Crimes Against Humanity

An independent legal opinion on the findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea

May 2014
North Korea is the world’s most impossible State: a totalitarian regime that brainwashes and brutalizes its own people while testing nuclear bombs which, in a few years’ time, its ballistic missiles will be capable of delivering not only to Seoul and Tokyo, but to Sydney and Los Angeles. It has proved impervious to international sanctions, and to pressure from the Security Council and the EU (and even from its erstwhile protectors, Russia and China) exerted through fear of its nuclear ambitions rather than from any concern over the barbarous treatment of its people.

The world has until recently ignored North Korea’s appalling human rights record – partly because of the difficulty of extricating facts from this impenetrable nation. Finally, after mounting concern from its special rapporteur about forced labour and starvation, extra-judicial executions and other “egregious” human rights abuses, in February 2013 the Human Rights Council established a Commission of Inquiry, chaired by the distinguished Australian jurist, Michael Kirby. Its members were not, of course, permitted entry, but after an exhaustive eleven month study of all the available evidence, and hearing the testimony of hundreds of escapees from its gulags, it reported on a State which it found presumptively guilty of on-going crimes against humanity:

*The gravity, scale, duration and nature of the unspeakable atrocities committed in the country reveal a totalitarian State that does not have any parallel in the contemporary world.*

So, what is the contemporary world to do? The first step, of which this follow-up report is a fine example, is to audit the Commission of Inquiry, checking that its sources were reliable, its methodology appropriate and its legal assumptions correct, in light of the dismissive response it received from North Korea, which condemned it as:

*another of the instruments in the political strategy on the part of the nations of the West, such as the United States, Japan, and the EU to eliminate socialism under the pretext of "human rights".*

This response was nonsensical - the commissioners were independent of Western governments (the others were a former Indonesian Attorney-General and a Serbian human rights activist) and it is preposterous to suggest that human rights is antipathetic to socialism, given the contribution made to its development by individual socialists and by democratic socialist governments. Socialist systems call for more exercise of State power than capitalist systems, and may for that reason require more checks against government abuse, but not even the six nations which voted against action on the Commission of Inquiry Report (Russia, Cuba, Venezuela, China, Pakistan and Vietnam) have subjected their peoples to anything like the degradation, repression and utter withdrawal of liberty that is the lot of citizens of North Korea. This State claims in its response to have adopted a “people-centred Juche Thought” but, whatever “Juche Thought” may be, its impact on the people has been to terrify and enslave them.

North Korea also accuses the Commission of Inquiry of “total fabrication and concoction”, and it has some basis for sounding an alarm – a basis that was no fault of the commissioners but which stemmed from the incautious language of the UN Human Rights Council resolution that set up their Inquiry. This resolution “strongly condemned the on-going, grave, widespread and systematic human rights violations in North Korea”, thereby appearing to pre-judge the very Inquiry which it was establishing to decide whether there were in fact such violations. Although this language reflected the findings of the UN’s Special Rapporteur on the human rights situation in North Korea, it was foolish to deploy it as preamble to the mandate of a supposedly independent and impartial commission. Although the Commissioners did not regard themselves as bound by it, this mistake at the inception does underline...
the value of this follow-up legal opinion, which convincingly dispels North Korea’s suggestion that the Commissioners were pre-selected or put under pressure to fabricate or dissemble.

This legal opinion confirms the correctness of their methods and methodology for obtaining and analysing available evidence. For all its truculence and refusal to co-operate, it is essential to be fair to North Korea, and to accept that those who have testified against it may well have a motive to lie or exaggerate, in order, for example, to bolster their claims for asylum in other countries, or to further some political objective. This is a problem which bedevils all commissions of inquiry into the human rights situation in countries which do not allow them entry and which ban the foreign media, and they must be scrupulous in testing the evidence and obtaining corroboration. This report confirms that the Kirby report, on this score, is both credible and compelling. The general rule of non-intervention in national sovereignty does not apply to States which betray their responsibility to protect their own people from crimes against humanity, and international law endorses the Commission of Inquiry’s message that the world must act.

This opinion sets out the international legal avenues through which the world may act, and indeed has a duty to act. The Security Council is empowered to set up courts to instigate proceedings for crimes against humanity, and the International Criminal Court Prosecutor may act of her own motion to commence investigations of North Korean crimes that take place in countries which have ratified the Court’s statute. There is mounting evidence that genocide – a crime which requires international action – has been committed through the regime’s actions to eliminate various groups within the population. Economic sanctions, which thus far have concentrated on banning imports of nuclear technology, could be extended to cover the luxuries that its elite craves.

These steps all fall short of intervention, of course, and the problem with North Korea is simply that its leadership will remain unmoved and increasingly hostile to any international initiative that threatens to undermine the Kim dynasty, or to correct the perversions of history that its people have been brainwashed into believing. Kim Il Sung, for example, “the Great Leader”, was not a war hero but a Soviet apparatchik installed as leader of a country carved out in 1948 as the communist half of the Korean peninsula. He quickly liquidated his opponents and dragged China into a war to reclaim the capitalist south – a conflict that cost 2.7 million Korean lives, together with those of 33,000 Americans and 800,000 Chinese. The Kirby report perhaps fails to comprehend how this conflict still rages in the minds of the rulers of this time-warped nation: since the conflict, the Great Leader and in due course his son, “the Dear Leader” Kim Jong-il, and his grandson (“the Great Successor”) have acquired a cache of nukes and continue to develop the missiles needed to drop them. North Korea is good at making rockets – its Nodong range has been sold to Iran and Pakistan, and a few years ago it was caught building a secret nuclear reactor for the Assad regime in the Syrian desert.

Meanwhile, the people of North Korea, as the Kirby report demonstrates, have the least freedom of any in the world. They are jailed for not dusting the pictures of the Great Leader they must display in their homes, or for whistling South Korean pop songs or for mentioning that the U.S. won the war against Japan (their history textbooks explain that it was won almost single-handed by the Great Leader). The State does not allow them to think for themselves or to make up their own minds. If they do, they are despatched to gulags where they are worked, in many cases, to death. Political enemies of the dictator – even his uncle – are mercilessly and summarily executed. One General, caught with a drink during the “90 days of no joy” following the Dear Leader’s death, was publicly executed by being blown to pieces by a mortar.

The ultimate question must be whether a State which treats its own citizens with such amoral brutality can be trusted with nuclear bombs and, in due course, with nuclear-tipped missiles. The legal measures
recommended in this opinion as responses to the Kirby report largely depend on action by the Security Council, which is constrained by the "big power" vetoes of China and Russia. But they have not been firm protectors of Pyongyang and have supported sanctions intended to curb its nuclear ambitions. The belligerence and unreliability of the Kim dynasty may eventually persuade them that the removal of this tyrannous dictatorship is in their interests as well as everyone else's. That is an issue for the future, but for the present it is both sensible and right to build on the Kirby report, by taking up the case of North Korea with international justice mechanisms, in the ways this legal opinion recommends.

Geoffrey Robertson QC
Doughty Street Chambers
5 May 2014
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<tr>
<td>1718 Committee</td>
<td>The UN Security Council Committee established pursuant to Resolution 1718</td>
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<tr>
<td>BMRs</td>
<td>Belgrade Minimal Rules of Procedure for International Human Rights Fact-finding Missions developed by a Sub-Committee of the International Law Association in 1980</td>
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<td>CEDAW</td>
<td>1979 Convention on the Elimination of all forms of Discrimination Against Women</td>
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<td>COI</td>
<td>The Commission of Inquiry on human rights in the DPRK</td>
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<td>CRC</td>
<td>1989 Convention on the Rights of the Child</td>
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<td>CRPD</td>
<td>2006 Convention on the Rights of Persons with Disabilities</td>
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<td>DPRK</td>
<td>Democratic People’s Republic of Korea</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>General Assembly</td>
<td>The main deliberative, policymaking and representative organ of the UN established pursuant to Chapter IV of the UN Charter</td>
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<tr>
<td>General Assembly Declaration</td>
<td>The Declaration on Fact-finding by the United Nations in the Field of Maintenance of International Peace and Security adopted by the General Assembly on 9 December 1991 (UN Doc A/RES/46/59)</td>
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<tr>
<td>Hogan Lovells</td>
<td>Hogan Lovells International LLP</td>
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>1966 International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>1966 International Covenant on Economic, Social and Cultural Rights</td>
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<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<tr>
<td>Istanbul Protocol</td>
<td>The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, developed in 1999 by independent experts and endorsed by various UN bodies</td>
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<tr>
<td>KINU White Paper</td>
<td>2013 White Paper on Human Rights in North Korea, prepared by the Korean Institute for National Unification</td>
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**OHCHR** Office of the High Commissioner for Human Rights  
**OTP** Office of the Prosecutor of the ICC  
**Protected Group** An ethinical, national, racial or religious group protected by the Genocide Convention  
**ROK** Republic of Korea  
**Security Council** The Security Council of the UN, established under Chapter V of the UN Charter, and charged with the maintenance of international peace and security  
**Special Rapporteur** Special Rapporteur on the situation of human rights in the DPRK  
**UDHR** 1948 Universal Declaration of Human Rights  
**UK** United Kingdom  
**UN** United Nations  
**UN Charter** The Charter of the UN, signed in San Francisco on 6 June 1945  
**UNHRC** The UN Human Rights Council, the UN body responsible for the promotion and protection of human rights around the world (as well as its predecessor, the UN Commission on Human Rights)  
**UPR** The Universal Periodic Review, a UNHRC mechanism involving a periodic review of the human rights records of all UN Member States. It provides an opportunity for all States to declare what actions they have taken to improve the human rights situations in their countries and to overcome challenges to the enjoyment of such rights. The UPR also includes a sharing of best human rights practices around the globe.  
**US** United States of America
INTRODUCTION AND SUMMARY

This document has been prepared by Hogan Lovells, a global law firm with significant human rights and international law capabilities, on behalf of Human Liberty. Human Liberty is a network of non-profit organisations that work to protect human liberty and fundamental freedom, with a specific focus on the DPRK. Further information on Human Liberty can be found at www.humanliberty.org.

Human Liberty instructed Hogan Lovells to produce this document as an independent and impartial legal opinion on the methodology, conclusions and recommendations of the COI Report, which was first published on 17 February 2014 and then formally presented to the UNHRC in Geneva on 17 March 2014.¹

In producing this opinion, we have reviewed the COI Report and the Summary of Findings, as well as the materials listed in the Bibliography. We have also reviewed a number of testimonies taken from DPRK refugees by the Government of the ROK, which have been translated for us by TransPerfect Legal Solutions, an independent translation service. Although we do not know enough about the conditions under which this evidence was collected to be able to satisfy ourselves that it meets the same standards as the evidence taken by the COI, these further testimonies do appear to corroborate the findings of the COI and highlight the continuing need to make a record of the events that are occurring in the DPRK.

We have also noted (and have addressed in this opinion) the specific criticisms of the COI Report that were set out in the DPRK’s response to the report which is annexed to this opinion at Annex 1. Those criticisms include the following:

(a) that the setting up of the COI was based on the desire of the US, the EU and Japan (among others) to eliminate socialism under the pretext of human rights;

(b) that the COI was controlled by the US and other nations who are hostile to the DPRK;

(c) that the COI Report has fabricated evidence and concocted findings of human rights violations in the DPRK; and

(d) that any interference by other countries in the internal affairs of the DPRK would offend the principle of the sovereignty of nation States.

This legal opinion starts, in section 1, by setting out the background to the COI, in particular concentrating on the reports and resolutions of various UN bodies since 2003 in respect of the human rights situation in the DPRK. It then goes on to examine the establishment of the COI itself, before summarising the progress that has been made since the COI formally presented its report to the UNHRC on 17 March 2014.

In accordance with our instructions from Human Liberty, we have conducted a careful assessment of the COI’s methodology, in particular as regards evidence gathering and evaluation. That assessment is set out in section 2. Careful analysis of the COI's methodology was a particularly important part of our review, as we recognize that the validity of the COI's findings significantly depends on its approach to gathering and assessing evidence. Evidence-gathering was made difficult for the COI as a result of its inability to gain access to the DPRK itself. However, the COI held extensive public hearings, gathering over 320 first-hand witness and expert testimonies about life in the DPRK. The COI then considered whether that evidence gave rise to reasonable grounds to suspect that human rights violations and crimes against humanity had been committed such that further investigation was justified. As we explain in section 2, our view is that the COI adopted a rigorous approach to gathering and


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analysing evidence, and also an appropriate standard of proof. On that basis, we can find no reason to doubt the adequacy or suitability of the COI's methodology.

Section 3 summarizes the findings of fact by the COI in relation to human rights violations. In terms of legal analysis, we agree that the evidence before the COI compellingly suggests that the DPRK has committed – and continues to commit – severe human rights violations. Section 3 also considers whether there may be further violations of the right to safe and healthy working conditions under the ICESCR, on the basis of the additional testimonies that we have received from the ROK Government in relation to the treatment of those DPRK citizens who work in nuclear plants and facilities.

The COI Report includes findings that DPRK officials have committed serious human rights violations amounting to crimes against humanity, entailing:

- extermination, murder, enslavement, torture, imprisonment, rape, forced abortions and other sexual violence, persecution on political, religious, racial and gender grounds, the forcible transfer of populations, the enforced disappearance of persons and the inhumane act of knowingly causing prolonged starvation.²

Section 4 sets out our analysis of the COI's findings in relation to crimes against humanity. On the basis of that analysis, we agree with the COI that crimes against humanity have been committed and are still being committed across the DPRK as a matter of State policy, and that compliance with such policies appears to be ingrained at the highest levels of government.

In addition to those crimes against humanity identified by the COI, section 4 considers whether a further crime against humanity may be established on the basis of the DPRK's policy of sending labourers abroad to earn foreign currency. This is an important question, given the potential implications for the jurisdiction of the ICC, which we explore in section 7. We consider there to be strong indications that the DPRK's treatment of its citizens who are forced to work abroad may amount to enslavement and imprisonment, both of which amount to crimes against humanity, and in our view this warrants further investigation.

Section 5 considers genocide. The COI Report touches on this topic, but the COI ultimately concluded that it had not seen sufficient evidence to make findings on genocide. In any case, the COI did not consider it necessary to investigate allegations of genocide, in light of the extensive evidence of crimes against humanity and of the seriousness and gravity of such crimes. While we understand this approach, we also consider that there may be a case for arguing that the DPRK has committed, and continues to commit, genocide, particularly in respect of the regime's targeting of civilians classified as "hostile" by the DPRK authorities, persons practicing Christianity, and children of Chinese descent. Again, we consider that this warrants further investigation.

Section 6 considers the question of accountability, in particular at institutional and individual level.

Section 7 addresses the COI's recommendations. In addition, we have considered whether there are any further practical recommendations that might be added to those published in the COI Report. In doing so, we have focused on the possible mechanisms that might be used to bolster the sanctions against the DPRK in an appropriately targeted way and on the possibility of an investigation and prosecution by the ICC.

² Summary of Findings, para. 76.
In section 8, we set out a summary of our conclusions and possible next steps. Those conclusions include a full endorsement of the findings of the COI as well as an expression of our unreserved support for the COI's recommendations.

Finally, it is important to note that, while this opinion summarises some of the COI's analysis and conclusions, it does not cover or refer to the entire contents of the COI Report. For that reason, it is clearly no substitute for reading the COI Report and the Summary of Findings themselves (both of which are available at: www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/ReportoftheCommissionofInquiryDPRK.aspx), as well as the public witness testimonies that were given to the COI (which are available at: www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/PublicHearings.aspx).
1. CONTEXT

1.1 BACKGROUND

Evidence provided by witnesses interviewed by the COI suggests that serious human rights abuses in the DPRK started as early as the armistice at the end of the Korean War in 1953. Witnesses indicated, for instance, that prison camps where political prisoners were subjected to torture, forced labour and summary executions have been in existence since the late 1950s.3

However, despite this situation having persisted for over 60 years, human rights abuses in the DPRK have tended to attract comparatively little international attention. This has been suggested to be due to a number of different factors,4 although there is little doubt that these include the focus by the international community on the DPRK’s nuclear programme, as well as the severe restrictions on access to the country by foreign observers and by the international press, which make it very difficult to gather evidence on the human rights abuses perpetrated in the DPRK.5

In the last decade, however, the human rights situation in the DPRK has increasingly come under international scrutiny, and particularly that of the UN, which now has 193 Member States. Over 60 reports and statements on the DPRK human rights situation have been issued by UN bodies in the last decade,6 and particularly by the General Assembly and the UNHRC.7 In 2003, the UNHRC took a significant step when it adopted the first of many resolutions in relation to the DPRK. The resolution expressed the UNHRC’s:

deep concern about reports of systemic, widespread and grave violations of human rights in the Democratic People's Republic of Korea ... [and the] ... precarious humanitarian situation,

and called upon the DPRK government to respond to these concerns urgently and to allow unimpeded access to its territory by humanitarian organisations and UN agencies.8

In April 2004, the UNHRC established the mandate of an independent human rights expert to act as the Special Rapporteur on the situation of human rights in the DPRK.9 Among other things, the Special Rapporteur was mandated to establish direct contact with the Government of the DPRK, as well as to visit the country.

