sec=health&res=9F00EEDF113DF933A25755C0A9649C8B63> (“More and more escapees from North Korea are asserting that forced abortions and infanticide are the norm in North Korean prisons, charges the country’s official Korean Central News Agency has denounced as ‘a whopping lie.’”).

<sup>81</sup> HAWK, *supra* note 48. Hawk provides details of eight eyewitnesses to ethnic infanticide in the North Korean prison camps, drawn from three cities. Hawk also notes that the NGO Human Rights Without Frontiers also interviewed several former detainees, and received similar testimony. Hawk’s report was cited by the U.S. State Department’s Bureau of Democracy, Human Rights, and Labor, in the 2005 Country Report, *supra* note 46.

<sup>82</sup> Report on Human Trafficking, *supra* note 52, at 194.

<sup>83</sup> *Id.*

<sup>84</sup> U.S. Special Envoy for Human Rights in North Korea Jay Lefkowitz, Statement to the House Committee on International Relations, Subcommittee on Asia and the Pacific, at 3 (Apr. 27, 2006), available at [http://wwwa.house.gov/international\\_relations/109/lef042706.pdf](http://wwwa.house.gov/international_relations/109/lef042706.pdf).

cooperation.”<sup>85</sup> Nevertheless, other countries, including the United States, have expressed concerns about the propriety of introducing Kaesong-manufactured goods into the international marketplace. The U.S. Special Envoy for Human Rights in North Korea, Jay Lefkowitz, explains:

In light of North Korea’s track record, what we know about what goes on in Kaesong bears greater scrutiny now of wage practices and some labor conditions. According to some reports, the companies pay a base wage of less than two dollars a day per worker. . . . These wages are paid to a North Korean agency in U.S. dollars, not to the workers themselves. The North Korean government deducts a 30 percent ‘social fee’ from the wage, and then pays the workers in North Korean won at the official exchange rate. We do not know how much the workers actually receive.<sup>86</sup>

The North Korean regime keeps most, if not all, of the foreign exchange and pays the workers in nonconvertible North Korean currency.<sup>87</sup> The debate over this exchange mechanism has fueled a dispute between South Korea and the United States over whether or not Kaesong-manufactured goods are to be labeled as domestic South Korean products for the purpose of international trade.<sup>88</sup>

### 5. Food Shortages

As discussed earlier, the people of North Korea suffered from famine and acute food shortages throughout the 1990s; shortages which continue to this day. The actions of the North Korean government exacerbated the effects of the famine and the subsequent food crisis by denying the existence of the problem and imposing ever-tighter controls on the population to hide the true extent of the disaster. North Korea remains dependent on food aid to feed its people but government policy still prevents the swift, equitable, and intended distribution of that aid. Furthermore, with the population denied freedom of movement, its ability to search for food is gravely limited.<sup>89</sup>

The regime established the Public Distribution System (the “PDS”), which was meant to be a system through which subsidized rations would be distributed on a gram-per-day per person basis, according to the person’s occupation. Access to state food supplies in North Korea – including domestic agricultural production, imports and aid – is determined by status, with priority given to government and ruling party officials, important military units and urban

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* See also Human Rights Watch, *North Korea: Workers' Rights at the Kaesong Industrial Complex* at 2 (Oct. 2006), available at <http://hrw.org/backgrounder/asia/korea1006/korea1006web.pdf> (last visited Oct. 18, 2007) (“Although the KIC Labor Law addresses certain workers' rights, many of the most fundamental rights are missing, including the right to freedom of association and collective bargaining, the right to strike, the prohibition on sex discrimination and sexual harassment, and the ban on harmful child labor. Absent legal protections requiring that these rights be respected, Human Rights Watch is concerned that they may be violated with impunity.”).

<sup>87</sup> Report on Human Trafficking, *supra* note 52, at 195.

<sup>88</sup> “U.S. report assails pay, forced labor in North,” *JoongAng Daily*, June 7, 2006, available at <http://joongangdaily.joins.com/200606/06/200606062152084109900090409041.html>.

<sup>89</sup> Amnesty Int’l, *Starved of Rights: Human Rights and the Food Crisis in the Democratic People’s Republic of Korea (North Korea)*, Jan. 17, 2004, available at <http://web.amnesty.org/library/print/ENGASA240032004> [hereinafter *Starved of Rights*].

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populations, in particular residents of Pyongyang.<sup>90</sup> The system has never covered workers on cooperative farms, who depend on their own production.

The World Food Programme (“WFP”) has characterized the situation in North Korea since 1998 as a “food crisis.” According to the WFP, 6.5 million North Koreans, or one-third of its population – mainly women and children – required food assistance for the calendar year of 2004. More than four out of every ten children in North Korea suffer from chronic malnutrition. In addition, the 2002 Nutrition Assessment of the DPRK shows that one-third of mothers surveyed were malnourished and anemic.<sup>91</sup>

### 6. Women’s Rights

Discrimination against women in North Korea is pervasive. While the North Korean Constitution states that “women hold equal social status and rights with men,” few women have reached high levels of the Party or the Government, despite the fact that women are represented proportionally in the labor force.<sup>92</sup>

There have been widespread reports of trafficking in North Korean women and young girls into China. Some are sold by their families or by kidnappers as wives or concubines to men in China; others flee to escape starvation and deprivation in North Korea. Many such women, unable to speak Chinese, are held as virtual prisoners and some are forced to work as prostitutes.<sup>93</sup>

Moreover, guards in the prison system sexually abuse female prisoners.<sup>94</sup> Victims and witnesses have stated that prison officials rape female prisoners in prison camps and detention facilities.<sup>95</sup> The North Korean authorities fail to acknowledge differences in women’s physical and mental condition compared to men. Also, within the security services, only men interrogate the women. For example, while investigating trafficking, security personnel frequently abuse women with beatings and insulting remarks.<sup>96</sup> Female guards are not used in the imprisonment facilities and, as a result, male guards supervise the women prisoners. Reports indicate that women are denied access to shower facilities even during menstruation.

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<sup>90</sup> *Id.*

<sup>91</sup> UNICEF/WFP/Central Bureau of Statistics, *Nutrition Assessment 2002 D.P.R. Korea*, at 27-28, available at [www.unicef.org/dprk/nutrition\\_assessment.pdf](http://www.unicef.org/dprk/nutrition_assessment.pdf) (last visited Oct. 18, 2007).

<sup>92</sup> U.S. Dep’t of State, *Country Reports on Human Rights Practices – 2003: Democratic People’s Republic of Korea* § 5, available at <http://www.state.gov/drl/rls/hrrpt/2003/27775.htm> [hereinafter 2003 Country Report].

<sup>93</sup> *Id.* § 6.

<sup>94</sup> *Id.* § 1.

<sup>95</sup> HAWK, *supra* note 48, at 72.

<sup>96</sup> Women’s Human Rights in North Korea (untitled report), available at [http://www.nkhumanrights.or.kr/bbs/board2/files/227\\_2nd-nkhr\(e18\).doc](http://www.nkhumanrights.or.kr/bbs/board2/files/227_2nd-nkhr(e18).doc) (last visited Aug. 27, 2006).

## 7. *Children's Rights*

Children suffer from human rights violations in North Korea. While North Korea provides compulsory education for all children until the age of fifteen, the government denies educational opportunities to some children based on their families' status. The regime also punishes children who, as a result of transgressions by family members under the loyalty classification system and the principle of "collective retribution" suffer for actions they did not commit.<sup>97</sup>

Children are the objects of intense political indoctrination, particularly through the state education system. Even mathematics textbooks propound party dogma. In addition, foreign visitors and academic sources report that children from an early age are subject to weekly mandatory military training and indoctrination at schools. The North Korean Constitution prohibits work by children under the age of 16 years. There is, however, no prohibition on forced labor by children, allowing school children to be assigned to factories or farms for short periods to help meet production goals.<sup>98</sup>

The minimum age for voluntary enlistment in the armed forces is 16, but children of earlier ages are taught to assemble and dismantle weapons.<sup>99</sup> Prisoners are routinely executed in public, often in the presence of children.<sup>100</sup> In addition, entire families, including children, have been imprisoned when one member of the family is accused of a crime.<sup>101</sup>

Evidence shows that children still suffer disproportionately from the persistent food shortages that have plagued the North. The United Nations World Food Programme reported feeding three million children during 2003. A nutrition survey carried out in 2002 by UNICEF and the WFP, in cooperation with the North Korean government, found that in a sample of 6000 children, 20 percent were underweight, 39 percent were stunted, and 8 percent were severely malnourished.<sup>102</sup>

### **D. Conclusion**

These facts indicate the magnitude of the problem in North Korea and the importance of action. In the following sections, this report will analyze the legal options available in the case of North Korea, using this factual background to establish the applicability of each option.

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<sup>97</sup> 2003 Country Report, *supra* note 92, § 5.

<sup>98</sup> *Id.* § 6.

<sup>99</sup> Amnesty International 2005 Report on North Korea, *available at* <http://web.amnesty.org/report2005/prk-summary-eng>.

<sup>100</sup> *See, e.g.*, Mark Honigsbaum, *Killing fields*, THE GUARDIAN (London) Oct. 17, 2005, at 16, *available at* <http://www.guardian.co.uk/g2/story/0,,1593701,00.html> (last visited Oct. 18, 2007). A video smuggled out of North Korea in 2005 shows such an execution. *Id.*

<sup>101</sup> U.S. Dep't of State, Country Report on Human Rights Practices – 2004: Democratic People's Republic of Korea § 1, *available at* <http://www.state.gov/g/drl/rls/hrrpt/2004/41646.htm> [hereinafter 2004 Country Report].

<sup>102</sup> 2003 Country Report, *supra* note 92, § 5.



## II. INTERNATIONAL CRIMINAL COURT

### A. Introduction

The International Criminal Court (“ICC”) was established by the Rome Statute (“Statute”), which entered into force in 2002, to provide a mechanism to hold individuals responsible for gross human rights violations.<sup>103</sup> Following the temporary criminal tribunals established for Rwanda and Yugoslavia in the 1990s, the ICC was intended to serve as a permanent international criminal tribunal.<sup>104</sup> The ICC has not yet tried a case, but at the time of publication is investigating four international situations.<sup>105</sup> While ICC prosecution is a potential avenue for enforcing human rights in states with bad human rights records, the ICC has jurisdiction only over the crimes enumerated in the Statute, and only in specific situations. Thus, it is a promising but complicated avenue to consider in the case of North Korea.

### B. Standards

Under the Statute, the ICC can act in four situations.<sup>106</sup>

- 1) Where crimes have been committed in the territory of a state which has ratified the Statute;
- 2) Where crimes have been committed by a citizen of a state which has ratified the Statute;
- 3) Where a state which has not ratified the Statute has made a declaration accepting the court’s jurisdiction over the crime;
- 4) Where crimes have been committed which threaten or breach international peace and security, and the U.N. Security Council has referred the situation to the ICC pursuant to U.N. Charter Chapter VII.

The ICC will have jurisdiction over a specific set of offenses: genocide, crimes against humanity, war crimes, and aggression.<sup>107</sup> The offense of aggression has not yet been defined, and it will not be actionable until such time as it is. Also, the ICC will only have jurisdiction over acts committed after the entry into force of the Statute, which was July 1, 2002.<sup>108</sup> This means that an NGO presenting evidence of criminal acts in North Korea needs to concentrate on events occurring after that date.

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<sup>103</sup> See Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), *available at* [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf) [hereinafter Statute]. See the Statute preamble for a description of the ICC’s goals.

<sup>104</sup> See Coalition for the International Criminal Court, History of the ICC, *available at* <http://www.iccnw.org/?mod=icchistory> (last visited Aug. 30, 2006).

<sup>105</sup> International Criminal Court, Situations and Cases, *available at* <http://www.icc-cpi.int/cases.html> (last visited Aug. 30, 2006).

<sup>106</sup> See Statute, *supra* note 103, art. 12(2)-12(3); art. 13(b).

<sup>107</sup> See *id.* art. 5(1).

<sup>108</sup> See *id.* art. 11.

North Korea is not a party to the Statute and has not made a declaration accepting the court's jurisdiction.<sup>109</sup> Thus, options two and three listed above are not available in this case. The first option is possible, but unlikely, as it requires a North Korean to commit a human rights atrocity in another state. Of North Korea's neighbors, Russia has signed (but not ratified) the Statute, while South Korea ratified the Statute in 2002.<sup>110</sup> Jurisdiction could thus theoretically be achieved if a North Korean abuse was committed in territory belonging to South Korea. This has occurred in the past: for example, North Korea has abducted Japanese and South Korean citizens, as described above in facts section I(C)(2)(a)(iv). However, given the furor created by these incidents it is not clear that North Korea is likely to repeat this activity. One possibility is that, if North Korea is still holding past abductees, such continued detention could constitute a violation under the Statute. The continued detention of P.O.W.s from the Korean War might also so qualify, although there are serious evidentiary obstacles to both these possibilities. The most likely option for ICC action, however, is option four, which would require referral to the ICC Prosecutor by the Security Council.<sup>111</sup> It follows that the best strategy for an NGO to follow to bring about ICC action is to lobby the Security Council in support of such a referral. The process of lobbying the Security Council is discussed in more detail in the next section of this report. One way for NGOs to advocate for Security Council action is to present evidence indicating the commission of the offenses proscribed by the Statute.

The Statute provides for the principle of complementarity, which states that ICC jurisdiction is complementary, rather than superior, to national judicial systems. This means the ICC will have no jurisdiction where a state's domestic court system is adequately addressing the alleged crime.<sup>112</sup> Thus, the ICC will only act where the state that has jurisdiction over the case is "unwilling or unable genuinely to carry out the investigation or prosecution" and the case is of sufficient gravity to justify further action by the ICC.<sup>113</sup> The principle of complementarity, however, should not be an obstacle to pursuing a case regarding North Korea, since Kim Jong-il dominates all governing functions.<sup>114</sup> Consequently, there are serious doubts about the independence of the judiciary,<sup>115</sup> making it unlikely that North

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<sup>109</sup> Coalition for the Int'l Crim. Ct., Factsheet: States Parties to the Rome Statute of ICC, available at <http://www.iccnw.org/documents/RATIFICATIONSbyUNGroups.pdf> (last visited Oct. 18, 2007).

<sup>110</sup> *Id.*

<sup>111</sup> For the other options, a case may be pursued upon referral to the Prosecutor by a member state, or by the Prosecutor's own *proprio motu* investigation, as described in articles 13, 14 and 15.

<sup>112</sup> See Statute, *supra* note 103, arts. 1, 17.

<sup>113</sup> *Id.* art. 17(1)(a).

<sup>114</sup> U.N. Comm'n on Human Rights, *Situation of Human Rights in the Democratic People's Republic of Korea, Report Submitted by the Special Rapporteur, Vitit Muntarbhorn*, ¶ 21, U.N. Doc. E/CN.4/2005/34 (Jan. 10, 2005), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G05/101/97/PDF/G0510197.pdf> [hereinafter Special Rapporteur's First Report] ("[T]he country is unique in the world community since power is concentrated absolutely at the top, with total, pervasive control exercised by the State over the population."); see also Human Rights Watch, *Human Rights Overview North Korea*, available at <http://hrw.org/english/docs/2006/01/18/nkorea12255.htm> (January 18, 2006) (last visited Aug. 27, 2006).

<sup>115</sup> *Concluding Observations*, *supra* note 38, ¶ 22 ("The Committee remains concerned about constitutional and legislative provisions that seriously endanger the impartiality and independence of the judiciary, notable that the Central Court is accountable to the Supreme People's Assembly . . . article 129 of the Criminal Code subjects judges to criminal liability for handing down 'unjust judgments'"); see also Special Rapporteur's First Report, *supra* note 113, ¶ 41. The Special Rapporteur notes that there are reports that there is no independent judiciary, although he is unable to verify this fact.

Korea's own justice system would genuinely pursue human rights abuses carried out as State policy.

### C. Violations

The three kinds of crimes over which the ICC can exercise jurisdiction – genocide, crimes against humanity, and war crimes – each have their own criteria. They will be considered in turn. In the discussion of possible violations, it is important to recall that the ICC only has jurisdiction over acts that have occurred since July 1, 2002, as explained above. Thus, NGOs gathering evidence of North Korean crimes will have to present facts showing recent violations.

#### 1. *Genocide*

The Statute's Article 6 defines 'genocide' as any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

- 1) Killing members of the group;
- 2) Causing serious bodily or mental harm to members of the group;
- 3) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- 4) Imposing measures intended to prevent births within the group;
- 5) Forcibly transferring children of the group to another group.

An individual may be found guilty of genocide not only for committing any of these five acts, but also for inciting others to do so. Statute Article 25 states that a person shall be criminally responsible and liable for punishment if that person "directly and publicly incites others to commit genocide."<sup>116</sup> In the case of North Korea, the government has taken various actions that could possibly be deemed to constitute genocide as defined by the Statute (or, at least, to warrant further examination to determine if they so qualify). These atrocities, described below, are presented as illustrative examples of the type of conduct that should be considered, although the evidence does not definitively establish that they reach the high threshold of genocide.

One example is that North Korean forces have killed babies fathered by non-Koreans (usually Chinese) and have forced women pregnant with such children to have abortions.<sup>117</sup> North Korean authorities, including nurses and prison guards, have also killed newborn babies.<sup>118</sup> The argument could be made that babies of Chinese fathers could constitute a group on national, ethnic, or racial grounds. These actions could then qualify as two of the acts considered genocide: killing members of a group and attempting to prevent group births. Although the scope of infanticide is unknown, genocide includes acts committed to destroy a group "in part." However, this raises questions of group definition, a common concern with allegations of genocide. A threshold question would be whether this should be viewed as an atrocity committed against the Chinese, or against the (substantially smaller) group of Chinese-Koreans. It is not clear whether this second group would be viewed as a

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<sup>116</sup> Statute, *supra* note 103, art. 25(3)(e).

<sup>117</sup> HAWK, *supra* note 48, at 59-72.

<sup>118</sup> See Section I(C)(3), *supra*, for more details of both forced abortions and infanticide.

protected group for purposes of the Statute. For example, the ICC could determine that the progeny of two separate national/ethnic/racial groups do not themselves constitute a third such group.

Religious persecution in North Korea is another example of possible genocide. Members of underground Christian churches have been executed,<sup>119</sup> and members of religious groups are frequently imprisoned.<sup>120</sup> There have been a number of similar acts, noted in the facts section above.<sup>121</sup> These actions could conceivably constitute genocide against Christians under the criteria of killing group members, causing serious harm to the members, and inflicting conditions to bring about the group's physical destruction.

One of the requirements of genocide is that the perpetrator act with an intent to destroy the group, 'as such.' That is, the actions must be driven by a desire to eliminate the group as a national, ethnic, racial or religious group, and not from a desire to achieve some other goal, or to attack members of the group based on some other shared characteristic (for example, opposition to the government or a desire to emigrate). Meeting this criterion does not require direct proof of intent, as the ICC Elements of Crimes allow for intent to be inferred from actions.<sup>122</sup> In this connection, it is noteworthy that atrocities have been specifically targeted at half-Chinese babies<sup>123</sup> and Christians.<sup>124</sup>

However, since it is such a universally-deplored crime, there are high standards to be met before a court accepts the label of 'genocide,' and it is uncertain how the ICC would treat these cases. The genocidal act must be either carried out "in the context of a manifest pattern of similar conduct," or capable of itself effecting "such destruction."<sup>125</sup> The organized, systematic nature of the atrocities committed against half-Chinese babies and against Christians over a period of years could conceivably establish a manifest pattern of such conduct, although this is not certain. An NGO analysis of possible genocide should carefully consider the requirements that the perpetrator act with intent to destroy the group 'as such,' and that the acts be part of a larger pattern of conduct. The group Christian Solidarity Worldwide ("CSW") has released a report addressing conditions within North Korea in terms of genocide. CSW found that there was insufficient evidence to establish whether forced abortion and infanticide constituted genocide. However, CSW concluded that there was sufficient evidence to show that North Korean persecution of Christians did meet the legal standard.<sup>126</sup> It should be noted, though, that there are no clear parallel cases to judge

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<sup>119</sup> 2005 Religious Freedom Report, *supra* note 44; EYEWITNESS ACCOUNTS, *supra* note 31, at 40-47.

<sup>120</sup> 2002 Religious Freedom Report, *supra* note 31, § II; EYEWITNESS ACCOUNTS, *supra* note 31, at 35-36, 45-47, 86-90.

<sup>121</sup> See Section I(C)(1), *supra*, for further details.

<sup>122</sup> See Elements of Crimes, Official Records of The First Session of The Assembly of States Parties to The Rome Statute of The International Criminal Court, September 3-10, 2002, U.N. Doc. ICC-ASP/I/3, at 112 [hereinafter Elements of Crimes].

<sup>123</sup> HAWK, *supra* note 48, at 59-72.

<sup>124</sup> EYEWITNESS ACCOUNTS, *supra* note 31.

<sup>125</sup> Elements of Crimes, *supra* note 122, at 113-14.

<sup>126</sup> See CHRISTIAN SOLIDARITY WORLDWIDE, NORTH KOREA: A CASE TO ANSWER, A CALL TO ACT (2007), available at [http://www.csw.org.uk/Countries/NorthKorea/Resources/North\\_Korea-A\\_Case\\_to\\_Answer-A\\_Call\\_to\\_Act.pdf](http://www.csw.org.uk/Countries/NorthKorea/Resources/North_Korea-A_Case_to_Answer-A_Call_to_Act.pdf) (last visited Oct. 18, 2007). This report lays out the legal framework for genocide, and concludes that the persecution of Christians in

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whether the hostility towards religion in North Korea would meet the high standard of genocide in the eyes of the ICC. Further, beyond evidentiary issues, jurisdictional issues would affect the ICC's consideration of this issue.<sup>127</sup>

Note that the ICC Elements of Crimes provides full details of the necessary components of each of the five types of genocide.<sup>128</sup>

## 2. Crimes Against Humanity

The Statute's Article 7(1) states that crimes against humanity include any of the following acts committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack:

- 1) Murder;
- 2) Extermination;
- 3) Enslavement;
- 4) Deportation or forcible transfer of population;
- 5) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- 6) Torture;
- 7) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- 8) 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;
- 9) Enforced disappearance of persons;
- 10) The crime of apartheid;
- 11) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>129</sup>

The requirement that an act be part of an "[a]ttack directed against any civilian population" means the act must be part of conduct in which that act is committed multiple times against the civilian population to further a State policy.<sup>130</sup> The Statute also provides definitions for most of the individual crimes included in this section. While space does not permit those

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North Korea includes many of the actions specified in the definition of genocide and that the targeted nature of those actions indicates genocidal intent. *Id.* at 61-67.

<sup>127</sup> The CSW report qualifies its finding that persecution of Christians constitutes genocide with the observation that intent is most easily shown for the 1950s and 1960s. *Id.* at 67. As explained above, such actions would not fall within the jurisdiction of the ICC, which excludes acts committed before 2002. *See also id.* at 78-79, on ICC jurisdiction.

<sup>128</sup> Elements of Crimes, *supra* note 122, at 112-15.

<sup>129</sup> Statute, *supra* note 103, art. 7.

<sup>130</sup> *Id.* art. 7(2).

definitions to be presented in this paper, they should be consulted in drafting a report specifically discussing North Korean crimes against humanity.<sup>131</sup>

Proving crimes against humanity should be significantly easier than proving genocide. Crimes against humanity usually need only be committed against “any civilian population,” while genocide requires actions committed against national, ethnic, racial, or religious groups.<sup>132</sup> In addition, genocide requires a specific intent to destroy a particular group, while crimes against humanity require only the intent to commit the act plus the knowledge that the conduct was part of a widespread or systematic attack against a civilian population.<sup>133</sup> The question here is whether North Korea’s conduct towards its own populace over several years constitutes such an attack. Absent ICC precedent, it is difficult to predict how the court would interpret this issue. It seems plausible that North Korea’s actions would qualify.<sup>134</sup>

In the case of North Korea, there are a number of abuses that fall within the various categories of crimes against humanity. The extensive prison camp system holding hundreds of thousands of political prisoners is one case in point. There have been a number of offenses committed against those prisoners.<sup>135</sup> As discussed *supra* in Section I(C)(2), those offenses include the murder of inmates; enslavement of inmates by using them for forced labor; forcible transfer to these camps; imprisonment in violation of international law; rape and other sexual violence; persecution against a group on political, national, or religious grounds in connection with other crimes; enforced disappearance of persons; and other inhumane acts.<sup>136</sup> The *kwan-li-so* system itself probably qualifies as a widespread attack against a civilian population.<sup>137</sup>

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<sup>131</sup> *Id.* In addition, for a general discussion of the definition of crimes against humanity, see FAILURE TO PROTECT, *supra* note 1, at 128-30.

<sup>132</sup> Statute, *supra* note 103, art. 7(1)(h) is the exception to this requirement, as it covers groups identifiable on racial, national, ethnic, and religious, political, cultural, and gender grounds (which is still much broader than the genocide requirement).

<sup>133</sup> Elements of Crimes, *supra* note 122, at 116-24. The requirement of perpetrator knowledge that the conduct was part of a widespread or systematic attack is included as an element of each of the individual crimes against humanity.

<sup>134</sup> “Attack directed against a civilian population’ . . . is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack.” *Id.* at 116. In the case of North Korea, there has been “multiple commission” of the individual crimes against humanity enumerated in the Statute, which was carried out as part of organized State policy for decades.

<sup>135</sup> See U.N. C.H.R. Res. 2004/13, *Situation of Human Rights in the Democratic People’s Republic of Korea*, ¶ 1, U.N. Commission on Human Rights, 50th Mtg., U.N. Doc. E/CN.4/2004/127 (Apr. 15, 2004), available at [http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-2004-13.doc](http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2004-13.doc) (noting the existence of torture, detention, prison camps, and forced labor); see also HAWK, *supra* note 48, at 24 (on the numbers imprisoned in the camps) and in general on the abuses within the political prison system; Human Rights Watch, *supra* note 39 (“It has been estimated that up to 200,000 political prisoners toil in these prison camps in North Korea. They are often tortured, starved, and forced to perform slave labor in mining, logging and farming enterprises. For many, imprisonment is a death sentence.”).

<sup>136</sup> See facts sections, *supra*, “Present Era – Torture in North Korea,” “Present Era – Women in North Korea,” and “Present Era – Religion in North Korea” for more details.

<sup>137</sup> Elements of Crimes, *supra* note 122, at 116. “Attack directed against a civilian population’ in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

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In addition to the abuses in the political prison system, the acts committed against religious and ethnic groups described in sections I(C)(1)-(2) could also constitute crimes against humanity. For example, the crime of persecution occurs where a person is deprived of a fundamental right because of their membership in a group.<sup>138</sup> The denial of the right to practice a religion may be such a violation of a fundamental right.<sup>139</sup> The infanticide described in section I(C)(3) constitutes ethnic persecution. The torture, killing, and imprisonment of religious believers constitute religious persecution.<sup>140</sup> These actions may also qualify as the crimes of murder or extermination. Forced abortion may qualify as sexual violence, in line with forcible sterilization. Moreover, these acts were likely committed with knowledge on the part of the regime that the act was part of a systematic attack on a civilian population.

Another possibility is that the North Korean policies in response to the famine constitute “other inhumane acts.”<sup>141</sup> As described above in facts section I(C)(5), an unknown number of North Koreans died as a result of famine in the 1990s,<sup>142</sup> and North Korea has undertaken policies which threaten to repeat that disaster. In order to fall within ICC jurisdiction, evidence would at least have to show that thousands have died since 2002.<sup>143</sup> It would be necessary to establish that government policies were not merely misguided, but were part of a known or intended “attack” against civilians.

Note that the ICC Elements of Crimes provide full details of the necessary components of each of the crimes against humanity.<sup>144</sup>

### 3. War Crimes

The Statute provides a very detailed definition of war crimes. Article 8 states that the ICC shall have jurisdiction over war crimes “in particular when committed as part of a plan or

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The acts need not constitute a military attack.” *Id.* The crimes involving the political prison system include repeated acts against civilians as part of regime policy.

<sup>138</sup> *Id.* at 122. The Elements stipulate that this crime occurs when the perpetrator “severely deprived, contrary to international law, one or more persons of fundamental rights,” where the person was targeted because of their membership in a political, racial, national, ethnic, cultural, religious, or gender group (or some other universally recognized category).