As with their responses to subsequent UNHRC resolutions, the DPRK authorities stated their “resolute rejection” of the resolution establishing the Special Rapporteur,10 categorically refusing to recognize, meet, cooperate with, or grant access to, the Special Rapporteur.11 Nevertheless, the Special

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3 COI Report, paras. 729-734.
4 See, e.g., Liberty in North Korea Blog, International Attention on NK Human Rights, 8 May 2013 (available at: https://www.libertyinnorthkorea.org/nkhrattn/).
6 A list of all such reports adopted as of 1 February 2013 can be found at Annex II to UNHRC, Report of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea, prepared by Marzuki Darusman (UN Doc A/HRC/22/57), 1 February 2013.
7 The UNHRC replaced the United Nations Commission on Human Rights in March 2006 (see General Assembly Resolution 60/251 (UN Doc A/RES/60/251), 15 March 2006. Both bodies are referred to in this legal opinion as UNHRC.
Rapporteur has gathered significant amounts of information about the human rights situation in the DPRK, and has submitted annual reports to both the UNHRC and the General Assembly. Since 2004, the Special Rapporteur has produced 18 reports, which have included the following findings.

There are a variety of discrepancies and transgressions – several of an egregious nature – in the implementation of human rights in the country, calling for immediate action to prevent abuses and to provide redress.

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.

Although torture is prohibited by law, it is extensively practised. Meanwhile, the abhorrent prison conditions, including lack of food, poor hygiene, freezing conditions in winter, forced labour and corporal punishment, result in a myriad of abuses and deprivations, ensuring that many prisons are a death trap for inmates.

Violence, neglect, abuse and exploitation pose a continuing concern for women at home, outside the country and across borders.

Approximately 2 million people in the most food-insecure areas of the country are currently receiving nutrition and food assistance. Around 10,300 children are expected to be treated for severe acute malnutrition and 57,000 for moderate acute malnutrition.

In response to the reports of the Special Rapporteur, the General Assembly and UNHRC have repeatedly adopted resolutions voicing concerns about the human rights situation in the DPRK. For example, in 2006, the General Assembly denounced:

continuing violation of the human rights and fundamental freedoms of women, in particular the trafficking of women for the purpose of prostitution or forced marriage, forced abortions, and infanticide of children of repatriated mothers, including in police detention centres and camps.

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12 For a complete list, see Bibliography. Since its creation, the Special Rapporteur issued two reports per year (one to the UNHRC and one to the General Assembly), except in 2004 when, "owing to time constraints resulting from his late appointment" the Special Rapporteur was "not … in a position to present a report to the Assembly as requested" (General Assembly, Note by the Secretariat (UN Doc A/59/316), 1 September 2004).


19 General Assembly Resolution 60/173 (UN Doc A/RES/60/173), 14 March 2006, para. 1(b)(iv).

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In 2012, the UNHRC and the General Assembly adopted resolutions on the “persisting deterioration” in the human rights situation in the DPRK, therefore concluding for the first time that the abuses were worsening. These resolutions were adopted by consensus, without a vote.  

1.2 THE ESTABLISHMENT OF THE COI

On 1 February 2013, the Special Rapporteur proposed that an international inquiry be launched in respect of the human rights situation in the DPRK. The Special Rapporteur noted that such a step would be in accordance with the obligations of the international community:

> the international community, through the United Nations, has the responsibility to use appropriate peaceful means to help to protect the population in the Democratic People’s Republic of Korea from crimes against humanity. As one of the minimum steps, and in line with the emerging practice with regard to other country situations where serious violations are being committed on a systematic or widespread basis, he considers that the international community has a responsibility to launch an independent and impartial inquiry into a situation, where there are grounds to believe that crimes against humanity are being committed and the country concerned fails to carry out effective independent and impartial inquiries itself. While usually not sufficient in and by itself to end crimes against humanity, increased scrutiny by international inquiry affords a measure of protection, especially when coupled with the prospect of future criminal investigations and the deterrent effect such a prospect may have on individual perpetrators.

Accordingly, on 21 March 2013, the UNHRC resolved, again by consensus, to establish a three-member Commission of Inquiry. The members of the COI, and their relevant experience, are discussed further in section 2.2.2 below.

The COI mandate required that the COI’s investigations pursue three interlinked objectives:

(a) the further investigation and documentation of human rights violations;
(b) the collection and documentation of victim, witness and perpetrator accounts; and
(c) ensuring full institutional and personal accountability, in particular for violations that might amount to crimes against humanity.

The COI was mandated to investigate the systematic, widespread and grave violations of human rights in the DPRK, including in the following nine substantive areas:

(a) violations to the right to food;
(b) violations associated with prison camps;
(c) torture and inhumane treatment;

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23 UNHRC Resolution 22/13 (UN Doc A/HRC/RES/22/13), 21 March 2013.
24 COI Report, para. 15.
(d) arbitrary arrest and detention;
(e) discrimination, in particular in the systematic denial and violation of basic human rights and fundamental freedoms;
(f) violations of the freedom of expression;
(g) violations of the right to life;
(h) violations of the freedom of individual movement; and
(i) enforced disappearances, including in the form of abductions of nationals of other States.  

The COI did not regard this list to be exhaustive and, where appropriate, it investigated violations intrinsically linked to one of those areas. The COI also paid specific attention to gender-based violations, particularly violence against women, and the impact of violations on certain groups, including women and children. The COI interpreted its mandate to include violations committed by the DPRK against its nationals both within and outside the DPRK's territory, as well as those violations that involved extraterritorial action originating from the DPRK, such as abductions of non-DPRK nationals from other countries.

In accordance with the timetable laid out by its mandate, and as already mentioned above, the COI Report was first published on 17 February 2014 and then formally presented to the UNHRC in Geneva on 17 March 2014, when the Chair of the COI stated:

The gravity, scale, duration and nature of the unspeakable atrocities committed in the country reveal a totalitarian State that does not have any parallel in the contemporary world.

These are the ongoing crimes against humanity happening in the Democratic People’s Republic of Korea, which our generation must tackle urgently and collectively. The rest of the world has ignored the evidence for too long. Now there is no excuse, because now we know. In today’s world, billions of people have direct access to the horrifying evidence.

... We have fulfilled our function. It is now up to the Member States of the United Nations to fulfil theirs. The world is now better informed about Korea. It is watching. It will judge us by our response. This Commission’s recommendations should not sit on the shelf. Contending with the scourges of Nazism, apartheid, the Khmer Rouge and other affronts required courage by great nations and ordinary human beings alike. It is now your duty to address the scourge of human rights violations and crimes against humanity in the Democratic People’s Republic of Korea.

1.3 EVENTS AFTER THE PRESENTATION OF THE COI REPORT

On the basis of the COI Report, a draft UNHRC resolution was introduced by the EU and Japan at the 25th session of the UNHRC, and co-sponsored by over 50 countries. The resolution, which was adopted

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27 COI Report, para. 17.
28 COI Report, para. 19.
by 30 votes in favour (with six votes against and 11 abstentions), supports the findings, conclusions and recommendations of the COI Report. It urges all States to adhere to the fundamental principle of “non-refoulement”, lists all of the crimes against humanity as identified by the COI and tasks the OHCHR to establish a field-based follow-up structure to continue to monitor the human rights situation in the DPRK. On 28 May 2014, the UN announced the establishment of a dedicated office in Seoul to systematically investigate human rights violations taking place in the DPRK.

Crucially, the UNHRC resolution adopted on 28 March 2014 also recommended:

that the General Assembly submit the report of the commission of inquiry to the Security Council for its consideration and appropriate action in order that those responsible for human rights violations, including those that may amount to crimes against humanity, are held to account, including through consideration of referral of the situation in the Democratic People’s Republic of Korea to the appropriate international criminal justice mechanism.

The DPRK’s reaction to the resolution was, again, one of categorical and resolute rejection, with the DPRK representative within the UNHRC stating that:

The United States, Japan and the European Union were not qualified to speak about the human rights situations of other countries, because they in the past had committed war crimes, crimes against humanity and genocide; a bloody history which they were now trying to cover up. The Democratic People’s Republic of Korea had a proverb – ‘mind your own business’ - which meant that one needed to see his or her face in the mirror to check how nasty it was before talking about others. The continuing adoption of country-specific resolutions made a mockery of the Human Rights Council and was an insult to the international community. The people of the Democratic People’s Republic of Korea were proud of having the world’s best socialist system that considered human beings to be the most precious resource in the world and placed everything in their service. It would continue to safeguard its ideology and socialist system and make every effort to faithfully fulfil its obligations in the international human rights area.

On 17 April 2014, the COI met with members of the Security Council to brief them on the findings of the COI Report in an Arria formula meeting convened by Australia, France and the US. The Arria formula meeting was open to all UN Member States, although only some (including the DPRK and Japan) were invited to speak. Neither the DPRK, nor China or Russia attended the meeting.

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30 UNHRC, Human Rights Council extends mandates on Syria, Iran, Democratic People’s Republic of Korea and Myanmar, 28 March 2014 (available at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14455&LangID=E ), recording the result of the vote as follows:

- In favour (30): Argentina, Austria, Benin, Botswana, Brazil, Burkina Faso, Chile, Costa Rica, Côte d’Ivoire, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Kazakhstan, Maldives, Mexico, Montenegro, Morocco, Peru, Philippines, Republic of Korea, Romania, Sierra Leone, The former Yugoslav Republic of Macedonia, United Arab Emirates, United Kingdom, and United States of America.
- Against (6): China, Cuba, Pakistan, Russian Federation, Venezuela and Viet Nam.
- Abstentions (11): Algeria, Congo, Ethiopia, Gabon, India, Indonesia, Kenya, Kuwait, Namibia, Saudi Arabia, and South Africa.


35 Arria formula meetings are not expressly provided for in the UN Charter, but are informal and confidential briefings, first initiated by Ambassador Diego Arria of Venezuela in 1992, when he was President of the Security Council.

Reportedly, at least ten of the 13 Security Council members that attended the Arria briefing declared they would be inclined to refer DPRK leaders to the ICC for prosecution.\(^{37}\) To do so would now require a proposal by at least one state, with nine other members agreeing to it.\(^{38}\) Approval of a resolution by the Security Council would then require the affirmative vote of nine of its 15 members,\(^{39}\) provided none of the five permanent members (China, France, Russia, the UK and the US) votes against the resolution.\(^{40}\)

While the DPRK’s human rights situation does not yet appear to be an item for consideration on the Security Council agenda, developments since the Arria briefing of 17 April 2014 confirm that the Pyongyang regime is increasingly alienating the international community.

On 25 April 2014, during a visit to the ROK, President Barak Obama stated that the US was:

> also deeply concerned about the suffering of the North Korean people, and the United States and South Korea are working together to advance accountability for the serious human rights violations being committed by the North.\(^{41}\)

Even China, one of the DPRK’s traditional allies, appears to be progressively distancing itself from the DPRK Government. A contingency plan leaked in early May 2014 indicated that China is preparing for the possible collapse of the Kim Jong-un’s regime, including making detailed provisions for the detention of key North Korean leaders in the event of an outbreak of civil unrest in the DPRK.\(^{42}\)

In May 2014, the DPRK also underwent its second cycle UPR, following which the UNHRC provided 268 recommendations to improve its dire human rights record.\(^{43}\) The DPRK actively took part in this process, submitting its National Report in January 2014\(^ {44}\) and dispatching a large number of high-ranking officials to Geneva for the subsequent UPR meeting.\(^ {45}\)

The UPR Working Group report recognised some progress made by the DPRK, including for instance its signature of the CRPD and its reform providing for 12-year free mandatory education. It also urged Pyongyang, however, to close its prison camps, end public executions and stop its systematic and widespread human rights violations, including forced labor. The DPRK immediately dismissed substantial portions of the report, rejecting 83 key recommendations outright on the basis that they allegedly came out of the international community’s misunderstanding and prejudices against the

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\(^{40}\) The current members of the Security Council are Argentina, Australia, Chad, Chile, Jordan, Lithuania, Luxembourg, Nigeria, the Republic of Korea and Rwanda, in addition to the five permanent members (China, France, Russia, the UK and the US).

\(^{41}\) Article 27(3) of the UN Charter.


\(^{43}\) The Telegraph, China plans for North Korean regime collapse leaked, 5 May 2014 (available at: http://www.telegraph.co.uk/news/worldnews/asia/northkorea/10808719/China-plans-for-North-Korean-regime-collapse-leaked.html);

\(^{44}\) UNHRC, Draft report of the Working Group on the Universal Periodic Review – Democratic People’s Republic of Korea (UN Doc A/HRC/WG.6/19/L.8), 5 May 2014.


regime. Notably, DPRK representatives rejected all recommendations by fellow-UNHRC members relating to the COI Report, reiterating the view that:

the creation of the 'COI' was motivated by reasons other than human rights. The purpose of its mission was to defame the country and ultimately eliminate the ideology and social system chosen by its population. The 'report' of the commission contained fabrications and constituted a manifestation of politicization, selectivity and double standards that run counter to the principles of the Human Rights Council. Therefore, the Government had rejected the 'COI', its 'report' and consequent 'resolution'.

However, in a more promising turn of events, the DPRK said that it would review the remaining 185 recommendations and would respond to them before the UNHRC's regular session scheduled for September.

Finally, on 28 May 2014, the UN announced the establishment of a dedicated office in Seoul to systematically investigate human rights violations taking place in the DPRK. This measure reflects the recommendation made in the COI Report that the OHCHR establish a field-based follow-up structure to continue to monitor the human rights situation in the DPRK.

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2. **THE COI’S METHODOLOGY, LEGAL FRAMEWORK AND STANDARD OF PROOF**

2.1 **INTRODUCTION**

The credibility of the COI Report's findings depends, principally, on the reliability of the methodology and standards adopted by the COI.

In this respect, we note the COI’s statement that it was "guided by the principles of independence, impartiality, objectivity, transparency, integrity and the principle of 'do no harm'"\(^{50}\) and that it applied "best practices ... with regard to witness protection, outreach, rules of procedure, report writing, international investigation standards and archiving"\(^{51}\)

2.2 **METHODOLOGY**

It has been noted that:

> the United Nations has not provided comprehensive criteria for the guidance of fact-finding missions to be carried out under its auspices.\(^{52}\)

In fact, the COI Report does refer to a document produced by the OHCHR in 2013, which sets out the best practices for International Commissions of Inquiry and Fact-Finding Missions on International Human Rights Law and International Humanitarian Law, and says that it followed those best practices.\(^{53}\)

However, as this document is not publicly available, we have not been able to assess the approach of the COI against it.

Instead, in the absence of that document, we have sought to assess the approach adopted by the COI against other general standards in this field.

As a general rule, the practice of UNHRC-established Commissions of Inquiry has been assessed primarily against a non-binding instrument adopted by the International Law Association in 1980: the BMRs.\(^{54}\) We consider the BMRs to be an appropriate starting point to evaluate the procedures and practices of the COI.\(^{55}\) In addition to the BMRs, we have sought to assess the work of the COI against a number of other sources of guidance originating from both within and outside the UN, including, among others:\(^{56}\)

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\(^{50}\) COI Report, para. 29. This reflected the COI’s mandate, according to which “in carrying out its work, the COI and its Secretariat staff will be guided by the principles of independence, impartiality, objectivity, transparency, integrity and the principle of “do no harm”, including in relation to guarantees of confidentiality and the protection of victims and witnesses”(Website of the OHCHR, Mandate of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (available at: [http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/Mandate.aspx](http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/Mandate.aspx)).


\(^{52}\) COI Report, para. 29.


(a) the General Assembly Declaration;\(^{57}\)
(b) the Code of Conduct;\(^{58}\) and
(c) the Istanbul Protocol.\(^{59}\)

As a whole, these sources are consistent in requiring that investigations be carried out "effectively, promptly, thoroughly and impartially."\(^{60}\) Thomas Franck and Scott Fairley, the experts whose research led to the adoption of the BMRs, identified five "key indicators of procedural properties"\(^{61}\) to be taken into account in assessing compliance with those principles:

(a) choice of subject;
(b) choice of fact-finders;
(c) terms of reference;
(d) procedures for investigation; and
(e) utilisation of product.

These indicators, which are largely reflected in the BMRs and the other sources of guidance reviewed, will be discussed in turn.

### 2.2.1 Choice of Subject

This key indicator refers to the "decision to investigate certain situations instead of others."\(^{62}\) In this connection, it has been noted that the ad hoc nature of the Commissions of Inquiries established by the UNHRC, including the COI, may give an appearance of political selectivity in the choice of situations to

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\(^{57}\) General Assembly Resolution 46/59 (UN Doc A/RES/46/59), 9 December 1991. The General Assembly Declaration sets out principles for the acquisition of detailed knowledge by the UN about factual circumstances of any dispute or situation that might threaten the maintenance of international peace and security.

\(^{58}\) The Code of Conduct was adopted by the UNHRC in UNHRC Resolution 5/2 (UN Doc A/HRC/RES/5/2), 18 June 2007. It sets out the guidelines on the working methods of special procedures of the UNHRC, which are independent human rights experts mandated to report and advise on human rights from a thematic or country-specific perspective.

\(^{59}\) The Istanbul Protocol is a manual providing international guidelines for the assessment of persons who allege torture and ill-treatment, for investigating allegations of torture and for reporting findings to investigative bodies. It sets out the minimum standards for States to ensure effective documentation of torture. It was developed in a collaboration of 75 experts including scientists, physicians, psychologists human rights monitors and lawyers, representing 15 countries. We consider this to be persuasive given the endorsement of the Istanbul Protocol by a number of UN bodies, the allegations of torture in the DPRK and the lack of standards available to investigate crimes against humanity. The Istanbul Protocol is available at: [http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf](http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf). Also see, General Assembly Resolution 55/89 (UN Doc A/RES/55/89), 22 February 2001.

\(^{60}\) General Assembly Resolution 60/147 (UN Doc A/RES/60/147), 21 March 2006. The General Assembly Declaration similarly provides that "fact-finding should be comprehensive, objective, impartial and timely" and requires fact-finding missions "to perform their task in an impartial way" (General Assembly Resolution 46/59 (UN Doc A/RES/46/59), 9 December 1991).


be examined, with the potential to negatively impact the credibility of the investigation.\(^63\) On this basis, States subject to investigation routinely argue that their human rights record is receiving disproportionate attention in the light of the numerous situations around the world involving mass victimization that receive no comparable level of scrutiny.\(^64\) We note that exactly this argument has been made by the DPRK in its response to the COI Report, in which the DPRK claimed that:

*The Western countries, acting as if they were judges of human rights, selectively raise human rights issues regarding the countries they do not like, while ignoring the human rights issues of the Western alliance.*\(^65\)

On the basis of our review on this issue, we find that that the DPRK's criticism has no merit. First, the COI was not an isolated example of a commission of inquiry: comparable commissions have been set up to investigate the situation in a variety of other countries, including Syria,\(^66\) Libya,\(^67\) Darfur,\(^68\) Lebanon\(^69\) and the Ivory Coast.\(^70\) Secondly, the scale and magnitude of the atrocities perpetrated in the DPRK, arguably worse than in any other Member State, unquestionably required prompt action at the UNHRC level.\(^71\) In our review, we found no evidence that the COI was, as claimed by the DPRK, set up as a political tool of Western countries, or indeed for any purpose other than the protection and promotion of human rights. This conclusion is further supported by the fact that the resolution establishing the COI\(^72\) was adopted by the UNHRC without any one of its 47 Member States exercising its right to call for a vote.\(^73\)

### 2.2.2 Choice of Fact-Finders

According to Rule 4 of the BMRs:

> [a] fact-finding mission should be composed of persons who are respected for their integrity, impartiality, competence and objectivity and who are serving in their personal capacities.\(^74\)

The COI's composition fully met these requirements, as the Commissioners served in a *non-remunerated, independent, expert capacity*.\(^75\) Further, the Commissioners' biographies leave no doubt as to their expertise in International Human Rights Law, International Humanitarian Law and International Criminal Law, the three legal frameworks relevant to the COI's mandate.

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\(^65\) See the DPRK's Response at Annex 1.

\(^66\) UNHRC Resolution S-16/1 (UN Doc A/HRC/RES/S-16/1), 4 May 2011; UNHRC Resolution S-17/1 (UN Doc A/HRC/RES/S-17/1), 7 August 2011.


\(^68\) UN Security Council Resolution 1564 (UN Doc S/RES/1564/2004), 18 September 2004. It should be noted that, unlike the COI, this commission was created by the Security Council acting under Chapter VII of the UN Charter.


\(^70\) UNHRC Resolution 16/25 (UN Doc A/HRC/RES/16/25), 25 March 2011.


\(^72\) UNHRC Resolution 22/13 (UN Doc A/HRC/RES/22/13), 21 March 2013.

\(^73\) A full list of the States which were members of the UNHRC for the year 2013 is available at: [http://www.ohchr.org/EN/HRBodies/HRC/Pages/Group2013.aspx](http://www.ohchr.org/EN/HRBodies/HRC/Pages/Group2013.aspx)

\(^74\) Analogous requirements can be found in the Code of Conduct which requires that the appointees "act in an independent capacity" (Art.3(a)), "exercise their functions in accordance with their mandate" (Art.3(c)) and "exercise their functions on a personal basis, their responsibilities not being national but exclusively international" (Art.4.1). Similarly, the Istanbul Protocol requires "impartiality, competence and independence" (para.108).

\(^75\) COI Report, para. 3.
(a) Michael Donald Kirby (Australia) has served for 13 years as Justice of the High Court of Australia and has been, among other things, President of the International Commission of Jurists and Special Representative of UN Secretary-General for Cambodia.\textsuperscript{76}

(b) Marzuki Darusman (Indonesia) is the current Special Rapporteur on the Situation of Human Rights in the DPRK. He has served as Chair of the Indonesian National Human Rights Commission as well as Attorney General of the Republic of Indonesia and has chaired the UN Secretary General's Panel of Experts on Sri Lanka.\textsuperscript{77}

(c) Sonja Biserko (Serbia) is a founder and president of the Helsinki Committee for Human Rights in Serbia and has received many awards for her contribution to international human rights protection. She has written extensively on the atrocities perpetrated during the wars in the former Yugoslavia and on key criminal prosecutions before the ICTY.\textsuperscript{78}

Rule 5 of the BMRs further provides that:

> the government or governments concerned, whenever possible, should be consulted in regard to the composition of the mission.

We are not aware of any evidence that the DPRK authorities had any input in relation to the appointment of the COI's members. The consistent and resolute refusal by the DPRK government to engage with, or even recognize, various initiatives undertaken by UN bodies in respect of its human rights record, as well as the DPRK’s response to the COI Report, strongly suggests that any attempts at consultation would have been rejected.

2.2.3 Terms of Reference

The BMRs provide that:

1. The organ of an organization establishing a fact finding mission should set forth objective terms of reference which do not prejudge the issues to be investigated. These terms should accord with the instrument establishing the organization.

2. The resolution authorizing the mission should not prejudice the mission's work and findings.

The UNHRC resolution establishing the COI included an expression of the UNHRC's deep concern "at the persisting deterioration in the human rights situation in the [DPRK]" and "strongly condemn[ed] the ongoing grave, widespread and systematic human rights violations in the [DPRK]."\textsuperscript{79} This may be regarded, in the words used by Franck and Fairley in respect of other missions, as "conclusory language that palpably interfered with the integrity of the fact-finding process by violating the essential line between political assumptions and issues to be impartially determined".\textsuperscript{80} As such, the wording of the UNHRC resolution is to be regretted.

\textsuperscript{76} Website of the OHCHR, Biography of Michael Donald Kirby (available at: http://www.ohchr.org/EN/HRBodies/HRC/ColDPRK/Pages/MichaelDKirby.aspx).

\textsuperscript{77} Website of the OHCHR, Biography of Marzuki Darusman (available at: http://www.ohchr.org/EN/HRBodies/HRC/ColDPRK/Pages/MarzukiDarusman.aspx).

\textsuperscript{78} Website of the OHCHR, Biography of Sonja Biserko (available at: http://www.ohchr.org/EN/HRBodies/HRC/ColDPRK/Pages/SonjaBiserko.aspx).

\textsuperscript{79} UNHRC Resolution 22/13 (UN Doc A/HRC/RES/22/13), 21 March 2013.

Nevertheless, it should be noted that the UNHRC’s reference to serious human rights abuses occurring in the DPRK was not based on political assumptions, but rather on extensive investigations previously performed by other UN organs. In this context, the main task entrusted to the COI in its mandate appears to be to further investigate these findings “with a view to ensuring full institutional and personal accountability, in particular where violations may amount to crimes against humanity.” Furthermore, the COI itself did not approach its task on the basis of an acceptance of these assumptions but, rather, built up its findings and recommendations from scratch.

In relation to the COI’s findings, it should also be noted that the General Assembly Declaration indicates that the report of a mission “should be limited to a presentation of finding of a factual nature”. Nonetheless, the COI was mandated to make – and has made – findings that go beyond this. However, we also note that this requirement appears to have been routinely diverted from by the UNHRC’s practice, which often mandates commissions of inquiry to go beyond findings of fact and “evaluate these facts, draw conclusions that have legal import and give recommendations for further actions.” In our view, therefore, the COI’s mandate and approach are in line with what has now become a well-established practice.

Further, we endorse the COI’s approach of not including names of potential suspects in the COI Report. This is consistent with the presumption of innocence and UN practice. We note, in this respect, that the COI has reportedly compiled a confidential database of suspects, which we consider to be an appropriate approach to this issue.

### 2.2.4 Procedures for Investigation

The COI's mandate included the following under the heading "methods of work".

*The COI will collect and document victims’ testimonies and the accounts of survivors, witnesses and perpetrators, including, where appropriate, through public hearings.*

*It will seek the full cooperation of the Government of the Democratic People’s Republic of Korea and has issued a request to visit the country.*

*The COI will seek to develop regular dialogue and cooperation with the United Nations, including its specialized agencies, regional intergovernmental organizations, mandate holders, interested institutions and independent experts and non-governmental organizations.*

*Any state, individual or organisation can submit information in writing to the Commission (see contact details below).*

*In carrying out its work, the COI and its Secretariat staff will be guided by the principles of independence, impartiality, objectivity, transparency, integrity and the principle of “do no harm”.*

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81 We note, in particular, the extensive investigative and reporting activity performed by the Special Rapporteur since 2004.
82 Website of the OHCHR, Mandate of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea (available at: [http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/Mandate.aspx](http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/Mandate.aspx)).
83 General Assembly Resolution 46/59 (UN Doc A/RES/46/59), 9 December 1991, para. 17.
85 The Special Rapporteur on Torture noted: “the commission should resist the temptation to “name names”. As stated above, officials must benefit from the presumption of innocence, and their conduct should be judged by the courts, not by a quasi-judicial investigatory body” (UNHRC, Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez (UN Doc A/HRC/19/61), 19 January 2012, para.76).
86 COI Report, para. 1196.
including in relation to guarantees of confidentiality and the protection of victims and witnesses.\textsuperscript{87}

The COI Report explains that, during its first meeting in July 2013, the COI determined its methodology and programme of work. According to the COI Report, the COI intended to ensure maximum transparency, as well as due process guarantees to the DPRK, while ensuring the protection of victims and witnesses.\textsuperscript{88}

The BMRs, as well as other relevant sources, provide extensive guidelines as to the procedure to be adopted in the collection of evidence. We consider that the COI complied with these sources of guidance including, but not limited to, in the following respects.

\subsection*{2.2.4.1 Publicity}

Rule 14 of the BMRs,\textsuperscript{89} as well as the guidance provided by the Special Rapporteur on Torture\textsuperscript{90} and the Istanbul Protocol,\textsuperscript{91} provide for the default rule that hearings should, in principle, be held in public.

The COI Report indicates that one of the most significant investigative challenges faced by the COI was the fear by witnesses of reprisals. The COI noted that the majority of potential witnesses were afraid to speak out even on a confidential basis because they feared for the safety of their families. Fear of reprisals had also apparently limited the willingness of many aid workers, journalists, diplomats and others to share their knowledge and information with the COI.\textsuperscript{92}

However, subject to considerations covered in the following paragraph, the COI complied with this principle through public hearings conducted in Seoul, Tokyo, London and Washington at which more than 80 witnesses and experts testified publicly.\textsuperscript{93}

\subsection*{2.2.4.2 Protection of Witnesses}

The preference for public hearings should be "without prejudice to some exceptions made for testimony to be received in camera, as required, for example, to ensure confidentiality and the security of victims or witnesses".\textsuperscript{94} Accordingly, in addition to the public hearings, the COI conducted more than 240 confidential interviews with victims and other witnesses\textsuperscript{95} and carefully assessed any threat to the safety of each witness, and his or her family, on a case-by-case basis.\textsuperscript{96}

\begin{itemize}
  \item Website of the OHCHR, Mandate of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (available at: \url{http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/Mandate.aspx}).
  \item COI Report, para. 28.
  \item Rule 14 of the BMRs provides that "petitioners ought ordinarily to be heard by the fact finding mission in public session".
  \item UNHRC, Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez (UN Doc A/HRC/19/61), 18 January 2012, para. 67.
  \item Istanbul Protocol, para. 112.
  \item COI Report, para. 59.
  \item COI Report, paras. 30-31.
  \item COI Report, para. 35.
  \item COI Report, paras. 34-36 and paras. 51-62.
\end{itemize}
2.2.4.3 Engagement with the DPRK

The applicable international standards, as well as its mandate, required the COI to engage extensively with the DPRK authorities. Rule 14 of the BMRs, for instance, provides that the State concerned should be given an opportunity to question witnesses at the public hearing. Further, the State must be invited to comment on the documentary evidence obtained by the investigating body and to respond to its findings.

The COI took considerable trouble to seek to comply with these requirements. For example, during the course of its investigations, the COI made a number of approaches to the DPRK seeking to gain access to the country's territory, offering the opportunity of dialogue and interaction, inviting DPRK representatives to its public hearings and generally offering to discuss with the authorities of the DPRK the progress and preparation of the COI Report. All these approaches were ignored. For this reason, the COI Report indicates that:

Where information was assessed to meet the "reasonable grounds" standard, the Commission could reach its conclusions and draw inferences more comfortably because it had repeatedly offered to the authorities of the DPRK the opportunity to attend the public hearings, to obtain leave to ask questions to the relevant witnesses, and to address the Commission on such information. In addition, the Commission shared its findings with the DPRK and invited comments and factual corrections. The authorities of the DPRK have failed to avail themselves of such facilities by their own decisions.

In addition, the COI made efforts to review information provided by the DPRK in publicly available documents including its reports to the Universal Periodic Review and the Treaty Bodies, as well as publicly available summaries of the DPRK's responses to allegations by the Special Procedures of the UNHRC.

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98 Rule 14 of the BMRs provides that "petitioners ought ordinarily to be heard by the fact finding mission in public session with an opportunity for questioning by the states concerned".
99 Rule 12 of the BMRs provides that "the state concerned should have an opportunity to comment in writing" on the data and evidence collected by the commission.
100 Article 8(d) of the Code of Conduct; General Assembly Declaration, para. 26.
102 COI Report, para. 76.
103 The DPRK underwent its first cycle of the UPR in 2009 and will be subject to the second cycle in 2014. The DPRK was the only country that failed, for years, to accept any of the 167 recommendations made by the UPR Working Group in 2009 (UNHRC, Report of the Working Group on the Universal Periodic Review – Democratic People’s Republic of Korea (UN Doc A/HRC/13/13), 4 January 2010). Contrary to standard practice, the DPRK only published its responses to the recommendations received in 2009 over five years later, on 1 May 2014, during its second UPR cycle (UNHRC, Position of the DPRK on the recommendations received during its first cycle UPR, 1 May 2014, available at: http://www.upr info.org/sites/default/files/document/korea_dpr/session_19_-_april_2014/a_hrc_wg.6.19_prk.1 annex e.pdf).
104 The human rights treaty bodies are committees of independent experts that monitor implementation of the core international human rights treaties. As a signatory to four such treaties, DPRK has periodic reporting obligations to the Human Rights Committee (in respect of the ICCPR), the Committee on Economic, Social and Cultural Rights (in respect of ICESCR), the Committee on the Elimination of Discrimination against Women (in respect of CEDAW) and the Committee on the Rights of the Child (in respect of CRC). A list of reports submitted by the DPRK to these Treaty Bodies is available at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=PRK&Lang=EN.
105 The special procedures of the Human Rights Council are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective. In addition to the Special Rapporteur, the situation in DPRK has also received attention from other special procedures, including the Working Group on Arbitrary Detention, the Working Group on Enforced and Involuntary Disappearances, the Special Rapporteur on the Right to Freedom of Opinion and Expression, the Special Rapporteur on the Freedom of Religion or Belief and the Special Rapporteur on the Right to Food.
In a letter dated 10 May 2013, addressed to the President of the UNHRC, the DPRK stated that it "totally and categorically rejects the Commission of Inquiry".  

Before publishing the COI Report, the COI shared its findings with the government of the DPRK and invited comments and factual corrections. Although no response was apparently received from the DPRK prior to publication of the COI Report, the DPRK has since issued a statement saying that it "completely rejects the raising of human rights issues related to North Korea", and describing the COI as "another of the instruments in the political strategy on the part of the nations of the West, such as the United States, Japan, and the EU to eliminate socialism under the pretext of 'human rights'". The statement also denounces the COI as a "no more than a puppet that is controlled from behind by the United States and other hostile powers".

2.2.4.4 Assessment of Evidence

The COI also adopted a solid approach in evaluating and assessing the evidence before it. Crucially, the COI Report explains in very comprehensive detail the methodology it adopted in weighing testimonial and documentary evidence.

The COI's approach, in this respect, appears to be sound and fully in compliance with the relevant international standards. In particular, the COI placed "particular emphasis" on information gathered during public hearings, "given that the general public and experts can directly scrutinize the Commission's assessment of the reliability and credibility of the witness and the validity of the information provided".

In addition, we have reviewed some of the transcripts of the hearings conducted by the COI. We note with approval the questions that were asked of witnesses in relation to their evidence, including questions as to the precise basis of the witness's knowledge, questions based on the COI's concerns about the possible evidence, and questions based on possible alternative points of view.