<sup>139</sup> There are many instances of regime actions designed to prevent religious activity. See EYEWITNESS ACCOUNTS, *supra* note 31, at 40-48; U.N. Comm’n on Human Rights, *Report of the Special Rapporteur on the situation of human rights in the Democratic People’s Republic of Korea, Vitit Muntarbhorn*, ¶ 19 & n.5, U.N. Doc. E/CN.4/2006/35 (Jan. 23, 2006), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G06/103/75/PDF/G0610375.pdf> [hereinafter Special Rapporteur’s Second Report] (citing and agreeing with EYEWITNESS ACCOUNTS); see also Special Rapporteur’s First Report, *supra* note 114, ¶¶ 58-59.

<sup>140</sup> See EYEWITNESS ACCOUNTS, *supra* note 31, at 47 (noting that religious beliefs, such as possession of a Bible, led to imprisonment or execution).

<sup>141</sup> Elements of Crimes, *supra* note 122, at 124.

<sup>142</sup> Human Rights Watch, *North Korea: Policy Changes May Foster New Hunger* (May 4, 2006), available at <http://hrw.org/english/docs/2006/05/03/nkorea13292.htm> (last visited Oct. 18, 2007). Human Rights Watch states that researchers believe the famine ten years ago resulted in between 580,000 and 3 million deaths. *Id.*

<sup>143</sup> See Elements of Crimes, *supra* note 122, at 124. “Other inhumane acts” must be similar, in nature and gravity, to the named crimes against humanity.

<sup>144</sup> See *id.* at 116-24.

policy or as part of a large-scale commission of such crimes.”<sup>145</sup> War crimes committed as part of an international conflict include grave breaches of the Geneva Conventions of 12 August 1949 and other serious violations of the law of war. The following acts constitute grave breaches of the Geneva Conventions:

- 1) willful killing;
- 2) torture or inhuman treatment;
- 3) willfully causing great suffering, or serious injury to body or health;
- 4) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- 5) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- 6) willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- 7) unlawful deportation or transfer or unlawful confinement;
- 8) taking of hostages.

There are a variety of other serious violations of the law of war which also constitute war crimes. These include:

- 1) killing or wounding a combatant who has surrendered;
- 2) subjecting persons in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind;
- 3) killing or wounding treacherously individuals belonging to the hostile nation or army;
- 4) committing outrages upon personal dignity, in particular humiliating and degrading treatment.<sup>146</sup>

Regarding intent, all these offenses require, at a minimum, that the perpetrator act with an awareness of facts that established that an armed conflict existed. The individual offenses have further requirements, such as that the perpetrator have an awareness that the victims had protected status.<sup>147</sup>

There is evidence that North Korea still holds prisoners of war from the Korean War of 1950-1953.<sup>148</sup> The South Korean Ministry of National Defense estimates that 486 captives are still alive in North Korea.<sup>149</sup> These captives likely undergo the same atrocities as other prisoners (as described above in the section on crimes against humanity). While crimes against

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<sup>145</sup> Statute, *supra* note 103, art. 8(i).

<sup>146</sup> *Id.* art. 8. Note that the crimes listed are only a sampling; the Statute contains a more complete listing of offenses constituting war crimes.

<sup>147</sup> See Elements of Crimes, *supra* note 122, at 125-55, for a listing of the various state of mind requirements for each of the war crimes. Note that awareness “of factual circumstances that established the existence of an armed conflict” is a requirement for all the war crimes.

<sup>148</sup> See facts section “Present Era – Abduction,” *supra*, above for more details.

<sup>149</sup> Special Rapporteur’s Second Report, *supra* note 139, ¶ 53; see also Human Rights Watch, *Human Rights Overview—North Korea* (2006), available at <http://www.hrw.org/english/docs/2006/01/18/nkorea12255.htm> (last visited Oct. 18, 2007) (“According to South Korea’s Unification Ministry, a total of 3,790 South Koreans were kidnapped and taken to North Korea between 1953 and 1995, of whom 486 remain detained.”); Lankov, *supra* note 71.

humanity apply only to actions committed against civilians, war crimes include abuses committed against prisoners of war, soldiers, and civilians. Possible breaches of the laws of war in the case of North Korea include torture or inhuman treatment; deprivation of the right to a fair trial; unlawful confinement; subjecting prisoners to medical experiments; or committing outrages upon personal dignity.

Note that the ICC Elements of Crimes provide full details of the necessary components of each of the war crimes.<sup>150</sup>

#### **D. Institutional Process**

The Statute provides that the Security Council may refer a case to the ICC Prosecutor under Chapter VII of the U.N. Charter, which provides that the Security Council shall act to prevent threats to the peace, breaches of peace, and acts of aggression.<sup>151</sup> The referral of a case by the Security Council must be enacted by resolution, which requires affirmation by nine of the fifteen members, without the opposition of any of the five Permanent Members of the Security Council (USA, UK, France, Russia, China).<sup>152</sup> At that point, the Prosecutor will consider the case and determine if there is reasonable basis to commence an investigation, which must be approved by the Pre-Trial Chamber.<sup>153</sup> Following the commencement of the investigation, the Prosecutor may apply to the Pre-Trial Chamber for an arrest warrant or summons.<sup>154</sup> If the arrest warrant or summons leads to the individual appearing before the court, the Pre-Trial Chamber holds a hearing to determine if the case should proceed.<sup>155</sup> If the case proceeds, then a Trial Chamber shall be assembled to try the case.<sup>156</sup> Should the accused be found guilty, then the ICC may sentence the accused to imprisonment (with the maximum sentence being life imprisonment), levy a fine, or order reparations to be paid to victims.<sup>157</sup>

The Prosecutor is currently conducting three investigations, following State referrals by the Democratic Republic of the Congo and Uganda, and Security Council referral of the situation in Sudan.<sup>158</sup> There has been a fourth referral from the Central African Republic.<sup>159</sup> The situation in Sudan provides a possible model for Security Council referral of North Korea. In the case of Sudan, the U.N. went through a lengthy process before referring the

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<sup>150</sup> See Elements of Crimes, *supra* note 122, at 125-55.

<sup>151</sup> U.N. Charter arts. 39-51.

<sup>152</sup> *Id.* arts. 23, 27.

<sup>153</sup> Statute, *supra* note 103, art. 15.

<sup>154</sup> *Id.* art. 58.

<sup>155</sup> *Id.* art. 61.

<sup>156</sup> *Id.* arts. 61-64.

<sup>157</sup> *Id.* arts. 75, 77.

<sup>158</sup> Coalition for the International Criminal Court, Cases and Situations, *available at* <http://www.iccnw.org/?mod=casessituations> (last visited Aug. 27, 2006).

<sup>159</sup> *Id.*

matter to the Prosecutor.<sup>160</sup> A number of Security Council resolutions addressing the situation in Darfur had already been passed.<sup>161</sup> A U.N. Advance Mission had been established.<sup>162</sup> The Economic and Social Council had appointed an expert to consider the situation.<sup>163</sup> Various Special Rapporteurs reported on the conflict in Darfur, as did a number of NGOs and the Permanent Mission.<sup>164</sup> An International Commission of Inquiry reported on the extent of human rights abuses in Sudan.<sup>165</sup> Finally, the Security Council determined that the situation posed a threat to international peace and security, and referred the case to the Prosecutor.<sup>166</sup>

It is important to consider that the ICC prosecutes individuals. The Security Council can refer the Prosecutor's attention to general conflicts (as with Sudan).<sup>167</sup> However, the Prosecutor, if he moves ahead, must bring charges against specific individuals. Any individual charged would have to meet all the criteria for the respective offense.<sup>168</sup> This would include participating in the act and possessing the requisite state of mind: for genocide, the specific intent to destroy the group; for crimes against humanity, knowledge that the conduct was part of a widespread or systematic attack on civilians; and for war crimes, at least knowledge of armed conflict. Such an individual would most likely be a military officer, political official, or Kim Jong-il himself.

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<sup>160</sup> See United Nations Mission in the Sudan, *Background*, available at <http://www.un.org/Depts/dpko/missions/unmis/background.html> (last visited Aug. 27, 2006).

<sup>161</sup> S.C. Res. 1547, U.N. Doc. S/Res/1547 (June 11, 2004); S.C. Res. 1556, U.N. Doc. S/Res/1556 (July 30, 2004); S.C. Res. 1564, U.N. Doc. S/Res/1564 (Sept. 18, 2004); S.C. Res. 1574, U.N. Doc. S/Res/1574 (Nov. 19, 2004); S.C. Res. 1585, U.N. Doc. S/Res/1585 (Mar. 10, 2005); S.C. Res. 1588, U.N. Doc. S/Res/1588 (Mar. 17, 2005); S.C. Res. 1590, U.N. Doc. S/Res/1590 (Mar. 24, 2005); S.C. Res. 1591, U.N. Doc. S/Res/1591 (Mar. 29, 2005); S.C. Res. 1593, U.N. Doc. S/Res/1593 (Mar. 31, 2005).

<sup>162</sup> S.C. Res. 1547, *supra* note 161.

<sup>163</sup> U.N. Economic & Social Council [ECOSOC], *Decision 2004/229: Situation of human rights in the Sudan*, U.N. Doc. E/2004/INF/2/Add.1 (June 15, 2004), available at <http://www.un.org/docs/ecosoc/documents/2004/decisions/edec2004-229.pdf>.

<sup>164</sup> See, e.g., ECOSOC–Commission on Human Rights, *Note verbale dated 13 May 2004 from the Permanent Mission of the Sudan to the United Nations addressed to the Office of the High Commissioner for Human Rights*, U.N. Doc. E/CN.4/2005/G/3 (June 4, 2004), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G04/144/01/PDF/G0414401.pdf>; *Violence against women, its causes and consequences, Report of the Special Rapporteur, Yakin Ertürk*, U.N. Doc. E/CN.4/2005/72/Add.5 (Dec. 23, 2004), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G04/169/44/PDF/G0416944.pdf>; *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World*, U.N. Doc. E/CN.4/2004/NGO/203 (Mar. 11, 2004), available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/f247c38438f0ddcdc12569910037e669/d235ab6c54272711c1256e63003758f4/\\$FILE/G0411779.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/f247c38438f0ddcdc12569910037e669/d235ab6c54272711c1256e63003758f4/$FILE/G0411779.pdf). There have been numerous other such reports, as seen at U.N. Office of the High Commissioner for Human Rights, *Documents on the Sudan*, available at [http://ap.ohchr.org/documents/dpage\\_e.aspx?c=174&su=173](http://ap.ohchr.org/documents/dpage_e.aspx?c=174&su=173).

<sup>165</sup> International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, U.N. Doc No. S/2005/60, available at [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf).

<sup>166</sup> S.C. Res. 1593, *supra* note 161.

<sup>167</sup> In the case of Sudan, the Security Council simply referred the “situation prevailing in Darfur” to the Prosecutor, leaving it to the Prosecutor to select individuals for prosecution based on the outcome of further investigation. S.C. Res. 1593, *supra* note 161, ¶ 1.

<sup>168</sup> See the sections on standards and violations for more details.

### **E. Possible Outcome / Result**

An ICC investigation could have several important effects. First, simply announcing that North Korea was the subject of an ICC investigation would draw world attention to North Korean human rights abuses. Any factual findings from the investigation would add to the international case for human rights reform, and would give North Korea an incentive to comply with human rights standards. These would be helpful developments for NGOs. Second, an investigation could lead to the issuance of arrest warrants. This would send an important message that human rights may not be violated with impunity. Arrest warrants would also serve to publicize specific instances of wrongdoing in North Korea, committed by specific individuals.

Third, an investigation could result in a criminal trial or trials, and ultimately the passing of sentence. The process of a trial would be very valuable. The judicial process of questioning witnesses and examining documents would uncover a wealth of new information about the situation in North Korea. Sentencing an individual for criminal conduct would show the consequences of abusing human rights. The ICC may administer penalties ranging from fines to life imprisonment,<sup>169</sup> and may also order reparations to be paid to victims.<sup>170</sup>

Importantly, a trial would only proceed if a warrant led to an individual appearing before the court (through surrender or arrest).<sup>171</sup> It is questionable whether North Korea would turn the subject of a warrant over to the court. Of course, even if North Korea resisted complying with an ICC warrant, the existence of such a warrant would provide a bargaining chip in negotiations and would be a significant symbolic action.

### **F. Political Considerations**

There may be increasing support for the notion of pursuing an ICC action addressing human rights violations in North Korea. The report FAILURE TO PROTECT presented an argument for North Korean culpability for crimes against humanity.<sup>172</sup> A report by the U.N. Special Rapporteur for North Korea observed that such culpability raises questions of individual criminal responsibility, particularly under Article 7 of the Statute.<sup>173</sup> This kind of analysis may make an ICC prosecution involving North Korea more likely.

However, there are several obstacles to a Security Council referral of the human rights situation in North Korea to the Prosecutor. First, as with Sudan, the Security Council is likely to require considerable international outcry before acting. International attention is already focused on North Korea, and there has been investigation and expressed concern from

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<sup>169</sup> Statute, *supra* note 103, art. 77.

<sup>170</sup> *Id.* art. 75.

<sup>171</sup> *Id.* art. 63(1) (“The accused shall be present during the trial.”).

<sup>172</sup> FAILURE TO PROTECT, *supra* note 1. The report argues that human rights abuses in North Korea “fall clearly within the definition of ‘crimes against humanity.’” *Id.* at 11.

<sup>173</sup> U.N. General Assembly, *Situation of Human Rights in the Democratic People’s Republic of Korea*, ¶¶ 50-52, U.N. Doc. A/62/264 (Aug. 15, 2007), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N07/461/27/PDF/N0746127.pdf?OpenElement> [hereinafter Special Rapporteur’s Fourth Report]. The Special Rapporteur also noted that the acts listed in the CSW report NORTH KOREA: A CASE TO ANSWER, A CALL TO ACT, *supra* note 126, were equivalent to crimes against humanity.

various U.N. bodies. The U.N. General Assembly has adopted a resolution expressing serious concern about the reports of “systemic, widespread and grave violations of human rights.”<sup>174</sup> The former Commission on Human Rights repeatedly noted the existence of human rights violations in North Korea.<sup>175</sup> Similarly, the Human Rights Committee has noted that various freedoms are not recognized in North Korea.<sup>176</sup> The former Commission on Human Rights also appointed a Special Rapporteur to investigate the issue.<sup>177</sup> In addition, various nations, such as Japan and the US, as well as multiple NGOs, have expressed concern about North Korea.<sup>178</sup>

Second, there are political hindrances to such a Security Council resolution. Any of the Permanent Members can veto a resolution. The U.S. is generally opposed to ICC action.<sup>179</sup> In the case of Sudan, the U.S. abstained from voting.<sup>180</sup> China is even more likely to resist referral. China has ties to the North Korean regime predating the Korean War. In addition, both China and Russia may be anxious to avoid the precedent of having the ICC investigate these kinds of human rights abuses, as similar charges have been made against the regimes in those nations.

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<sup>174</sup> G.A. Res. 60/173, U.N. Doc. A/Res/60/173 (Dec. 16, 2005), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/497/98/PDF/N0549798.pdf>. This resolution discusses abuses including torture, arbitrary detention, prison camps, trafficking in women and infanticide.

<sup>175</sup> U.N. C.H.R. Res. 2003/10: *Situation of Human Rights in the Democratic People’s Republic of Korea*, U.N. Commission on Human Rights, 51st Meeting, ¶ 1, U.N. Doc. E/CN.4/2003/L.11 (2003); U.N. C.H.R. Res. 2004/13, *supra* note 135; U.N. C.H.R. Res. 2005/11: *Situation of Human Rights in the Democratic People’s Republic of Korea*, U.N. Commission on Human Rights, 50th Meeting, ¶ 1, U.N. Doc. E/CN.4/2005/L.10/Add.9 (Apr. 14, 2005).

<sup>176</sup> *Concluding Observations*, *supra* note 38, ¶¶ 22-25.

<sup>177</sup> U.N. C.H.R. Res. 2004/13, *supra* note 135, at 5.

<sup>178</sup> Japan passed a North Korean Human Rights Law in 2006. *Diet Enacts Law on DPRK Rights Abuses*, DAILY YOMIURI (TOKYO), June 17, 2006, at 1. Also in 2006, the Parliament of the European Union passed a resolution on North Korea’s human rights record. Bureau of Democracy, Human Rights & Labor, U.S. Dep’t of State, Country Reports on Human Rights Practices – 2006: Democratic People’s Republic of Korea § 4 (Mar. 6, 2007), available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78777.htm> (last visited Oct. 19, 2007). In the U.S., a law was passed in 2004. North Korean Human Rights Act of 2004, 22 U.S.C. §§ 7801-7845 (2006). The U.S. Congress found that “[a]ccording to the Department of State, 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,” *id.* § 7801(1), and that “[i]t is the sense of Congress that the United Nations has a significant role to play in promoting and improving human rights in North Korea,” *id.* § 7815. In addition, a number of NGOs have voiced concerns about North Korea, such as Human Rights Watch (see note 3 *supra*); Amnesty International (see Amnesty International, *North Korea: Briefing on present situation*, available at <http://web.amnesty.org/library/Index/ENGASA240022005?open&of=ENG-PRK> (July 28, 2005)); People’s Solidarity for Participatory Democracy, *Written Statement Submitted by the People’s Solidarity for Participatory Democracy (PSPD)*, U.N. Commission on Human Rights, 61st Sess., U.N. Doc. E/CN.4/2005/NGO/227 (2005).

<sup>179</sup> United Nations Treaty Collection, *Rome Statute of the International Court*, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp#N6>. The United States sent a communication on May 6, 2002, stating “the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000.” U.S. Dep’t of State, Press Statement, *International Criminal Court: Letter to UN Secretary General Kofi Annan* (May 6, 2002), available at <http://www.state.gov/r/pa/prs/ps/2002/9968.htm> (last visited Oct. 18, 2007).

<sup>180</sup> U.N. Security Council Press Release, *Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court*, 5158th Meeting, U.N. Doc. SC/8351, available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> (2005). The United States representative said that “[t]he United States continued to fundamentally object to the view that the Court should be able to exercise jurisdiction over the nationals, including government officials, of States not party to the Rome Statute.” However, the United States did not oppose the resolution, because “of the need for the international community to work together,” and because the resolution provided safeguards for the armed forces of non-parties to the Statute. This indicates the United States is willing to accept ICC referral, despite its general opposition to the Court.

Finally, passage of a resolution authorizing referral to the Prosecutor is complicated by the tension over North Korea's nuclear program. The Security Council would presumably be reluctant to act while there is tension over North Korea's nuclear capacity.<sup>181</sup> In the context of international concern over nuclear weaponry, an international criminal investigation sponsored under the auspices of the U.N. would likely raise tensions and complicate the existing situation. Given the diplomatic progress declared in 2007, countries may be unwilling to support more active measures against North Korea, so as not to imperil that progress. Three of the six nations that have been involved in the talks with North Korea (the U.S., China, Russia) are permanent Security Council members holding veto power.

### **G. Conclusion**

ICC prosecution is an option with several virtues. The ICC's mission is to enforce international human rights standards, and to establish individual accountability for abuses. The situation in North Korea falls squarely within that mandate. Further, the process of an ICC investigation and possible eventual trial would serve to focus international attention on conditions in North Korea. In addition, the fact-finding nature of this judicial process would likely uncover further details about human rights violations in North Korea, and establish those facts as matters of international record. A trial would also give victims of the regime a chance to be heard.

However, there are several obstacles to be considered. The difficulty of gathering evidence would be a hurdle for any prosecutor to overcome, as would the probable noncompliance of North Korea with any ICC process. Nevertheless, helping to gather evidence and ensuring that the prosecutor has access to helpful witnesses outside North Korea is one area where NGOs concerned about North Korea could make a significant contribution.

Another serious obstacle is North Korea's failure to ratify the Statute. Accordingly, jurisdiction would require either an atrocity committed by a North Korean in South Korea (or other nation participating in the Statute) or reference by the Security Council. It is not likely that a North Korean would commit a serious human rights violation outside North Korea, barring further abductions. Although North Koreans have previously abducted Japanese and South Korean nationals outside North Korea, there are no known cases that have occurred since July 1, 2002, which would be required for ICC jurisdiction. Most information about the situation within North Korea has been obtained from defectors who left the country before 2002. It is possible that the continued detention of past abductees and of P.O.W.s could qualify, but this is unclear, and presents evidentiary challenges. Security Council action is dependent on political considerations, since any of the Permanent Members can veto a resolution. However, the Security Council can be lobbied, providing yet another avenue for NGO participation.

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<sup>181</sup> The long-deadlocked talks led to international disagreement on the best way to handle North Korea. See, e.g., Guy Dinmore and Anna Fifield, Comment & Analysis, *Disunited Front: How Washington and Seoul are Pulling Different Ways on North Korea ASIA: Disagreements over Strategy are Complicating International Efforts to Convince Pyongyang to Give up Its Nuclear Programme*, Financial Times (London), May 22, 2006, at 19. The February 2007 nuclear deal, if successful, could reduce international concerns about North Korea's nuclear program, but might also reduce international willingness to take strong action regarding North Korea.



### III. U.N. SECURITY COUNCIL ACTION

Any approach by an NGO to the United Nations Security Council (the “Security Council”) on grounds that North Korea represents a “threat to peace,” whether for purposes of Security Council resolutions, sanctions or other actions, raises a litany of political questions. This report does not aim to explain the political hurdles that face any legal approach to the Security Council. Although such developments must be kept in mind by NGOs, they remain outside the scope of this report. It should be noted that the Security Council has approved past resolutions aimed at North Korea.<sup>182</sup> NGOs should continue to engage Security Council members. This section outlines the legal arguments, and particularly, the North Korea-specific facts necessary to support a successful approach to the Security Council. First, this chapter establishes the legal basis for Security Council action under the “threat to peace” doctrine. Second, the chapter highlights the violations, as established by prior Security Council action under the “threat to peace” doctrine, that might give rise to possible Security Council action against North Korea. Third and finally, this section analyzes possible courses of action the Security Council could pursue with North Korea.<sup>183</sup>

#### A. Legal Basis of Security Council Action Against North Korea

The Security Council has various options at its disposal to address international issues of serious concern. For example, the Security Council can pursue action under Chapter VI or Chapter VII of the U.N. Charter. Chapter VI provides that, where there are disputes that endanger international peace and security, the Security Council can call upon the parties to reach a settlement; can investigate the situation; and can make recommendations to states.<sup>184</sup> It is disputed whether Security Council resolutions made under Chapter VI are binding.<sup>185</sup> Chapter VI establishes that the Security Council can undertake a relatively peaceful course of action, using persuasion and recommendations to influence states, thus attempting to resolve disputes via diplomatic negotiation.

In the event that North Korea does not respond to recommendations made under Chapter VI, the Security Council can turn to the more forceful provisions of Chapter VII, Article 39 of the U.N. Charter (the “Threat to Peace Chapter”), under which the Security Council may take action against states on various grounds. The text of the Threat to Peace Chapter establishes a broad and ambiguous standard for Security Council action: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and

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<sup>182</sup> Most notably, S.C. Res. 1718, U.N. Doc. S/RES/1718 (Oct. 14, 2006), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N06/572/07/PDF/N0657207.pdf>. This resolution demands that North Korea cease its nuclear testing program and calls for other states to restrict the flow of weapons and luxury goods to North Korea, among other things.

<sup>183</sup> A more complete discussion of the legal basis for action by the Security Council is provided by FAILURE TO PROTECT, *supra* note 1.

<sup>184</sup> U.N. Charter arts. 33-38.

<sup>185</sup> See Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT’L L. 1, 5 n.31, 15 n.82 (1996).

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security.”<sup>186</sup> No other U.N. Charter document defines the contours of “threat to peace” under Article 39.

If the Security Council finds that it needs to take action pursuant to Article 39, it must look to Articles 41 and 42 of the U.N. Charter for the permitted range of prospective actions. Article 41 allows the Security Council to engage in non-military operations such as “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”<sup>187</sup> If these actions fail and the Security Council decides that more extreme measures are necessary, Article 42 allows the Security Council to authorize military action, such as “demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”<sup>188</sup>

In order to apply the powers set forth in Articles 41 and 42 the Security Council must first determine that there has been a “threat to the peace.”<sup>189</sup> For example, Security Council Resolution 1718 found that North Korea’s nuclear testing program created a risk to international peace and security.<sup>190</sup> Neither the Security Council nor the U.N. Charter provides a clear definition of what type of situation or circumstance constitutes a “threat to peace” under Article 39. Past Security Council decisions, however, shed some light on which conditions or criteria the Security Council considers central when authorizing Article 39 resolutions, painting a rough picture of what scenarios constitute a “threat to peace.” It is important to note that the legal standards that are discussed in this section are very fact-specific, and relate to the individual situation that justified the intervention.

While each case is unique, an analysis of several key Security Council decisions reveals clear patterns in the Security Council’s decision-making. In particular, the Security Council’s past actions in Sierra Leone, Afghanistan, Haiti, Yemen, Rwanda, and Liberia illustrate common factors that the Security Council has cited as being most important in the assessment of a “threat to peace.” Generally speaking, these factors include human rights violations, refugee outflows and internal displacement, drug production and trafficking, illicit weapons trading, and illicit economic crimes. Each by itself may not constitute a “threat to peace”, but the existence of each provides strong evidence for the necessity of Security Council intervention. Ultimately, the Security Council considers the totality of the circumstances of each situation in determining whether a “threat to peace” exists and whether Security Council action is necessary.

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<sup>186</sup> U.N. Charter art. 39.

<sup>187</sup> *Id.* art. 41.

<sup>188</sup> *Id.* art. 42.

<sup>189</sup> A recent report on North Korea focusing on Security Council action discusses a “Responsibility to Protect” as grounds for Security Council action. See FAILURE TO PROTECT, *supra* note 1, at 83-84. This ground is a new development in international law and deserves further analysis. However, in light of the fact that the “Responsibility to Protect” thesis is largely based under customary international law and not past Security Council resolutions taken with respect to specific countries, it remains outside the scope of this report.

<sup>190</sup> S.C. Res. 1718, *supra* note 182.

**B. Past U.N. Security Council Action**

1. *Sierra Leone*

On October 8, 1997 the Security Council imposed an oil and arms embargo on Sierra Leone in response to a coup by the Revolutionary United Front (“RUF”). Following years of military coups and governmental instability, successful parliamentary and presidential elections were held in February 1996, with the army relinquishing power to the election’s winner. Even though the RUF refused to respect the results, a U.N. envoy was able to convince the warring factions to sign peace agreements in November 1996. The success of these accords was short-lived, however, as the RUF and military staged a successful coup in May 1997.<sup>191</sup>

The conflict between the RUF and the exiled government resulted in massive human rights violations. The ruling RUF wreaked havoc on the infrastructure and citizenry of the nation. Rape and murder were commonplace and the fighting destroyed schools, health facilities, water supply systems, and transportation grids.<sup>192</sup> Additionally, the conflict displaced over 1.6 million people, with just over 200,000 of them finding refuge in displaced person camps.<sup>193</sup> Over 300,000 displaced persons also sought refuge in neighboring countries, with the majority of them fleeing to Ghana and Liberia.<sup>194</sup> The ruling military junta suspended the Constitution and arbitrarily detained and tortured political opponents, including those that spoke out against the ongoing human rights violations.<sup>195</sup>

Given the deteriorating situation in Sierra Leone, the Security Council passed Resolution 1132, which stated that the situation posed a threat to international peace and regional security.<sup>196</sup> The Security Council noted that the refusal of the military junta to allow the restoration of a democratically-elected government and return to constitutional order spurred continued violence, deteriorating humanitarian conditions, and loss of life in Sierra Leone.<sup>197</sup> The Security Council imposed an oil and arms embargo on Sierra Leone in an effort to end the violence, stop the interference with humanitarian assistance and return the exiled leaders to power.<sup>198</sup>

2. *Afghanistan*

The withdrawal of the Soviet Union from Afghanistan in 1989 destabilized the country, leading to its division into different warlord-controlled zones. In 1996, the Taliban took

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<sup>191</sup> United Nations Mission to Sierra Leone, UNAMSIL, *Background* (2005), available at <http://www.un.org/Depts/dpko/missions/unamsil/background.html>.