Further, the COI based its findings, whenever possible, on at least two credible sources of evidence (one of which was first-hand), thereby complying with the requirement that particular weight should be given to corroborated testimony. At the same time, the COI did not simply exclude witness...
evidence on the sole ground that it was not corroborated,\textsuperscript{114} reflecting the approach taken in this respect under the ICC Rules of Procedure and Evidence.\textsuperscript{115}

\subsection*{2.2.5 Call for submissions and engagement with stakeholders}

The BMRs require openness to the receipt of material from all relevant sources, including States, NGOs and individuals\textsuperscript{116} and specifically provide that fact-finding missions:

\textit{may invite the submission of evidence that is in writing and contains specific statements of fact that are in their nature verifiable.}\textsuperscript{117}

The COI took advantage of this opportunity, making a call for written submissions to all UN Member States together with relevant stakeholders.\textsuperscript{118} It also conducted official visits to the ROK, Japan, Thailand, the United Kingdom and the US.\textsuperscript{119} In addition, it sought access to and corresponded with China, seeking information in particular concerning forced repatriations, the trafficking in persons and other issues relevant to the COI’s mandate.\textsuperscript{120} Finally, the COI engaged with a number of United Nations entities and NGOs.\textsuperscript{121}

\subsection*{2.2.6 Utilisation of Product}

The main concern under this heading is that the report should be made public. Even though the BMRs simply require that, in the case of a decision to go public, the report \textit{“should be published in its entirety”},\textsuperscript{122} the publication of the final report is generally regarded as key to the investigation’s credibility.\textsuperscript{123}

The COI Report was officially presented to the UNHRC on 17 March 2014.\textsuperscript{124} It is now freely available on the internet. As noted in the COI Report, DPRK citizens \textit{“only have access to an intranet system that contains information filtered and determined by the government, [while] internet access is restricted to a limited few such as universities or some members of the elite”}.\textsuperscript{125} It is extremely unlikely, therefore, that the online version of the COI Report is accessible from within the DPRK.\textsuperscript{126} Nevertheless, we understand that a Korean translation of the COI Report is being prepared.

\section*{2.3 Legal Framework}

The COI’s findings on the human rights situation in the DPRK are made largely in the context of the binding legal obligations that have been voluntarily assumed by the DPRK as a State party to the ICCPR, the ICESCR, the CRC and the CEDAW. In addition, the COI noted that \textit{“other obligations expressed in

\begin{flushleft}
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\textsuperscript{114} COI Report, para.70.
\textsuperscript{115} The rule \textit{ unus testis, nullus testis} (one witness is no witness) does not apply in international criminal proceedings. Rule 63(4) of the ICC Rules of Procedure and Evidence provides that \textit{“a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court …”}.
\textsuperscript{116} Rules 9, 11 and 13 of the BMRs.
\textsuperscript{117} Rule 11 of the BMRs.
\textsuperscript{118} COI Report, paras. 37-38.
\textsuperscript{119} COI Report, paras. 39-44.
\textsuperscript{120} COI Report, para. 45.
\textsuperscript{121} COI Report, paras. 47-50.
\textsuperscript{122} Rule 24 of the BMRs.
\textsuperscript{123} Istanbul Protocol, para. 117; UNHRC, \textit{Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment}, Juan E. Méndez (UN Doc A/HRC/19/61), 18 January 2012, para. 74.
\textsuperscript{125} COI Report, para. 211.
\end{flushleft}
customary international law also bind the DPRK\textsuperscript{127} including its residual obligations of international humanitarian law (in respect of the period of the Korean War)\textsuperscript{128} and international criminal law.\textsuperscript{129}

The COI’s assessment of whether or not the human rights violations identified in the factual findings of its Report amount to crimes against humanity are based, in fact, on the definition of such crimes set out by customary international criminal law.\textsuperscript{130} As the COI comments, such definitions largely overlap with those contained in the Rome Statute.\textsuperscript{131} We discuss these definitions and their applicability in more detail in section 4 below.

2.4 STANDARD OF PROOF

In its report, the COI rightly recognizes that it is neither a judicial body nor a prosecutor. It cannot therefore make final determinations of individual criminal responsibility.\textsuperscript{132} However, consistent with the practice of other UN fact-finding bodies,\textsuperscript{133} the COI has employed a “reasonable grounds” standard of proof in making its factual determinations.\textsuperscript{134} The COI explained this standard in the following terms:

\textit{There are “reasonable grounds” establishing that an incident or pattern of conduct has occurred when the Commission is satisfied that it has obtained a reliable body of information, consistent with other material, based on which a reasonable and ordinarily prudent person has reason to believe that such incident or pattern of conduct has occurred.}\textsuperscript{135}

The COI’s findings relating to crimes against humanity are also made on the basis of the “reasonable grounds” standard of proof. The COI explains that this standard of proof is lower than the standard required in criminal proceedings to sustain an indictment,\textsuperscript{136} but is sufficiently high to call for further investigations into an incident or pattern of conduct and, where available, initiation of the consideration of a possible prosecution.\textsuperscript{137}

We agree with this approach, particularly in light of the standard of proof adopted under the Rome Statute for the ICC Office of the Prosecutor to initiate an investigation \textit{proprio motu} under Articles 13(c) and 15(1). The Prosecutor may initiate an investigation on this basis when there is a “reasonable basis to proceed with an investigation”. The ICC Pre-Trial Chamber provided guidance on this standard, indicating that it is relatively low, as the information presented need not be conclusive and need not eliminate all other possible interpretations of the information, as long as:

\textit{a sensible or reasonable justification exists for the belief that a crime falling within the jurisdiction of the Court has been or is being committed.}\textsuperscript{138}

\textsuperscript{127} COI Report, para. 63.
\textsuperscript{128} COI Report, para. 64
\textsuperscript{129} COI Report, para. 65.
\textsuperscript{130} COI Report, para. 65.
\textsuperscript{131} COI Report, para. 65.
\textsuperscript{132} COI Report, para. 1023.
\textsuperscript{133} The Commission of Inquiry on Syria, for instance, adopted a similar “reasonable suspicion” standard (UNHRC, \textit{Report of the Independent International Commission of Inquiry on the Syrian Arab Republic} (UN Doc A/HRC/S-17/2/Add.1), 23 November 2011, para. 5).
\textsuperscript{134} COI Report, para. 67.
\textsuperscript{135} COI Report, para. 68.
\textsuperscript{136} The standards applicable before the ICC for the issuance of an arrest warrant and for the confirmation of charges are, respectively, “reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court” and “substantial grounds to believe that the person committed each of the crimes charged” (Articles 58 and 61 of the Rome Statute).
\textsuperscript{137} COI Report, para. 68.
\textsuperscript{138} ICC, \textit{Situation in the Cote d’Ivoire} (Case No. ICC-02/11), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, 15 November 2011, para. 24. Also
In the circumstances, we consider that the standard adopted by the COI is at least equivalent to that set out under Article 15(1) of the Rome Statute. We consider therefore that, in these circumstances, a decision of the UN Security Council to refer the case to the ICC would be fully justified.

2.5 CONCLUSIONS

We have considered carefully the COI's explanation of its methodology, as well as the legal framework and standard of proof it has applied in making the findings set out in its report. We consider these to be robust and entirely appropriate for a report of this kind. We agree, in particular, with the COI's statement that although it cannot make final determinations of individual criminal responsibility, it can, and was in the position to, determine whether its findings established reasonable grounds that crimes against humanity had been committed so as to merit a criminal investigation by a competent national or international organ of justice.
3. **HUMAN RIGHTS VIOLATIONS**

3.1 **INTRODUCTION**

As already explained in section 1.2 above, the COI was mandated to consider certain specific human rights violations. The COI did not regard the list of areas for investigation in the mandate to be exhaustive, and also considered other areas that were intrinsically linked to those covered in the mandate. The areas addressed by the COI are discussed below.

3.2 **VIOLATIONS OF THE RIGHT TO FREEDOM OF THOUGHT, EXPRESSION AND RELIGION**

Based on the testimonies of the witnesses it interviewed, the COI found that there is "almost complete denial" in the DPRK of the right to freedom of thought, conscience and religion, as well as the rights to freedom of opinion, expression, information, and association, in violation of the DPRK's obligations under both the CRC and the ICCPR.\(^\text{139}\)

The COI Report refers, in particular, to the indoctrination of children and students through education, mass games and other compulsory mass propaganda events.\(^\text{140}\) It also describes the involvement of children and others in regular confession and criticism sessions, obligatory participation in the activities of mass associations, as well as the constant exposure to State propaganda.\(^\text{141}\) It concludes that these matters are in direct contravention of Articles 15 (freedom of association), 29 (goals of education), 31 (right to leisure, play and culture) and 32 (child labour) of the CRC, and Articles 18 (freedom of thought, conscience and religion), 19 (freedom of opinion and expression), 20 (prohibition on incitement to racial or religious hatred) and 22 (freedom of association) of the ICCPR.\(^\text{142}\)

The COI Report also describes the control by the DPRK authorities of its citizens' access to information from independent sources including television and radio, the print media and the internet, as well as the severe restrictions on foreign CDs and DVDs, and the possession and use of mobile phones.\(^\text{143}\) It refers to the suppression of the free expression of opinion through surveillance and violence, as well as the vast surveillance apparatus which has been established by the DPRK to monitor individuals' actions to assess and determine their loyalty.\(^\text{144}\)

Finally, the COI Report refers to the testimony of various witnesses as to the denial of freedom of religion and of religious expression and, in particular, the prohibition of Christianity and persecution of Christians.\(^\text{145}\) The COI Report concludes that such activities are in breach of the rights of freedom of religion and religious expression guaranteed in Articles 18 and 19 of the ICCPR, as well as Articles 13 and 14 of the CRC.\(^\text{146}\)

3.3 **DISCRIMINATION**

The COI Report describes DPRK society as being rigidly stratified with entrenched patterns of discrimination. It explains that discrimination is rooted in the *songbun* system. This system is discussed in more detail in section 5.2 below, but, put simply, is a system under which the State classifies people on the basis of social class and then organizes them into one of three broad groups. Although the COI Report finds that the organisation and names of these groups have changed over time, they can be

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\(^{139}\) COI Report, paras. 163 and 259.

\(^{140}\) COI Report, paras. 165, 166, 167, 171, 175 and 181.

\(^{141}\) COI Report, paras. 176-196.

\(^{142}\) COI Report, paras. 163-164.

\(^{143}\) COI Report, paras. 197-221.

\(^{144}\) COI Report, paras. 222-239.

\(^{145}\) COI Report, paras. 240-258.

\(^{146}\) COI Report, para. 240.

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broadly categorized as the "core" (핵심) class, the "basic" class and the "complex" class, the latter being made up of a combination of the "wavering" (동요) class, and the "hostile" (적대) class.147

The COI Report finds that, in spite of the growing influence of wealth in determining opportunities for citizens of the DPRK, the songbun system remains important in determining significant aspects of an individual's livelihood, including where he/she can reside, his/her ability to pursue a particular occupation, and his/her access to healthcare, education and other services. The COI Report concludes that despite increasing marketization in the DPRK and the influence of money on people's ability to better access their economic, social and cultural rights, the songbun system is still a significant factor in determining many, if not most, aspects of an individual's life in the DPRK.148

Discrimination based on songbun continues in particular through the stark differences in living conditions between the larger cities, particularly the capital Pyongyang, where the elite of the highest songbun is concentrated, and the remote provinces to which people of lower songbun have been historically confined.149

The COI Report also finds that women and persons with disabilities experience particular discrimination, although the State appears recently to have taken positive steps to improve its approach to the issue of disability, such as by signing the CRPD in July 2013 (although it has not yet ratified it), and passing the Korean Law for Persons with Disabilities in 2003, promising free medical care and special education for those with disabilities.150 In respect of women, however, the COI Report finds that discrimination remains pervasive in all aspects of society, and that the State has imposed blatantly discriminatory restrictions on women, and has failed to protect them from sexual and gender-based violence, which is prevalent throughout DPRK society.151

The COI Report concludes that while discrimination exists to some extent in all societies, the DPRK has "practised a form of official discrimination" that has had a very great impact on individuals' enjoyment of human rights.152 Given the exceptional levels of State control in the DPRK, this official discrimination influences most aspects of people's lives, and discrimination remains the major means for the leadership to maintain control against perceived threats, both internal and external.153

The discriminatory practices identified by the COI Report give rise to significant potential breaches of the UDHR (which provides, at Article 2, that everyone is entitled to all the rights and freedoms set forth in that declaration "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"), as well as the non-discrimination principles contained in Article 2 of the ICCPR and Article 2 of the ICESCR, treaties that have been ratified by the DPRK.154

Furthermore, the COI Report's findings in relation to discrimination against women and persons with disabilities give rise to potential breaches of Article 2 of the CEDAW (which prohibits discrimination against women and stipulates that equality of the sexes must be pursued through the provision of protection and abolishment of discriminatory laws, regulations and customs),155 Article 3 of the ICCPR (which stipulates that State parties must undertake to ensure equal rights of men and women to the

147 COI Report, paras. 271 and 281-282.
149 COI Report, paras. 330-333.
151 COI Report, paras. 300-320.
152 COI Report, para. 354.
153 COI Report, para. 254.
154 COI Report, paras. 265-266.
155 COI Report, para. 269.
enjoyment of all civil and political rights), and Article 5 of the CRPD (which provides, inter alia, for the prohibition by State parties of all discrimination on the basis of disability and a guarantee of equal and effective legal protection against discrimination).

3.4 RESTRICTIONS ON FREE MOVEMENT

The COI Report considers the DPRK's policies regarding its citizens' (as well as foreigners') right to freedom of movement and residence within the DPRK in the context of Article 12 of the ICCPR (which provides, inter alia, for the right to freedom of movement and the right to choose one's residence; freedom to leave any country including one's own; and the right not to be arbitrarily deprived of the right to enter one's own country).

As DPRK nationals are assigned their employment by the State, which therefore dictates where they reside, the COI Report also refers to Article 6 of the ICESCR (which provides for the right to work, including the right of everyone to have the opportunity to make a living by work which he or she freely chooses or accepts). The COI also takes account of Article 10 of the CRC (which provides that families whose members live in different countries should be allowed to move between those countries so that parents and children can stay in contact, or get back together as a family).

The COI Report finds that the DPRK authorities severely restrict its citizens' (as well as foreigners') right to freedom of movement and residence within the country, and that this policy is designed to limit information flows and to uphold discrepancies in living conditions that favour elites in Pyongyang and discriminate against people of low songbun who are concentrated in more remote provinces. Specifically, the COI found that the DPRK's policy of assigning its citizens' residence and employment and denying them the option to change them is in violation of Article 12 of the ICCPR and Article 6 of the ICESCR.

In support of its findings, the COI Report notes that DPRK citizens are not even allowed to leave their province temporarily or to travel within the country without official authorisation, and that this policy is motivated by the desire to maintain desperate living conditions, to limit the information flows and to maximize State control, at the expense of social-familial ties. The State also imposes a virtually absolute ban on ordinary citizens travelling abroad. Where DPRK nationals do risk fleeing the country, in cases where they are apprehended or forcibly repatriated, they are subjected to persecution, torture, prolonged arbitrary detention and in some cases sexual violence. The COI also heard evidence that repatriated women who are pregnant are regularly forced to undergo an abortion. In cases where a baby is born, it is killed by the authorities. In addition, persons found to have been in contact with officials or nationals from the ROK, or with the Christian churches, may be forcibly "disappeared" into political prison camps, imprisoned in ordinary prisons, or even summarily executed.

The COI found that forced abortions and infanticide are not only in violation of the right to life under Article 6 of the ICCPR, but entail discrimination and persecution on the basis of gender. They also

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156 COI Report, para. 268.
157 COI Report, para. 270. The DPRK signed the CRPD on 3 July 2013, but is yet to ratify this Convention.
158 COI Report, para. 355.
159 COI Report, para. 355.
160 COI Report, para. 356.
161 COI Report, para. 357.
162 COI Report, para. 366.
163 COI Report, para. 487.
164 COI Report, para. 489.
165 COI Report, para. 489.
subject women to a level of severe mental and physical suffering amounting to torture, in violation of Article 7 of the ICCPR.\footnote{COI Report, para. 434.}

The COI also found that a large number of women are trafficked by force or deception from the DPRK into China for the purposes of forced marriage or concubinage, or prostitution. It estimated that there are an estimated 20,000 children born to DPRK women who are currently in China and who are effectively deprived of their rights to birth registration, nationality, education and healthcare.\footnote{COI Report, para. 491.}

Finally, the COI Report finds that the DPRK has repeatedly breached its obligations in respect of the rights of its nationals who have special ties in relation to another country, namely, the ROK.\footnote{COI Report, para. 492.}

Specifically, the Commission finds that entire families separated between the North and South have had no opportunities to see each other, exchange letters or speak over the telephone for more than six decades, in violation of the right to family protected by Article 23 of the ICCPR.\footnote{COI Report, para. 480.}

### 3.5 Violations of the Right to Food

The COI Report confirms that the right to adequate food is enshrined in Article 25 of the UDHR, Article 11 of the ICESCR, and Articles 24 and 26 of the CRC, amongst other international human rights treaties.\footnote{COI Report, para. 493.} In addition, it notes that the "fundamental right of everyone to be free from hunger" is enshrined in Article 11(2) of the ICESCR, and that Article 6 of the ICCPR recognizes every human being’s inherent right to life, which also requires the State to increase life expectancy, especially in adopting measures to eliminate malnutrition.\footnote{COI Report, para. 496.}

The COI Report explains that information received by the COI during its investigation indicates that starvation in the DPRK started at the end of the 1980s, peaked during the 1990s and continued after the 1990s. For the purpose of its mandate, the COI explains that it focussed its attention on the human rights issues associated with the right to food, namely why people are suffering and dying of hunger, and whether someone is responsible for this situation.\footnote{COI Report, para. 498.}

The principal findings of the COI on this issue include that the State has used food as a means for control over the population and that it has practiced discrimination with regard to access to and distribution of food based on the songbun system, including privileging certain parts of the country, such as Pyongyang, over others.\footnote{COI Report, paras. 682-683.}