<sup>192</sup> The Secretary-General, *Report of the Secretary-General on Sierra Leone, delivered to the Security Council*, U.N. Doc. S/1997/80 (Jan. 26, 1997).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Amnesty International, *AI Report 1998: Sierra Leone*, available at <http://www.amnesty.org/ailib/aireport/ar98/afr51.htm>.

<sup>196</sup> S.C. Res. 1132, U.N. Doc. S/RES/1132 (Oct. 8, 1997).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

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control of Kabul and declared itself the official government of the entire nation. Under the Taliban's rule, serious human rights violations were commonplace.<sup>199</sup> Political killings, torture, rape, arbitrary detention, lootings, abductions and kidnapping were committed on a regular basis.<sup>200</sup> Islamic Sharia law was instituted and punishments were meted out without any due process or proper judicial procedures. Additionally, landmines and other crude arms led to thousands of civilian deaths. The infighting displaced millions of citizens. Further, under the Taliban the illegal narcotics trade flourished, making Afghanistan a top global producer of opium products.<sup>201</sup> The Taliban ignored women's basic rights, denying them access to necessities such as education as well as access to political and cultural outlets.<sup>202</sup>

On October 22, 1996 the Security Council passed Resolution 1076 calling for an end to the hostilities in Afghanistan between the warring factions. The resolution called for an immediate ceasefire and concerted push towards a political solution to the conflict. Further, the Security Council called for an immediate end to arms shipments to all parties involved in the conflict.<sup>203</sup> The resolution also called for all states to stop interfering with the internal affairs of Afghanistan. The Security Council noted that certain elements underpinned its call for action, including "civilian casualties and an increase in refugees and displaced persons," "discrimination against women and other abuses of human rights in Afghanistan," and the "terrorism and drug trafficking which destabilize[d] the region and beyond."<sup>204</sup>

### 3. *Haiti*

In early 1991, a de facto military regime in Haiti overthrew the democratically-elected Presidency of Jean-Bertrand Aristide.<sup>205</sup> The regime committed human rights violations such as "preventative repression, persecution, arbitrary detention and torture"<sup>206</sup> primarily

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<sup>199</sup> Bureau of Democracy, Human Rights & Labor, U.S. Dep't of State, *Afghanistan Report on Human Rights Practice for 1996* (Jan. 30, 1997), available at [http://www.state.gov/www/global/human\\_rights/1996\\_hrp\\_report/afghanis.html](http://www.state.gov/www/global/human_rights/1996_hrp_report/afghanis.html) [hereinafter 1996 Afghanistan Report].

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*; U.S. Central Intelligence Agency, World Factbook, *Afghanistan*, <https://www.cia.gov/cia/publications/factbook/geos/af.html> (last visited Aug. 29, 2006).

<sup>202</sup> U.N. High Commission for Human Rights, *Situation of human rights in Afghanistan*, H.R. Res. 1996/75, U.N. Doc. E/CN.4/RES/1996/75 (Apr. 12, 1996), available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/24d8e53aba788c3d8025669400499a7c?Opendocument>.

<sup>203</sup> S.C. Res. 1076, U.N. Doc. S/RES/1076 (Oct. 22, 1996).

<sup>204</sup> *Id.* at 1.

<sup>205</sup> U.N. Mission in Haiti (UNMIH), *Haiti Background Summary*, Dep't of Pub. Info. (2003), available at [http://www.un.org/Depts/dpko/dpko/co\\_mission/unmihbackgr1.html](http://www.un.org/Depts/dpko/dpko/co_mission/unmihbackgr1.html).

<sup>206</sup> *Haiti Background Summary*, *supra* note 194.

against political opponents.<sup>207</sup> The systematic violation of human rights created a situation of internal chaos, leading to massive refugee outflows of 40,000 citizens.<sup>208</sup>

On June 16, 1991 the U.N. Security Council passed Resolution 841 in response to the deteriorating domestic situation in Haiti caused by the military coup and the overthrow of President Aristide. The Security Council passed the resolution to create pressure to reinstate Aristide and end the atrocities occurring in the nation. The Security Council called for a trade embargo to be placed on Haiti and the freezing of Haitian funds in other countries.<sup>209</sup> The Security Council noted that there was an “urgent need for an early, comprehensive and peaceful settlement of the crisis in Haiti in order to prevent the on-going tumult from continuing.”<sup>210</sup> The domestic Haitian environment was plagued by a humanitarian crisis, including mass displacement of citizens that sought refuge in other countries. Further, there was a climate of “persecution and economic dislocation” that could have exacerbated the refugee problem.<sup>211</sup>

#### 4. *Republic of Yemen*

The Republic of Yemen formed in 1990 but fell into civil war in 1993 with the southern part of the nation seceding from the Republic.<sup>212</sup> The rebels were members of the former totalitarian regime that had lost the Republic’s first parliamentary election in 1993. The rebels took control of Aden, an economic and commercial hub, and “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 persons subjected to their direct control.”<sup>213</sup> Extra-judicial killings were common, as were disappearances, inhumane treatment of political opponents, killing of unarmed civilians on both sides of the conflict, and deplorable situations in the prisons and detention centers.<sup>214</sup>

In response to the situation in the Republic of Yemen, the Security Council passed Resolution 924 on June 1, 1994 over strong opposition from the parties involved in the conflict.<sup>215</sup> The resolution called for a peaceful resolution to the conflict through negotiation and diplomatic means; specifically a cease fire and the cessation of the supply of arms to

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<sup>207</sup> See *Threat of the Peace: A Call for the U.N. Security Council to Act in Burma*, U.N. Doc. S/25942 (Sept. 20, 2005).

<sup>208</sup> European Journal of International Law, *Applicability of International Law Standards to United Nations Economic Sanction Programmes*, U.N. Doc. S/PV.3238 (E. Haiti 93-94) (2004).

<sup>209</sup> S.C. Res. 841, U.N. Doc. S/Res/841 (June 16, 1993).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> U.S. Dep’t of State, *Yemen Human Rights Practices, 1994*, available at [http://dosfan.lib.uic.edu/ERC/democracy/1994\\_hrp\\_report/94hrp\\_report\\_nea/Yemen.html](http://dosfan.lib.uic.edu/ERC/democracy/1994_hrp_report/94hrp_report_nea/Yemen.html) (last visited Aug. 30, 2006).

<sup>213</sup> U.N. Doc. S/1994/642 (1994).

<sup>214</sup> *Yemen Human Rights Practices*, *supra* note 199.

<sup>215</sup> U.N. Doc. S/1994/642 (1994).

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the warring factions.<sup>216</sup> The resolution stated that the action was being taken because the Security Council was “deeply concerned at the tragic death of innocent civilians” and the possibility that “continuance of the situation could endanger peace and security in the region.”<sup>217</sup>

### 5. *Rwanda*

In October of 1990, the Rwandan Patriotic Front (“RPF”), which was based in neighboring Uganda, invaded Rwanda and launched a civil war against the government.<sup>218</sup> The RPF invasion and its subsequent short-term success triggered harsh responses from the government, leading to both sides committing human rights violations and harming civilians.<sup>219</sup> The conflict displaced approximately one million Rwandan civilians.<sup>220</sup> The government massacred hundreds of Tutsi civilians throughout the following two years and also began to arbitrarily detain and arrest others.<sup>221</sup>

On March 12, 1993, the Security Council took action by passing Resolution 812. Noting a grave concern for the fighting in Rwanda and its destabilizing regional effects, the Security Council urged the warring factions to consider a peaceful settlement to the conflict and to respect the cease-fire agreement which had become effective days before the passage of Resolution 812.<sup>222</sup> The Security Council noted that it was alarmed 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 populations.”<sup>223</sup> The Security Council also demanded that both parties strictly respect the rules of international humanitarian law.<sup>224</sup>

### 6. *Liberia*

In 1989, Liberia was torn apart by civil war. The National Patriotic Front of Liberia (“NPFL”), led by Charles Taylor, began an insurgency in December 1989 which was met with incredible force and brutality by the Liberian government.<sup>225</sup> Throughout years of fighting, both the insurgents and the government committed gross human rights violations included the massacring of targeted ethnic minorities, arbitrary detention and torture, and the

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<sup>216</sup> S.C. Res. 924, U.N. Doc. S/Res/924 (June 1, 1994).

<sup>217</sup> *Id.*

<sup>218</sup> Human Rights Watch World Report 1992, *Rwanda*, available at <http://www.hrw.org/reports/1992/WR92/AFW-07.htm>.

<sup>219</sup> U.N. Doc. S/PV.3183 (1993).

<sup>220</sup> *Id.*; U.N. Doc. S/25363 (1993).

<sup>221</sup> *Id.*

<sup>222</sup> S.C. Res. 812 (1993).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Human Rights Watch World Report 1992, *Background to the Conflict*, available at <http://www.hrw.org/reports/1990/liberia/#2>.

enlisting of children into conflict.<sup>226</sup> These atrocities caused massive refugee outflows to neighboring nations, especially Sierra Leone. This chaos created a fear that the burgeoning West African illegal narcotics trade would take root and entrench itself in Liberia.<sup>227</sup>

On November 19, 1992, the Security Council passed Resolution 788 in response to the situation in Liberia. The resolution was spurred by the increasing threat of regional destabilization, violation of a cease-fire agreement, and an increased need for humanitarian assistance.<sup>228</sup> The Security Council called on all parties to the conflict to “respect strictly the provisions of international humanitarian law” and also called on members of the United Nations to impose an arms embargo on Liberia.<sup>229</sup> Finally, all member nations were asked to exercise self-restraint in their relations with all parties to the conflict in order to ensure that the peace process could continue unhindered.

### **C. Application of the U.N. Security Council Criteria to the Situation in North Korea**

An analysis of prior Security Council action under the “threat to peace” doctrine demonstrates that the situation in North Korea warrants Security Council action. The totality of the circumstances supports the finding of a “threat to peace,” in that the continuing situation in North Korea threatens the peace and stability of the nation, region, and possibly the rest of the world.<sup>230</sup>

As a starting point, the situation in North Korea differs from circumstances surrounding past Security Council action because prior situations involved ongoing conflicts within the borders of a nation. In most circumstances, the instability and threat to peace arose as by-products of internal conflicts and the ensuing power vacuums that formed. North Korea, on the other hand, exhibits no power struggles—the regime of Kim Jong-il remains firmly entrenched with full political control. The absence of a political struggle, however, does not undermine the case for Security Council action under the “threat to peace” doctrine. In fact, the stability of Kim Jong-il’s regime should be a deciding factor in convincing the Security Council to act. The government plays the main role as perpetrator of the atrocities and crimes occurring in North Korea, and the regime’s unfettered power perpetuates the deplorable situation within the country. The entrenched power of the North Korean regime, combined with the other deciding factors that were present in prior Security Council decisions, makes a strong case for action under the “threat to peace” doctrine.

The current situation in North Korea is substantially similar in degree and kind to the abuses that the Security Council has cited in prior cases justifying action. Each section below discusses the fact patterns under which the Security Council has authorized prior action and how the lessons gleaned from these actions can be applied to North Korea.

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<sup>226</sup> *Id.*; U.N. Doc. S/PV.3138 (1992).

<sup>227</sup> *Id.*

<sup>228</sup> S.C. Res. 788, U.N. Doc. S/Res/788 (Nov. 19, 1992).

<sup>229</sup> *Id.*

<sup>230</sup> Note that this includes both traditional and non-traditional threats to peace. See FAILURE TO PROTECT, *supra* note 1, at iii-iv, 94-100, for further discussion.

### 1. *Human Rights Violations*

Concern for the civilian population in targeted countries remains a key concern in deciding whether Security Council action is warranted. Generally, the Security Council is bound by the principle of non-intervention and in most circumstances leaves human rights affairs at the United Nations to the General Assembly. Nonetheless, when the Security Council determines that a problematic situation stretches beyond domestic borders and includes severe and systematic human rights violations that create general instability and threaten regional peace and security, it may take action.

Human rights abuses are the most cited factors underpinning Security Council action in prior resolutions. Security Council action in Sierra Leone represents the first case in point. The Security Council noted several factors in justifying action in Sierra Leone, but key among them were human rights abuses. The Security Council emphasized the instability generated by rape, murder and other human rights violations.<sup>231</sup> The eroding human rights situation caused massive displacement of millions to neighboring countries and engendered instability throughout the region.<sup>232</sup> Security Council resolutions concerning Afghanistan also present human rights violations as the *raison d'être* for U.N. action. There, the Taliban's rise to power was accompanied and strengthened by the use of brutal and inhumane tactics against civilians and opponents.<sup>233</sup> In Haiti, similarly, the human rights violations that triggered the Security Council action occurred when a party in control refused to relinquish its leadership. Yemen, Rwanda, and Liberia all represented situations where the bulk of human rights violations occurred during an ongoing conflict between warring factions in the country. They share the similar characteristic of being nations with leadership in flux.

The scale of North Korean human rights violations is on par with these prior situations. Even though there is no ongoing internal conflict, the scale of the human rights atrocities justifies Security Council action. The different context of the atrocities does not justify their brutal nature. As stated in Section I(C)(2) of this report, relaying the facts of Kim Jong-il's bloody exercise of power, the North Korean citizenry has been subject to harsh treatment including arbitrary detention, torture for detainees and political opponents, and forced starvation (which was also noted in the resolutions dealing with Haiti). Prisoners are forced to live in squalor and inhumane conditions and are subject to sexual abuse, forced labor, infanticide, and arbitrary execution. The scope and scale of these horrors justifies action by the Security Council. The political situation in North Korea makes a strong Security Council resolution all the more necessary – Kim Jong-il is entrenched in power and without action by an external authority, his brutal tactics and rules will continue to be imposed on an innocent people.

### 2. *Refugee Flow and Internal Displacement*

Several Security Council resolutions partly justify action under the “threat to peace” doctrine based on concerns for refugees and internally displaced persons. Refugee outflows, and their root causes such as human rights abuses, domestic conflict, deep poverty, food

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<sup>231</sup> U.N. Doc. S/1997/80, *supra* note 192.

<sup>232</sup> *Id.*

<sup>233</sup> 1996 Afghanistan Report, *supra* note 199.

shortages, and starvation conditions, are featured prominently in several Security Council resolutions, including resolutions involving Sierra Leone, Afghanistan, Haiti, and Rwanda.<sup>234</sup> North Korea's refugee and displacement situation is on par with the aforementioned situations and it is estimated that from 20,000 to as many as 400,000 individuals (most likely a figure in the middle of this range) have fled the deplorable situation in North Korea.<sup>235</sup> While the refugee outflows are not caused by an internal conflict, the effects in North Korea are just as disastrous for the country and its neighbors. Refugee outflows entail, by their very definition, a destabilizing force and a serious threat to peace.

North Korea, unlike Sierra Leone, Afghanistan, Haiti and Rwanda, does not have large-scale factional violence but suffers from deep economic malaise and starvation conditions; a key underlying factor for refugee outflows cited by the Security Council. Section I(C)(5) of this report discusses these conditions in detail, including one of the main causes of the refugee problem – the off-and-on famines that have stricken the North throughout the last decade.<sup>236</sup> These famines have killed over 10% of the North's population. It is important to note that the exacerbation of the famine's effects would be completely preventable were it not for the government's refusal to receive help and aid. The details of the government's food rationing and distribution system are laid out in Section I of this report. The famines and the resulting deaths are state controlled events that the regime uses to entrench its power and punish those that it disfavors or disagrees with. Essentially, they are a loyalty mechanism with fatal consequences that the government has used to discipline its people. Many that are disfavored choose to flee their current situations and look for better opportunities elsewhere.

The effects of refugee outflows are described in more detail above in facts sections I(B)(2) and (C)(2). North Koreans regularly escape the North to China and South Korea in an effort to escape the poverty, repression, and starvation that prevails under Kim Jong-il's regime. The late 1990s were a high point for refugee outflows, but exact numbers are difficult to pin down as the majority of the refugees remain hidden in Chinese cities. Further, many of these refugees face an unsympathetic Chinese immigration policy which classifies the North's refugees as "economic migrants" and forcibly returns many to North Korea.

### 3. *Drug Production and Trafficking*

The Security Council has also cited, albeit indirectly, the production of illegal drugs and narco-trafficking as a justification for intervention under the "threat to peace" doctrine. The Security Council mentions drug production and trafficking as a factor, among others, justifying actions in Afghanistan. As previously noted, Afghanistan under the Taliban was the world's premier producer and distributor of opiates. Local governments often find themselves unable to curtail the violence and corruption that goes hand-in-hand with the drug trade. This corruption and violence continues to be a destabilizing factor for Afghanistan and many of its neighbors.

North Korea is a central player in both the production and distribution of illegal narcotics, especially in the Asia-Pacific region. As facts section I(B)(3) of this report illustrates,

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<sup>234</sup> See *supra* Sections III(B)(1)-(3), (5).

<sup>235</sup> NORTH KOREAN REFUGEE CRISIS, *supra* note 4, at 14.

<sup>236</sup> Andrew Natsios, *The Politics of Famine in North Korea*, Special Report U.S. Institute for Peace, No. 51 (Aug. 2, 1999), available at <http://www.usip.org/pubs/specialreports/sr990802.html>.

regional authorities have seized significant quantities of many different types of narcotics coming from the North, including heroin and methamphetamines, in the last five years. It is estimated that North Korea produces 40 tons of opium alone per year. Most importantly for purposes of Security Council review, the North Korean regime is implicitly involved in the drug trade; several North Korean government officials have been implicated and arrested for narcotics trafficking. The funds amassed from the illegal narcotics trade are used to fund other illegal activities in North Korea that have destabilizing effects that reach across domestic borders and affect the entire Asia-Pacific region.

#### 4. *Illicit Weapons Trading*

Although the Security Council has never cited weapons trading as a factor justifying Security Council action under the “threat to peace” doctrine, this category is ripe for incorporation into this doctrine. Trading of arms, while legal in many contexts, erodes states’ monopoly over the use of force and directly threatens domestic and regional peace. Consequently, the trading of weapons by North Korea constitutes a compelling reason for justifying Security Council action. Unlike refugee outflows and illicit narcotics trading, the act of selling weapons to hostile actors directly creates instability and threatens regional and international peace and security.

As section I(B)(4) of this report indicates, North Korea is a nerve-center of the global weapons market. North Korea exports significant ballistic missile-related equipment and technical expertise to every corner of the globe, including substantial amounts of weaponry that has exacerbated already unstable situations in the Middle East and Central Africa. Buyer countries include the Congo, Syria, India, and Pakistan. Nevertheless, despite the notorious negative effect of these sales, their legality remains open to debate. North Korea exports weaponry in blatant contravention of norms established in international treaties and other bilateral agreements among Western nations.<sup>237</sup> Further, since North Korea is not a signatory to existing anti-trafficking instruments, its weapons trading is not illegal as it does not contravene a legal regime to which North Korea is a party. North Korea, consequently, can argue that its arms sales do not violate international law, rendering it much more difficult for the Security Council to reach a consensus to take action against North Korea for arms-trafficking.

Regardless, North Korea’s illicit weapons trading is exactly the type of action that the Security Council *should* be acting upon. Such sales threaten other domestic and regional actors and consequently exacerbate tensions in already tumultuous areas. The situation is similar to Afghanistan’s pivotal role in the narcotics trade, which the Security Council cited as a reason for the passage of its resolution in that case.<sup>238</sup> One can argue that it would be inconsistent for the Security Council not to take action in this case, as the consequences of illicit weapons trading are arguably far more direct and severe. If the Security Council acts

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<sup>237</sup> See Wortzel, *supra* note 14 (remarking that “the missile export problem can be particularly vexing. Compliance with the multilateral Missile Technology Control Regime is voluntary, and the sale of these missiles does not violate international law.”); see also Missile Tech. Control Regime, *The Missile Technology Control Regime*, <http://www.mtcr.info/english/index.html> (last visited Oct. 19, 2007) (“National export licensing measures on these technologies make the task of countries seeking to achieve capability to acquire and produce unmanned means of WMD delivery much more difficult. As a result, many countries, including all MTCR partners, have chosen voluntarily to introduce export licensing measures on rocket and other unmanned air vehicle delivery systems or related equipment, material and technology.”).

<sup>238</sup> See S.C. Res. 1076, *supra* note 203.

in North Korea, it has the opportunity to shine a bright light on a major segment of the arms trade and maintain pressure on North Korea to change its illicit arms practices.

### 5. *Counterfeiting*

An analogy can be drawn between North Korea's illicit counterfeiting and Afghanistan's central role in the narcotics trade. Both illegal activities occur domestically but have far reaching effects that pose serious problems to other nations. These actions increase the prospect for disruption of peace by unreasonably imposing costs on and harming other nations. Illicit economic activity has not been directly cited in the past as a reason for finding a threat to peace, but, as with illicit weapons trading, it has serious deleterious effects that stretch across domestic borders. Security Council action is especially necessary in this situation because North Korean counterfeiting activities are in their nascent stages and immediate action could prevent them from growing into a more serious problem.

North Korea, despite being a poor country with decaying infrastructure and lack of basic services for its suffering population, has invested \$10 million to buy a printing press for the presumed purpose of printing counterfeit U.S. dollars.<sup>239</sup> Though North Korea counterfeits a relatively small amount of money (\$15 million per year) compared to the revenue from drug and weapons sales, this illegal industry is in its infant stages and is a growing source of income. Security Council action is crucial at this juncture to insure that Kim Jong-il's regime cannot profit from illegal activity and continue to entrench its power.

### **D. Recommendations Under the "Threat to Peace" Doctrine**

There are various remedies available under the United Nations Charter for threats to peace, and they must, of course, be tailored to the specific situations they address. This Section discusses each option in turn and provides a brief discussion of ways in which NGOs can participate.

#### 1. *Possible Security Council Action*

First, the Security Council may exert additional diplomatic pressure on the North Korean regime. Article 39 of the U.N. Charter empowers the Security Council to "determine the existence" of any threat and "make recommendations." The Security Council could recommend a wide range of improvements to North Korea, including better treatment of prisoners, observing basic human rights protections, ending its trade in sophisticated weapons technology, and accepting international supplies of food, among others. The Security Council, along with other international entities and members of the international community, has already proposed many similar recommendations to Kim's regime.<sup>240</sup>

Unfortunately, the North Korean regime has largely ignored these propositions. Nations and NGOs alike have attempted to influence North Korea through diplomacy, but to no avail. Nonetheless, ceasing all efforts on the diplomatic front pursuant to Article 39 of the U.N. Charter would be shortsighted. The Security Council should begin diplomatic engagement on human rights concerns. A highly coordinated, unified Security Council list of recommendations lends gravity and authority to any critique, and may serve as an effective

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<sup>239</sup> For further discussion, please see *supra* Section I(B)(5).

<sup>240</sup> U.N. Charter art. 39, ¶ 1.

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tool in convincing the North Korean regime to abide by the tenets set forth in the human rights instruments to which it is a party.

Second, the U.N. Charter empowers the Security Council to take affirmative actions short of the use of force. Chapter VII, Article 41 states: “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures.”<sup>241</sup>

For all practical purposes, only a Chinese economic embargo, particularly of gas and electricity, would have any significant impact (although Russia and South Korea also enjoy some level of economic relations with North Korea). Such a move on China’s part, however, remains an unattractive alternative for several reasons. Geopolitical concerns will inform any Chinese calculus about decisions regarding North Korea, and will militate against such action. China also has concerns about destabilizing the regime and triggering a massive exodus of refugees across its northeastern border. In light of current events in North Korea, this report cannot recommend severance of all economic relations.

The third and final option on the Security Council’s table is well known: the use of force. Article 42 of the U.N. Charter empowers the Security Council’s authorization of force: “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.” In light of North Korea’s strategic position and other geopolitical issues that are outside the scope of this report, this report will not discuss the availability or viability of such an option.

Finally, it should be noted that any Security Council action can be vetoed by any of the five Permanent Members: the U.S., Russia, the United Kingdom, France, and China. International political considerations thus play a large role in potential Security Council action. China and Russia may be particularly reluctant to authorize any action against North Korea. However, as noted above, a full political analysis is beyond the scope of this report.

### 2. *Opportunities for NGO Participation*

The first two Security Council options discussed provide an excellent context for NGOs to become involved in the international debate regarding North Korea. While there is no official means by which an NGO can present an item to the Security Council for debate or consideration, Security Council members have entertained the suggestions of third parties. NGOs can either lobby member nations’ U.N. delegations to refer an issue to the Security Council, or attempt to approach the Security Council directly through unofficial “Arria formula” meetings, where delegates meet individually – even casually – with those who wish to present an issue to the Security Council but are otherwise unable to testify at an official

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<sup>241</sup> *Id.* art. 41. Article 41 lists various such measures, most of which would not be helpful in the case of North Korea, such as severing economic relations, communication, or diplomatic relations. *See id.*

session.<sup>242</sup> NGOs have begun to use the “Arria formulas” to brief the Security Council more and more frequently over the past ten years.<sup>243</sup> A practical approach would be to prepare a report addressing the issues an NGO would like the Security Council to consider and distribute it unofficially in order to attract the attention of individual delegates from nations with the capability to bring an issue before the Security Council.<sup>244</sup>

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<sup>242</sup> James Paul, Global Policy Forum, *Arria Formula*, available at <http://www.globalpolicy.org/security/mtgsetc/arria.htm> (revised Oct. 2003). The Global Policy Forum website contains extensive information regarding Arria briefings, past usage, and the potential for obtaining a hearing before the Security Council.

<sup>243</sup> *Id.*

<sup>244</sup> For an example, see FAILURE TO PROTECT, *supra* note 1.



#### IV. HUMAN RIGHTS COUNCIL

##### A. Council Introduction

The Human Rights Council (“Council”) is a charter body that came into existence in 2006 to replace the former Commission on Human Rights (“Commission”). The Commission was established in 1946 by the U.N. Economic and Social Council (“ECOSOC”),<sup>245</sup> in accordance with the U.N. Charter’s instruction to ECOSOC to establish a Commission dealing with human rights.<sup>246</sup> The Council’s task, taking over from the Commission, is to address general human rights issues around the world.

##### B. Standards

According to its founding resolution, the Council shall be responsible for “promoting universal respect for the protection of all human rights and fundamental freedoms for all,” and to “address situations of violations of human rights, including gross and systematic violations.”<sup>247</sup> Accordingly, it has a broad mandate encompassing a number of human rights violations. This matches the Commission, which had a similarly broad scope. Thus, the Council can respond to concerns about human rights from a number of sources, such as international treaties or customary human rights law. In the specific case of North Korea, the government is a party to four major international human rights treaties: the ICCPR, the International Convention for Economic, Social, and Cultural Rights (“ICESCR”), the Convention on the Rights of the Child (“CRC”), and the Convention for the Elimination of Discrimination Against Women (“CEDAW”).

##### C. Violations

North Korea is in breach of myriad freedoms recognized by the Council. The Commission has already recognized that North Korea has committed various breaches of human rights. In Resolution 2003/10, the Commission noted the existence of torture; restrictions on freedoms of thought, conscience, religion, expression, assembly and movement; the mistreatment of disabled children; and the violation of human rights for women.<sup>248</sup> In Resolution 2004/13, the Commission again listed various human rights abuses in North Korea, including torture, detention, prison camps, slave labor, travel restrictions, limited freedom of expression and the repression of women.<sup>249</sup> The Commission reiterated these concerns in Resolution 2005/11.<sup>250</sup> In addition, since the Council’s purview includes the ICCPR, ICESCR, CEDAW, and the CRC, all violations that are of concern under those agreements are also the concern of the Council. It is therefore clear that the human rights

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<sup>245</sup> U.N. Office of the High Commissioner of Human Rights, Fact Sheet No. 27, *Seventeen Frequently-Asked Questions about United Nations Special Rapporteurs 2* (2001).

<sup>246</sup> U.N. Charter, art. 68.

<sup>247</sup> G.A. Res. 60/251, U.N. GAOR, 60th Sess., at 2, U.N. Doc. A/RES/60/251 (Apr. 3, 2006), available at [http://www.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251\\_En.pdf](http://www.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf).

<sup>248</sup> U.N. C.H.R. Res. 2003/10, *supra* note 175, ¶ 1.

<sup>249</sup> U.N. C.H.R. Res. 2004/13, *supra* note 135, ¶ 1.

<sup>250</sup> U.N. C.H.R. Res. 2005/11, *supra* note 175, ¶ 1.

situation in North Korea falls within the competence of the Council, and that there are a broad range of violations to address.

The “Present Era” part of the section on facts above further illustrates that North Korea is in breach of every major category of human rights. A variety of atrocities, too numerous to detail here, are listed in the facts section on Human Rights, in the subsections on Refugees, Religion in North Korea, Torture in North Korea, Infanticide in Prison Camps, Forced Labor and International Trade, Food Situation in North Korea, Women in North Korea, and Children in North Korea.

### **D. Institutional Process**

The Council was created to be a forum to discuss human rights issues, make recommendations, and issue reports to the General Assembly. It replaced the existing Commission on Human Rights in June, 2006, and has so far functioned in a similar fashion.<sup>251</sup> Under its founding resolution, the Council’s role includes: making recommendations to the General Assembly; carrying out a periodic review of the human rights situation in each state; and making recommendations on human rights.<sup>252</sup> Its 47 member states will hold a minimum of three sessions each year in Geneva.<sup>253</sup> A list of member states is available at the website of the U.N. Office of the High Commissioner of Human Rights.<sup>254</sup>

The Council accepts reports from NGOs under Resolution 1996/31.<sup>255</sup> That resolution provides that NGOs may obtain ‘consultative’ status, at which point they receive a variety of benefits.<sup>256</sup> ‘Consultative’ NGOs are entitled to attend meetings of ECOSOC (or its subsidiary bodies), and make oral and written statements on items on the agenda. In addition, organizations may propose new items for consideration, and may attend U.N. international conferences. In addition, NGOs, whether or not in consultative status, may make oral presentations to the Council.<sup>257</sup>

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<sup>251</sup> G.A. Res. 60/251, *supra* note 247, at 4. The Commission on Human Rights was formally abolished on 16 June 2006, to be replaced by the Human Rights Council.

<sup>252</sup> *Id.* at 3.

<sup>253</sup> U.N. Office of the High Commissioner for Human Rights, *The Human Rights Council*, available at <http://www.ohchr.org/english/bodies/hrcouncil/> (last visited Aug. 28, 2006).

<sup>254</sup> U.N. Office of the High Commissioner for Human Rights, *Membership of the Human Rights Council*, available at <http://www.ohchr.org/english/bodies/hrcouncil/membership.htm> (last visited Aug. 28, 2006).

<sup>255</sup> Resolution 1996/31: *Consultative relationship between the United Nations and non-governmental Organizations*, U.N. ESCOR, 49th plenary meeting, at art. 5 (July 25, 1996), available at <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm>.

<sup>256</sup> *Id.* arts. 27-54.

<sup>257</sup> For example, A Woman's Voice International made oral interventions at the 59th and 60th Sessions of the Commission. See Hae Young Lee, A Woman's Voice Int'l, Oral Intervention, U.N. Comm'n for Human Rights, 59th Sess., Item 12: Integration of the human rights of women and the gender perspective, available at <http://www.hrnk.org/documents/Geneva03-LeeIntervention.doc> (through link from [http://www.nkhumanrights.or.kr/NKHR\\_new/new\\_pages/pds\\_docu03.htm](http://www.nkhumanrights.or.kr/NKHR_new/new_pages/pds_docu03.htm)) (last visited Oct. 19, 2007); Ji Sun Jeong, A Woman's Voice Int'l, Oral Intervention, U.N. Comm'n for Human Rights, 60th Sess., Item 13: Rights of Children, available at [http://www.nkhumanrights.or.kr/documents/Rights\\_of\\_Children.doc](http://www.nkhumanrights.or.kr/documents/Rights_of_Children.doc) (through link from

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Further information on obtaining consultative status may be found at the U.N. website.<sup>258</sup> It is important to note that this status must be approved by the ECOSOC Committee on NGOs, of which both China and Russia are members.<sup>259</sup> To qualify, NGOs must meet a variety of criteria, including having a democratically adopted constitution, a representative structure, and democratic decision-making processes.<sup>260</sup> There are three types of consultative arrangement: general, special, and roster. ‘General’ consultative NGOs are large NGOs that cover many issues in many countries. ‘Special’ consultative NGOs are smaller NGOs with special competence in only a few of the areas concerning ECOSOC. ‘Roster’ consultative NGOs are NGOs with a very narrow or technical focus. ‘General’ and ‘Special’ consultative NGOs must file a report every four years in accordance with Resolution 1996/31.<sup>261</sup>

A further avenue for NGOs is to submit information to the Special Rapporteur for North Korea. Commission Resolution 2004/13 appointed the Special Rapporteur for North Korea, Vitit Muntarbhorn, in response to North Korean human rights abuses. Resolution 2004/13 calls on the Special Rapporteur to seek out credible information from other actors, including NGOs.<sup>262</sup> Since then, the Special Rapporteur has issued four reports on North Korean human rights. In those reports, he noted that he met with various NGOs and used them as a source for information on the conditions within North Korea.<sup>263</sup> The Special Rapporteur reports that human rights abuses are serious problem.<sup>264</sup> Since the Special Rapporteur’s requests to visit North Korea himself have been denied by that government, the assistance of NGOs is very important.<sup>265</sup>

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[http://www.nkhumanrights.or.kr/NKHR\\_new/new\\_pages/pds\\_docu03.htm](http://www.nkhumanrights.or.kr/NKHR_new/new_pages/pds_docu03.htm) (last visited Oct. 19, 2007); Young Ja Kim, A Woman’s Voice Int’l, Oral Intervention, U.N. Comm’n for Human Rights, 60th Sess., Item 14: Mass Relocations, *available at* [http://www.nkhumanrights.or.kr/documents/Mass\\_Relocation.doc](http://www.nkhumanrights.or.kr/documents/Mass_Relocation.doc) (through link from [http://www.nkhumanrights.or.kr/NKHR\\_new/new\\_pages/pds\\_docu03.htm](http://www.nkhumanrights.or.kr/NKHR_new/new_pages/pds_docu03.htm)) (last visited Oct. 19, 2007). For more information on oral interventions, see the discussion under the following “International Covenant on Civil and Political Rights” section, in the “Institutional Process” subsection at page 64.

<sup>258</sup> NGO Section, ECOSOC, *Consultative Status with ECOSOC*, <http://www.un.org/esa/coordination/ngo/> (last visited Aug. 28, 2006) [hereinafter *Consultative Status*]; NGO Section, ECOSOC, *NGO related frequently asked questions*, <http://www.un.org/esa/coordination/ngo/faq.htm> (last visited Aug. 28, 2006) [hereinafter *NGO Related FAQ*].

<sup>259</sup> See *Consultative Status*, *supra* note 258; *NGO Related FAQss*, *supra* note 258.

<sup>260</sup> Resolution 1996/31, *supra* note 255, arts. 1-17.

<sup>261</sup> *Id.* art. 61(c).

<sup>262</sup> U.N.C.H.R. Res. 2004/13, *supra* note 135, ¶ 7.

<sup>263</sup> Special Rapporteur’s First Report, *supra* note 114, ¶¶ 4-7; Special Rapporteur’s Second Report, *supra* note 139, ¶ 1; Special Rapporteur’s Third Report, *supra* note 71, ¶ 1; Special Rapporteur’s Fourth Report, *supra* note 173.

<sup>264</sup> See, e.g., Special Rapporteur’s Third Report, *supra* note 71, ¶ 60 (“There are major concerns in regard to the rights to food and life, the rights to security of the person and humane treatment, the rights to freedom of movement, asylum and refugee protection, and various political rights such as self-determination, freedom of expression, association and religion.”); Special Rapporteur’s Fourth Report, *supra* note 173, ¶¶ 9-10.

<sup>265</sup> Special Rapporteur’s Second Report, *supra* note 139, ¶ 2.

It is also possible to submit complaints to the Council of a consistent pattern of gross violations of human rights under the 1503 procedure.<sup>266</sup> Any individual or group that is the victim of such violations, or has reliable knowledge of such violations, may submit a complaint. Where an NGO does so, “it must be acting in good faith and in accordance with recognized principles of human rights. The organization should also have reliable direct evidence of the situation it is describing.”<sup>267</sup> Such a complaint should identify the sender, refer to the 1503 procedure, describe the purpose of the complaint, and indicate which rights have been violated.<sup>268</sup> It should provide detailed and specific evidence that indicates a pattern of abuses, not merely the facts of an individual case or facts drawn from media reports. A complaint should be submitted “a reasonable time” after domestic remedies have been exhausted (and should ideally indicate that such remedies have been exhausted).<sup>269</sup>

1503 procedure complaints go through a screening process. They are reviewed by the Secretariat and the Chairperson of the Working Group on Communications, and may then be forwarded to the Working Group on Communications. If so forwarded, they will also be submitted to the state concerned for comment. The Working Group on Communications considers the complaint and state response, and may then forward the complaint to the Working Group on Situations. That Group may deal with human rights situations itself, or refer the matter to the Council. Since the 1503 process is confidential, no response is made to the group submitting the complaint.<sup>270</sup>

However, 1503 procedure complaints should not overlap with or duplicate other U.N. procedures.<sup>271</sup> Since the Commission and other U.N. bodies have already addressed human rights in North Korea, and since a Special Rapporteur has been appointed to consider the issue, a 1503 procedure complaint would likely be viewed as redundant. For this reason, it should probably not be considered as the most effective option in the case of North Korea.

### **E. Possible Outcome / Result**

Information presented to the Council or to the Special Rapporteur could influence the Council to adopt a resolution calling for action. Although the Council has not existed for long at the time of this publication, under the General Assembly resolution establishing the Council, a variety of roles are presented. These include making recommendations to the

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<sup>266</sup> This procedure was originally established by ECOSOC Resolution 1503: *Consultative relationship Between the United Nations and Non-Governmental Organizations*, U.N. ESCOR, 48th Sess., Supp. No. 1A, U.N. Doc. E/4832/Add.1 (1970). It was later revised under Resolution 2000/3: *Procedure for Dealing with Communications Concerning Human Rights*, U.N. ESCOR, 10th Meeting, Supp. No. 1, at 24, U.N. Doc. E/2000/L.5 (2000).

<sup>267</sup> U.N. Office of the High Commissioner of Human Rights, Fact Sheet No. 7 (Rev. 1), *Complaints Procedure*, available at [http://www.ohchr.org/english/about/publications/docs/fs7.htm#\\_ftn14](http://www.ohchr.org/english/about/publications/docs/fs7.htm#_ftn14) [hereinafter Fact Sheet No. 7].

<sup>268</sup> *Id.*; U.N. Office of the High Commissioner of Human Rights, *The Revised 1503 Procedure*, available at <http://193.194.138.190/html/menu2/8/1503.htm>. The complaint should be submitted to the U.N. Office of the High Commissioner of Human Rights, and may be mailed to Support Services Branch, OHCHR-UNOG, 1211 Geneva 10, Switzerland; faxed to + 41 22 917-9011; or e-mailed to [1503@ohchr.org](mailto:1503@ohchr.org).

<sup>269</sup> Fact Sheet No. 7, *supra* note 267. Note that domestic remedies need not be exhausted if pursuing them would be futile. *The Revised 1503 Procedure*, *supra* note 268.

<sup>270</sup> Fact Sheet No. 7, *supra* note 267.

<sup>271</sup> *Id.*

General Assembly, acting as a forum for human rights issues, promoting State follow-up of human rights obligations, responding to human rights emergencies, working with governments, making recommendations to protect human rights, and submitting an annual report to the General Assembly.<sup>272</sup> In addition, the Council has the full range of functions of the Commission it replaced.<sup>273</sup> A Council resolution could call for a variety of actions: it could urge action by North Korea itself, by the international community, or by another U.N. organ. Another possibility is that the Council could continue to extend the mandate of the Special Rapporteur.<sup>274</sup> The Council also has various options available to respond to a complaint submitted under the 1503 procedure.<sup>275</sup> At a minimum, the Council's continued attention to the situation in North Korea would contribute to international awareness of the problem and maintain pressure on North Korea.

As noted above, the Commission has adopted three resolutions addressing the severe human rights issues in North Korea and appointed a Special Rapporteur. These three resolutions represent a victory for NGOs concerned about North Korea who pursued action through the Commission. The resolutions also illustrate the potential for NGOs to achieve results by presenting information of abuses and lobbying U.N. bodies to take action.

## **F. Political Considerations**

In the past, the Commission has shown itself willing to criticize North Korean human rights abuses. CHR Resolutions 2004/13 and 2005/11 address human rights abuses in North Korea and call for international action. Presumably, the Council will continue to be willing to criticize North Korean human rights abuses and make recommendations. The creation of the Council, and its elevation to Charter status, may create a new opportunity for more forceful international action, although to date it is not generally viewed as an improvement on the Commission.

One criticism that was sometimes leveled at the Commission was the membership of states with questionable human rights records pursuing political agendas.<sup>276</sup> A number of states with poor records are still represented, including China, Russia, and Cuba.<sup>277</sup> The presence

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<sup>272</sup> G.A. Res. 60/251, *supra* note 247, art. 5.

<sup>273</sup> *Id.* art. 6.

<sup>274</sup> This mandate, which was originally for one year, has already been extended once. U.N. C.H.R. Res. 2005/11, *supra* note 175, ¶ 7.

<sup>275</sup> The Council may take a variety of actions in response to such complaints. It can choose to keep a situation under review; to appoint an independent expert; to pursue a public procedure; or to make a recommendation to the ECOSOC. Fact Sheet No. 7, *supra* note 267.

<sup>276</sup> "Manuel Rodriguez Cuadros, Chairman of the UN Human Rights Commission until June 16, said the creation of the new council was essential. 'The Human Rights Commission eventually became paralyzed and could not longer act . . . . It had become an instrument for various countries seeking to pursue their foreign policies, which eventually damaged the Commission's reputation.'" Deutsche Welle, *Germany Elected to new UN Human Rights Council* (May 10, 2006), available at <http://www.dw-world.de/dw/article/0,2144,2014565,00.html> (last visited Oct. 19, 2007).

<sup>277</sup> Freedom House, *UN Human Rights Council: Time for Action*, available at <http://www.freedomhouse.org/template.cfm?page=70&release=381> (May 25, 2006). Freedom House noted that fewer human rights abusers were elected to the Council than had been represented on the Commission, but that "a number of governments with notorious human rights records were also elected, raising serious questions about the ability of the new Council to fulfill its mandate to protect human rights. China, Cuba, Saudi Arabia, Pakistan, Tunisia, Cameroon, Algeria, Russia and Azerbaijan have a demonstrated track record of human rights violations at home and of obstructing international

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of these three states in particular could have an impact on the Council's willingness to hold North Korea accountable.

One specific concern with the Council is that some of the states with questionable records have suggested that the Council should not continue the Commission's practice of passing resolutions specifically targeting individual state's human rights records. For example, in the recent debates following the Special Rapporteur's presentation of a report on North Korea, the representatives of Cuba and Zimbabwe both opposed the adoption of resolutions criticizing human rights in North Korea. Both nations stated that "constructive dialogue" should replace such condemnation, with Zimbabwe stressing that the Council should break with the traditions established by the Commission, and Cuba calling for the new Council to "constitute a different forum."<sup>278</sup> NGOs lobbying the Council should be aware of this political dynamic and act accordingly. It is important for NGOs to press the Council to continue the work begun by the Commission in recognizing and criticizing human rights problems in North Korea and also to make constructive recommendations for improvement.

Of course, in the case of an isolated, totalitarian regime, the usual questions about the impact of international opprobrium continue to apply. Nevertheless, the efforts of NGOs and the international community are a necessary background to change, without which States would have much smaller incentives to accept and comply with international human rights standards.

### **G. Conclusion**

The various options presented here have various degrees of effectiveness in the case of North Korea. The most effective options are probably to lobby the Council to maintain pressure on North Korea to comply with international human rights standards, and to provide information to the Special Rapporteur. A further option for NGOs is to pursue consultative status with the Council. The Council is potentially a useful international forum for NGOs, and has the potential to set the human rights agenda for North Korea and spur further international action.

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scrutiny." See also Human Rights Watch, *U.N.: New Council Must Champion Fight for Rights*, available at <http://hrw.org/english/docs/2006/05/10/global13343.htm> (May 10, 2006). The article notes that, despite the presence of some nations with bad records, "[t]he 47 countries elected yesterday to the new Human Rights Council by the United Nations General Assembly represent a substantial improvement over the recent membership of the former Commission on Human Rights."

<sup>278</sup> U.N. Human Rights Council, Summary Record of 16th Meeting, 2d Sess. Held at Palais Des Nations, Geneva, Sept. 27, 2006, ¶¶ 36, 45, U.N. Doc. A/HRC/2/SR.16 (Dec. 4, 2006), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/141/55/pdf/G0614155.pdf>.

## **INTRODUCTION TO U.N. TREATY BODIES**

Several U.N. bodies have mandates including human rights. Such bodies exist to promote international adherence to human rights standards. There are two main types of U.N. bodies: charter bodies and treaty bodies. Charter bodies are bodies created by the U.N. Charter (such as the Security Council or Human Rights Council), and draw their legitimacy, mandate and competence directly from the U.N. By contrast, treaty bodies are created by specific international treaties. Treaties often provide for the creation of an organization to monitor compliance and settle disputes arising from the treaty. This report will summarize the potential strategies for human rights groups to take regarding U.N. treaty bodies.

Unlike charter bodies, treaty bodies draw their legitimacy from the treaty that establishes them. This both limits and empowers these bodies. Treaty bodies may exercise power only over members of that treaty and only to the extent the treaty provides, while charter bodies can consider the actions of any nation. However, treaty bodies claim authority over nations that have deliberately signed and ratified a treaty, which reinforces their mandate. When a nation chooses to join a treaty, it explicitly affirms the values of that treaty and accedes to the authority of that treaty's administering body. This legitimates condemnation by the international community for violation of those values, and creates leverage for NGOs to hold nations accountable to the standards they have espoused.

North Korea has acceded to four of the major international human rights conventions: the International Covenant on Civil and Political Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child; and the International Covenant on Economic, Social and Cultural Rights. An NGO considering the options available to address human rights problems in North Korea should give these treaties special attention, as they are the only aspects of the U.N. system involving human rights with which North Korea cooperates.

This handbook presents an overview of the working methods of these treaty bodies and suggests ways that NGOs can productively engage them. However, these bodies are in a state of flux - each year, procedures and personnel may change. One reform under consideration at the U.N. is to streamline the treaty body system, replacing the existing seven bodies with one unified body.<sup>279</sup> The goal of this reform would be to strengthen the system's ability to monitor national compliance with human rights standards. Other suggestions include maintaining the existing bodies, but unifying their procedures.<sup>280</sup> In light of the possibility of change, an NGO interested in working with one of these bodies should verify that the procedures described in this report remain accurate. To assist with that end, this report describes general approaches more than specific details, and indicates various sources for further information.

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<sup>279</sup> U.N. Secretariat, *Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body*, U.N. Doc. HRI/MC/2006/2 (Mar. 22, 2006), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G06/410/75/PDF/G0641075.pdf>. This paper notes the Secretary-General's call, repeated by the High Commissioner, for a streamlined treaty system with harmonized reporting requirements. *Id.* ¶ 5. The paper also suggests the establishment of a unified treaty body to meet these goals, but notes some of the legal obstacles to this plan. See *id.* ¶¶ 27-36, 64-65.

<sup>280</sup> See Report of the Working Group of the Harmonization of Working Methods of Treaty Bodies, Geneva, Nov. 27-28, 2006, U.N. Doc. HRI/MC/2007/2 (Jan. 9, 2007), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G07/400/45/PDF/G0740045.pdf>. In this report, the representatives of the various treaty bodies indicate they are generally opposed to the creation of a unified treaty body, but support investigation into harmonized reporting and complaints requirements.



## V. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

### A. Introduction

The Human Rights Committee (“HRC”) is the treaty body associated with the International Covenant on Civil and Political Rights (“ICCPR”). Accordingly, its remit is the basic human rights standards contained in the ICCPR. It consists of 18 experts who meet three times a year in New York and Geneva.<sup>281</sup> North Korea acceded to the ICCPR on December 14, 1981.<sup>282</sup>

### B. Standards

The HRC was established by the ICCPR to attend to breaches of that document.<sup>283</sup> The ICCPR sets out various fundamental human rights standards which signatories are obliged to respect. These are wide-ranging and include prohibitions on torture, slavery, and arbitrary detention; freedom of movement, expression, and religion; and the protection of children, families, and ethnic groups.<sup>284</sup>

### C. Violations

North Korea is guilty of numerous violations of the ICCPR, as the HRC itself has already recognized. In a report in 2001, the HRC noted that North Korea does not respect freedom of religion, freedom of the press, or the right to vote, among others.<sup>285</sup> That report makes it plain that the HRC considers the situation in North Korea to be within its purview.

Independent sources of information also indicate North Korea has systematically violated all the main categories of rights recognized in the ICCPR. See this report’s facts section “Present Era” above for more detail, specifically the subsections on Refugees, Religion in North Korea, Torture in North Korea, Infanticide in Prison Camps, Abduction, Forced Labor and International Trade, Women in North Korea, and Children in North Korea.

### D. Institutional Process

There are several types of action that can be taken by the HRC.

1) State parties to the ICCPR are obliged to submit regular reports to the HRC on their implementation of ICCPR rights. States first report within a year after accession to

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<sup>281</sup> For the number and location of sessions, see U.N. Office of the High Commissioner for Human Rights, *Human Rights Committee – Sessions*, available at <http://www.ohchr.org/english/bodies/hrc/sessions.htm> (last visited May 31, 2006). For HRC membership, see U.N. Office of the High Commissioner for Human Rights, *Human Rights Committee – Members*, available at <http://www.ohchr.org/english/bodies/hrc/members.htm> (last visited May 31, 2006). That site contains a list of the members of the HRC and their backgrounds.

<sup>282</sup> See Office of U.N. High Comm’r for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties 4* (July 14, 2006), available at [www.ohchr.org/english/bodies/docs/status/pdf](http://www.ohchr.org/english/bodies/docs/status/pdf) [hereinafter *Status of Ratifications*].

<sup>283</sup> International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 360 [hereinafter *ICCPR*], arts. 40-45, available at [http://www.unhcr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhcr.ch/html/menu3/b/a_ccpr.htm).

<sup>284</sup> *Id.* arts. 1-27.

<sup>285</sup> *Concluding Observations*, *supra* note 38, ¶¶ 22-25.

the ICCPR, and thereafter on request by the HRC, which is normally every four years.<sup>286</sup> The HRC examines the state report and issues its own report with “concluding observations” to the state. The HRC then forwards the state report along with its own report and comments to the Economic and Social Council. All these reports are publicly accessible, which provides a useful tool for future influence on states.

North Korea’s last report was distributed May 4, 2000, the first in 17 years.<sup>287</sup> The last report by the HRC on North Korea was August 27, 2001. In that report, the HRC observed that there were numerous human rights concerns in North Korea, including (among others) the independence of the judiciary, capital punishment for political offenses, abuses by law enforcement personnel, forced labor, pre-trial detention, travel within the country and abroad, religious freedom, media freedom, freedom of assembly, the ability to vote for political parties, and trafficking in women.<sup>288</sup> North Korea’s next report was due January 1, 2004 and is still outstanding.<sup>289</sup>

NGOs can influence the report process by submitting their own reports about human rights conditions in a particular country.<sup>290</sup> The OHCHR notes that “the Committee invites non-governmental organizations and national human rights institutions to provide reports containing country-specific information on states parties whose reports are before them.”<sup>291</sup> NGOs can submit “*shadow reports*” (sometimes called “*counter reports*” or “*alternative reports*”), which are critical comments on the accuracy of the report submitted by the State itself. Note that shadow reports are a vital tool of NGO participation with each of the treaty bodies, not just the HRC. Shadow reports generally track state reports article for article and give NGOs a voice to challenge a state’s own depiction of human rights conditions inside the country. An alternative to a detailed shadow report is to submit a report that supplies general information about a particular state.<sup>292</sup> It is generally helpful to explain how the facts presented in a shadow report relate to specific articles of the ICCPR. General advice on drafting reports can be found at the Human Rights First website and in official HRC

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<sup>286</sup> ICCPR, *supra* note 283, art. 41; U.N. Office of the High Commissioner for Human Rights, *Human Rights Committee*, available at <http://www.ohchr.org/english/bodies/hrc/index.htm> (last visited Aug. 30, 2006).

<sup>287</sup> *Second Periodic Report of the Democratic People’s Republic of Korea on its Implementation of the International Covenant on Civil and Political Rights*, U.N. Human Rights Committee, U.N. Doc. CCPR/C/PRK/2000/2 (2000), available at <http://www.hri.ca/forthereCord2001/documentation/tbodies/ccpr-c-prk-2000-2.htm>.

<sup>288</sup> See *Concluding Observations*, *supra* note 38, ¶¶ 8, 10, 13, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26.

<sup>289</sup> See *id.* ¶ 30.

<sup>290</sup> Human Rights First, *Role of NGOs*, <http://www.humanrightsfirst.org/pubs/descriptions/ngoguide/role.htm> (last visited Aug. 30, 2006) (“The committee has repeatedly stated that it is particularly interested in receiving information on actual country conditions from national and local NGOs based on the countries under review. There are several ways in which NGOs can contribute to the review of state reports.”).

<sup>291</sup> U.N. Office of the High Commissioner for Human Rights, *Human Rights Committee – Working Methods*, section VIII, available at <http://www.ohchr.org/english/bodies/hrc/workingmethods.htm#a8> [hereinafter, *Working Methods*]. The document continues, “[s]uch information should be submitted in writing, preferably well in advance of the relevant session.”

<sup>292</sup> “Apart from submitting a detailed counter-report, NGOs can also provide the committee with more general information on a country, in so far as this [sic] information is relevant to the covenant. It is useful for example to include the text . . . of laws or decrees which violate the covenant, or to submit specific cases of human rights abuses.” Human Rights First, *supra* note 290.

documents.<sup>293</sup> Past state reports and HRC observations can be found online.<sup>294</sup> In addition, an NGO should determine whether other NGOs have submitted shadow reports on the same country in the past – if so, NGOs should consider what they can add to the existing picture.

Thus, an NGO concerned about North Korea could draft a counter-report when North Korea fulfills its treaty obligations and files its next report to the HRC. When considering state reports, the HRC takes account of information provided by NGOs in shadow reports.<sup>295</sup> To be most useful to the HRC, and thus also most persuasive, such a report should concentrate on the presentation of facts about life in North Korea, to capitalize on NGOs' abilities to gather information. Such a report could springboard from the HRC's expressed concerns about human rights in North Korea. A report should be submitted to the HRC six weeks before the next scheduled session on North Korea, as it would be at that session that the HRC considers the situation in North Korea and prepares its own comments. The reports should be sent to the HRC Secretary in Geneva.<sup>296</sup> The schedule for upcoming HRC sessions can be found at the website of the OHCHR.<sup>297</sup> Importantly, the HRC may consider the situation in North Korea even if North Korea delays the submission of its report.<sup>298</sup>

When the HRC considers state reports, NGOs have another opportunity to communicate with the members. After receiving a state report, the HRC meets with state representatives to discuss the HRC's questions about the report and conditions within the state. The HRC

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<sup>293</sup> See *id.* That website cites *Guidelines Regarding the Form and Contents of Initial Reports from States Parties*, U.N. Human Rights Committee, 43rd Sess., U.N. Doc. CCPR/C/5/Rev.2 (1995), and *Guidelines Regarding the Form and Contents of Periodic Reports from States Parties*, U.N. Human Rights Committee, 53rd Sess., U.N. Doc. CCPR/C/20/Rev.2 (1995).

<sup>294</sup> U.N. Office of the High Commissioner for Human Rights, Treaty Body Database, *Documents by Treaty*, available at <http://www.unhcr.ch/tbs/doc.nsf> (last visited August 21, 2006).

<sup>295</sup> U.N. Office of the High Commissioner of Human Rights, Fact Sheet No. 15 (Rev. 1), Civil and Political Rights: the Human Rights Committee 12 (2005), available at <http://www.ohchr.org/english/about/publications/docs/fs15.pdf> [hereinafter, Fact Sheet No. 15]. The fact sheet states that the HRC considers "shadow reports" from NGOs when examining the submission of a State. See also Human Rights First, *supra* note 290 ("As one of the [Committee] members put it, 'NGOs are the eyes and ears' of treaty bodies.").