The COI Report concludes that the DPRK has consistently failed in its obligation to use the maximum of available resources (contrary to Article 2(1) of the ICESCR), and that testimony and submissions received by the COI in its investigations have shown that the DPRK continues to allocate disproportionate amounts of resources to its military, the development of weapons systems and the nuclear programme, as well as the personality cult of its Supreme Leader, together with the related glorification events, and the purchase of luxury goods for the elite.\footnote{COI Report, para. 688.} The COI Report also notes that in accordance with Articles 2(1) and 11(2) of the ICESCR, each State has the obligation to ensure freedom from hunger including through international assistance, if necessary.\footnote{COI Report, para. 623.} However, even during the worst

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\*COI Report, para. 434.*

\*COI Report, para. 491.*

\*COI Report, para. 492.*

\*COI Report, para. 480.*

\*COI Report, para. 493.*

\*COI Report, para. 496.*

\*COI Report, para. 498.*

\*COI Report, paras. 682-683.*

\*COI Report, para. 688.*

\*COI Report, para. 623.*
periods of mass starvation, the COI found that the DPRK impeded the delivery of food aid by imposing conditions that were not based on humanitarian considerations.\textsuperscript{176}

The COI Report concludes that there have been systematic, widespread and grave violations of the right to food and that decisions, actions and omissions by the State, and of its leadership, have caused many hundreds of thousands to die of starvation.\textsuperscript{177}

\subsection*{3.6 \textbf{ARBITRARY DETENTION, TORTURE, EXECUTIONS, ENFORCED DISAPPEARANCE AND POLITICAL PRISON CAMPS}}

The COI Report’s findings in relation to arbitrary detention, torture, executions and prison camps are based principally on the human rights obligations of the DPRK under Articles 6, 7, 9, 10 and 14 of the ICCPR (which relate to the rights to life, freedom from torture and cruel, inhumane or degrading treatment, the right to liberty and security, the humane treatment of detainees and the right to a fair trial). In reaching its findings, the COI also takes account of the rights of children under Articles 6, 37 and 40 of the CRC (which provide for the right to life, freedom from torture, unlawful deprivation of liberty and fair treatment in a justice system).\textsuperscript{178}

The COI Report finds that the police and security forces of the DPRK systematically employ violence and punishment that amount to gross human rights violations in order to create a climate of fear to maintain the current State structure in the DPRK.\textsuperscript{179} Torture is widespread and starvation and other inhumane conditions of detention are imposed on suspects.\textsuperscript{180} Persons found to have engaged in major political crimes disappear without a trial or judicial order to political camps.\textsuperscript{181} The practice of sending entire families to political prison camps on the basis of the principle of guilt by association is now less common but, nevertheless, still occurs.\textsuperscript{182}

The inmates of political prison camps are subjected to "unspeakable atrocities" including deliberate starvation, forced labour, executions, torture, sexual violence, including rape and a denial of reproductive rights enforced through punishment, forced abortion and infanticide.\textsuperscript{183} The COI estimates that hundreds of thousands of political prisoners have died in the political prison camps over the course of more than five decades.\textsuperscript{184} Although the DPRK authorities deny that the camps exist (and have ever existed), this has been contradicted by the testimony of former guards, inmates and neighbours, as well as satellite imagery.\textsuperscript{185} It is estimated that between 80,000 and 120,000 political prisoners are currently detained in five political prison camps.\textsuperscript{186}

The COI also finds that gross human rights violations are being committed in the ordinary prison system of the DPRK, where the vast majority of inmates have been imprisoned either without trial or on the basis of trials contrary to due process and fair trial guarantees set out in international law. Prisoners in the ordinary prison system are also systematically subjected to deliberate starvation and forced labour,
with torture, rape and other arbitrary cruelties widespread. Finally, the DPRK authorities carry out executions – with or without trial – to punish political and other crimes.

### 3.7 Enforced Disappearances from Other Countries, Including Through Abduction

The COI Report finds that from 1950 until present the DPRK has engaged in the systematic abduction, denial of repatriation and subsequent enforced disappearance of persons from other countries on a large scale and as a matter of State policy. The COI Report estimates that the number of such abductions may exceed 200,000. The vast majority of these abductions and enforced disappearances occurred during, or were otherwise linked to, the Korean War and the organized movement of ethnic Koreans from Japan that started in 1959. However, hundreds of nationals of the ROK, Japan and other States have also been abducted and disappeared between the 1960s and 1980s, and in more recent years the DPRK has abducted a number of DPRK and ROK nationals from China. Further, the COI Report also finds that many individuals were abducted from Chinese territory between 1998 and 2001 through "meticulously planned operations ordered by and carried out on behalf of the DPRK's State Security Department." There is also some evidence from the DPRK itself as to the fact of these abductions: following years of denial by the DPRK of any involvement in the abduction of foreign nationals, during a Japan-DPRK summit in 2002, Kim Jong-II admitted the abduction of 13 Japanese citizens by persons affiliated with the DPRK and apologized. More recently, on 29 May 2014, the DPRK agreed to reopen an investigation into the fate of Japanese citizens it abducted in the 1970s and 1980s.

Whether such abductions are motivated by the DPRK's need or desire for technical, language or other skills, all those abducted have been denied the right to leave the DPRK and have also been subject to severe deprivation of their liberty and freedom of movement. Women abducted from Europe, the Middle East and Asia, have been subjected to forced marriages with men from other countries living in the DPRK, and some of the abducted women have also been subject to sexual exploitation. Ethnic Koreans from the ROK and Japan have been discriminated against for their origins and background. They have been categorized as "hostile" and forced to work in mines and farms in

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187 COI Report, para. 844.
188 COI Report, para. 845.
189 COI Report, para. 1011.
190 COI Report, para. 1011.
192 COI Report, para. 981.
195 COI Report, para. 1015.
196 COI Report, para. 1014.
197 COI Report, para. 1014.
198 COI Report, para. 1016.
remote marginalized areas of the DPRK. Non-Korean abductees have not been able to integrate into social and economic life in the DPRK as they have been detained in tightly controlled compounds.

Finally, the COI found that family members of abductees from foreign States wishing to exercise their right to provide diplomatic protection have been denied by the DPRK the information necessary to establish the fate and whereabouts of the victims. Family members of the disappeared have also been subjected to torture and other cruel, inhumane or degrading treatment. They have been denied the right to effective remedies for human rights violations, including the right to truth. Both parents and disappeared children have been denied the right to family life.

3.8 VIOLATIONS OF THE RIGHT TO SAFE AND HEALTHY WORKING CONDITIONS

As mentioned above, we have been provided with a small number of further testimonies collected by the ROK Government. Although these cannot be treated as meeting the same standards as evidence taken by the COI, they do indicate that the DPRK may also be responsible for breaches of Article 7(b) of the ICESCR, which provides:

_The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular … safe and healthy working conditions._

The testimonies that we have seen suggest that scientists, members of the military and other workers deployed at the DPRK's nuclear sites are exposed to nuclear radiations without appropriate protective measures. Witnesses stated, for instance:

_The soldiers in the ‘131 Guidance Bureau’ are experiencing severe pain due to mysterious diseases such as skin diseases while serving in harsh environments without any equipment or solutions for preventing their exposure to radioactivity_

a. Unlike civilian workers, they are working without wearing a dust mask or protective suit

b. In daily activities in the barracks such as bath or laundry, they are using underground water or water in the valley contaminated by uranium ore wastes and the waste water of the ‘Uranium Refining Plant’, as it is

* Though drinking water is supplied from other areas, the case where certain soldiers are drinking the underground water as it is occurs frequently

c. Therefore, a significant number of soldiers are suffering from severe skin diseases and headache, and those soldier who have served for more than a year tend to have the eye discharge and experience the symptom of lethargy, such as the stiffening of legs

_In spite of this situation, the ‘131 Guidance Bureau’ is unable to take any fundamental preventive steps other than exempting seriously ill patients from work and conducting their own treatment_

3.9 CONCLUSIONS

We fully endorse each and every one of the COI's findings of fact in relation to human rights violations covered above. We note in particular that, in each case, they involve violations of treaties to which the
DPRK is a party. As such, we further note that the COI's findings should be reflected, and addressed, in the long-outstanding reports to be submitted by the DPRK to the relevant treaty bodies in accordance with its reporting obligations under these treaties.

We also consider that there are grounds for establishing human rights violations in relation to the DPRK's nuclear programme, and the conditions of those who work in the nuclear industry. In our view, this warrants further investigation.

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203 As noted above, these currently include the ICCPR, the ICESCR, the CRC and the CEDAW. We note, in this respect, that:
- the DPRK's 3rd cycle report to the Human Rights Committee under the ICCPR has been outstanding since 1 January 2004;
- the DPRK's 2nd cycle report to the Committee on the Elimination of Discrimination against Women under the CEDAW has been outstanding since 27 March 2006;
- the DPRK's 3rd cycle report to the Committee on Economic, Social and Cultural Rights under the ICESCR has been outstanding since 30 June 2008; and
- the DPRK's 4th cycle report to the Committee on the Rights of the Child under the CRC has been outstanding since 20 October 2012.

4. **CRIMES AGAINST HUMANITY**

4.1 **INTRODUCTION**

The COI was mandated to conduct its investigation with a view to ensuring full institutional and personal accountability, in particular where violations may amount to crimes against humanity.\(^{205}\) As such, it was necessary for the COI to consider whether the human rights violations discussed in the previous section have been violated to such an extent that the violation amounts to a crime against humanity.

4.2 **DEFINITION**

Crimes against humanity involve gross violations of the fundamental human rights of a citizen population. They are recognized as one of the most serious crimes under conventional and customary international law, alongside genocide and war crimes.

It is worth noting that crimes against humanity can be distinguished from the crime of genocide as they need not target a specific group and there is no need to show that their perpetrator has an intention to destroy a group in whole or in part, but it must be shown that the crimes were committed as part of a widespread or systematic attack against the civilian population. Crimes against humanity also differ from war crimes in that they do not have to be committed in the context of an armed conflict.

Crimes against humanity were first explicitly formulated as a category of crimes in the Nuremberg Charter,\(^{206}\) and the definition of such crimes has developed in subsequent jurisprudence before various international criminal tribunals and national courts. As the COI Report acknowledges, Article 7 of the Rome Statute, together with the specifications contained in the Rome Statute's 'Elements of Crimes' largely reflect the definition of crimes against humanity under customary international law.\(^{207}\) The two definitions (i.e., that in the Rome Statute and that under customary international law) therefore significantly overlap, but are not identical.

In these circumstances, the COI Report notes that as crimes against humanity committed within the DPRK could become the subject of prosecution either before the ICC on the basis of the Rome Statute or before another international or national court that applies customary international law, the COI has, in its Report, followed a "lowest common denominator" approach.\(^{208}\) In other words, it has applied the definition in the Rome Statute where it is narrower than customary international law, and vice versa.

Article 7(1) of the Rome Statute provides that a "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation or forcible transfer of population;
(e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

\(^{205}\) COI Report, para. 1022.

\(^{206}\) Charter of the International Military Tribunal of Nuremberg, 8 August 1945.

\(^{207}\) COI Report, para. 1026.

\(^{208}\) COI Report, footnote 1541.

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(f) torture;
(g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;
(h) persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court;
(i) enforced disappearance of persons;
(j) the crime of apartheid; and
(k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

The Rome Statute also provides definitions for the majority of inhumane acts listed above. Such acts must be committed with criminal intent, which requires that the perpetrator acted with the objective of carrying out the inhumane act, and was aware that the consequence of the act would occur in the ordinary course of events.\(^\text{209}\) The inhumane acts identified above do not amount to crimes against humanity if they constitute isolated or sporadic events.\(^\text{210}\) They must amount to a course of conduct involving the multiple commission of such acts against any civil population, pursuant to or in furtherance of a State policy.\(^\text{211}\)

4.3 The COI’s findings in relation to crimes against humanity

In its consideration of crimes against humanity, the COI explained that it focused on those areas where its factual findings demonstrate particularly compelling patterns of gross human rights violations.\(^\text{212}\) Its analysis therefore focused on six groups of victims:

(a) inmates of political prison camps;
(b) inmates of the ordinary prison system, in particular, political prisoners among them;
(c) religious believers and others considered to introduce subversive influences;
(d) persons who try to flee the country;
(e) starving populations; and
(f) persons from other countries who become victims of international abductions and enforced disappearances.

4.3.1 Crimes against humanity in political prison camps

Based on the testimony and other information considered in its investigations, the COI found that DPRK authorities have committed, and are committing, crimes against humanity in the political prison camps,

\(^{209}\) COI Report, para. 1029, referring to Article 30 of the Rome Statute.
\(^{210}\) COI Report, para. 1030
\(^{211}\) Article 30(2)(a) of the Rome Statute.
\(^{212}\) COI Report, para. 1024.
including extermination, murder, enslavement, torture, imprisonment, rape and other grave sexual violence and persecution on political, religious and gender grounds.  

The COI Report finds further that such inhumane acts perpetrated in the prison camps in the DRPK are committed on such a scale, and with such a level of organisation, that they amount, in and of themselves, to a systematic and widespread attack, pursuant to State policy.  Furthermore, the COI found that the political prison camp system constitutes a core element of the larger systematic and widespread attack on anyone considered to be a threat to the system or leadership of the DPRK.

4.3.2 Crimes against humanity in the ordinary prison system

Based on the testimony and other information considered in its investigations, the COI found that the crimes against humanity committed by the DPRK authorities extend to the ordinary prison system and involve the following inhumane acts:

(a) imprisonment;
(b) extermination and murder;
(c) torture, rape and other grave sexual violence;
(d) enslavement; and
(e) forcible transfer of a population.

The COI further found that the criminal justice system and prisons of the DPRK serve not merely to punish crimes but also form an integral part of the State’s systematic and widespread attack against anyone considered a threat to the political system and its leadership.

4.3.3 Crimes against humanity targeting religious believers and others

Based on the testimony and other information considered by the COI in its investigations, the COI found that persons who are considered by the DPRK authorities to introduce politically or ideologically subversive influences are subject to crimes against humanity.  Such crimes involve the following inhumane acts:

(a) imprisonment and torture;
(b) murder; and
(c) persecution.

The COI further found that the systematic and widespread attack of the State against populations that are considered a threat to the political system and leadership of the DPRK extends to those following religion or introducing other influences considered by the State to be subversive.
4.3.4 Crimes against humanity targeting persons who try to flee the country

Based on the testimony and other information considered in its investigations, the COI found that crimes against humanity have been, and are still being, committed against persons who try to flee the DPRK, including against persons forcibly repatriated from China.\(^{221}\) Such crimes involve the following inhumane acts:

(a) imprisonment;
(b) torture and murder;
(c) rape and other forms of sexual violence; and
(d) enforced disappearance.\(^{222}\)

The COI further found that persons who flee the DPRK are targeted as part of the DPRK's systematic and widespread attack against populations considered to pose a threat to the political system and leadership of the DPRK.\(^{223}\)

4.3.5 Starvation

Based on the testimony and other information considered in its investigations, the COI found that DPRK officials have committed crimes against humanity by implementing actions, decisions, and policies known to have led to mass starvation, death by starvation and serious mental and physical injuries.\(^{224}\) Such crimes involve the following inhumane acts:

(a) extermination;
(b) murder; and
(c) other inhumane acts, including causing significant physical and mental harm through chronic malnutrition and prolonged starvation.\(^{225}\)

The COI further finds that the decisions, policies and actions that aggravated mass starvation, deaths and other suffering and physical harm form part of a systematic and widespread attack against the civilian population of the DPRK that is based on the State policy aimed at sustaining the political system and its leadership at all costs, even at the expense of aggravating starvation and sacrificing a substantial part of the general population.\(^{226}\)

4.3.6 Crimes against humanity targeting persons from other countries, in particular through international abduction

Based on the testimony and other information considered in its investigation, the COI found that DPRK authorities have committed, and are committing, crimes against humanity against persons from other countries, namely victims of international abduction and other persons denied repatriation.\(^{227}\)

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\(^{221}\) COI Report, para. 1098.
\(^{222}\) COI Report, paras. 1099-1108.
\(^{223}\) COI Report, paras. 1109-1114.
\(^{224}\) COI Report, para. 1115.
\(^{225}\) COI Report, paras. 1116-1131.
\(^{226}\) COI Report, paras. 1132-1137.
\(^{227}\) COI Report, para. 1138.
According to the findings of the COI, most of the international abductions and denials of repatriation that give rise to enforced disappearances occurred between 1950 and the mid-1980s.\textsuperscript{228} The COI noted, therefore, that in accordance with the principle that criminal provisions must not be applied retroactively (see Article 15 of the ICCPR), such acts must be assessed based on the definition of crimes against humanity as it stood when they occurred.\textsuperscript{229} The COI found that acts amounting to enforced disappearance have been recognized as inhumane acts since the Nuremberg trials in the late 1940s and can therefore give rise to crimes against humanity.\textsuperscript{230} Therefore, to the extent that they entail enforced disappearances, the COI concluded that the cases of abductions and denial of repatriations that were carried out by the DPRK and its leadership from 1950 amount to crimes against humanity.\textsuperscript{231}

The COI further found that the enforced disappearance of persons who come from other countries constitutes a systematic and widespread attack that was carried out pursuant to a State policy and based on political grounds.\textsuperscript{232} Although the enforced disappearances were carried out over the span of several decades, common elements unite them, and make it appropriate to consider them as a single large scale attack.\textsuperscript{233}

### 4.4 POSSIBLE ADDITIONAL CRIMES AGAINST HUMANITY: ENSLAVEMENT AND IMPRISONMENT

Having reviewed the facts and conclusions presented in the COI Report, as well as the additional material as set out in the Bibliography, we have given further consideration to whether additional crimes against humanity could be established on the basis of the conditions of DPRK labourers working abroad, potentially amounting to enslavement or imprisonment. As explained further in section 7.2.2, this has important consequences as regards the jurisdiction of the ICC.