<sup>296</sup> See Human Rights First, *supra* note 290 ("Ideally, the secretary of the committee should have all NGO information six weeks before the session of the committee, to allow the secretariat enough time to send this information to all the members at their home addresses."). Human Rights First recommends that twenty copies be sent, and that they be addressed to the Committee Secretary in Geneva, or to the U.N. in New York when the HRC is meeting there. The Secretary is: Eric Tistounet, Human Rights Committee Secretary, Room D-204, Support Services Branch, OHCHR, Palais des Nations, 1211 Geneva 10, Switzerland. He may be emailed at: [etistounet.hchr@unog.ch](mailto:etistounet.hchr@unog.ch).

<sup>297</sup> See U.N. Office of the High Commissioner for Human Rights, *Human Rights Committee – Sessions*, available at <http://www.ohchr.org/english/bodies/hrc/sessions.htm>. Alternatively, the Secretary of the Committee should also be able to provide a schedule: see his contact details at note 296, *supra*.

<sup>298</sup> "The Committee may, in a case where there has been a long-term failure by a State party, despite reminders, to submit an initial or a periodic report, announce its intention to examine the extent of compliance with Covenant rights in that State party at a specified future session." *Consolidated Guidelines for State Reports under the International Covenant on Civil and Political Rights: 26/02/2001*, U.N. Human Rights Committee, 70th Sess., ¶ G.6.1, U.N. Doc. CCPR/C/66/GUI/Rev.2 (2001), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.66.GUI.Rev.2.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.66.GUI.Rev.2.En?Opendocument). See also *General Comment No. 30: Reporting Obligations of States Parties under Article 40 of the Covenant: 18/09/2002*, U.N. Human Rights Committee, 2025th Meeting, ¶ 4, U.N. Doc. CCPR/C/21/Rev.2/Add.12 (2002), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/c4007d6e34e519a1c1256eac002f3173?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/c4007d6e34e519a1c1256eac002f3173?Opendocument).

then drafts its own concluding observations on the state.<sup>299</sup> Before the dialogue with state representatives, NGOs have the opportunity to meet with members of the HRC and suggest questions.<sup>300</sup> This is an avenue for NGOs to ensure that states are questioned about the most pertinent issues and to make the HRC aware of any factual concerns about a state's report.

Generally, when a treaty body considers a particular issue (such as human rights within a country), it may invite interested NGOs to make a statement, often called an 'oral intervention.' The process of oral intervention is driven by the need of treaty bodies for independent information, their relative lack of ability to gather information, and the desire of NGOs to provide information about their cause. This process is governed by each treaty body's own customary procedure. However, despite calls to formalize the arrangement, the process remains somewhat informal and unstructured.<sup>301</sup>

2) The HRC also drafts general comments. These are statements made by the HRC to clarify the provisions of the ICCPR.<sup>302</sup> Thirty-one have been issued to date.<sup>303</sup> The HRC takes account of NGO input when drafting these comments.<sup>304</sup> However, as with state reports, the HRC follows a set schedule to consider, research, and draft particular comments. Thus, an NGO providing information to the HRC should restrict itself to comments under consideration.<sup>305</sup> The general comments do not address the situations in individual states. However, an NGO concerned about North Korea could help ensure that a pertinent general comment, such as one addressing freedom of religion or the right to vote, included language condemning the type of conduct engaged in by the DPRK.

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<sup>299</sup> *Working Methods*, *supra* note 291, section II; Human Rights First, *Functions of the Human Rights Committee*, section 1, *State Reporting*, available at <http://www.humanrightsfirst.org/pubs/descriptions/ngoguide/functions.htm#reporting>; Fact Sheet No. 15, *supra* note 295, at 13.

<sup>300</sup> See Human Rights First, *supra* note 290 ("The Human Rights Committee recently decided to invite NGOs to suggest what issues should be dealt with in the written questions it prepares for the state in connection with its report."). See also *Working Methods*, *supra* note 291, section VIII ("The Committee sets aside the first morning meeting of each plenary session to enable representatives of non-governmental organizations to provide oral information. In addition to this, lunch-time briefings are organized to allow non-governmental organizations to provide further information to Committee members before the examination of the State report by the Committee.").

<sup>301</sup> Robert Charles Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 BUFF. HUM. RTS. L. REV. 261, 311-313 (2004). Blitt observes that recommendations to create formal procedures for oral interventions by NGOs have not been enacted, despite the fact that U.N. treaty bodies would be unable to operate without the input of human rights NGOs.

<sup>302</sup> General comments "usually elaborate the Committee's view of the content of the obligations assumed by States as party to the Convention." *Working Methods*, *supra* note 291, section IX.

<sup>303</sup> U.N. Office of the High Commissioner for Human Rights, *Human Rights Committee – Gen. Comments*, available at <http://www.ohchr.org/english/bodies/hrc/comments.htm>. This listing of General Comments indicates the types of topics normally addressed by the HRC.

<sup>304</sup> "During the process of formulation of general comments, consultations take place with specialized agencies, non-governmental organizations, academics and other human rights treaty bodies, allowing for broader input into the process of elaboration of the general comment." *Working Methods*, *supra* note 291, section IX.

<sup>305</sup> "NGOs can find out what general comments are currently being researched or drafted by directly contacting the Secretariat or by looking at either the annual report of the Human Rights Committee to the General Assembly or the summary records of previous meetings of the committee . . ." Human Rights First, *supra* note 290.

3) The HRC can pursue claims brought by one state against another, under ICCPR Article 41. A State party must first complain of violations to another state and may then refer the matter to the HRC. The HRC may then appoint a Conciliation Commission.<sup>306</sup> However, Article 41 places a precondition on this process: both the complaining state and the state concerned must have previously declared that they recognize the competence of the HRC to hear claims under this article. To date, although 48 States have made such a declaration, this procedure has never been used.<sup>307</sup>

Thus, in theory, one option for promoting and protecting human rights would be for an NGO to undertake a campaign to convince a state party to the ICCPR to complain to another State about human rights abuses, with such a complaint intended to ultimately lead to the appointment of a Conciliation Commission. Since this process has not yet been attempted, it is difficult to address how effective it would be.

The process as envisioned in the ICCPR is mainly one of facilitating communication. A state makes a formal complaint directly to the offending state, which must answer within three months. If the disagreement continues for six months, either state can refer the matter to the HRC. The HRC then ascertains whether all domestic remedies in the state of concern have been exhausted, and then makes available its “good offices” to resolve the matter. The HRC then makes a final report twelve months after the matter has been referred to it. If one of the states is still unsatisfied, the HRC may then appoint a five-member Conciliation Commission. That Commission then attempts to resolve the dispute, and drafts its own report on the matter, including its findings of fact.<sup>308</sup>

This process is thus not so much a matter of enforcement, as with a traditional juridical body, but is one of communication, compromise, and influence. However, it appears that it could still be quite effective. This procedure would focus attention on a state for a substantial period of time and would generate a number of reports and substantial opportunity for international comment (including by NGOs). It seems unlikely that any state, even a more isolated regime, would care to be the focus of a lengthy international process focusing on its human rights background. The fact that another state would bring the complaint would add further force to the process.

North Korea, however, does not recognize the competence of the HRC in respect to claims brought under Article 41.<sup>309</sup> Thus, this option is not currently a possibility in the case of North Korea. The only avenue for an NGO to pursue regarding this action would be to campaign for North Korea’s acceptance of Article 41, thus enabling the use of this procedure in the future. However, given that the procedure itself is of uncertain effectiveness (having never been used) and relies on the official actions of another state

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<sup>306</sup> ICCPR, *supra* note 283, art. 42.

<sup>307</sup> See Australian Government Department of Foreign Affairs and Trade, Human Rights Manual 2004, chapter 5, *available at* [http://www.dfat.gov.au/hr/hr\\_manual\\_2004/chp5.html](http://www.dfat.gov.au/hr/hr_manual_2004/chp5.html) (last visited June 12, 2006).

<sup>308</sup> ICCPR, *supra* note 283, arts. 41-42; Thomas Buergenthal, *The U.N. Human Rights Committee*, in MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 364-366 (Armand von Bogdandy & Rüdiger Wolfrum eds. 2001).

<sup>309</sup> See Office of the U.N. High Commissioner for Human Rights, *International Covenant on Civil and Political Rights New York, 16 December 1966 – Declarations Recognizing the Competence of the Human Rights Committee under Article 41*, *available at* [http://www.ohchr.org/english/countries/ratification/4\\_2.htm](http://www.ohchr.org/english/countries/ratification/4_2.htm) (last visited June 12, 2006). As noted above, such recognition is a prerequisite of the Article 41 process.

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party to pursue a complaint, and the DPRK is presumably unlikely to accept Article 41, this process has to be considered an unlikely avenue of persuasion in the case of North Korea.

4) Finally, the HRC can, under certain circumstances, hear claims brought by individuals against states. The First Optional Protocol to the ICCPR (“First Protocol”) empowers the HRC to hear individual complaints of ICCPR violations by States.<sup>310</sup> Under this procedure, individuals who have exhausted domestic remedies for violations of the ICCPR may bring claims against their States to the HRC. The HRC will then bring such communication to the attention of the State, which will respond within six months.<sup>311</sup> The HRC will then consider the matter and forward its views to the State and the individual, and will summarize all such findings in its annual report to the General Assembly.<sup>312</sup> A step-by-step guide to this procedure is available at the website of Human Rights First.<sup>313</sup> In addition, a model for individual communication to the HRC has been drafted by the U.N.<sup>314</sup>

Conclusions of the HRC under the first Protocol are probably not strictly legally binding.<sup>315</sup> Nevertheless, they can be useful in affecting the behavior of states, particularly through increasing international awareness of human rights/violations.<sup>316</sup> HRC conclusions can lead to changes in national practice and legislation, and can be evidence of a pattern of abuses within a country.<sup>317</sup>

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<sup>310</sup> Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 1, 999 U.N.T.S. 302, *available at* <http://www.hrweb.org/legal/cpr-prot.html> (last edited Jan. 27, 1997) [hereinafter *Optional Protocol*].

<sup>311</sup> *Id.* art. 4.

<sup>312</sup> *Id.* arts. 5-6.

<sup>313</sup> For a description of the overall process of individual complaints, see Human Rights First, *Functions of the Human Rights Committee* section II, *Individual Cases*, *available at* <http://www.humanrightsfirst.org/pubs/descriptions/ngoguide/functions.htm#cases>, and for suggestions for NGO actions, see Human Rights First, *supra* note 290, section IV, *Submit Individual Cases*.

<sup>314</sup> Fact Sheet No. 7, *supra* note 267, Annex 1.

<sup>315</sup> Timothy G. Furrow, *Canada Challenged as a Human Rights Leader: The Human Rights Committee's Decision in Waldman*, 11 *TRANSNAT'L L. & CONTEMP. PROBS.* 225, 242 (2001) (“The majority of scholars agree that the views of the Committee are not legally binding on the state parties. First, the Optional Protocol does not explicitly state that the views are binding. Second, the Committee itself has stated that it is not a court, and, in contrast to the European Court of Human Rights, it does not have a quasi-judicial mandate.” (internal citations omitted)).

<sup>316</sup> Gillian Triggs, *Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (CTH)*, 23 *MELBOURNE U.L.REV.* 372, 411 (1999). Commenting on the Protocol, Triggs observed that “[a]ny negative finding by an international human rights body is not directly enforceable against the offending state. . . . A finding of breach does, however, raise international awareness of national violations of human rights which has political consequences and, through persuasion, may be ultimately reflected in legal obligations.” *Id.*

<sup>317</sup> “Rein Mullerson, a former member of the Human Rights Committee, has identified three different functions which individual complaints procedures may, in principle, promote: ‘First, as a result of considering such a complaint an individual, whose rights have been violated, may have a remedy against the wrong suffered by him, and the violation could be stopped and/or compensation paid, etc.; second, considering a complaint may result not only in a remedy for the victim of the violation, whose complaint has been considered, but also in changes to internal legislation and practice; and third, an individual complaint (or more often, a series of complaints) may serve as evidence of systematic and/or massive violations of certain rights in a given country.’” Andrew Byrnes & Jane Connors, *Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention? Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, 21 *BROOKLYN J. INT'L L.* 679, 701-702 (1996) (citation omitted). The authors go on to state that they generally believe in the potential efficacy of the HRC.

Unfortunately, in the case of North Korea, this is not currently a feasible option. North Korea is not a party to the First Protocol and is thus not subject to this procedure. In the case of North Korea or other States that are not parties to the First Protocol, NGOs can mount campaigns to pressure States into accession.<sup>318</sup> Such a campaign would emphasize the advantages of being seen as a country that upholds international human rights standards and the gains in international prestige from signing the First Protocol.<sup>319</sup> The advantage of convincing North Korea to accept the First Protocol is that individual dissidents would be empowered to complain directly to the HRC about specific human rights abuses. This would significantly increase awareness of the reality in North Korea, as well as create a source of pressure on the North Korean regime. However, for the same reasons, it is unlikely that North Korea would accede to the First Protocol.

**E. Possible Outcome / Result**

Submitting a shadow report to the HRC could influence the HRC's own concluding observations about North Korea when it considers North Korea's state report. This could result in action by the U.N., by other states, or by North Korea itself. The ability of an NGO to verify North Korean compliance with prior HRC reports helps to give those reports more teeth. In addition, the ability of an NGO to dispute the facts contained in any new reports submitted by North Korea gives North Korea more incentive to be truthful in such reports. In general, the information provided by NGOs could make it more feasible for the international community to take action about the human rights situation in North Korea. However, one difficulty with the option of presenting a counter-report to the HRC is that it depends on the HRC's timetable, as such a report should ideally be presented only when the HRC is scheduled to consider North Korea.

Presenting information to the HRC on a proposed general comment, rather than a report specific to North Korea, could also have some productive results. Providing information about North Korea could help to keep the HRC focused on North Korean human rights violations. NGO efforts could also help ensure that a general comment on a specific freedom contains language that is applicable to the situation in North Korea. This would help to maintain international pressure against North Korean abuses of human rights.

With regard to the procedure for individual complaints under the First Protocol, an NGO campaign could aim to pressure North Korea into accession to the First Protocol, thus opening this avenue of human rights enforcement for the future. Similarly, an NGO could attempt to pressure North Korea into accepting the validity of the Article 41 procedure for State complaints. Failing this, however, both the individual and State complaint procedures are unlikely to be helpful. Further, the attempt to use such mechanisms could lead a state such as North Korea to cease its cooperation with the HRC, or to attempt to "un-sign" the ICCPR.

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<sup>318</sup> See Human Rights First, *supra* note 290 (recommending that NGOs lobby governments who have not ratified the Protocol).

<sup>319</sup> Beth Lyon, *Efforts and Opportunities to Use International Law to Alleviate Poverty in the U.S.*, 7 No. 2 HUM. RTS. BRIEF 6 (2000) (Lyon recommends that U.S. activists campaign for U.S. signature of the Protocol.), available at <http://www.wcl.american.edu/hrbrief/07/2efforts.cfm>.

### **F. Political Considerations**

The last HRC report was critical of North Korea, so it seems clear the HRC is willing to take a strong position against North Korean human rights abuses.<sup>320</sup> It is possible that the HRC may be wary of issuing too stark a verdict on North Korean human rights, for fear of exacerbating international controversy over the best way to deal with North Korea. However, the HRC may also be even more willing to criticize North Korea than before: in the last few years, awareness of the situation in North Korea has spread, with more NGOs submitting shadow reports to U.N. bodies, more coverage of North Korea in the media, and with the investigative efforts of Mr. Muntarbhorn, the Special Rapporteur for North Korea, who was appointed in 2004.

### **G. Conclusion**

The various options presented in this paper regarding the HRC have various degrees of effectiveness in the case of North Korea. On balance, the most effective option appears to be drafting a shadow report, to be presented to the HRC for the next session addressing human rights in North Korea. This would provide a useful means of publicizing violations and focusing international attention on problems within North Korea.

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<sup>320</sup> See *Concluding Observations*, *supra* note 38.

## VI. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

### A. Introduction

The U.N. Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), adopted in 1979 by the U.N. General Assembly, is often described as an international bill of rights for women. CEDAW consists of a preamble and 30 articles. The document defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.<sup>321</sup> The Democratic People’s Republic of Korea acceded to CEDAW on February 27, 2001. CEDAW came into effect on March 29, 2001 for the DPRK.<sup>322</sup> The Committee on the Elimination of Discrimination against Women (the “CEDAW Committee”) is the treaty body associated with CEDAW.

### B. Standards

Article 1 of CEDAW defines discrimination against women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”<sup>323</sup>

By accepting CEDAW, States commit themselves to undertake a series of measures to end all forms of discrimination against women, including: (1) incorporating the principle of equality of men and women in their legal system, abolishing all discriminatory laws and adopting appropriate ones prohibiting discrimination against women; (2) establishing tribunals and other public institutions to ensure the effective protection of women against discrimination; and (3) ensuring elimination of all acts of discrimination against women by persons, organizations or enterprises.<sup>324</sup>

CEDAW provides the basis for realizing equality between women and men through ensuring women’s equal access to, and equal opportunities in, political and public life – including the right to vote and to stand for election – as well as education, health and employment. State parties agree to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms. Moreover, the CEDAW is the only human rights treaty which affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations. It affirms women’s rights to acquire, change or retain their nationality and

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<sup>321</sup> Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature*, Dec. 18, 1979, 1249 U.N.T.S. 13, *available at* <http://www.ohchr.org/english/law/pdf/cedaw.pdf> [hereinafter CEDAW].

<sup>322</sup> Status of Ratifications, *supra* note 282, at 4.

<sup>323</sup> CEDAW, *supra* note 321, art. 1.

<sup>324</sup> *Id.* art. 2.

the nationality of their children. State parties also agree to take appropriate measures against all forms of trafficking in women and exploitation of women.<sup>325</sup>

### C. Violations

Discrimination against women is pervasive in North Korea. While the North Korean Constitution states that “women hold equal social status and rights with men,” few women have reached high levels of the Party or the Government, despite the fact that women are proportionally represented in the labor force.<sup>326</sup> This disparity in female to male representation in the public sector violates Article 11, which requires that states take all appropriate measures to eliminate discrimination against women in the field of employment.<sup>327</sup>

Since 2002, China has deported thousands of North Korean women back to North Korea, some of whom were pregnant, and many of whom were imprisoned upon their return. As discussed in this report’s facts section “Present Era – Infanticide,” forced abortions are regularly performed in detention centers, particularly in centers holding women repatriated from China. This practice violates Article 11(1)(f) of CEDAW, which requires states to safeguard the function of reproduction.<sup>328</sup>

Practices at odds with the goals of gender equality laid out by CEDAW are rampant in North Korea. Women prisoners in North Korea suffer from abusive and discriminatory practices which undermine CEDAW’s principles. For example, guards sexually abuse female prisoners.<sup>329</sup> Victims and witnesses have stated that prison officials have raped female prisoners under their custody in the prison camps and detention facilities.<sup>330</sup>

Women undergo serious discrimination and abuse in prisons and other detention facilities, as described in the facts section “Present Era – Women.” Furthermore, prisons lack basic facilities for women’s needs.<sup>331</sup> Reports show that women do not have access to shower facilities even during their menstruation, and differences in their physical and mental conditions compared to men are not fully acknowledged. Also, men examine women during security procedures. This practice violates Article 2(g) of CEDAW which requires states to repeal all national penal provisions which constitute discrimination against women.<sup>332</sup> Moreover, these abusive and discriminatory practices violate Article 2 of CEDAW. This Article requires that States abolish practices which discriminate against women.<sup>333</sup>

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<sup>325</sup> *Id.* art. 6.

<sup>326</sup> 2005 Country Report, *supra* note 46, § 5. See the “Present Era – Women” facts section above for more detail.

<sup>327</sup> CEDAW, *supra* note 321, art. 11.

<sup>328</sup> *Id.* art. 11(1)(f).

<sup>329</sup> 2005 Country Report, *supra* note 46, § 1(c).

<sup>330</sup> *Id.* § 5; see also HAWK, *supra* note 48, at 45.

<sup>331</sup> Amnesty International USA, *supra* note 6, Torture and Ill-Treatment.

<sup>332</sup> CEDAW, *supra* note 21, art. 2(g).

<sup>333</sup> *Id.* art. 8.

It should be noted that the CEDAW Committee expressed concern about many of these issues in its 2005 concluding observations on the DPRK report submitted in 2002.<sup>334</sup> The CEDAW Committee noted its concern about many issues, including indirect discrimination, representation on the people's committees, domestic violence, famine, trafficking, HIV, and women in detention.<sup>335</sup>

#### **D. Institutional Process Under CEDAW**

CEDAW Article 17 established the CEDAW Committee, consisting of 23 experts of “high moral standing and competence in the field covered by the Convention.”<sup>336</sup> The CEDAW Committee enjoys a very specific mandate: it watches over the progress women make in those countries that are state parties to CEDAW. A country becomes a state party in one of two ways: it either ratifies or accedes to CEDAW. A state party thereby accepts the legal obligation to counteract discrimination against women. The CEDAW Committee monitors the implementation of national measures to fulfill this obligation.<sup>337</sup> It meets at two sessions each year, although the schedule and number of meetings is subject to change.<sup>338</sup>

State parties are legally bound to put the CEDAW provisions into practice. They are also committed to submit national reports, at least every four years, on measures they have taken to comply with their CEDAW obligations.<sup>339</sup> Once the report is submitted, a pre-session working group meets to compile a list of issues relevant to that country.<sup>340</sup> After this, the CEDAW Committee meets with a representative from the state to formally consider the state report. Finally, there is a closed meeting at which the CEDAW Committee draws up its concluding observations. This may occur some time after the submission of the state report: while North Korea submitted its initial report in 2002, the CEDAW Committee did not issue

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<sup>334</sup> It should also be noted that there has been an “unplanned” yet gradual improvement in the status of women in North Korea over the past decade. While many men continue to report to their official positions in the non- or barely operating shops and factories in order to maintain the family's social status—and therefore its position on the PDS system—their wives now operate the stalls and tables in the many private markets that have emerged throughout North Korea. See Andrei Lankov, “North Korea: De-Stalinization From Below and the Advent of New Social Forces,” *Harvard Asia Quarterly*, available at <http://www.asiaquarterly.com/content/view/full/171/43/> (last visited Oct. 19, 2007).

<sup>335</sup> Committee on the Elimination of Discrimination against Women, *Concluding Comments: Democratic People's Republic of Korea*, U.N. Committee on the Elimination of Discrimination against Women, 33rd Sess., U.N. Doc. CEDAW/C/PRK/CO/1DAW/C/PRK/CO/1 (2005), available at [http://www.un.org/womenwatch/daw/cedaw/cedaw33/conclude/DPRK\\_Final\\_25%20July.pdf](http://www.un.org/womenwatch/daw/cedaw/cedaw33/conclude/DPRK_Final_25%20July.pdf) (last visited Oct. 19, 2007).

<sup>336</sup> CEDAW, *supra* note 21, art. 17(1).

<sup>337</sup> U.N. Division for the Advancement of Women, *Committee on the Elimination of Discrimination Against Women*, available at <http://www.un.org/womenwatch/daw/cedaw/committee.htm> (updated June 13, 2006).

<sup>338</sup> U.N. Division for the Advancement of Women, *Meeting of States Parties to the Convention on the Elimination of All Forms of Discrimination against Women – Fourteenth Meeting* (June 23, 2006), available at <http://www.un.org/womenwatch/daw/cedaw/statesmeeting/fourteenth.htm> (updated Aug. 25, 2006). The CEDAW Committee formerly met twice a year, in January and July, with the working group meeting for five days before each session. However, the General Assembly is currently considering the CEDAW Committee's request to extend the yearly meeting time.

<sup>339</sup> CEDAW, *supra* note 21, art. 18.

<sup>340</sup> Committee on the Elimination of Discrimination against Women – *Overview of the Current Working Methods of the Committee on the Elimination of Discrimination against Women*, U.N. General Assembly, 59th Sess., Supp. 38, at Annex X, p. 260, U.N. Doc. A/59/38 (2004), available at <http://www.un.org/womenwatch/daw/cedaw/wk-methods/Overview-English.pdf>. This Annex provides an overview of the operation of the CEDAW Committee.

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its concluding observations until 2005.<sup>341</sup> Article 21 empowers the CEDAW Committee to report annually to the General Assembly and make suggestions and general recommendations based on the examination of reports and information received from state parties. The CEDAW Committee's report incorporates its own general recommendations as well as comments, if any, from state parties.<sup>342</sup>

As with the other human rights treaty bodies, NGOs can contribute to the report process. NGOs can submit shadow reports either to the pre-session working group or to the CEDAW Committee itself.<sup>343</sup> NGOs should submit at least 15 copies of their shadow reports to the pre-session working group, and at least forty copies to the CEDAW Committee. Reports may be sent to the U.N. Division for the Advancement of Women or emailed to IWRAW Asia Pacific.<sup>344</sup>

In general, the process for writing and submitting shadow reports to the CEDAW Committee is similar to the process with the other human rights treaty bodies. A listing of past country reports, and the CEDAW Committee's conclusions on those reports, is available online.<sup>345</sup>

An NGO interested in drafting a shadow report should first review any shadow reports on the same country that other NGOs have submitted in the past. An NGO should then consider what it can add to the existing information on a country. It may also be worthwhile to establish contact with those other NGOs to explore the possibility of collaborating on a joint alternative report. Several NGOs - the Citizens' Alliance for North Korean Human Rights and the Good Friends organization - submitted alternative reports to the CEDAW Committee for its 2005 examination of North Korea's initial country report.<sup>346</sup> These shadow reports analyzed the claims made by North Korea in its report and provided an alternative description of conditions in North Korea. They also call on North Korea to make specific changes. These reports illustrate the role that shadow reports can play: challenging a state's own account of its human rights conditions and policies.

One useful guide to shadow reports submitted under CEDAW is available from International Women's Rights Action Watch ("IWRAW").<sup>347</sup> That guide advises compiling a shadow report

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<sup>341</sup> Committee on the Elimination of Discrimination against Women, *Concluding Comments*, *supra* note 335.

<sup>342</sup> CEDAW, *supra* note 21, art. 21.

<sup>343</sup> U.N. Division for the Advancement of Women, *NGO Information Note*, available at [http://www.un.org/womenwatch/daw/cedaw/NGO\\_Information\\_note\\_CEDAW.pdf](http://www.un.org/womenwatch/daw/cedaw/NGO_Information_note_CEDAW.pdf) (last visited Oct. 19, 2007). The note describes NGO participation with the CEDAW Committee in detail.

<sup>344</sup> The contact information for the U.N. Division for the Advancement of Women and IWRAW Asia Pacific can be found in the *NGO Information Note* cited above, along with other logistical details on report submission. *Id.*

<sup>345</sup> U.N. Division for the Advancement of Women, *Country Reports*, available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (last visited Aug. 22, 2006).

<sup>346</sup> Citizens' Alliance for North Korean Human Rights, *Class and Gender Discrimination in North Korea: Alternative Report (2005)*, available at [http://www.nkhumanrights.or.kr/jabong/board/zboard.php?id=NKHR\\_NOTICE&page=1&sn1=&divpage=1&sn=off&ss=on&sc=on&select\\_arrange=headnum&desc=asc&no=89](http://www.nkhumanrights.or.kr/jabong/board/zboard.php?id=NKHR_NOTICE&page=1&sn1=&divpage=1&sn=off&ss=on&sc=on&select_arrange=headnum&desc=asc&no=89); Good Friends, *Alternative NGO Report on the Convention on the Elimination of All Forms of Discrimination Against Women First Periodic Report of the Democratic People's Republic of Korea (2005)*, available at [http://www.fidh.org/IMG/pdf/cedaw\\_kr2005a.pdf](http://www.fidh.org/IMG/pdf/cedaw_kr2005a.pdf).

<sup>347</sup> Producing NGO Shadow Reports to CEDAW: A Procedural Guide, International Women's Rights Action Watch (2003), available at <http://iwraw.igc.org/shadow/CEDAWNGOguideJune2003.pdf>.

and submitting it at least three months before the CEDAW Committee is due to consider the country report. The guide further advises that NGOs should obtain the official country report that will be considered by the CEDAW Committee, and organize the shadow report accordingly. This report may be available from the DPRK Foreign Ministry. Failing this, however, an NGO must wait until the report has been officially submitted to the CEDAW Committee and must then obtain copies. Note that reports are required every four years. The next report was due from North Korea in 2006,<sup>348</sup> although an NGO should check with the CEDAW Committee or the DPRK Foreign Ministry to find out when it is actually expected.

As with the other treaty bodies, oral interventions are another means of influencing the CEDAW Committee. The IRAW guide recommends making an oral presentation to the CEDAW Committee and lobbying the CEDAW Committee as it considers the country report.<sup>349</sup> The CEDAW Committee itself notes that it sets aside time for oral presentations from NGOs at each of its sessions, and also provides the opportunity to talk to the pre-session working group.<sup>350</sup> This could be a valuable opportunity to draw the attention of the CEDAW Committee to the abuses against women that occur in North Korea. For example, the Citizens' Alliance for North Korean Human Rights made an oral intervention when they presented their alternative report in 2005.<sup>351</sup>

#### **E. Possible Outcome / Result**

The reporting requirement is the sole means of enforcement under CEDAW. The absence of a reliable and factual state report makes it difficult for the CEDAW Committee to monitor North Korea's progress in protecting the rights of women.<sup>352</sup> The submission of a shadow report could provide a helpful independent source of information. In addition, a shadow report, and possible NGO participation in CEDAW Committee working group meetings, could help focus the CEDAW Committee on North Korean human rights abuses. After the CEDAW Committee produces its concluding observations on the next North Korean report, NGOs can publicize those findings and attempt to hold North Korea accountable.

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<sup>348</sup> Committee on the Elimination of Discrimination against Women – *Concluding Comments*, *supra* note 335, ¶ 54.

<sup>349</sup> Producing NGO Shadow Reports, *supra* note 347, p. 2, 6, 9.

<sup>350</sup> Committee on the Elimination of Discrimination against Women, *supra* note 340 ¶ 30; *see also* *NGO Information Note*, *supra* note 343, for more information on NGO attendance at CEDAW Committee sessions or pre-session working group meetings.

<sup>351</sup> Citizens' Alliance for North Korean Human Rights, Citizens' Alliance for North Korean Human Rights (NKHR) Makes Oral Intervention at the 33rd Session of Convention on the Elimination of All Forms of Discrimination against Women, *available at* [http://www.nkhumanrights.or.kr/jabong/board/zboard.php?id=NKHR\\_notepad&page=13&sn1=&divpage=1&sn=off&ss=on&sc=on&select\\_arrange=headnum&desc=asc&no=328](http://www.nkhumanrights.or.kr/jabong/board/zboard.php?id=NKHR_notepad&page=13&sn1=&divpage=1&sn=off&ss=on&sc=on&select_arrange=headnum&desc=asc&no=328) (July 15, 2005). The representative of Citizens' Alliance gave a five minute presentation and answered two questions on their shadow report.

<sup>352</sup> *See Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women – Initial report of States Parties: Democratic People's Republic of Korea*, U.N. Committee on the Elimination of Discrimination against Women, U.N. Doc. CEDAW/C/PRK/1, at 10-11 (Sept. 11, 2002), *available at* [http://www.bayefsky.com/reports/dprkorea\\_cedaw\\_c\\_prk\\_1\\_2002.pdf](http://www.bayefsky.com/reports/dprkorea_cedaw_c_prk_1_2002.pdf). The North Korean report references laws such as Article 77 of North Korea's Constitution declaring the sexes to be equal, *see id.* at 10, while failing to acknowledge that these laws are not enforced in practice. The North Korean report falsely states that "discrimination against women [in North Korea] has been eliminated and sex equality realized," *id.*, and "[e]quality between men and women has been realized in [sic] such a degree that the word [sic] 'discrimination against women' sounds unfamiliar to people now." *Id.* at 11.

**F. Conclusion**

CEDAW provides a useful avenue for an NGO interested in publicizing the plight of women in North Korea. The CEDAW Committee lacks any direct mechanism to enforce change in North Korea. However, working with the CEDAW Committee could be a good way to publicize abuses, monitor DPRK compliance with international standards, and to form connections with other concerned groups.

## VII. CONVENTION ON THE RIGHTS OF THE CHILD

### A. Introduction

The Convention on the Rights of the Child (the “CRC”) is an international instrument designed to recognize the special human rights that should protect children. The CRC sets out these rights in 54 articles and two Optional Protocols. The text enumerates the rights that children everywhere should enjoy: the right to survival; to development to the fullest; to protection from harmful influences, abuse and exploitation; and to full participation in family, cultural and social life. The CRC has four core principles, which are: non-discrimination; devotion to the best interests of the child; the right to life, survival, and development; and respect for the views of the child.<sup>353</sup>

After a long and slow path towards approval, the U.N. General Assembly unanimously adopted the text of the CRC on November 20, 1989. The CRC became legally binding on signatories in September 1990, after twenty States ratified it. As of December 2005, nearly every United Nations member was party to the CRC, including North Korea, which ratified the CRC on September 21, 1990.<sup>354</sup> The Committee on the Rights of the Child (the “CRC Committee”) is the treaty body associated with the CRC.

### B. Standards

Ratification or accession to the CRC means that signatory States undertake the obligations of the CRC. In essence, state parties, including North Korea, must protect children’s rights and hold themselves accountable for this commitment before the international community. State parties to the CRC are obliged to develop and undertake all actions and policies in light of the best interests of the child.

The CRC places equal emphasis on all the rights of children. There is no hierarchy of human rights. These rights are indivisible and interrelated, with a focus on the child as a whole. Although the principles of the CRC include a wide range of civil, political, economic, social and cultural rights, Articles 2, 3, 6 and 12 enshrine the four main principles. Article 2 focuses on non-discrimination. It states that state parties shall respect the rights listed in the CRC for each child in their jurisdiction, “without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”<sup>355</sup> Under this Article, all children are entitled to equal rights and opportunities.

Article 3 defines the “best interests of the child” principle, the second major principle of the CRC. It states that “[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration.”<sup>356</sup> As a result, social welfare institutions, courts of law,

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<sup>353</sup> U.N. Convention on the Rights of the Child, *adopted and opened for signature* Nov. 20, 1989, 28 I.L.M. 1448, *available at* <http://www.ohchr.org/english/law/pdf/crc.pdf> [hereinafter CRC].

<sup>354</sup> Status of Ratifications, *supra* note 282, at 4.

<sup>355</sup> CRC, *supra* note 353, art. 2.

<sup>356</sup> *Id.* art. 3.

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administrative bodies, and legislative bodies are all compelled to act in the best interests of the child when taking action involving a child.

The third principle, addressed in Article 6, outlines a child's right to life, survival, and development. Article 6 holds that "every child has the inherent right to life" and "[s]tates [p]arties shall ensure to the maximum extent possible the survival and development of the child."<sup>357</sup> The right to life is given further emphasis by ensuring the child's rights to survival and development. The right to development means not only physical health and development, but also mental, emotional, social, cognitive, and cultural development.<sup>358</sup> Essentially, the CRC is premised on the belief that all children are born with fundamental freedoms and the inherent rights of all human beings, and that States Parties must take active measures to ensure that those freedoms and rights are fully implemented and respected.

### C. Violations

Children suffer gravely from human rights violations in North Korea. To begin with, while the state provides compulsory education for all children until the age of 15, some children are denied educational opportunities and subjected to other punishments and disadvantages as a result of the North Korean loyalty classification system and the principle of 'collective retribution' for the transgressions of family members.<sup>359</sup> This policy clearly violates the CRC's Article 28, which recognizes the right of the child to education.<sup>360</sup> Furthermore, it violates Article 2(2), which requires that states take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of their family members' status, activities or beliefs.<sup>361</sup>

Like every member of North Korean society, children are subjected to intense political indoctrination—"even mathematics textbooks propound party dogma."<sup>362</sup> Foreign visitors and academic sources report that children from an early age are subjected to several hours a week of mandatory military training and indoctrination at their schools.<sup>363</sup> While the minimum age for voluntary enlistment in the armed forces is 16, schoolchildren are nevertheless taught to assemble and dismantle weapons at an earlier age.<sup>364</sup> Indeed, this

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<sup>357</sup> *Id.* art. 6.

<sup>358</sup> Natasha Parassram Concepcion, *The Convention on the Rights of the Child After Ten Years: Success or Failure?*, 7 HUM. RTS. BRIEF 2 (Winter 2000), *available at* <http://www.wcl.american.edu/hrbrief/v7i2/child10years.htm> (last visited Oct. 19, 2006).

<sup>359</sup> For more detail on the facts underlying these violations, *see* Section I(C)(7), *supra*.

<sup>360</sup> CRC, *supra* note 353, art. 28.

<sup>361</sup> *Id.* art. 2(2).

<sup>362</sup> *See* 2005 Country Report, *supra* note 46, § 5.

<sup>363</sup> For example, a documentary about life in North Korea portrays pre-school posters of children throwing missiles at a U.S. soldier. NORTH KOREA: A DAY IN THE LIFE (Pieter Fleury 2004).

<sup>364</sup> Amnesty International, Report 2005: North Korea, *available at* <http://web.amnesty.org/report2005/prk-summary-eng>.

practice likely violates the CRC's Article 38(3), which requires that states refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.<sup>365</sup>

According to North Korea's Constitution, the state prohibits work by children under the age of 16 years. However, this prohibition does not prevent forced labor by children imprisoned with their families. Moreover, schoolchildren are assigned to factories or farms for short periods to help meet production goals.<sup>366</sup> This forced labor violates Article 32 of the CRC which recognizes the right of the child to be protected from economic exploitation, from performing any work that is likely to be hazardous, or work that may interfere with the child's education.<sup>367</sup>

Practices in conflict with the "best interests of the child" principle, and thus proscribed by CRC Article 3, are rampant in North Korea. Prisoners are sometimes executed in public, often in the presence of children.<sup>368</sup> Indeed, subjecting children to viewing such executions violates the CRC's basic goals, as it undermines the well-being and best interests of the child. In addition, entire families, including children, have been imprisoned when one member of the family was accused of a crime.<sup>369</sup> This form of collective punishment is not only against the best interests of the child, it also violates CRC Article 2(2), which requires that states ensure that children are protected against all forms of discrimination or punishment on the basis of the status, activities or beliefs of their family members.<sup>370</sup>

Additionally, "[t]he U.N. Committee on the Rights of the Child has repeatedly expressed concern over de facto discrimination against children with disabilities and the insufficient measures taken by the state to ensure that these children had effective access to health, education, and social services, and to facilitate their full integration into society."<sup>371</sup> This discriminatory practice violates the CRC's Article 23, which recognizes that a mentally or physically disabled child should enjoy a full and decent life and receive special care.<sup>372</sup>

Although famine and malnutrition have plagued North Koreans in general for the past decade, children have suffered disproportionately. The United Nations World Food Programme reported feeding over 2.8 million North Korean children during 2005. A nutrition survey carried out in 2004 by UNICEF and the WFP, in cooperation with the North Korean government, found that in a sample of 4,800 children, 23 percent were underweight, 37 percent were stunted and 7 percent were acutely malnourished.<sup>373</sup> Allowing such a famine

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<sup>365</sup> CRC, *supra* note 353, art. 38(3).

<sup>366</sup> See 2005 Country Report, *supra* note 46, § 5. For more detail, see the "Present Era- Children" facts section above.

<sup>367</sup> CRC, *supra* note 353, art. 32.

<sup>368</sup> See U.S. Dep't of State, Country Reports on Human Rights Practices – 2004: Democratic People's Republic of Korea § 1 (Feb. 28, 2005), *supra* note 101. See the "Present Era–Children" facts section above for more detail.

<sup>369</sup> See 2005 Country Report, *supra* note 46, § 1(d). See the "Present Era–Children" facts section above for more detail.

<sup>370</sup> CRC, *supra* note 331, art. 2(2).

<sup>371</sup> See 2005 Country Report, *supra* note 46, § 5.

<sup>372</sup> CRC, *supra* note 353, art. 23(1)/(2).

<sup>373</sup> See 2005 Country Report, *supra* note 46, § 5.

to develop, without taking appropriate limiting actions, violates the CRC's Article 24(2)(c), which requires states to take appropriate measures to combat disease and malnutrition through the provision of adequate nutritious foods and clean drinking water.<sup>374</sup> North Korea has at times rejected aid that would have benefited millions of children simply to make political statements.<sup>375</sup>

The lives of North Korean children, its most vulnerable citizens, are not granted the respect the CRC demands. As described in facts section I(C)(3), there are reports of infanticide and forced abortion in North Korean detention camps.<sup>376</sup> North Korea's refugee crisis directly fuels these abuses. When North Korean refugees flee to China in search of food or a better life, China frequently repatriates those refugees to North Korea. Upon their forced return, such refugees are placed in prison camps for their attempted flight. Prisoners discovered to be pregnant with the babies of Chinese men are forced to have abortions, and any babies that are born despite these efforts are killed.<sup>377</sup> Such systemic efforts by the North Korean government result in the killing of babies by an array of means, including abandonment, suffocation, or neck-breaking.<sup>378</sup> This policy violates Article 6 of the CRC, which requires recognition of every child's inherent right to life and requires states to ensure to the maximum extent possible the survival and development of the child.<sup>379</sup> The North's systemic efforts against half-Chinese babies violate the core of Article 6's protections. These practices, furthermore, undermine the central aim of the CRC – protection from physical abuse and death at the early childhood stage.

It should be noted that the CRC Committee pointed out the existence of many of these violations in its 2004 conclusions on the last report submitted by North Korea.<sup>380</sup> The CRC Committee's recommendations included: to provide more resources to children, to cooperate with civil society and international groups, to fight discrimination against children, to prevent torture and other violence in detention facilities, to inform children of the whereabouts of jailed parents, to reduce the institutionalization of children, to improve health care, improve education, to ensure that children aged 16-18 join the military voluntarily, and to not treat children repatriated from China as criminals.

### **D. Institutional Process**

International human rights instruments such as the CRC and its Optional Protocols are negotiated among United Nations Member States and are legally binding on the individual States that become parties to the instrument. Ratification of the CRC means that a state accepts the obligation to respect, protect, promote and fulfill the enumerated rights under

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<sup>374</sup> CRC, *supra* note 353, art. 24(2)(c).

<sup>375</sup> See the "Present Era – Food Situation" facts section above for more detail.

<sup>376</sup> See *supra* Section I(C)(5), (7) for more details.

<sup>377</sup> See James Brooke, *supra* note 80.

<sup>378</sup> See *id.*

<sup>379</sup> See CRC, *supra* note 353, art. 6.

<sup>380</sup> *Concluding Observations of the Committee on the Rights of the Child: Democratic People's Republic of Korea*, U.N. Committee on the Rights of the Child, 36th Sess., ¶ 68, U.N. Doc. CRC/C/15/Add.239 (July 1, 2004), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.239.En](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.239.En).

the CRC, including adopting or changing laws and policies in order to implement the provisions of the CRC.

The CRC Committee, established pursuant to Article 43 of the CRC, is a body of experts that monitors the progress made by States Parties in implementing the CRC.<sup>381</sup> The CRC Committee establishes guidelines by which states may structure their own domestic legislation relating to the CRC. Governments that ratify the CRC must report to the CRC Committee every five years.<sup>382</sup> The reports issued by States Parties to the CRC outline the situation of children in the country and explain the measures taken by the State to enhance children's rights. The CRC Committee begins with a pre-sessional discussion of the report by a working group. The CRC Committee then reviews each report at a public meeting with representatives of the reporting nation.<sup>383</sup> After such a meeting, the CRC Committee issues its own report, which contains concerns, suggestions and recommendations for the reporting country. The CRC Committee submits its concluding observations, along with a transcript of the meeting, to the reporting nation and to several U.N. bodies, and makes them available to the public.<sup>384</sup> In its review of States' reports, the CRC Committee urges all levels of government to use the CRC as a guide in policymaking and further implementation.

NGOs can influence the report process by submitting documents to the CRC Committee, similar to the process with the HRC described above. According to the OHCHR, "the Committee has systematically and strongly encouraged" NGOs to submit reports, documentation, and other information to help it assess conditions in a country. Information can be submitted from either single NGOs, or from NGO coalitions, although coalitions are likely to be more influential.<sup>385</sup> Information from NGOs is valuable (and persuasive) to the extent that it provides the CRC Committee with an independent source of information. The Coalition to Stop the Use of Child Soldiers submitted a brief alternative report to the CRC Committee in 2004 which addressed the militarization of youth in North Korea.<sup>386</sup>

NGO submissions may be informative documents or reports, or may be full-fledged shadow reports. As with the HRC, a shadow report should closely replicate the structure of the official country report. It is important to note that material should be submitted at least two months before the meeting of the pre-sessional working group. Twenty copies should be provided.<sup>387</sup> The NGO Group for the CRC ("NGO Group") has drafted a specific guide for

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<sup>381</sup> See CRC, *supra* note 353, art. 43.

<sup>382</sup> U.N. Office of the High Commissioner for Human Rights, *Committee on the Rights of the Child: Monitoring children's rights*, available at <http://www.ohchr.org/english/bodies/crc/index.htm> (last visited August 29, 2006). Reports are due within two years of accession to the CRC, and then every five years.

<sup>383</sup> Lawrence J. LeBlanc, *The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights (Human Rights in International Perspective)* 256-58 (1995).

<sup>384</sup> CRC, *supra* note 353, art. 44.

<sup>385</sup> U.N. Office of the High Commissioner for Human Rights, *Committee on the Rights of the Child – Working Methods*, § VIII, available at <http://www.ohchr.org/english/bodies/crc/workingmethods.htm#a8> (last visited Aug. 29, 2006).

<sup>386</sup> The Coalition to Stop the Use of Child Soldiers, *Child Soldiers: CRC Country Briefs: North Korea* (2004), available at [http://www.crin.org/docs/resources/treaties/crc.36/dprk\\_CSCS\\_ngo\\_report.pdf](http://www.crin.org/docs/resources/treaties/crc.36/dprk_CSCS_ngo_report.pdf). Note that this report was not directly responsive to a state report, and was issued in 2004 after North Korea had submitted a state report in 1996.

<sup>387</sup> U.N. Convention on the Rights of the Child, *Committee on the Rights of the Child – Report on the twenty-second session*, 22nd Sess., at Annex VIII, p. 111, U.N. Doc. CRC/C/90 (Dec. 7, 1999), available at

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NGOs interested in submitting a shadow report, which provides information about format, length, and content. An NGO interested in submitting a shadow report should begin by consulting this document.<sup>388</sup>

There is also a possibility for NGOs to address the CRC Committee directly. Based on reports submitted, the CRC Committee will invite selected NGOs to take part in the pre-sessional Committee working group.<sup>389</sup> This is a meeting which occurs prior to the official consideration of a country's report by the entire CRC Committee. NGOs who wish to be invited to this meeting should so indicate on the cover letter accompanying their report to the CRC Committee. Full instructions on NGO participation at this meeting, and the procedure followed, are available in the guide from the NGO Group.<sup>390</sup> NGOs may also attend the CRC's thrice-yearly Plenary Sessions as observers. These sessions are the formal consideration of a country's report by the CRC Committee.<sup>391</sup>

An NGO interested in submitting a shadow report should contact the CRC Committee, the NGO Group, or the North Korean Foreign Ministry to verify when North Korea will actually submit its report.<sup>392</sup> A schedule of upcoming CRC Committee sessions is also available online from the OHCHR.<sup>393</sup> Shadow reports should be submitted either to the NGO Group, to the OHCHR, or directly to the CRC Committee. The CRC Committee may be contacted at its address in Geneva.<sup>394</sup> Past state reports and CRC Committee observations can be found online.<sup>395</sup>

Another avenue for NGO influence is publicizing the CRC Committee's conclusions. The CRC Committee is not a prosecutorial or adjudicatory body. Instead, it tries to obtain compliance by persuasion, suggestion and assistance, rather than by confrontation. In light of the CRC Committee's lack of adjudicatory powers, its "main mechanism" for assuring compliance with the CRC is the "threat of negative publicity and exposure to international

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<http://www.ohchr.org/english/about/ngohandbook/RightsOfTheChildReport.pdf>. This Annex provides an overview of CRC Committee cooperation with NGOs, and is a useful source of information. See Guidelines for the Participation of Partners (NGOs and Individual Experts) in the Pre-sessional Working Group of the Committee on the Rights of the Child, available at <http://www.ohchr.org/english/bodies/crc/docs/guidelines-E.pdf>.

<sup>388</sup> A Guide For Non-Governmental Organizations Reporting to The Committee On The Rights of The Child (rev. 1998), available at <http://www.ohchr.org/english/bodies/crc/docs/Guide-NGO-E.pdf>.

<sup>389</sup> See *Committee on the Rights of the Child – Report on the twenty-second Session*, *supra* note 387.

<sup>390</sup> See Guide, *supra* note 388, at 4.

<sup>391</sup> See *id.* 11-12.

<sup>392</sup> At the time of publication, the next report was due on October 20, 2007. See *supra* note 380, ¶ 68.

<sup>393</sup> See U.N. Office of the High Commissioner for Human Rights, *Upcoming Sessions of the Committee on the Rights of the Child*, available at <http://www.unhchr.ch/html/menu2/6/crc/doc/future.htm> (last visited Oct. 20, 2007).

<sup>394</sup> Secretariat, Committee on the Rights of the Child, UNOG-OHCHR, 8-14 Avenue de la Paix, CH 1211 Geneva 10, Switzerland. Tel: 00 41 22 917 9000, Fax: 00 41 22 917 9022. The main contact person is Paulo David ([pdavid@ohchr.org](mailto:pdavid@ohchr.org)).

<sup>395</sup> U.N. Office of the High Commissioner for Human Rights, *Documents by Treaty*, available at <http://www.unhchr.ch/tbs/doc.nsf> (last visited August 29, 2006).

scorn.<sup>396</sup> NGOs can increase the impact of the CRC Committee's findings by publicizing them and by reporting on continuing violations.

**E. Possible Outcome / Result**

As indicated above, the potential impact of the CRC Committee comes from persuasion. The reporting process is the sole enforcement mechanism under the CRC. North Korea formally complies with the reporting requirements, but has failed to accurately report the status of children's rights in North Korea.<sup>397</sup> The absence of a reliable and factual state report makes it difficult for the CRC Committee to monitor North Korea's progress in protecting the rights of children. The submission of a shadow report to the CRC Committee could provide a helpful independent source of information. In addition, a shadow report, and possible NGO participation in CRC Committee working group meetings, could help focus the CRC Committee on North Korean human rights abuses. After the CRC Committee produces its concluding observations on the next North Korean report, NGOs can publicize those findings and attempt to hold North Korea accountable.

**F. Conclusion**

An NGO concerned about child welfare in North Korea could benefit from working with the CRC Committee. Although the CRC Committee has no direct enforcement power to compel North Korea to follow its recommendations, submitting a well-thought out and researched shadow report is a good tactic by which to publicize North Korean abuses.

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<sup>396</sup> Sanford J. Fox, *Report on the United Nations Convention on the Rights of the Child*, 15 CHILD. LEGAL RTS. J. 15, 21 (1995) ("The possibility of international adjudication under the Convention is remote at best.").

<sup>397</sup> UNICEF, National Reports on Follow-Up to the World Summit for Children (Dec. 2002), *available at* [http://www.unicef.org/specialsession/how\\_country/list-national-reports.pdf](http://www.unicef.org/specialsession/how_country/list-national-reports.pdf).



## VIII. INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

### A. Introduction

The International Covenant on Economic, Social and Cultural Rights (“ICESCR” or the “Covenant”) was adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of December 16, 1966, following almost 20 years of drafting debates. The Covenant became law a decade later, on January 3, 1976.<sup>398</sup> The ICESCR contains some of the most significant international legal provisions establishing economic, social and cultural rights, including rights to work in just and favorable conditions, to social protection, to an adequate standard of living, to the highest attainable standards of physical and mental health, to education and to enjoyment of the benefits of cultural freedom and scientific progress. North Korea became a signatory to the Covenant on December 14, 1981.<sup>399</sup>

### B. Standards

The ICESCR encompasses the following principles, among others: (1) the right to education, which guarantees free and compulsory primary education and equal access to secondary and higher education, the right to establish schools and teach, and the right to education that does not foster hatred or discrimination;<sup>400</sup> (2) the right to health, which guarantees access to adequate health care, nutrition, sanitation, and to clean water and air, and information about health;<sup>401</sup> (3) the right to housing, which guarantees access to a safe, habitable, and affordable home with protection against forced eviction not valid under law, and the right to privacy in the home;<sup>402</sup> (4) the right to safe and nutritious food, which guarantees the ability of people to feed themselves, and also obligates states to cooperate in the adequate distribution of world food supplies;<sup>403</sup> (5) the right to work, which guarantees the opportunity to earn a living wage in a safe work environment, and also provides for the freedom to organize and bargain collectively.<sup>404</sup> This report focuses primarily on the right-to-food provision under the ICESCR, as famine and malnutrition continue to plague the citizens of North Korea.

### C. Violations

Economic, social and cultural rights are guaranteed in North Korea’s constitution, but are not upheld in practice. Access to state structures, including a legal system which upholds international standards, is fundamental to protecting and fulfilling the full range of human rights set out in the Covenant. Nevertheless, little is known about the functioning of the individual complaints system under the ‘Law on Complaints and Petitions’, which the North

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<sup>398</sup> Available at <http://www.ohchr.org/english/law/pdf/cescr.pdf>.

<sup>399</sup> Status of Ratifications, *supra* note 282, at 4.

<sup>400</sup> ICESCR, *supra* note 398, art. 13.

<sup>401</sup> *Id.* art. 12.

<sup>402</sup> *Id.* art. 11.

<sup>403</sup> *Id.* art. 11(2).

<sup>404</sup> *Id.* art. 6.

Korean government asserts is a means of enforcing and upholding individual human rights. In 2003, the Committee on Economic, Social and Cultural Rights (the “CESCR”) expressed its concern “about the constitutional and other legislative provisions . . . of [North Korea’s] Constitution, that seriously compromise the impartiality and independence of the judiciary and have an adverse impact on the protection of all human rights guaranteed under the Covenant.”<sup>405</sup>

Article 11 of the ICESCR enshrines the right to food. The ICESCR requires that “state parties will take appropriate steps to ensure the realization of [the right to adequate food], recognizing to this effect the essential importance of international co-operation based on free consent.” Moreover, the ICESCR recognizes that active measures may need to be taken by states to guarantee “the fundamental right of everyone to be free from hunger.”<sup>406</sup> It is also important to note that as a state party to the ICESCR, North Korea is within its rights to seek international cooperation to improve its food situation. Article 11(2) of the ICESCR states that:

*“The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international cooperation, the measures, including specific programmes which are needed:*

*(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;*

*(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.”*

Based on the above standard, the North Korean government has not been fulfilling its obligations under the ICESCR. As described in Section I(C)(5), the people of North Korea have suffered from famine and acute food shortages. An estimated one million people (nearly 5% of the total population) have died in famines which began in the 1990s.<sup>407</sup> The actions of the North Korean government exacerbated the effects of the famine and the subsequent food crisis; the government denied the existence of the problem for many years and imposed ever-tighter controls on the population to hide the true extent of the disaster. Although North Korea remains dependent on food aid, government policy still prevents the swift and equitable distribution of this aid for many reasons. For example, the population is denied the freedom of movement, even in search for food.<sup>408</sup>

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<sup>405</sup> U.N. Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Democratic People’s Republic of Korea*, 31st Sess., ¶ 9, U.N. Doc. E/C.12/1/Add.95 (Dec. 12, 2003). The CESCR noted that the Human Rights Committee has expressed similar concerns.

<sup>406</sup> *Id.* art. 11 (2).

<sup>407</sup> Stephan Haggard & Marcus Noland, *supra* note 4. See Section I(C)(5), *supra* for more details.

<sup>408</sup> See *Starved of Rights*, *supra* note 89.