#### 4.4.1 Overview of facts

The number of DPRK workers abroad has not been confirmed, but some sources have put forward an estimate of up to 60,000-70,000 workers.\textsuperscript{234} A Special Report of the US embassy in Seoul indicated that the DPRK sends labourers to work abroad under bilateral contracts with foreign governments. The US Special Envoy for Human Rights in North Korea raised the issue of human trafficking by the DPRK as early as 2006, specifically in relation to DPRK workers in Mongolia, Russia and the Czech Republic.\textsuperscript{235} Another account suggests that there are DRPK export labourers in as many as 45 countries.\textsuperscript{236} As recently as October 2013, the DPRK was reported to have signed a deal to send 20,000 DPRK labourers to factories in north-eastern China.\textsuperscript{237}

The DPRK's reserves of foreign currency have reportedly been depleted as a result of the implementation of the international sanctions put in place against it. Based on available reports and media coverage, the "export" of workers appears to be part of an official DPRK government policy, specifically to increase the DPRK's reserves of foreign currency. In 2012, Kim Jong-un was reported to

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\textsuperscript{228} COI Report, para. 1139.

\textsuperscript{229} COI Report, para. 1139.

\textsuperscript{230} COI Report, para. 1140.

\textsuperscript{231} COI Report, para. 1141.

\textsuperscript{232} COI Report, para. 1149.

\textsuperscript{233} COI Report, para. 1149.


have "issued an order to send as many workers as possible abroad to earn hard currency". The majority of the foreign worker's wage, reportedly anywhere from 60% to 90% of their salary, is remitted directly to the DPRK government in taxes and 'loyalty' payments, as well as to the agencies which arrange for the workers to be sent to foreign countries and the agencies which domestically receive DPRK labourers and liaise with DPRK officials.

It is reported that the DPRK labourers sent abroad work in conditions akin to forced labour, "with their movement and communications constantly under surveillance and restricted by North Korean 'minders'". Such reports are widespread, and include, for example, accounts from journalists in direct contact with DPRK workers deployed abroad, such as DPRK workers in the North Korean restaurants established across the world. One report relating to a North Korean restaurant in Phnom Penh, Cambodia, stated that "two or three North Korean security agents live on site at each restaurant to 'regulate' the workers, and any attempts at flight result in the immediate repatriation of the entire staff". According to other reports, the State Security Department of the DPRK directly sends its agents in order to watch over workers abroad, with approximately one agent to every 50 workers so as to "prevent them from defecting or absorbing and bringing back western influences".

4.4.2 Enslavement and imprisonment as crimes against humanity

As reflected in section 4.2 above, the definition of "crimes against humanity" in the Rome Statute includes:

(a) "enslavement", which the statute defines as "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons"; and

(b) "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law".

The COI Report does not consider in depth whether the DPRK and/or its officials have committed a crime against humanity in relation to the thousands of DPRK workers sent to foreign countries and the imposed conditions in which they work.

However, based on the considerable amount of information available, we note the living conditions of DPRK workers abroad, the restriction on movements and extent of oversight by DPRK agents, and the DPRK State policy of sending its citizens abroad.

In our view, a detailed review of the evidence, testimony and official reports relating to these practices should be carried out, and there are strong indications that this would lead to a finding that the DPRK

238 BBC Monitoring Asia Pacific – Political Supplied by BBC worldwide Monitoring, North Korea leader orders sending workers abroad for hard currency – South paper, 27 April 2012.
243 Article 7(1)(c) of the Rome Statute.
244 Article 7(2)(c) of the Rome Statute.
245 Article 7(1)(e) of the Rome Statute.
authorities have committed and continue to commit a crime against humanity within the meaning of that term under the Rome Statute as set out in section 4.2 above.

4.5 CONCLUSIONS

In summary, the COI found that, based on the body of testimony and other information it considered, crimes against humanity have been committed in the DPRK, pursuant to policies established at the highest level of the State. Such crimes are on-going because the policies, institutions and patterns of impunity that lie at their root remain in place.

In its conclusions and recommendations, the COI Report states that:

\[\text{a number of long-standing and on-going patterns of systematic and widespread violations, which were documented by the Commission, meet the high threshold required for proof of crimes against humanity in international law.}\]

Having reviewed the COI’s findings of fact, as well as its analysis and findings into the question of whether or not the activities of the DPRK authorities amount to crimes against humanity, we agree with the findings of the COI in this respect.

Furthermore, we consider there to be strong indications that the DPRK’s treatment of foreign workers who are forced to work abroad may amount to a further crime against humanity of enslavement. In our view, this warrants further investigation.

\[\text{COI Report, para. 1160.}\]

\[\text{COI Report, para. 1160.}\]

\[\text{COI Report, para. 1216.}\]
5. **GENOCIDE**

5.1 **INTRODUCTION**

The COI Report touches on the possibility of two instances of genocide having been committed in the DPRK: "political genocide" and genocide against Christians. In relation to political genocide, the COI Report finds that the extermination of citizens and other human rights violations have been based on "imputed political opinion and state-assigned social class", but recognizes that:

such grounds are not included in the contemporary definition of genocide under international law.

For this reason, the COI is sympathetic to the expansion of the current strict definition of genocide.

In respect of Christians, the COI Report notes that Christian Solidarity Worldwide had, in its testimony before the COI, submitted that there were indications that genocide had been committed against Christians in the past. However, while the COI made some findings of fact on this subject, such as in relation to the significant drop in the proportion of the population adhering to a religion between 1950 (24%) and 2002 (0.16%), the COI considered that it:

was not in a position to gather enough information to make a determination as to whether the authorities at the time sought to repress organized religion by extremely violent means or whether they were driven by the intent to physically annihilate the followers of particular religions as a group.

This section of the opinion builds on the findings of the COI. It starts by considering the legal status of, and test for, genocide. It then goes on to assess the application of that test to the situation in the DPRK, in particular in relation to three different groups:

(a) the lower classes under the songbun system;
(b) adherents of a religion; and
(c) persons with non-DPRK ethnic or racial origins.

5.2 **LEGAL STATUS OF GENOCIDE**

The crime of genocide has attained customary status under international law. Particularly important in prescribing the definition and scope of this crime is the Genocide Convention.
145 State parties to the Genocide Convention, including the DPRK, which acceded to it on 31 January 1989.\textsuperscript{256}

The influence and customary status of the Genocide Convention can be seen in the replication of its provisions in the statutes of several international criminal tribunals, including the ICTY\textsuperscript{257} and the ICTR,\textsuperscript{258} as well as the use of the definition of genocide in Article 6 of the Rome Statute.\textsuperscript{259}

The law relating to genocide, as laid down in the Genocide Convention and elsewhere, has attained the status of a \textit{jus cogens} norm, which means that all States (and individuals) must comply with it, whether or not that State is a party to the Genocide Convention. As such, States are unable to derogate from the Genocide Convention,\textsuperscript{260} whether by international agreement, national legislation or otherwise.\textsuperscript{261}

The prohibition of genocide is also an \textit{erga omnes} obligation, which means that it is an obligation owed by each State to the international community as a whole.\textsuperscript{262} As such, all States are treated as having a legal interest in the protection of the rights involved,\textsuperscript{263} and any individual State can, whether or not it is directly affected by a breach of the law against genocide,\textsuperscript{264} initiate international proceedings against a perpetrator State. These proceedings can require:

(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition; and

(b) performance of the obligation of reparation in the interest of the injured State or of the beneficiaries of the obligation breached.\textsuperscript{265}

### 5.3 Elements of Genocide

Article II of the Genocide Convention defines "genocide" as:

\begin{quote}
any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
\end{quote}

\begin{itemize}
  \item[a.] Killing members of the group;
  \item[b.] Causing serious bodily or mental harm to members of the group;
  \item[c.] Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  \item[d.] Imposing measures intended to prevent births within the group;
\end{itemize}


\textsuperscript{257} Article 4 of the ICTY Statute.

\textsuperscript{258} Article 2 of the ICTR Statute.

\textsuperscript{259} Article 6 of the Rome Statute.


e. **Forcibly transferring children of the group to another group.**

Therefore, under Article II of the Genocide Convention (as reflected in Article 6 of the Rome Statute), the crime of genocide requires the presence of three elements:

(a) the victims must be members of a national, ethnical, racial or religious group (a "Protected Group");

(b) certain harmful acts or omissions must have been inflicted on members of the Protected Group; and

(c) the perpetrator must have acted with the intent to destroy the Protected Group, in whole or in part.

We consider each of these elements in turn.

### 5.3.1 **Protected Group**

According to the Genocide Convention, a group of people will be a Protected Group if it is defined on either national, ethnical, racial or religious grounds. This list, which is currently accepted as being exhaustive rather than illustrative, is based on the idea that a group must be identified by positive characteristics, and not through the lack of a distinct identity.

It is important to note that political groups were among the categories that the drafters of the Genocide Convention initially considered for inclusion as a Protected Group in the definition of genocide. However, a strong majority of 29 to 13 of the drafting committee of the Genocide Convention voted to exclude political groups on the basis that:

> unlike the other groups covered by the [Genocide] Convention, political groups do not have stable and permanent attributes and that, as voluntary organizations, they are different from the other protected groups.

The analysis of precisely what is meant by the phrases "national group", "ethnical group", "racial group" and "religious group" has, to date, primarily been conducted by the ICTR and the ICTY. These tribunals have considered whether it is objective factors, or the subjective view of the group itself, or of someone outside the group (in particular the perpetrator), that determine whether the group is a distinct group. Ultimately, the caselaw of the tribunals suggests that both objective and subjective factors should be taken into account when considering whether a particular group is a Protected Group for the purposes of the crime of genocide.

The case of *Akayesu* was a particularly significant case in relation to the question of Protected Groups. The case related to the genocide in Rwanda, and turned to a large extent on whether the Tutsis and Hutus could be treated as separate groups. The specific problem faced by the Trial Chamber was...
that, although the Hutus and Tutsis were objectively the same people, they had been treated as different
by the colonizers, who had:

relied on an elite essentially composed of people who referred to themselves as Tutsi, a choice
which ... was born of racial or even racist considerations. In the minds of the colonizers, the
Tutsi looked more like them, because of their height and colour, and were, therefore, more
intelligent and better equipped to govern. 272

The Chamber went on to consider the point that it was in the 1930s that Belgian authorities had:

introduced a permanent distinction by dividing the population into ... groups which they called
ethnic groups ... In line with this division, it became mandatory for every Rwandan to carry an
identity card mentioning his or her ethnicity. 273

This treatment had eventually led to a socially constructed reality, in which identity cards were used to
codify a subjective perception of group divisions, which became so entrenched in Rwanda that they
ultimately defined the population targeted in the 1994 genocide.

However, the ICTR Trial Chamber also looked beyond the question of whether or not the Tutsis and
Hutus were objectively the same ethnicity. In doing this, the ICTR Trial Chamber particularly relied on
the Genocide Convention travaux préparatoires:

the question that arises is whether it would be impossible to punish the physical destruction of
a group as such under the Genocide Convention, if the said group, although stable and
membership is by birth, does not meet the definition of any one of the four groups expressly
protected by the Genocide Convention. In the opinion of the Chamber, it is particularly important
to respect the intention of the drafters of the Genocide Convention, which according to the
travaux préparatoires, was patently to ensure the protection of any stable and permanent
group. 274

In finding that the overarching intention of the Genocide Convention is to protect groups of a stable and
permanent natures, the Trial Chamber held that the Tutsis ought to be viewed as a separate group, and
therefore also as a Protected Group, for the purposes of the Genocide Convention. 275

Following Akayesu, 276 the ICTY has also held that Protected Groups need to be considered in the
specific context of each case. In particular, it was recognized in the Jelisić judgment that a subjective
analysis is a key consideration:

to attempt to define a national, ethnical or racial group today using objective and scientifically
irreproachable criteria would be a perilous exercise whose result would not necessarily
correspond to the perception of the persons concerned by such categorisation. Therefore it is
more appropriate to evaluate the status of the national, ethnical or racial group from the point of
view of those persons who wish to single that group out from the rest of the community ... It is
the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which
allows it to be determined whether a targeted group constitutes a national, ethnical or racial
group in the eyes of the alleged perpetrators. 277

272 ICTR, Prosecutor v. Jean-Paul Akayesu (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 82.
273 ICTR, Prosecutor v. Jean-Paul Akayesu (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 83.
274 ICTR, Prosecutor v. Jean-Paul Akayesu (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 516.
275 ICTR, Prosecutor v. Jean-Paul Akayesu (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 701.
276 ICTR, Prosecutor v. Jean-Paul Akayesu (Case No. ICTR-96-4-T), Judgment, 2 September 1998.
277 ICTY, Prosecutor v. Goran Jelisić (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 70.
Similarly, in the Kayishema case, which also related to crimes committed in Rwanda, the ICTR Chamber found that, while the Tutsis did not strictly satisfy the objective analysis of being a distinct ethnic group, they did satisfy this criterion on a subjective basis because the Rwandan Government and the perpetrators of the genocide viewed them as having a distinct ethnicity.\footnote{Developments in the Law: International Criminal Law: IV. Defining Protected Groups Under the Genocide Convention, (2001) 114 Harv. L. Rev. 2007, p.2016.}

The Chamber in the Kayishema case described an ethnic group as:

\begin{quote}
…one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others) …
\end{quote}

The Chamber further accepts that the Tutsis were an ethnic group. In support of this contention the Prosecution provided evidence that since 1931, the Rwandans were required to carry identification cards which indicated the ethnicity of the bearer as Hutu, Tutsi or Twa. The government-issued identification cards specified the individual bearer's ethnicity. It should be noted that, in accordance with Rwandan custom, the ethnicity of a Rwandan child is derived from that of her or his father.\footnote{ICTR, Prosecutor v. Clément Kayishema and Obed Ruzindana (Case No. ICTR-95-1-T), Judgment, 21 May 1999, paras. 98 and 523.}

Therefore, the Chamber determined, the Tutsis should be considered to be a separate ethnic group, and hence a Protected Group for purposes of the crime of genocide.\footnote{ICTR, Prosecutor v. Clément Kayishema and Obed Ruzindana (Case No. ICTR-95-1-T), Judgment, 21 May 1999, paras. 522-526. See also: ICTR, Prosecutor v. Georges Anderson Nderubumwe Rutaganda (Case No ICTR-96-3-T), Judgment, 6 December 1999, para. 373.}

\subsection*{5.3.2 Harmful acts or omissions inflicted on members of the Protected Group}

The second element of the crime of genocide is that one of certain enumerated actions (set out in section 5.3 above) must be committed by a perpetrator against a Protected Group.

These actions must also, in themselves, amount to criminal acts and must, therefore, involve not only the act itself (the \textit{actus reus}) but also the intention to commit the act (the \textit{mens rea}). To put it simply, it would clearly not be a genocide on the basis of killing if, for example, a government used all its best efforts to prevent a particular group from dying due to a natural disaster, but failed. Indeed, the ICTY has said that the elements of killing are: the death of the victim, the causation or the death of the victim by the accused and the \textit{mens rea} of the perpetrator.\footnote{ICTY, Prosecutor v. Dario Kordić and Mario Čerkez (Case No. IT-95-14-2-A), Appeals Chamber, Judgment, 17 December 2004), para. 37}

For the purposes of this opinion, it is worth drawing out the third of the acts listed in the definition of genocide in section 5.3 above, which is that of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. In contrast to the underlying acts of killing or causing serious bodily harm, this act does not require proof that any result was attained in order to establish that genocide has taken place. Failure to provide adequate food has been cited as an example by the ICTY.\footnote{ICTY, Prosecutor v. Momčilo Krajišnik (Case No. IT-00-39-T) Judgment, 27 September 2006, para. 859.}

It is also worth mentioning the fourth of the acts listed in section 5.3 above, which is that of imposing measures intended to prevent births within the group. This has been held to include forced sexual mutilation, sterilization, forced birth control and separation of the sexes. To amount to a genocidal act,
the evidence must establish that the acts were carried out with the intention of preventing births within the Protected Group and, ultimately, destroying the group as such in whole or in part.

Finally, the fifth of the acts, prevention of births, encompasses castration, compulsory abortion, sterilization, and the segregation of the sexes.283 The question of forced abortion is particularly relevant for the purposes of this opinion, and has been cited by the ICTR when making a finding of genocide in Rwanda.284

Importantly, only one of the actions listed in section 5.3 above is required to establish that genocide has taken, or is taking, place.285

5.3.3 Intent to destroy the Protected Group, in whole or in part

The third element of the crime of genocide is the “intent” element: “the perpetrator must have acted with the intent to destroy, in whole or in part, the Group”.286 It is this element of the crime that distinguishes genocide from crimes against humanity, particularly persecution and extermination.287

As noted above, there must be criminal intent for the underlying crime. However, the intention to destroy the Protected Group is a separate form of intention, which is also required in order to bring the crime within the purview of the Genocide Convention.288

The phrase “in whole or in part” has been the subject of considerable academic debate. The Krstić Appeal Judgment includes a useful passage on this point, which makes clear the principal considerations in relation to this question:

It is well established that where a conviction for genocide relies on the intent to destroy a protected group “in part”, the part must be a substantial part of that group. The aim of the Genocide Convention is to prevent the intentional destruction of entire human groups, and the part targeted must be significant enough to have an impact on the group as a whole.