According to an Amnesty International Report, the Public Distribution System in North Korea is an extensive system by which state-subsidized rations are distributed on a “gram-per-day per person basis, according to a person’s occupation.” The report explains that this system does not include workers on cooperative farms, who depend on their own production. Further, “[a]ccess to state food supplies – including domestic agricultural production, imports and aid – is determined by status with priority [access to food supplies] granted to government and ruling party officials, important military units and urban populations, in particular residents of the capital, Pyongyang.”<sup>409</sup>

North Korea’s class system is still fully entrenched in North Korean society; a quarter of the population reportedly still belongs to the ‘hostile class.’ This class comprises people suspected of opposing the government or whose family members have been imprisoned. This also includes the so-called ‘impure elements’ such as prisoners of war from South Korea who were reportedly relocated to remote mountainous areas immediately after the Korean War. This group’s institutionalized lower status and its restrictions on movement all inhibit its access to food. Such discriminatory food distribution policies clearly violate ICESCR’s Article 2(2). This Article states: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>410</sup> Furthermore, conditions within the prison systems include deprivation of food and medicine that frequently results in death.<sup>411</sup>

The World Food Programme (“WFP”) has characterized the situation in North Korea since 1998 as a “food crisis.” According to the WFP, more than four out of every ten children in North Korea suffer from chronic malnutrition.<sup>412</sup> The Special Rapporteur has pointed out that adequate food is especially important for the most vulnerable groups in society, such as pregnant women, children and the elderly.<sup>413</sup> In addition, the 2002 Nutrition Assessment of the DPRK reported that one-third of mothers surveyed are malnourished and anemic.<sup>414</sup> A growing number of women have turned to prostitution to feed themselves and their hungry families.<sup>415</sup> According to the U.N. Special Rapporteur on the right to food, the “social, economic and political discrimination experienced by women in many societies” is a key barrier to realizing the right to food. The Special Rapporteur continues that women and girls are not only often the first victims of famine, but also pass on the effects of malnutrition to the next generation. “For example, in North Korea, the famine of the 1990s destroyed

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<sup>409</sup> *Id.* at 4.1.

<sup>410</sup> ICESCR, *supra* note 398, art. 2(2).

<sup>411</sup> HAWK, *supra* note 48, at 56. See facts section “Present Era – Torture” for more details.

<sup>412</sup> See *Starved of Rights*, *supra* note 88, at 10.

<sup>413</sup> *Id.* at 22.

<sup>414</sup> UNICEF/WFP/DPRK Central Bureau of Statistics, *Report on the DPRK Nutrition Assessment (2002)*, at 28, available at [http://unicef.org/dprk/nutrition\\_assessment.pdf](http://unicef.org/dprk/nutrition_assessment.pdf).

<sup>415</sup> Amnesty International, *Democratic People’s Republic of Korea: Persecuting the Starving: The Plight of North Koreans Fleeing to China* (Dec. 2000), at 6-7, available at [http://web.amnesty.org/library/pdf/ASA240032000ENGLISH/\\$File/ASA2400300.pdf](http://web.amnesty.org/library/pdf/ASA240032000ENGLISH/$File/ASA2400300.pdf).

between 12 and 15 per cent of the total population. However, the social damage was much higher if one considers the fall-off in the fertility curve caused by famine.<sup>416</sup>

The North Korean famine and food crisis have been largely invisible because of the North's political controls, including restrictions on the movement of both North Koreans and the staff of international humanitarian agencies. These restrictions have been coupled with the near-total suppression of freedom of expression, information and association. The challenging physical terrain, strict governmental controls over travel, the lack of a transport infrastructure, fuel shortages and flooding have all restricted the movement of people within the country in search of food, especially those weakened by hunger. The result has been what aid workers label a "silent famine."<sup>417</sup> The North Korean government has not taken appropriate steps to achieve the basic goal of the Covenant – the right to adequate food.<sup>418</sup>

### **D. Institutional Process**

In 1985, the Economic and Social Council ("ECOSOC") created the CESCR which met for the first time in 1987 and has to date held 14 sessions. The CESCR is comprised of 18 members who are experts with recognized competence in the field of human rights. Members of the CESCR are independent and serve in their personal capacity, not as representatives of Governments. The CESCR itself selects its own chairperson, three vice-chairpersons and a rapporteur.<sup>419</sup>

The CESCR primarily monitors the implementation of the ICESCR by States Parties. It strives to develop a constructive dialogue with States Parties and seeks to determine through a variety of means whether or not the norms contained in the ICESCR are adequately applied. Furthermore, the CESCR reports how the implementation and enforcement of the ICESCR could be improved.<sup>420</sup> Drawing on the legal and practical expertise of its members, the CESCR can also assist governments in fulfilling their obligations under the ICESCR by issuing specific legislative, policy and other suggestions and recommendations.

Under Articles 16 and 17 of the ICESCR, States Parties submit periodic reports to the CESCR – within two years of the entry into force of the ICESCR for a particular state party, and thereafter once every five years.<sup>421</sup> These reports outline the legislative, judicial, policy and other measures which state parties have taken to comply with the ICESCR. In conjunction with these reports, States Parties are requested to provide detailed data on the degree to which the rights are implemented and areas where particular difficulties in

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<sup>416</sup> E/CN.4/2001/53, at 23, ¶ 78.

<sup>417</sup> L. Gordon Flake, *The Experience of U.S. NGOs in North Korea, in Paved with Good Intentions: The NGO Experience in North Korea* 15, 21 (L. Gordon Flake & Scott Snyder eds., 2003).

<sup>418</sup> ICESCR, *supra* note 398, art. 11 (2).

<sup>419</sup> Office of the High Commissioner for Human Rights, Fact Sheet No. 16 (Rev. 1), *The Committee on Economic, Social and Cultural Rights* (1991), available at <http://www.unhchr.ch/html/menu6/2/fs16.htm#6>.

<sup>420</sup> *Id.*

<sup>421</sup> At the time of writing, North Korea's next report is due on June 30, 2008. See U.N. Committee on Economic, Social and Cultural Rights, *supra* note 405, ¶ 49.

implementation occur. The CESCR has emphasized that reporting obligations under the Covenant fulfills various important objectives.<sup>422</sup>

The CESCR has invited direct input from NGOs in both written and oral forms.<sup>423</sup> To that end, it has drafted a guide that explains the various contributions possible by NGOs, which should be consulted by an NGO prior to submitting information to the CESCR.<sup>424</sup> The guide states that NGOs can participate in three main activities: the consideration of state reports, the days of general discussion, and the drafting of general comments. All information submitted should be: “(a) specific to the Covenant; (b) relevant to the matters under consideration by the Committee or its pre-sessional working group; (c) based on documentary sources and properly referenced; (d) concise and succinct; and (e) reliable and not abusive.”

Once a state submits its report, the CESCR sends copies to interested NGOs and solicits their reactions. NGOs concerned about a particular country should contact the CESCR secretariat for inclusion in this distribution. NGOs can then submit a variety of relevant material which is added to the CESCR’s file for that country: “press clippings, NGO newsletters, video tapes, reports, academic publications, studies, joint statements, etc.”<sup>425</sup>

The CESCR forms a pre-sessional working group which prepares for upcoming sessions by drafting lists of issues to consider.<sup>426</sup> NGOs can submit information to the working group for consideration. Information can be submitted either to the CESCR secretariat for distribution to the entire working group, or to the ‘country rapporteur,’ the working group member responsible for drafting the list of issues for a particular country. In addition, NGOs can make oral statements during the first meeting of the working group.

NGOs can also participate in the full CESCR’s consideration of a country report. NGOs can submit a formal written statement (of limited length).<sup>427</sup> In addition, as with the other treaty bodies, NGOs can submit shadow reports. Shadow reports should generally follow the guidelines explained in the other sections of this handbook, responding to the official country report and addressing the implementation of the ICESCR. An NGO should provide 25 copies of a shadow report. A useful guide for the submission of shadow reports to the CESCR is available from the IWRAW.<sup>428</sup>

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<sup>422</sup> Committee on Economic, Social and Cultural Rights, General Comment 1, *Reporting by States parties* (3rd Sess. 1989), U.N. Doc. E/1989/22, ¶¶ 2-9, available at <http://www1.umn.edu/humanrts/gencomm/epcomm1.htm>. This list in the text is paraphrased.

<sup>423</sup> U.N. Office of the High Commissioner for Human Rights, *Committee on Economic, Social and Cultural Rights – Working Methods*, section VII, available at <http://www.ohchr.org/english/bodies/cescr/workingmethods.htm> (last visited Oct. 20, 2007).

<sup>424</sup> *Id.*

<sup>425</sup> *Id.* at II(B)

<sup>426</sup> *Id.* at II(A)

<sup>427</sup> *Id.* at II(B)

<sup>428</sup> International Women’s Rights Action Watch, *NGO Shadow Reporting To CESCR: A Procedural Guide* (June, 2003), available at <http://iwraw.igc.org/shadow/CESCRNGOguideJune2003.pdf>.

Two organizations submitted shadow reports to the CESCR in conjunction with its 2003 examination of North Korea's second country report. These NGOs, the International Federation for Human Rights and Good Friends, presented reports challenging the depiction of human rights in North Korea's official report.<sup>429</sup> As with the alternative reports submitted to the CEDAW Committee and the CRC Committee, these reports should be reviewed by an NGO interested in submitting a report on North Korea to the CESCR.

The CESCR also notes that NGOs can provide information orally. Part of the first afternoon of each session of the CESCR is set aside for presentations from NGOs.<sup>430</sup> These presentations are generally limited to 15 minutes and should address the country report and the NGO shadow report. The CESCR also provides details of the accreditation process for NGOs wishing to attend CESCR or working group meetings.<sup>431</sup>

For further information, including the address to which submissions should be sent, NGOs should contact the Secretary of the CESCR.<sup>432</sup> Past state reports and CESCR observations can be found online.<sup>433</sup>

### **E. Possible Outcome / Result**

The reporting process is the sole mechanism under the ICESCR to evaluate state compliance.<sup>434</sup> General implementation and enforcement of the ICESCR has been hampered by the limited attention given to economic, social and cultural rights as compared to civil and political rights.<sup>435</sup> Therefore, while the ICESCR has been ratified by 153 countries to date, most countries have acknowledged the existence of the rights the ICESCR enshrines, but have "fail[ed] to take steps to entrench those rights constitutionally, to adopt legislative or administrative provisions based explicitly on the recognition of specific economic and social rights as international rights, or to provide effective means of redress to individuals or groups alleging violations of those rights."<sup>436</sup>

In addition, a state reporting enforcement mechanism is "the weakest form of supervision available in international human rights law, to ensure that human rights are properly

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<sup>429</sup> The International Federation for Human Rights, *Misery and Terror: Systematic Violations of Economic, Social and Cultural Rights in North Korea* (2003), available at <http://www.fidh.org/IMG/pdf/kp374a.pdf>; Good Friends, *Alternative NGO Report on the Committee on Economic, Social and Cultural Rights of the Second Periodic Report of the Democratic People's Republic of Korea* (2003), available at <http://goodfriends.or.kr/eng/>.

<sup>430</sup> *Committee on Economic, Social and Cultural Rights – NGO participation*, *supra* note 424. The CESCR notes that NGOs "should request accreditation from the secretariat in advance. Identity photo-badges valid for the duration of the session may be obtained by all delegations from the United Nations Office at Geneva (UNOG) Security and Safety Section at the Villa 'Les Feuillantines', 13, avenue de la Paix, Geneva."

<sup>431</sup> *Id.*

<sup>432</sup> At the time of writing, the secretary is Ms. Wan-Hea Lee, Secretary of the Committee on Economic, Social and Cultural Rights, OHCHR, Office 1-025, Palais Wilson, Palais des Nations, 8-14 Avenue de la Paix, 1211 Geneva 10, Switzerland. Tel: 0041-22-917 91 54, fax: 0041-22-917 90 22, e-mail: [wlee@ohchr.org](mailto:wlee@ohchr.org).

<sup>433</sup> *Documents by Treaty*, *supra* note 371.

<sup>434</sup> See Klaus Dieter Beiter, *The Protection of the Right to Education by International Law* 86, 90 (2006).

<sup>435</sup> See Henry J. Steiner & Philip Alston, *International Human Rights In Context: Law Politics Morals* 305 (2d ed. 2000).

<sup>436</sup> See *id.*

implemented.”<sup>437</sup> As with the ICCPR, CRC and CEDAW, the inability of the CESCR to compel state parties to either report the true situation in their countries or even submit required reports is a weakness of the reporting mechanism. Reports may lack the information needed in order to assess compliance. State reports often focus on statutes and other legal provisions that support implementation but ignore the reality of how these legal provisions and other policies interact with the exercise of rights by individuals, particularly disadvantaged groups.<sup>438</sup>

Despite these problems, it is important to note that the reporting obligations under the ICESCR do facilitate implementation. Preparation of the reports requires an assessment of a given state party’s progress in implementing the Covenant. Moreover, the periodic nature of the reports facilitates an ongoing assessment rather than a solitary review of implementation.<sup>439</sup> The benefits of these steps for state parties that choose to adhere to the reporting requirement should be noted. Further, the submission of a shadow report can provide a helpful independent source of information to the CESCR. NGO participation in CESCR working group meetings could help focus the CESCR on the facts behind human rights in North Korea. In addition, after the CESCR produces its concluding observations on the next North Korean report, NGOs can publicize those findings and attempt to hold North Korea accountable.

#### **F. Conclusion**

The problem of access to food in North Korea is severe. Famine, food shortages and malnutrition have had a detrimental impact on the lives on North Koreans. To date, the North Korean government has failed in its duty to uphold the right to food; the North’s actions in fact exacerbate the effects of the famines and food crisis. The Covenant, limited by a lack of a true enforcement mechanism, cannot directly improve the lives of North Koreans struggling under constant food shortages. However, an NGO could work with the CESCR to indicate the true magnitude of the problem in North Korea, to pressure the North Korean government to respond to international criticism, and to encourage action by the international community.

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<sup>437</sup> See *id.*

<sup>438</sup> See *id.* at 622-23.

<sup>439</sup> See *id.* at 622.



## IX. POTENTIAL FOR LITIGATION RELIEF

### A. Introduction to the Alien Tort Claims Act

The Alien Tort Claims Act (“ATCA”) is a tool that allows foreign citizens to sue individuals or corporations in U.S. courts “for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>440</sup> In other words, the statute gives a citizen of a foreign nation the ability to sue another individual or a corporation for an injury, if that injury would constitute a violation of international law.<sup>441</sup> In addition, U.S. citizens can sue for torts that constitute violations of international law under the Torture Victim Protection Act (“TVPA”).<sup>442</sup> The ATCA is without parallel around the world.

The ATCA was enacted by the First Congress of the United States, as part of the Judiciary Act of 1789,<sup>443</sup> but lay dormant for nearly 200 years. The First Congress sought to assure aliens – as well as prove to the rest of the world – that United States courts would address violations of the laws of nations.<sup>444</sup> Nevertheless, the statute was largely ignored for the better part of two centuries. In 1980, however, the United States Court of Appeals for the Second Circuit handed down an opinion in *Filartiga v. Pena-Irala*,<sup>445</sup> discussed below, which breathed life into the ATCA.

The ATCA might be a useful tool for enforcing human rights law in North Korea. To its proponents, the ATCA is a method for extending the rule of law to states that do not recognize it, subjecting the perpetrators of atrocities to the legal process and advancing the cause of human rights. The legal process of a civil trial can be a powerful way to focus attention on the accusations made and the evidence presented. Even where a case is ultimately unsuccessful at trial, if the case survives preliminary motions there can be satisfaction for victims in having an avenue to voice their grievances and be heard publicly. This section will address the many considerations involved for a plaintiff bringing a claim under the ATCA. This section is relevant to the present discussion because NGO capabilities for gathering information—including locating witnesses and evidence—enable them to play an important supporting role in such a litigation, should a plaintiff request their assistance.

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<sup>440</sup> 28 U.S.C. § 1350.

<sup>441</sup> See *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995) (the ATCA “validly creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations”).

<sup>442</sup> The Torture Victim Protection Act of 1991 (“TVPA”) allows individuals (including U.S. citizens) to sue foreign individuals for torture or murder, Pub. L. No. 102-256, 106 Stat. 73 (1992) (text in note following 28 U.S.C. § 1350). (“An individual who, under actual or apparent authority, or color of law, of any foreign nation (1) — subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.”). Actions brought under the TVPA will be generally similar to actions brought under the ATCA, but the TVPA, although including actions by U.S. citizens, is limited to claims for torture and extrajudicial killing.

<sup>443</sup> See Judiciary Act of 1789, § 9(b), 1 Stat. 73, 77 (1789) (codified as amended at 28 U.S.C. § 1350).

<sup>444</sup> See Carolyn A. D’Amore, Note, *Sosa v. Alvarez-Machain and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?*, 39 AKRON L. REV. 593, 597-98 (2006). For a discussion of primary and secondary sources supporting this interpretation, see Beth Stephens, *Upsetting Checks and Balances: The Bush Administration’s Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 186-188 (2004).

<sup>445</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

### B. Basis for Jurisdiction

#### 1. *Constitutional Requirements*

In order to hear a case, a U.S. federal court must have both *constitutional* and *statutory* jurisdiction. A basis for constitutional jurisdiction could be Article III of the U.S. Constitution, which provides that the federal judicial power “shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”<sup>446</sup> The court in *Filartiga* found two bases for constitutional jurisdiction. It held that “Laws of the United States” can be interpreted to include international law as part of the federal common law of the United States, thereby granting constitutional jurisdiction, and that the ATCA is a law that expressly grants the courts permission to hear certain suits based on violations of international law.<sup>447</sup>

The Constitution also has a due process requirement, which mandates that a court must have “personal jurisdiction” over any defendant. This refers to a “court’s power to bring a person into its adjudicative process.”<sup>448</sup> Generally, courts have personal jurisdiction over individuals and corporations who are “residents of the forum state” in which the court sits.<sup>449</sup> For individuals, this means that a court will have jurisdiction over those who live within the state and whose presence there is non-transitory, or at least semi-permanent.<sup>450</sup> A corporation, on the other hand, is a resident of the state “where it is incorporated or where its principal place of business is located.”<sup>451</sup> Federal courts may also exercise jurisdiction over nonresidents in certain circumstances. Some states have enacted “long-arm” statutes which provide for personal jurisdiction over nonresidents if the nonresident has “minimum contacts” with the forum state, such as transacting business there, communicating with persons there, or owning property.<sup>452</sup> This means that ATCA defendants, although sued for a violation of international law, must have at least—and in some states, much more than—a minimal connection to the U.S.

#### 2. *Statutory Requirements*

Once constitutional jurisdiction has been satisfied, on a case-specific basis, an ATCA suit must meet three statutory requirements before it can go forward. First, the plaintiff suing must be an alien. Note, however, that non-alien may pursue certain similar actions under

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<sup>446</sup> U.S. Const. art. III, § 2, cl. 1; *see also* Erwin Chemerinsky, FEDERAL JURISDICTION § 1.1 (4th Ed. 2003).

<sup>447</sup> *Filartiga*, 630 F.2d at 885-86 (“The constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law. . . . A case properly ‘aris(es) under the . . . laws of the United States’ for Article III purposes if grounded upon statutes enacted by Congress or upon the common law of the United States.” (second omission in original) (citation omitted)); *see also* Paquete Habana, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”).

<sup>448</sup> BLACK’S LAW DICTIONARY 870 (8th ed. 2004).

<sup>449</sup> Heidi K. Brown, FUNDAMENTALS OF FEDERAL LITIGATION § 2:9 (2005). For example, the U.S. District Court for the Southern District of New York would have jurisdiction over all citizens of the state of New York, the “forum state” in which it sits.

<sup>450</sup> *See id.*

<sup>451</sup> *Id.*

<sup>452</sup> *Id.*

the TVPA.<sup>453</sup> Second, the suit brought must be for a tort, that is, for an injury. Third, the tort must have been committed in violation of the law of nations.<sup>454</sup>

In addition, in some instances plaintiffs must demonstrate that the defendant was a “government actor or committed the violation while acting ‘under color of law.’” Actions are taken “under color of law” when a private actor acts “under the auspices of a state,” i.e. either together with state officials or with significant state aid.<sup>455</sup> Violations requiring such a showing include torture and summary execution, and probably arbitrary imprisonment and religious persecution.<sup>456</sup> On the other hand, there is no state action requirement for genocide, war crimes, and slavery.<sup>457</sup>

U.S. courts are conflicted over what should be considered a “violation of the law of nations” for the purposes of the ATCA.<sup>458</sup> Generally, in order to determine principles of international law a court looks to international conventions, customary international law (the general usage and practice of law as recognized by civilized nations) and the works of highly qualified jurists in the field of international law.<sup>459</sup> However, in recent years, the U.S. Supreme Court has narrowed the standard for international legal violations that can be used to invoke jurisdiction under the ATCA, holding that claims must be based on violations of international law as firmly entrenched as the violations recognized at the time the statute was enacted, such as piracy, slave trading, and crimes against ambassadors and consuls.<sup>460</sup> Nevertheless, certain core violations committed by certain defendants may remain viable options for plaintiffs. These violations include, but are not necessarily limited to, torture, genocide, crimes against humanity, and forced labor/slavery.<sup>461</sup>

### C. Filing a Lawsuit

The prosecution of a lawsuit first involves an initial filing by a proper plaintiff against an appropriate defendant. Most published judicial opinions in ATCA cases involve pretrial motions to dismiss, in which the defendant argues that even if the plaintiff’s allegations are true, the plaintiff has failed to state grounds for a valid lawsuit.<sup>462</sup> Should the plaintiff defeat this motion, the parties would proceed with discovery, which theoretically involves the

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<sup>453</sup> See note 442 *supra*.

<sup>454</sup> *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995).

<sup>455</sup> *Id.* at 238-39.

<sup>456</sup> *Kadic*, 70 F.3d at 243-44.

<sup>457</sup> *Id.* at 239-40.

<sup>458</sup> See *id.* at 238 (“Because the [ATCA] requires that plaintiffs plead a ‘violation of the law of nations’ at the jurisdictional threshold, this statute requires a more searching review of the merits to establish jurisdiction than is required under the more flexible ‘arising under’ formula of [28 U.S.C. §] 1331.”).

<sup>459</sup> See *Filartiga v. Pena-Irala*, 630 F.2d 876, 880-81 (2d Cir. 1980); see also Statute of the International Court of Justice, art. 38, 59 Stat. 1055, 1060 (1945).

<sup>460</sup> See *infra* Part IX(D)(1)(c).

<sup>461</sup> See generally *infra* Part IX(D).

<sup>462</sup> For example, the landmark *Filartiga* decision involved a motion to dismiss. See *Filartiga*, 630 F.2d at 878-80.

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production of evidence by both sides and includes depositions of the parties and witnesses. After discovery, if the court decides there are remaining questions regarding the factual allegations involved in the case, the case will proceed to trial.<sup>463</sup> Of course, any decision made by the court during the course of litigation is possibly subject to appeal, and appeals have the potential to prolong litigation for years.

### 1. *Collecting a Judgment*

In all probability, even if a lawsuit under the ATCA proves successful, collecting any sort of judgment may prove difficult. ATCA defendants generally are not wealthy and do not have many assets. Even if assets do exist, they would have to be present in the U.S. in order for a U.S. court to seize them, or the plaintiff would have to take the U.S. judgment to a foreign jurisdiction in hopes that it would be enforced by the foreign legal system.

### 2. *Emotional Burden of Confrontation*

One should not underestimate the emotional burden a lengthy investigation and trial will place on any prospective plaintiffs and witnesses. Apart from having to make a public accusation, a plaintiff may have to confront his abuser in court and be subject to questioning by the defendant's attorneys – and possibly by the defendant himself – during depositions and/or cross examination.

### 3. *A Proper Plaintiff*

As previously discussed, the ATCA only permits certain plaintiffs to bring claims. A lawsuit under the ATCA can only be filed by an alien, although U.S. citizens may file suit under the TVPA. This plaintiff must have suffered one of the human rights violations discussed in the following section on "Potential Claims." Note that in some circumstances a plaintiff may be able to sue for the loss of a family member.

### 4. *Expenses*

ATCA litigation is protracted, and consequently expensive. The *Alvarez-Machain* case, discussed below, was litigated from 1993 to 2005 – 12 years. A Plaintiff interested in pursuing this course of action should either be well-funded or should find attorneys willing to pursue the case on a *pro bono* basis. The costs could be substantial, and the financial burden will be compounded by the necessary investment of time and other resources in order to gather information. NGOs could help a plaintiff bear the latter part of this burden, should a plaintiff request their assistance. NGOs may have access to information and witnesses that could greatly assist a victim to bring suit. It is to the victim's benefit to gather as much evidence of the alleged abuse as possible. It is especially helpful to find any witnesses, either to testify publicly in open court, or to sign a written affidavit of what they have seen.

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<sup>463</sup> If the court decides that there are "no triable questions of fact" – essentially that the parties agree on what actually happened, just not on the legal consequences – the court will grant judgment for one party or the other in what is known as "summary judgment." If the court grants summary judgment, there is no trial.

## D. Potential Claims

In order to proceed with an ATCA claim, it is necessary to determine what kind of claim is being pursued. There are two basic kinds of claims under the ATCA. The first is a suit against a prime actor, which would be a suit for a *direct violation* of fundamental international law. The second kind of claim is for *aiding and abetting* a direct violation.

A second question is what kind of defendant is being sued: an individual or a corporation. A suit against a prime actor could be against either, but would most likely be against an individual (for example, a military officer guilty of coordinating crimes against humanity). A claim for aiding and abetting, however, has primarily been recognized against corporations. There have been few—if any—cases alleging that corporations have directly committed human rights abuses themselves.

### 1. *Suits against prime actors (usually individuals)*

A suit against a prime actor is the first option for an ATCA action. Prime actors –who themselves commit violations of international law – are ideal targets under the ATCA provided they meet federal personal jurisdiction requirements. There have been numerous cases in which plaintiffs have successfully sued primary violators under the ATCA to bring suit for a wide variety of international legal offenses.

#### (a) Torture

One of the most famous ATCA cases, responsible for the ATCA's resurgence in the American legal system, is *Filartiga v. Pena-Irala*.<sup>464</sup> The United States Court of Appeals for the Second Circuit held that a Paraguayan police officer could be sued in U.S. courts for the alleged torture and murder of Joelito Filartiga, the son of a political opponent of the Paraguayan government. The victim's sister, Dolly Filartiga, brought the suit after realizing that the defendant had left Paraguay and was living in Brooklyn. The court held that "there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody."<sup>465</sup> Therefore, under the ATCA, federal court jurisdiction was proper. Dolly Filartiga effectively established a cause of action under the ATCA for victims of torture, which was later codified by Congress under the TVPA.<sup>466</sup>

#### (b) Genocide and War Crimes

Similarly, for violations on a much greater scale, Croat and Muslim citizens of Bosnia-Herzegovina sued Radovan Karadzic, President of the self-proclaimed Bosnian-Serb republic of "Srpska" and commander-in-chief of its armed forces.<sup>467</sup> Plaintiffs successfully alleged violations of the international legal norms against genocide, war crimes, and torture; the underlying allegations involved Karadzic personally ordering murder, rape, forced

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<sup>464</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>465</sup> *Id.* at 881.

<sup>466</sup> See note 442 *supra*.

<sup>467</sup> See *Kadic v. Karadzic*, 70 F.3d 232, 236-37 (2d Cir. 1995).

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impregnation, torture, arbitrary forced detention, and summary execution.<sup>468</sup> A jury eventually ordered Karadzic to pay \$4.5 billion in damages to the victims.<sup>469</sup>

### (c) State-sponsored Abduction/Kidnapping

Liability under the ATCA for violation of an international legal norm against state-sponsored abduction or kidnapping is unclear. In a series of recent opinions in *Sosa v. Alvarez-Machain*, federal courts, at the urging of the Bush Administration, took a strong stance against recognizing a cause of action for victims of cross-border abductions.<sup>470</sup> In *Sosa*, the plaintiff sued under the ATCA (among other provisions) alleging violations of international law related to his detention in Mexico and subsequent transport to the United States for trial outside of the formal extradition process. The plaintiff alleged that his detention and subsequent transport violated the international norm against forcible cross-border abduction, as well as arbitrary arrest and detention.