... The intent requirement of genocide under Article 4 of the Statute is satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group. The determination of when the targeted part is substantial enough to meet this requirement may involve a number of considerations. The numeric size of the targeted part of the group is the necessary and important starting point, though it is not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration.289

284 ICTR, Prosecutor v. Jean-Paul Akayesu (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 121.
286 Article II of the Genocide Convention.
287 ICTR, Prosecutor v. Clément Kayishema and Obed Ruzindana (Case No. ICTR-95-1-T), Judgment, 21 May 1999, para. 89.
289 ICTY, Prosecutor v. Radoslav Krstić (Case No. IT-98-33-A), Appeal Judgment, 19 April 2004, paras. 8-12
One reason that "intent" can be difficult to determine is that genocidal "intent" is generally not stated by a perpetrator, but must be inferred from actions that are directed against a Group.

While many facts and circumstances may provide evidence of the perpetrator's intent, thereby allowing the court to draw inferences to determine that the requisite intent was present, there is no specific test for making a finding of intent.

ICTY and ICTR case law provides that genocidal intent may be inferred from relevant facts and circumstances that can lead beyond reasonable doubt to a finding of intent, provided that this is the only reasonable inference that can be made from the totality of evidence. In particular, the Kayishema Trial Chamber found that "the intent can be inferred either from words or deeds and may be demonstrated by a pattern of purposeful action". Along the same lines, the Musema Trial Chamber cited the following finding of the Akayesu Trial Chamber with approval:

On the issue of determining the offender's specific intent, the Chamber considers that the intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.

Finally, it is worth nothing that intent does not require that there be a "viable means" for a perpetrator actually to destroy a Protected Group or to proceed with the destruction of a particular proportion of it, so long as the perpetrator intends to do so.

5.4 Genocide in Relation to Members of the Hostile Class

As described in the COI Report, since the 30 May 1957 resolution "On the Transformation of the Struggle with Counter-Revolutionary Elements into an All-people All-Party movement", the DPRK has been organized in accordance with the songbun system. At its most basic level, songbun can be described as a social caste system, organized in accordance with deemed level of loyalty to the regime and to the Kim family. The Collins Report summarises it as a system where:

each and every North Korean citizen is assigned a heredity-based class and socio-political rank over which the individual exercises no control but which determines all aspects of his or her life.297

Under songbun, the citizens of DPRK are assessed and then grouped into one of three over-arching categories, although there are further, complex sub-categories within each group.298 Traditionally, these categories were as follows.

(a) The core (핵심) class is considered loyal, and serves in positions that sustain and protect the regime. It is given significant privileges and priority in every aspect of life, including employment, education, housing, medical treatment and food.

(b) The wavering (동요) class consists of persons whose loyalty is questionable but who can serve through economic and political contribution, for example if they demonstrate loyalty to the party.

(c) The hostile (적대) class is judged as being disloyal, with "anti-party and anti-revolutionary forces".299 The COI Report finds that religious people are themselves included in the hostile class under the songbun system.300 Persons in this class are discriminated against in terms of employment, military service, education, food, housing, medical care and opportunity.

Although the COI Report notes that these categories "appear to have shifted over time to where the wavering and hostile classes together have been condensed into a "complex" category" and the middle category is characterized as a new "basic" class,301 we have concentrated our analysis on the traditional "hostile" class. This class remains the lowest social class within the songbun system, and therefore the most disadvantaged.

The COI Report emphasizes the importance of inheritance through the paternal line within songbun, which is described as:

a system through which the state categorizes citizens of the DPRK into classes based on their perceived political allegiance to the regime, ascertained by reference to family background and particular actions taken by family members. Based on this assessment, citizens fall into three broad classes: core, wavering and hostile. Decisions about residency, occupation, access to food, health care, education and other services are contingent on Songbun. While the official Songbun structure was quite elaborate and changed over time, its main feature has been the unchallengeable nature of the designation which is inherited mainly through the paternal line.302

The Collins Report also emphasizes the importance of surveillance, pointing to evidence that the DPRK’s national police force maintains a file on every person from the age of 17 recording their songbun, and noting that such files are updated every two years.303 In addition, there is evidence that the DPRK has subjected its civilians to examinations to sort them into these social classes since the 1950s.304

298 Collins Report, pp.6-7.
300 COI Report, para. 245.
301 COI Report, para. 281 and footnote 300.
302 COI Report, para. 117.
303 Collins Report, p.3.
Based on testimony referred to in the Collins Report, *songbun* continues to affect every citizen’s relationship with DPRK State organs, in spite of the growing importance of wealth in determining opportunities for DPRK citizens. This appears to be corroborated by reports from defectors.305 *Songbun* also affects citizens’ relationships with each other: according to the Collins Report, marriage between members of the core and lower classes is unthinkable and it is difficult to improve one’s *songbun*, especially if it is derived from a family’s pre-revolutionary class status or family behaviour.306

### 5.4.1 The hostile class as a Protected Group

There is no standard definition or test for what amounts to an ethnic group as a matter of international law in the context of the crime of genocide, and the question is a notoriously difficult one. Furthermore, and as described above, whether or not a group is a Protected Group for the purposes of genocide depends on both objective and subjective considerations, which must be viewed against the relevant socio-historical context.

The Akayesu Trial Chamber judgment does provide some assistance when it considers the differences between national, ethnic and racial groups:

> Based on the Nottebohm decision rendered by the International Court of Justice, the Chamber holds that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.

> An ethnic group is generally defined as a group whose members share a common language or culture.

> The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.307

It is our view that, although members of the hostile class cannot be objectively distinguished from members of the other classes in the *songbun* system based on race, nationality or religion, there is at least an argument that the hostile class could be treated as a separate ethnic group based on subjective factors, including their identification as such by DPRK authorities (which has become entrenched), the victims’ awareness of their *songbun* status (to the extent that they are aware of it), and the permanent and relatively stable status of the “hostile” classification, which is inherited for generations.

As emphasized in the COI Report, the DPRK authorities treat people in the different *songbun* in fundamentally different ways. Members of the higher *songbun* live and work in and around Pyongyang, and have access to education, healthcare, and food, members of the lower *songbun*, on the other hand, may be interned in prison camps for seemingly low level crimes, are prohibited from visiting or living in certain areas of the country, have limited access to education, jobs, healthcare and food.308 In this sense, it could be argued that the vast gulf between the treatment and lifestyles of those in the higher *songbun* and those in the hostile class effectively amounts to those in the hostile class having a subjectively separate cultural identity. While members of the hostile class may not be aware of their precise status, they are more likely to be aware on restrictions and limitations that they encounter when, at the very least, applying for jobs or seeking to travel within the DPRK.

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308 COI Report, paras. 271-299.

WWW.HUMANLIBERTY.ORG
Furthermore, there are good indications that members of the hostile class are viewed as comprising a distinct group by the DPRK authorities, which could be characterized as an ethnic group. In this sense, useful parallels can be drawn between social classification under songbun and the artificial classification imposed on Hutus and Tutsis in Rwanda. While the ICTR recognized that, objectively speaking, the Hutus and Tutsis were not separate ethnic groups, in that they shared a common language and culture, the perpetrators of the genocide viewed Tutsis as having a distinct ethnicity. As such, it was held that the Tutsis were an ethnic group for the purposes of genocide. Similarly, in the DPRK, the differences between the social classes in the songbun system are based on artificial distinctions created by the ruling regime. One difficulty with this argument, which also arises from the Akayesu Trial Chamber judgment is the fact that, while in Rwanda the authorities used the term “ethnic” to distinguish between Hutus and Tutsis, it is not clear that the same distinction in drawn in the case of the DPRK. However, in our view, the use of the word “ethnic” cannot be determinative. The fact is that the DPRK authorities treat members of the hostile group in a completely different way to the way in which they treat members of higher social classes. As a result, members of the hostile class live in different areas of the DPRK and have wholly different lives to members of other classes, all of which could be said to amount to a wholly different cultural experience and identity.

Furthermore, in finding that the Tutsis were a separate ethnic group in the Kayishema case, the ICTR placed considerable emphasis on their status as a permanent and stable group. This is also useful when considering the DPRK situation. The materials that we have seen, including the COI Report, suggest that categorization as hostile could well be said to be stable and permanent. Although there are suggestions that it is possible to fall from another group into the hostile class, there appear to be strong grounds for arguing that, once a citizen has been classified as hostile, it is much more difficult for that citizen to improve his or her songbun status. This argument is strengthened by the fact that songbun status is inherited from generation to generation, and that this appears to be the most important factor in determining membership of the hostile class.

In considering whether the hostile class should be considered to be a Protected Group, it is also useful to emphasise the importance that was placed on adopting a purposive interpretation of the Genocide Convention in Akayesu. As already discussed above, the Chamber found that, from an objective standpoint, Hutus and Tutsis do not constitute distinct ethnic, racial, religious or national groups. However:

On reading through the travaux préparatoires of the Genocide Convention, it appears that the crime of genocide was allegedly perceived as targeting only “stable” groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more “mobile” groups which one joins through individual voluntary commitment … a common criterion in the four types of groups would seem to be normally not challengable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.

the Chamber considered whether the groups protected by the Genocide Convention … should be limited to only the four groups expressly mentioned and whether they should not also include any group which is stable and permanent like the said four groups … In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide

311 ICTR, Prosecutor v. Jean-Paul Akayesu (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 511.
Convention, which according to the travaux préparatoires, was patently to ensure the protection of any stable and permanent group.\(^{312}\)

The importance of adopting a purposive approach to the interpretation of international law has been recognized more widely. For example, the COI on Darfur noted that "interpretation and expansion has become part and parcel of international customary law".\(^{313}\)

5.4.2 Harmful acts or omissions inflicted on the hostile class

According to the KINU White Paper, those in the lowest social class constitute approximately 27% of the population of the DPRK.\(^{314}\)

On the basis of the COI Report, and other reports on the DPRK, there appear to be grounds for establishing that members of the hostile class are exposed to conditions of life calculated to physically destroy them. This is achieved through a variety of means, ranging from internment in prison camps and infliction of harm to those in such prison camps, as well denial of access to things that are vital to support life, including food.

Evidence suggests that members of the hostile class are frequently punished, including by imprisonment, for wrong-doings, whereas those who are in higher songbun may avoid punishment. For example, it has been reported that, in one case, ten people were executed by firing squad for stealing, but the one whose father was a national hero received no punishment.\(^{315}\) Similarly, an entire family may end up in prison on the basis of "crime by association", which punishes three generations of an individual's family for alleged crimes.\(^{316}\)

The Collins Report suggests that those who are detained in political prison camps have generally been charged with one or more of the following six crimes listed in the North Korean Criminal Act:

(a) class enemies – former landowners, collaborators with the Japanese, capitalists or religious leaders and the descendants of these groups;

(b) collaborators with ROK forces or relatives of someone who went South;

(c) anti-revolutionaries;

(d) opponents of the Kim regime;

(e) opponents of the Ten Great Principles of the Monolithic Ideology; or

(f) important people who tried to defect.\(^{317}\)

Once imprisoned, those who were already in the hostile class receive the worst treatment.\(^{318}\) However, all prisoners suffer from appalling treatment. For example, the COI found that:

\begin{quote}
the DPRK has been responsible for the deliberate starvation of people detained for interrogation purposes as well as those imprisoned in political prison camps and the ordinary prison system.
\end{quote}

\(^{312}\) ICTR, Prosecutor v. Jean-Paul Akayesu (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 516.


\(^{314}\) KINU White Paper, p.208.

\(^{315}\) Collins Report, p.48.


\(^{317}\) Collins Report, p.50.

\(^{318}\) Collins Report, pp.50-52.
Starvation among the inmates is a general feature of detention in the DRPK. Deliberate deprivation of food has been systematically used as a means of control and punishment in detention facilities.\textsuperscript{319}

The COI Report finds that the DPRK authorities use food more generally, and not only within the prison system, as a key tool in controlling the people of the DPRK. This control is also based to a considerable extent on social class:

\textit{The rights to food, freedom from hunger, and to life in the context of the Democratic People's Republic of Korea cannot be reduced to a narrow discussion of food shortages and access to a commodity. The state has used food as a means of control over the population. It has prioritized those whom the authorities believe to be crucial in maintaining the regime over those deemed to be expendable.}

Confiscation and dispossession of food from those in need, and the provision of food to other groups, follows this logic. The state has practiced discrimination with regard to access to and distribution of food based on the songbun system.\textsuperscript{320}

The COI Report also finds that the DPRK failed to satisfy the State's obligations to fulfill its citizens' right to freedom from hunger without discrimination on grounds of social origin. The COI noted that:

\textit{responsible officials stopped the provision of food rations through the Public Distribution System in provinces of the Northeast, where populations of low songbun were concentrated as a result of past purges and forced population transfers.}\textsuperscript{321}

This finding is supported by the maps at figures 8 and 9 of the COI Report, which show rates of stunting and acute malnutrition by region.

One expert quoted by the COI also emphasized the importance of the songbun system in terms of access to food, noting that:

\textit{The Great Famine was driven by an absolute shortage of food, but also by inequalities in distribution. Differences in distribution priorities followed the songbun system. The 'royal families' in Pyongyang were fed, while less or no food was sent to North Hamgyong [where] mostly people of lower songbun live.}\textsuperscript{322}

While the COI did not consider whether this amounted to genocide, it is clear from the COI Report that the impact is significant:

\textit{While acknowledging the impact of factors beyond state control on the food situation, the Commission finds that decisions, actions and omissions by the state and its leadership have caused the death of at the very least hundreds of thousands of human beings.}\textsuperscript{323}

Such treatment of a Protected Group has been described as genocide by attrition:

\textit{Genocide by attrition occurs after a group is singled out for political and civil discrimination. It is separated from the larger society, and its right to life is threatened through concentration and forced displacement, together with systematic deprivation of food, water, and sanitary and...}
medical facilities. These measures, along with the frequent imposition of overcrowded living quarters, lead to death through disease and starvation. These actions violate Article II of the UN Genocide Convention, specifically: causing serious bodily or mental harm to members of the group; and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.  

All of this evidence suggests that the DPRK authorities could be said to be pursuing a deliberate policy of inflicting conditions of life upon the hostile class that are calculated to bring about its destruction. This accords with the view of the Trial Chamber in the Kayishema case:

_It is the view of the Trial Chamber that “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,” includes methods of destruction which do not immediately lead to the death of members of the group. The Chamber adopts the above interpretation. Therefore the conditions of life envisaged include rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period, provided the above would lead to the destruction of the group in whole or in part._

### 5.4.3 Intent to destroy members of the hostile class under the _songbun_ system

Intent to destroy the Protected Group in whole or in part is notoriously difficult to prove. Such intent is rarely evidenced by direct proof, since "only the accused himself has first-hand knowledge of his own mental state, and he is unlikely to testify to his own genocidal intent". This is true in the case of the DPRK. The information and evidence available on the DPRK authorities' objectives in committing the above-mentioned acts is limited, and further investigation in this respect will be required, particularly as the relevant intent would need to be proved in respect of the specific individual defendant in each case. We also note the COI's conclusion, in the context of its findings on crimes against humanity, that "the underlying objective of the State policy may not have been to starve the population".

In our view, however, there are at least indicators of a deliberate policy targeting the hostile class with a view to destroying it in whole or in part. For instance, the Ten Great Principles of the Establishment of the Unitary Ideology System, which have been described as the highest norm that governs the daily lives of North Korean people, require citizens of the DPRK to:

> fight on tenaciously with uncompromising combative spirit, firm revolutionary principle, indomitable revolutionary spirit, and faith in certain victory against the enemy class.

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327 Ten Great Principles were proposed by Kim Yong-Ju (the youngest brother of Kim Il-Sung) in 1967 and officially declared by Kim Jong-il in 1974. They consist of 10 main principles and 65 specific directives which govern the thoughts and behavior of North Korean people. By idolizing Kim Il-Sung’s ruling, the ten principles operate as legal tools to restrain people’s freedom of politics, religion and expression, as well as a justification for harsh punishment if not followed. (Available at: https://eng.nkhumanrights.or.kr:444/board/download.php?fileno=1101&no=3&board_table=bbs_literature&board_table=bbs_literature&page=1&word=&searchItem=&cate_id=-)
While it is not entirely clear that this refers to the hostile class, the Collins Report concludes that this is the intention. According to the Collins Report, this provision effectively "compels party-state leaders to ensure they see the hostile class as the enemy and treat them accordingly".328

Further, there have been suggestions that the DPRK's policy of restricting food and humanitarian aid to the north eastern regions of the DPRK was driven by Kim Jong Il's objective to annihilate the hostile class, which he regarded as a constant threat of uprising, particularly after witnessing the execution of his close friend Ceaușescu in the popular revolts in Romania.329

In addition, and as mentioned above, ICTY and ICTR case law provides that genocidal intent may be inferred from relevant facts and circumstances that can lead beyond reasonable doubt to a finding of intent, provided that this is the only reasonable inference that can be made from the totality of evidence.330 In light of the context in which the abuses described in section 5.4.2 above have taken place, the ongoing nature, magnitude and seriousness of the crimes committed, and the fact that they were specifically targeted to members of the hostile class, it is our view that there may be a good case for establishing the mens rea required for genocide.