While the plaintiff was initially successful at the district court level, the case failed on appeal. The United States Court of Appeals for the Ninth Circuit rejected the plaintiff's argument that there was a "specific, universal, and obligatory" international norm against state-sponsored transborder abduction sufficient to give rise to a cause of action under the ATCA.<sup>471</sup> The Ninth Circuit did find that the plaintiff adequately pleaded a claim for "unilateral, nonconsensual extraterritorial arrest and detention."<sup>472</sup>

The Supreme Court reversed the ruling in a decision that may limit future application of the ATCA. Bypassing the issue of transborder abduction, the Supreme Court went further and held that "a general prohibition of 'arbitrary' detention, defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances" had not attained "the status of a binding customary norm today."<sup>473</sup> Therefore, the plaintiff had no cause of action under the ATCA for his abduction in Mexico and transport to the U.S. for trial. In its opinion, the Court limited the claims that fell within the scope of the ATCA, stating that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATCA] was enacted."<sup>474</sup>

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<sup>468</sup> *Id.* at 242-44.

<sup>469</sup> William Glaberson, *U.S. Courts Become Arbiters of Global Rights and Wrongs*, N.Y. TIMES, June 21, 2001, at A1.

<sup>470</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697-99 (2004).

<sup>471</sup> See *Alvarez-Machain v. United States*, 331 F.3d 604, 618-19 (9th Cir. 2003) (en banc) (rejecting argument where "no authority cited by Alvarez recognizes an explicit prohibition against forcible abduction"), *rev'd sub nom.* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>472</sup> *Alvarez-Machain*, 331 F.3d at 620; see *id.* ("Unlike transborder arrests, there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention.").

<sup>473</sup> *Sosa*, 542 U.S. at 736-38; see also *id.* at ("As he presently argues it, the claim does not rest on the cross-border feature of his abduction. . . . It is this position that Alvarez takes now: that his arrest was arbitrary and as such forbidden by international law . . . because no applicable law authorized it.").

<sup>474</sup> *Id.* at 732.

In other words, as explained above, claims under the ATCA must be for violations of international law that are as serious as the violations recognized when the ATCA was enacted in the eighteenth century.<sup>475</sup> It is unclear exactly which violations have such status in the modern world. It is also unclear how lower courts will apply the Supreme Court's rationale, and how their interpretations of the *Sosa* holding will impact future ATCA litigation.

2. *Suits for aiding & abetting violations of international law*

Despite mixed signals regarding the extent of their reach, some U.S. courts have extended the scope of the ATCA to corporations. There are currently about three dozen cases on record charging multinational corporations with human rights abuses in other countries.<sup>476</sup> While defendants have argued that corporations may not be held liable for violations of international law, several courts have rejected this argument. The Supreme Court has yet to address the issue. Below we discuss various cases that have either ended in a settlement or are still pending.

(a) Forced Labor Cases (Unocal)

The most well-known case involving alleged corporate complicity in international human rights violations involved Unocal Corporation, a large oil company, and Burma. In a series of cases, the most prominent of which was *Doe I v. Unocal Corp.*, plaintiffs sued Unocal for allegedly aiding and abetting the Burmese government's practice of forced labor.<sup>477</sup> The plaintiffs alleged that they were forced by the military to build transportation infrastructure such as roads and helipads, which Unocal used in constructing an oil pipeline in Burma. Furthermore, the plaintiffs alleged that Unocal lent "practical assistance" and "encouragement" to the military by hiring them to provide security and construct infrastructure in exchange for money and food, knowing full well that forced labor would be used.

The courts allowed the plaintiffs to bring claims against Unocal under the ATCA for allegedly aiding and abetting the Burmese military's use of forced labor. The courts held that forced labor is a *jus cogens* violation of international law, and is the modern equivalent of slavery.<sup>478</sup> Aiding and abetting liability was defined as "practical assistance or encouragement which has a substantial effect on the perpetration of the crime of, in the present case, forced labor." The Court of Appeals for the Ninth Circuit held that sufficient evidence existed for a jury to consider the allegations. The case eventually settled for an undisclosed amount.<sup>479</sup>

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<sup>475</sup> See *id.* at 724-25, 732-33.

<sup>476</sup> Marc Lifsher, *Unocal Settles Human Rights Lawsuit Over Alleged Abuses at Myanmar Pipeline*, L.A. TIMES, Mar. 22, 2005 at C1.

<sup>477</sup> See, e.g., *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *vacated on grant of reh'g en banc*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed and district court opinion vacated per stipulation*, 403 F.3d 708 (9th Cir. 2005).

<sup>478</sup> See *Doe I v. Unocal Corp.*, 395 F.3d 932, 945-46 (9th Cir. 2002), *vacated on grant of reh'g en banc*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed and district court opinion vacated per stipulation*, 403 F.3d 708 (9th Cir. 2005).

<sup>479</sup> Lifsher, *supra* note 476.

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### (b) Crimes Against Humanity (Wiwa v. Royal Dutch Petroleum)

In *Wiwa v. Royal Dutch Petroleum Co.*, the plaintiffs alleged that the Royal Dutch oil company, through its Nigerian subsidiary, enlisted the help of the Nigerian police and military to ensure that its operations in that country proceeded “as usual.”<sup>480</sup> According to the plaintiffs, Royal Dutch provided logistical support, transportation and weapons to state authorities, who subsequently attacked indigenous villages and attempted to stifle political opposition to the defendants’ oil excavation. In the course of the defendants’ efforts, the plaintiffs claimed, the leaders of the political opposition were arrested and hanged after a summary trial, and other members of their families were arrested and beaten. The plaintiffs sued, alleging the following violations: (1) summary execution; (2) crimes against humanity for “acts perpetrated . . . as part of a . . . systematic attack against [a] civilian population or persecutions on political, racial, or religious grounds”; (3) torture; (4) cruel, inhuman, or degrading treatment; (5) arbitrary arrest and detention; (6) wrongful death; (7) assault and battery; (8) intentional and negligent infliction of emotional distress; and (9) negligence.

A federal judge allowed the plaintiffs to bring claims under both the ATCA and the TVPA. The court rejected the defendants’ argument that corporate defendants could not be held liable, holding that all private actors may be held liable if they are “willful participants in joint action with the state or its agents,” and if plaintiffs allege a substantial degree of cooperative action between the corporation and the government.<sup>481</sup>

### (c) Persecution of Religious Groups

In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, residents of Sudan sued Talisman, a Canadian energy company, for allegedly conspiring with the Sudanese government in ethnic cleansing operations against non-Muslim residents surrounding Talisman oil concessions in order to facilitate oil exploration and extraction.<sup>482</sup> Allegations of corporate misconduct included building and repairing government buildings, airstrips, and vehicles that facilitated attacks on civilians, meeting with the government to devise security plans for the oil concessions, hiring military advisers to coordinate with the Sudanese military, and allegedly holding meetings with the Sudanese military discussing how to “dispose of civilians” and “clean up” areas where the company intended to operate.<sup>483</sup> As in *Wiwa*, the defendants moved to dismiss the case on the grounds that a corporation is incapable of violating international law. The court rejected this argument, holding that corporations particularly may be held liable where their actions constitute a *jus cogens*

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<sup>480</sup> *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 U.S. Dist. LEXIS 3293, at \*3-5 (S.D.N.Y. Feb. 22, 2002).

<sup>481</sup> *See id.* at \*40-45.

<sup>482</sup> *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 296 (S.D.N.Y. 2003). Plaintiffs alleged that Talisman aided and abetted the Sudanese government in “extrajudicial killing, forced displacement, military attacks on civilian targets, confiscation and destruction of property, kidnappings, rape, and the enslavement of civilians.” *Id.*

<sup>483</sup> *See id.* at 300-301; *cf. Bigio v. Coca-Cola Co.*, 239 F.3d 440, 447-49 (2d Cir. 2000) (refusing to uphold a claim against a corporation because its actions did not amount to a *jus cogens* violation of international law).

violation of international law, such as genocide.<sup>484</sup> The court also reinforced the *Wiwa* concept that liability for conspiracy and aiding and abetting exists in international law.<sup>485</sup>

**E. Legal considerations**

1. *The “Defendant Question”*

One recurring problem with lawsuits filed under the ATCA is the difficulty in locating a suitable defendant over which a federal district court has jurisdiction.

(a) Sovereign Immunity

States and heads of state generally are immune from suit under the theory of Sovereign Immunity, which has been codified in U.S. law and effectively precludes a lawsuit by a foreign national against such a defendant under the aegis of the ATCA.<sup>486</sup> In order for an ATCA suit to go forward, the defendant would ordinarily have to waive its sovereign immunity, which is unlikely.

However, a suit by a U.S. citizen under the TVPA may be a possibility regardless. As part of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Congress amended the Foreign Sovereign Immunities Act to permit certain lawsuits for “act[s] of torture, extrajudicial killing[s], aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.”<sup>487</sup> There are three requirements to bring such a suit. First, the plaintiff must be a U.S. “national,” meaning a citizen or permanent resident. Second, the plaintiff must have previously provided the foreign state with the opportunity for international arbitration of the claim. Third, the state in question must be on a list of “state sponsors” of terrorism, as provided for by law.<sup>488</sup> Currently, this list includes Syria, Iran, Libya, Cuba, Sudan, and North Korea.

This provision has never been utilized against North Korea, so there is little indication as to how a direct lawsuit against North Korea or Kim Jong-Il would fare. The AEDPA has been invoked most frequently against Iran, and primarily where American victims of terrorist attacks sued those responsible.<sup>489</sup> Nevertheless, according to the wording of the statute, an American victim of any of the enumerated acts could sue North Korea directly in a U.S. court, and the doctrine of Sovereign Immunity would not apply.

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<sup>484</sup> *Talisman Energy*, 244 F. Supp. 2d at 308-10.

<sup>485</sup> *Id.* at 322-24.

<sup>486</sup> 28 U.S.C. §§ 1603-05.

<sup>487</sup> 28 U.S.C. § 1605(a)(7).

<sup>488</sup> *See id.*; *see also* 22 C.F.R. § 126.1(d) (2007) (listing countries).

<sup>489</sup> *See, e.g., Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998) (suit by family whose daughter was killed by an Iranian-sponsored suicide bomber in Israel); *see also* Hamish Hume & Gordon Dwyer Todd, Federalist Society National Security White Paper, *Ambulance Chasing for Justice: How Private Lawsuits for Civil Damages Can Help Combat International Terror*, (2003), available at <http://www.fed-soc.org/Publications/Terrorism/ambulancechasing.htm>.

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### (b) Difficulty in Locating an Individual Defendant

As mentioned in the above section on personal jurisdiction, due process requires that individual and corporate defendants to an action in a U.S. court have sufficient contacts with the U.S., although the extent of the required contacts varies by jurisdiction. In the case of a closed state such as North Korea, such contacts with appropriate individuals are rare. The best target for an ATCA lawsuit would be a former member of the North Korean regime who was present in the U.S. and implicated in human rights abuses against an identifiable plaintiff. To this date, however, no such defendant has been identified by NGOs working on human rights in North Korea.

### (c) Corporate Defendants

When bringing a suit against a corporation—to the extent such suits are allowed—it would first be necessary for potential litigants to locate a corporation with business contacts in both the U.S. and North Korea to comply with U.S. personal jurisdiction requirements.

In light of current ATCA precedent, multinational corporations taking advantage of North Korean labor—either in North Korea or abroad—expose themselves to the possibility of lawsuits under the ATCA. An ATCA lawsuit on this ground would probably have to be based on a violation of the *jus cogens* norm against the use of forced labor or slavery. The outcome of such a lawsuit is unclear. As seen in *Doe v. Unocal*, some courts are willing to let suits proceed against corporations who have benefited from forced labor abroad, especially where the company can be portrayed as eager to benefit from unfair labor practices.<sup>490</sup> Nevertheless, it is uncertain whether particular labor practices amount to forced labor or slavery sufficient to violate international law.

## 2. *Legal defenses against ATCA suits*

The law provides defendants with several established objections to ATCA lawsuits that merit serious consideration.

### (a) Act of State Doctrine

The Act of State Doctrine is the idea that one state may not judge the official acts of another. A defendant may try to dismiss an action based on the premise that since a nation is sovereign within its own borders, a foreign court may not question another nation's domestic actions.<sup>491</sup> The key issue with this doctrine is whether a particular action is an “official” action by the state, an action allowed by the state, or an action unconnected with the state. The doctrine is especially relevant to the ATCA, as U.S. courts frequently are presented with

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<sup>490</sup> See *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1298 (C.D. Cal. 2000) (noting that a corporation allegedly requested aid from the military knowing that it would likely involve the use of forced labor), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *vacated on grant of reh'g en banc*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed and district court opinion vacated per stipulation*, 403 F.3d 708 (9th Cir. 2005). The trial court in *Unocal* also discussed the Nuremberg trials of several German corporate leaders. *Id.* at 1309-10. The court discussed *United States v. Krauch*, 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 1179 (1952) (finding five defendants guilty because they “embraced the opportunity to take full advantage of the [Nazi] slave-labor program”); and *United States v. Krupp*, 9 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 1440 (1950) (finding 12 defendants guilty for employing slave labor where the “Krupp firm had manifested not only its willingness but its ardent desire to employ forced labor”).

<sup>491</sup> Black's Law Dictionary (7th ed. 1999)

cases involving human rights abuses committed with at least the tacit participation/consent of a foreign government.

A seminal case involving the Act of State Doctrine is *Banco Nacional de Cuba v. Sabbatino*,<sup>492</sup> where a U.S. corporation sued to recover damages stemming from the Cuban government's expropriation of its property. The U.S. Supreme Court ultimately held that the Act of State Doctrine precludes U.S. Courts from "inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory."<sup>493</sup> Commentators have described the doctrine as one which aims to "minimize conflicts with a foreign nation and . . . avoid interference with negotiations carried on by the executive branch."<sup>494</sup>

It is impossible to predict exactly how and to what extent a court will follow the Act of State Doctrine, although courts have been reluctant to apply it in the context of gross human rights abuses. In *Republic of Philippines v. Marcos*,<sup>495</sup> the Court of Appeals for the Second Circuit placed the burden of raising the Act of State Doctrine on the defendant and ultimately held that the defendant – the President of the Philippines from 1965 to 1986 – had not met that burden. Courts are reluctant to apply the Act of State Doctrine in cases involving human rights violations, as individual violations of international law – such as torture – are rarely performed in an actor's "official" capacity, and foreign governments do not usually explicitly endorse such acts.<sup>496</sup> Some courts have even held that the Act of State Doctrine can *never* apply to *jus cogens* violations of international law, as *jus cogens* norms are peremptory norms "from which no derogation is permitted."<sup>497</sup>

(b) Forum Non Conveniens

The legal doctrine of *forum non conveniens* refers "to the discretionary power of the district court to decline jurisdiction when the convenience of the parties and ends of justice would be better served if the action were brought and tried in another forum."<sup>498</sup> In other words, the court can decline to hear a case because it would be easier or more desirable to hear the case elsewhere. When deciding whether to apply this doctrine, courts may consider both public and private interest factors. Private interest factors include "the parties' ease of access to sources of proof, ability to subpoena unwilling witnesses, access to willing witnesses, and the possibility of viewing certain premises which are the subject of the

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<sup>492</sup> 376 U.S. 398 (1964).

<sup>493</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

<sup>494</sup> Chemerinsky, *supra* note 446, § 6.2.4, at 374.

<sup>495</sup> 806 F.2d 344 (2d Cir. 1986).

<sup>496</sup> See *Republic of Philippines v. Marcos*, 806 F.2d 344, 358-59 (2d Cir. 1986); see also *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980) (questioning whether action taken by a state official, in violation of the constitution and laws of Paraguay and unendorsed by the government, could constitute an act of state for the purposes of the Act of State Doctrine); but see *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1206 (C.D. Cal. 2002) (dismissing an ATCA action for environmental harm on the grounds that it would interfere in the internal affairs of a foreign government, where the foreign government was heavily involved in the mining operation that gave rise to the lawsuit), *aff'd in part, vacated in part, rev'd in part*, Nos. 02-56256, 02-56390, 2006 WL 2242146 (9th Cir. Aug 7, 2006).

<sup>497</sup> *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 345 (S.D.N.Y. 2003).

<sup>498</sup> *Brown*, *supra* note 449, § 2:10 (internal quotations omitted).

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suit.<sup>499</sup> Public interest factors are also considered, and they include factors such as court congestion in the relevant jurisdiction and conflict of law questions.<sup>500</sup>

While the issue of *forum non conveniens* has arisen in the context of the ATCA, it would probably not apply to cases involving human rights violations in North Korea. If the only other likely forum were the North Korean judicial system, it is unlikely that a U.S. federal judge would dismiss a suit in favor of adjudication there, unless the judge concluded that the case would be fairly tried in North Korea.<sup>501</sup> In the case of a lawsuit against a foreign corporation, an argument could be made that the corporation's home country provides an adequate forum, but U.S. courts have been lukewarm to these arguments.<sup>502</sup>

### (c) Political Question Doctrine

Defendants may also argue that the courts cannot consider an ATCA claim because it involves a political question regarding the conduct of the United States' foreign affairs – in other words it involves a judgment that is best left to the politically accountable branches of government: Congress and the President.<sup>503</sup> Courts are likely to reject this argument if the specific facts of the case do not implicate a particular foreign policy issue. The Supreme Court of the United States has stated that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance,” and this rationale has been extended to political question challenges to ATCA cases.<sup>504</sup> Courts have found that even though deciding a case involving international human rights violations may have political implications, the decision of the case itself is not a “political” act.<sup>505</sup>

Nevertheless, the administration under George W. Bush has consistently taken a stance against alien tort claims litigation and has intervened in law suits in an attempt to invalidate the *Filartiga* line of cases as an unconstitutional misinterpretation of the ATCA statute. The Bush administration has asserted that “judicial review of allegations of gross human rights abuses constitutes an unconstitutional interference with executive branch foreign affairs power,” and has insisted that the judiciary refrain from questioning executive authority when

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<sup>499</sup> *Id.*

<sup>500</sup> *Id.*

<sup>501</sup> See *Talisman Energy*, 244 F. Supp. 2d at 335-36 (holding that Sudan is not an adequate alternative forum, on the grounds that there was no evidence the Sudanese judicial system was “fair and free from corruption, and that plaintiffs, who are alleging that Sudan committed genocide and war crimes, could get a fair trial”).

<sup>502</sup> *Id.* at 338-41 (refusing to dismiss in favor of a Canadian forum, after considering the deference accorded to plaintiffs' choice of forum, the U.S. interest in vindicating international human rights violations, and the relative hardships imposed upon the respective parties by the litigation); see also *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 107-08 (2d Cir. 2000) (applying the same factors and deciding in favor of the United States over Britain and Nigeria).

<sup>503</sup> Chemerinsky, *supra* note 446, § 2.6.1.

<sup>504</sup> *Baker v. Carr*, 369 U.S. 186, 211 (1962); see also *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1996) (“Although [ATCA] cases present issues that arise in a politically charged context, that does not transform them into cases involving nonjusticiable political questions.”).

<sup>505</sup> *Talisman Energy*, 244 F. Supp. 2d at 347 (“[T]he issues in this case are not political. The Court's function is to determine whether Sudan and Talisman violated international law by committing certain acts.”).

the administration deems specific human rights litigation harmful to foreign policy.<sup>506</sup> It is therefore possible that the Bush administration would file a brief with the court in an ATCA case requesting dismissal of the suit, in line with its prior positions. The diplomatic successes of 2007 with North Korea may encourage such an action, as the United States government may wish to avoid judicial action that could imperil such success. However, future administrations may come to different conclusions about the legitimacy of the ATCA.

The Bush administration, however, may be more accepting of an ATCA action involving North Korea. It would be difficult for the administration to represent that measures taken expressly for the purpose of remedying violations of human rights in North Korea would be “harmful to foreign policy,” as the Bush administration enacted the North Korean Human Rights Act of 2004 in order to “promote human rights and freedom in the Democratic People’s Republic of Korea.”<sup>507</sup> The legislation expressly 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,” and contains detailed descriptions of those abuses committed by the North.<sup>508</sup> Furthermore, the Act’s purposes include promoting “respect for and protection of fundamental human rights in North Korea,” “a more durable humanitarian solution to the plight of North Korean refugees,” “increased monitoring, access, and transparency in the provision of humanitarian assistance inside North Korea,” “the free flow of information into and out of North Korea,” and “progress toward the peaceful reunification of the Korean peninsula under a democratic system of government.”<sup>509</sup> In furtherance of these goals, the Act provides for various measures, including but not limited to, financial support for nonprofits and programs that promote human rights and provide humanitarian assistance inside North Korea, support for the dissemination of United States broadcasting to North Korea, and a lenient immigration and asylum policy for North Korean refugees.<sup>510</sup>

## F. Practical Considerations

Aside from legal issues faced by plaintiffs bringing an ATCA claim, potential litigants must also consider the practical wisdom of doing so. The potential for lawsuits against foreign corporations for their alleged complicity in international human rights violations creates a quandary. Does providing a victim of human rights abuses with a forum in which they can obtain relief outweigh potential advantages resulting from foreign investment in North Korea, namely the increased contact between citizens of the hermit state and the outside world?

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<sup>506</sup> Stephens, *supra* note 444, at 169-70. The Administration has argued that the cases decided so far represent an unconstitutional misinterpretation of the statute, insofar as they encroach upon the executive’s constitutionally assigned power to conduct the nation’s foreign affairs. *Id.* at 182. Furthermore, on an individualized basis, the Administration has asserted that specific cases threaten U.S. foreign policy and should be dismissed in accordance with the act of state and political question doctrines. *Id.* This latter set of arguments historically has found a more receptive audience in the courts. See also Brief for the United States in Support of Petition for Writ of Certiorari, *Sosa v. Alvarez-Machain*, No. 03-339, at 8 (“The potential impact of this case on the actions of the Executive abroad is great and further heightened by the Nation’s ongoing war against terrorism.”).

<sup>507</sup> Pub. L. No. 108-333, 118 Stat. 1287 (2004) (codified at 78 U.S.C. § 7801 *et seq.*).

<sup>508</sup> *Id.* at 1287.

<sup>509</sup> *Id.* at 1290.

<sup>510</sup> See *id.* at 1290-97.

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The U.S. State Department has expressed concern that domestic human rights litigation may, in the long run, harm those it is trying to help. Through contact with foreign investors, citizens of developing countries such as North Korea “see the advantages of modern business practices including transparency, respect for contracts, fair labor practices, anti-corruption, efficiency, and competitiveness.”<sup>511</sup> Litigation can discourage foreign investment and also foment economic and political instability should foreign investors suddenly pull out, thereby rendering it more difficult for the government to provide quality public services such as education and health care.<sup>512</sup> Most importantly, litigation can affect the desire of host governments to cooperate with foreign governments such as the United States on a variety of issues, from counterterrorism to voluntary human rights reform.<sup>513</sup> A complicating factor is the extent to which ATCA litigation may conflict with state diplomacy. In the case of North Korea, the diplomatic progress of 2007 may have the effect of making the United States government less supportive of domestic litigation involving North Korea, for fear of jeopardizing that progress.

When deciding whether or not to pursue legal action against foreign corporations investing in North Korea, it may be wise to reflect on the egregiousness of the alleged corporate conduct, and whether obtaining a judgment in court warrants potentially damaging the tenuous foreign investment structure and the limited links that North Koreans have to the outside world.

### **G. Conclusion**

Filing a lawsuit under the ATCA can be a productive way to use the American legal system to punish and publicize breaches of international law. As indicated above, there are various practical considerations to be kept in mind. Rarely do both the prospective plaintiff and defendant meet the various requirements for bringing a suit under the ATCA. Furthermore, any plaintiff pursuing this avenue must have the resources to proceed with a possibly lengthy litigation. However, this is a powerful tactic which uses federal courts to enforce the most universal international laws.

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<sup>511</sup> July 29, 2002, letter from William H. Taft IV, Legal Advisor to the U.S. Department of State, to Hon. Louis F. Oberdorfer, Judge, U.S. District Court for the District of Columbia, *Doe v. ExxonMobile Corp.*, No. 01-CV-1357 (D.D.C. filed June 19, 2001) (discussing the negative effect of human rights litigation on foreign investment in and U.S. relations with Indonesia); see also William A. Reinsch, President, National Foreign Trade Council, Letter to the Editor, N.Y. TIMES, June 5, 2003 (“[ATCA] cases also threaten to deter much needed foreign investment in developing countries that are the most likely target of these suits. . . . [I]t won’t be long until virtually every country will be off bounds to U.S. business, and virtually every multinational will stand accused of violating human rights. And, what will that achieve?”).

<sup>512</sup> See Taft, *supra* note 511; see also Reinsch, *supra* note 511.

<sup>513</sup> Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT’L L. 457, 461 (Fall 2001) (discussing the cost of international human rights litigation to U.S. foreign relations, including the toll on the “carefully calibrated strategy” used by the President and Congress to criticize human rights abuses, which “balances criticism against the benefits of engagement in economic and related matters”).

## CONCLUSION

In order for an NGO to take effective international legal action against North Korea and bring it into compliance with its human rights obligations, it is essential that the organization play to its key strength—the ability to collect, evaluate, and disseminate information regarding the rampant human rights abuses occurring on a daily basis. NGOs should concentrate on getting accurate information into the hands of the myriad international legal bodies responsible for regulating human rights abuses.

In conclusion, this report outlines a possible course of action to be taken by NGOs regarding each alternative presented.

International Criminal Court. An ICC prosecution against members of the North Korean regime while challenging , may be an effective option, due to its ability to both focus international attention on North Korean human rights abuses and provide possible justice and closure for victims. An NGO could play an effective role in encouraging states to refer North Korea to the ICC, whether through a Security Council referral or a complaint by an individual state. Furthermore, NGOs would be effective in helping the Prosecutor to collect accurate information and reliable witness testimony once an investigation is underway.

U.N. Security Council. As previously discussed, the U.N. Security Council is a complicated entity with challenging political obstacles to taking action against an egregious human rights abuser such as North Korea. Nevertheless, an NGO can be highly effective if it is able to successfully lobby a member state to bring a resolution against North Korea before the Security Council. Even if such a resolution were vetoed, the publicity resulting from the ensuing debate would focus international attention on the situation in the North. NGOs interested in working with the Security Council should also consider pursuing unofficial “Arria formula” meetings with delegates. In the course of such meetings, an NGO might have the opportunity to present a comprehensive report on the situation in North Korea, which could find its way into a Security Council debate via the delegates.

Human Rights Council. The various options available in the Council may present important opportunities to publicize information regarding human rights abuses in North Korea. NGOs should continue to press the Council to continue the work the Commission began with its resolutions on North Korea and should assist the Council and Special Rapporteur where possible. Further, an NGO looking to work with the Council could try to obtain “consultative status,” thereby granting it the right to submit written reports to the Council for consideration and to attend U.N. conferences on relevant issues. NGOs lacking consultative status can also work with NGOs that do hold such status.

Treaty Bodies. Several international human rights conventions have their own enforcement bodies, such as the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, the Convention on the Rights of the Child Committee, and the Committee on Economic, Social, and Cultural Rights. All of these enforcement mechanisms rely on state reporting, which is the weakest form of supervision available under international law. Nevertheless, these treaty bodies still present a valuable forum for raising the international profile of North Korean human rights abuses. NGOs should make every effort to attend working group meetings, as well as to submit shadow reports whenever North Korea submits a report to the various treaty bodies. Providing these entities with independent, accurate information on the situation in North Korea keeps public pressure on the regime to change, even though such change may not come immediately.

Alien Tort Claims Act. Finally, the ATCA provides an alternative that might be pursued against certain defendants in the U.S. legal system. If a suitable plaintiff and defendant can be located, the ATCA provides a course of action that can potentially provide resolution in the form of a monetary judgment against a human rights abuser. As with an ICC prosecution, NGOs can provide a valuable support role to the plaintiff's legal team by providing it with information, witnesses, and evidence that may be difficult or impossible to locate without help. The ATCA is a valuable tool that can use a national legal system to enforce international human rights laws.

Although international law aspires to protect universal standards of human rights, using international law to curb human rights abuses can be challenging. The various international legal regimes and institutions present a complex network of possibilities. The difficulty in translating the proceedings of these apparently-distant institutions into real-world practice presents a further obstacle. These difficulties are strongest of all in the case of an isolated nation such as North Korea, which is resistant to the dictates of international law and the force of international opinion. However, NGOs still have opportunities for action. An understanding of the basic options available under the international legal system allows concerned NGOs to determine which of these opportunities are the most promising. This document provides a general survey of international legal options to enable NGOs to fight for human rights and help the system of international human rights law fulfill its promise.

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