5.5 GENOCIDE IN RELATION TO CHRISTIANS

5.5.1 Christians as a Protected Group

The COI Report notes that Christianity has a long history in Korea, with first contacts dating back to the 17th century.331 Although, as noted below, the number of Christians appears to have decreased significantly since the 1950s, the COI Report refers to evidence that Christianity continues to be practiced by some of the citizens of the DPRK, although principally in a clandestine manner.332 Therefore, despite the measures by the DPRK authorities, it seems clear that there is still a Christian population in the DPRK.

As is clear from the Genocide Convention, religious groups are one of the four Protected Groups under Article II. In Akayesu, the Trial Chamber found that:

The religious group is one whose members share the same religion, denomination or mode of worship.

Christianity would clearly fall within Article II and that the Christians in the DPRK would, therefore, be treated as a Protected Group for the purposes of the Genocide Convention.

5.5.2 Harmful acts or omissions inflicted on Christians

The COI found that:

The spread of Christianity is considered by the DPRK a particularly serious threat since it ideologically challenges the official personality cult and provides a platform for social and political organization and interaction outside the state realm. Apart from the few organized state-
controlled churches, Christians are prohibited from practicing their religion. Christians caught practicing their religion are subject to severe punishment in violation of the right to freedom and the prohibition of religious discrimination.

The COI Report refers to figures provided by the DPRK itself, which suggest that there has been a substantial drop in the number of religious believers between 1950 to 2002 from close to 24% to 0.16%.334 However, the COI concludes that it does not have sufficient evidence to make findings of genocide in this regard.335

These findings are supported by other reports on the DPRK. For example, the Collins Report suggests that the DPRK persecutes religious believers as a matter of policy.336 According to the Collins Report:

> every religious believer is regarded as being an enemy of the state, a hostile and impure element, an agent of the United States (if they are Christian), and a counter-revolutionary for whom only discrimination, punishment, isolation, and even execution are the proper forms of treatment by the regime.337

In terms of specific acts committed against Christians, the KINU White Paper notes that Christians in particular were "purged because they are regarded as tools of imperialist aggression".338 The KINU White Paper cites, by way of example, testimony from refugees and defectors that:

(a) the wife of a tactical staff officer of Air Command in China's military was publicly executed for possessing a Bible around 2009;

(b) in 2009, when a tree was cut down and a Bible fell out of a magpie's nest, all five of the family were sent away and it was assumed to a prison camp; and

(c) a woman praying "Good God, please help me" was taken away while detained in a detention center.339

As recently as 31 May 2014, the international press reported that Pyongyang had sentenced Kim Jong-uk, a ROK Baptist missionary, to a labor camp for life for allegedly trying to build underground churches in the country and for spying on behalf of the ROK Government.340

While the COI Report is right to suggest that there is insufficient factual evidence to come to any clear conclusions, the available evidence suggests that Christians may have been killed, caused to suffer serious bodily or mental harm, or deliberately subjected to conditions of life calculated to cause their physical destruction. Of course, the fact that the number of persons declaring to be religious followers in the DPRK is said to have dropped so dramatically cannot be said, of itself, to establish an intentional extermination of Christians by the DPRK authorities, particularly given the possible repercussions for those known by the authorities to practice a religion. However, the drop is significant enough to suggest that the DPRK may have committed harmful acts that are specifically targeted at Christians.

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334 COI Report, para. 244.
335 COI Report, para. 1159.
336 Collins Report, p.79.
337 Collins Report, p.78.
5.5.3 Intent to destroy Christians

We have not seen any recent statements by the DPRK authorities that expressly demonstrate an intent to destroy Christians.

However, a report by Christian Solidarity Worldwide, published in 2007, does contain numerous statements alleged to have been made by Kim Il-Sung in the 1960s and 1970s. Although these have not been published by the regime but are from unofficial sources, which means that their veracity cannot be confirmed, they are nonetheless worth noting briefly. They include the following:

Through court trials, we have executed all Protestant and Catholic church cadre members and sentenced all other vicious religious elements to heavy punishment. The repentants have been given work, but non-repentants have been sent to concentration camps.

The guidelines for dealing with religious believers are clearly set out in our Party’s public security policy. You need only follow it. Silly old religionists need to die in order for their bad habits to be corrected. In which case, we must mercilessly eradicate them.341

The Christian Solidarity Worldwide report also includes a quote from a former guard at a number of political prison camps:

The genocide definition fits the policy towards Christians one hundred per cent. There was a special instruction from the political leadership that all religions are social evil. There was an abundance of references to Christian groups for the purposes of annihilation. There were speeches, texts, instructions, textbooks and pamphlets covering this. Religion is seen to be like opium and has to be wiped out. When I was on duty I saw many Christians. One is meant to worship only the political leaders and any other worship was a deviation from loyalty to the regime. When North Koreans hear about God they think they are talking about Kim Il-Sung. All North Koreans have this confusion. If anyone embraces Christianity in North Korea they are called a crazy guy. No one could understand or imagine someone wanting to become a Christian. It is very unlikely one could find a descendant of a Christian still living. The camp rules were intended to prevent Christian families. Everyone in the camp was prevented from reproducing. If someone had a baby it would be a problem in the whole camp. Christians were reactionaries and there were lots of instructions and mottos to wipe out the seed of reactionaries. The purpose of the camps I was involved in was to kill the prisoners. Instead of killing them by shooting, the intention was to force them to work to the last minute. The intention was to kill, not to extract labour. The purpose was to kill; the method was just different.342

While, as noted above, we are not able to corroborate these allegations, they at the very least suggest that further investigation should be carried out into the treatment of Christians in the DPRK. If found to be true, that would show that the DPRK had pursued a deliberate policy of targeting and persecuting Christians for the purposes of the Genocide Convention.


5.6  GENOCIDE IN RELATION TO CHILDREN WITH CHINESE LINEAGE

5.6.1  Children with Chinese lineage as a Protected Group

The COI Report found that:

\textit{there is a widespread prevalence of forced abortion and infanticide against repatriated mothers and their children, in contravention of domestic and international laws. Forced abortion occurs when a woman who wants to carry her pregnancy to full term is required to terminate it against her will. Infanticide is generally defined as a mother or other person killing an infant soon after birth. This only appears to have occurred when attempts to abort the pregnancy of a woman repatriated from China failed, or could [not] be conducted because the woman was at an advanced stage in her pregnancy and the baby was born alive.}\textsuperscript{343}

The COI Report suggests that these forced abortions and infanticides are based on a deep-rooted disdain for ethnically mixed children, in particular those of Chinese descent. Sources suggest that forced abortions may be carried out on all pregnant women who are repatriated from China, on the assumption that the father of the child could be Chinese and without asking the mother about whether or not that is the case.\textsuperscript{344}

Forced abortion and infanticide give rise to two possible types of harmful act on which to make a finding of genocide: killing and prevention of births. In the case of killings, the targets of the harmful acts are children with Chinese lineage. As such, these children are identified on racial grounds. Similarly, the apparent policy of aborting half-Chinese babies amounts to the prevention of Korean-Chinese births, which also constitutes harm inflicted on racial grounds. Therefore, it is clear that the acts described below are targeted at a Protected Group.

5.6.2  Harmful acts or omissions inflicted on unborn children and infants with Chinese lineage

The COI Report includes witness testimony on this subject, including the following:

\textit{One witness saw guards take away the new-born baby of a repatriated mother at the Onsong County SSD detention facility. Moments after the baby was born to the mother in the cell – without medical assistance – guards put the baby in a bucket and took it away saying "the baby is not human" and "[it] does not deserve to live because it is impure".}\textsuperscript{345}

\textit{Another witness described to the Commission seeing officials at an SSD detention facility in Hoeryong force chemicals into the vagina of a pregnant woman to encourage an abortion. Whilst doing so, the officials said they must exterminate “mixed-race people”.}\textsuperscript{346}

\textit{A former Commissioner of the Women’s Group, who herself witnessed (in her capacity as Commissioner) a forced abortion upon a repatriated woman, testified that […] she personally saw a pregnant woman being beaten by an SSD agent in a jipkyulso in a northern province sometime in 2007. Security agents were calling the pregnant detainee names, and saying that the offspring of Chinese men cannot be born in the DPRK. The agents verbally and physically abused her, and she miscarried immediately. The foetus was discarded.}\textsuperscript{347}

\textsuperscript{343} COI Report, para. 424.  
\textsuperscript{344} COI Report, para. 426.  
\textsuperscript{345} COI Report, para. 426.  
\textsuperscript{346} COI Report, para. 426.  
\textsuperscript{347} COI Report, para. 428.
Ms Jee Heon A [...] was subjected to the forceful physical removal of the foetus in her womb by someone reaching into her uterus whilst she was restrained on a table. The bleeding was so profuse it gave rise to concerns of internal damage.\textsuperscript{348}

Such findings are supported by other reports on the situation in the DPRK. An article run by \textit{The New York Times} in 2002 contained testimony of officials targeting unborn children due to their Chinese parentage.\textsuperscript{349} The KINU White Paper specifically refers to 10 different cases of witness testimony of forced abortions, by way of beating or operation, due to the babies having Chinese lineage.\textsuperscript{350}

The further testimonies provided by the ROK Government appear to be consistent with the evidence of forced abortions gathered by the COI and other sources. For example, a testimony from an employee of the security department of Musan-gun described a forced abortion carried out on a woman trying to escape to South Korea when she was six months pregnant.

Although figures for the number of infanticides and abortions are not available, there are strong suggestions that no half-Chinese children are permitted to live. As such, there are grounds to suggest that the second element for genocide may be satisfied in relation to children and infants of Chinese descent.

5.6.3 Intent to destroy unborn children and infants with Chinese lineage

We have not seen any statements directly attributable to the DPRK regime that expressly demonstrate an intention to destroy children with Chinese lineage. However, as already noted above, it is not necessary to have a statement of intent in order to show that there has been genocide. In particular, a pattern of purposeful action may demonstrate such an intention.\textsuperscript{351}

In our view, although there is no express statement of intent, the circumstances of the infanticides and forced abortions that are carried out are suggestive of a pattern of purposeful action. This is particularly the case in respect of the number of witness testimonies in relation to forced abortions and also in relation to the underlying belief in a "pure Korean race".\textsuperscript{352}

In our view, this possible pattern of purposeful action warrants further investigation in order to establish whether or not there may be a case of genocide in respect of half-Chinese babies.

5.7 Conclusions

As is evident from the COI Report and reports from other commentators, the lack of access to information in the DPRK poses a barrier to analyzing and addressing potentially serious human rights violations. We agree with the COI that the lack of clear evidence makes it difficult to come to any firm conclusions as to whether genocide is being committed in the DPRK.

We also agree with the COI that the limitations on the categories of Protected Group under the Genocide Convention narrow the scope for making a finding that genocide has been committed in the DPRK. It is our opinion that, to the extent that it is necessary to take a purposive approach to the definition of Protected Groups under the Genocide Convention in respect of the DPRK, this is entirely consistent

\textsuperscript{348} COI Report, para. 430.
\textsuperscript{350} KINU White Paper, pp.485-486.
\textsuperscript{352} COI Report, paras. 353 and 426.
with case law and other customary international law that has emerged from international criminal tribunals and other international bodies to date.

We consider there to be good arguments that the targeting by DPRK State-controlled officials of groups classified by the DPRK as being in the hostile class, Christians, and children of Chinese heritage with the intent to destroy such groups could be found to amount to genocide if the necessary further investigation is carried out.

As such, we recommend further investigation of the possibility of genocide being committed by the DPRK regime in respect of these three groups. This further investigation should include both the collection of testimony from victims, refugees and defectors, which should so far as possible be collected to a court evidence standard, as well as further consideration of the applicable legal tests for genocide and identification of the strongest possible arguments on the basis of the evidence gathered.
6. ACCOUNTABILITY

6.1 INTRODUCTION

One of the elements of the COI's mandate was to ensure:

full institutional and personal accountability, in particular where violations may amount to crimes against humanity.\(^{353}\)

The COI Report makes various findings of fact as to the ways in which such accountability might be achieved.\(^ {354}\)

6.2 INTERNATIONAL ACCOUNTABILITY

In light of its findings that the DPRK, a Member State of the UN, has committed crimes against humanity over a span of several decades, the COI briefly considered the accountability of the international community.\(^ {355}\)

This falls outside the scope of our opinion and as such we have not considered and do not comment on the COI's findings in this regard.

6.3 INSTITUTIONAL ACCOUNTABILITY

The COI Report finds that the DPRK is a State where the commission of human rights violations and crimes against humanity is engrained in the institutional framework. In particular, it finds that the State Security Department, the Ministry of People's Security, the Korean People's Army, the Office of the Public Prosecutor, the Judiciary and the Workers' Party of Korea are all implicated in human rights violations and crimes against humanity, and are acting under the effective control of the leadership of the Workers' Party of Korea, the National Defence Commission and the Supreme Leader of the DPRK.\(^ {356}\)

According to the COI Report, it is, however, the main security agencies, the State Security Department, the Ministry of People's Security and the Korean People's Army that are the most conspicuous institutions perpetrating gross human rights violations and related crimes against humanity, including summary executions, and other extrajudicial killings, enforced disappearances, torture, prolonged arbitrary detention, rape and sexual violence of comparable gravity. Local and central institutions of the Workers' Party of Korea, the Office of the Prosecutor and the judiciary are also highly involved in human rights violations.\(^ {357}\)

The COI Report notes the need for:

profound institutional reforms starting at the very top and centre of the nation's institutions. Entire structures of surveillance, indoctrination and repression that serve the sole purpose of committing human rights violations must be dismantled ... The Commission also finds that the economic system must be restructured so that provision of the basic needs of the population on a non-discriminatory basis becomes possible.\(^ {358}\)


\(^{354}\) COI Report, paras. 1166-1210.

\(^{355}\) COI Report, paras. 1204-1210.

\(^{356}\) COI Report, para. 1193.

\(^{357}\) COI Report, para. 1168.

\(^{358}\) COI Report., para. 1194.
6.4 INDIVIDUAL CRIMINAL ACCOUNTABILITY

The COI Report rightly states that the prohibition of crimes against humanity has the status of *jus cogens* (i.e., part of the body of peremptory norms of customary international law that apply to the entire international community).\(^{359}\) In these circumstances, individuals who commit crimes against humanity in the DPRK may be held responsible under international customary law, even though the DPRK has not included crimes against humanity in its domestic criminal law and is not a State party to the Rome Statute.\(^{360}\)

Testimony or other information considered by the COI that named individuals who have committed, ordered, solicited, or aided and abetted crimes against humanity, has been recorded by the COI. The COI has also recorded names where it could ascertain those who had headed particular departments, prison camps or institutions implicated in crimes against humanity. Such information has been put on the COI’s confidential database and the High Commission of Human Rights has been authorized to provide access to this information to competent authorities that carry out relevant investigations.\(^{361}\)

As the crimes against humanity identified by the COI appear to have been based on decisions and policies approved at the highest level of the State, the COI found that the DPRK’s own institutions are neither willing nor able effectively to investigate and prosecute crimes against humanity, as required under international law.\(^{362}\) In these circumstances, the COI rightly recognizes that it is incumbent on the international community to step in and ensure that the perpetrators are brought to justice.\(^{363}\) Two specific options are put forward by the COI:

(a) the UN could set up an *ad hoc* International Tribunal for the DPRK; or

(b) the UN Security Council could refer the situation in the DPRK to the ICC based on Article 13(b) of the Rome Statute and Chapter VII of the UN Charter.\(^{364}\)

6.4.1 *Ad hoc* international tribunal

The COI suggests that the UN could set up an *ad hoc* international tribunal for the DPRK. The COI noted that there are two possible ways in which this could be done.

(a) First, the UN Security Council could set up a tribunal using its powers under Chapter VII of the UN Charter.

(b) Alternatively, a tribunal could be established by the General Assembly, relying on its residual powers.\(^{365}\)

Whichever method is used, the COI Report suggests that such a tribunal could be provided with jurisdiction dating back before July 2002 and could thereby comprehensively address crimes against humanity in the DPRK.\(^{366}\)

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\(^{359}\) COI Report, para. 1195.

\(^{360}\) COI Report, para. 1195.

\(^{361}\) COI Report, para. 1196.

\(^{362}\) COI Report, para. 1199.

\(^{363}\) COI Report, para. 1199.

\(^{364}\) COI Report, para. 1201.

\(^{365}\) COI Report, para. 1201(2).

\(^{366}\) COI Report, para. 1201(2).
However, as is also noted by the COI, such a tribunal would require substantial resource commitments and planning, leading to a further delay. While the establishment of an ad hoc tribunal was put forward as one of the two viable options to secure accountability, the COI appeared to favour a referral to the ICC by the Security by the UN Security Council.

6.4.2 The ICC

An alternative way of ensuring that the perpetrators are brought to justice would be for the ICC to investigate the allegations. The ICC is the first permanent, treaty-based, international criminal court established to help end impunity for the perpetrators of the most serious international crimes. Established under the 1998 Rome Statute, the Court is an independent international organisation, and not part of the UN system.

The ICC has jurisdiction to try individuals accused of committing genocide, crimes against humanity, war crimes and the crime of aggression, each as defined in the Rome Statute.

The ICC can exercise this jurisdiction in relation to events that have taken place since the entry into force of the Rome Statute on 1 July 2002 (or from any later date on which the Statute entered into force for the relevant State), in cases where the relevant State is "unwilling or unable" genuinely to carry out the investigation or prosecution.

According to the Rome Statute, the ICC may only exercise jurisdiction:

(a) where the accused is a national of, or the crime took place on the territory of, a State party or a State otherwise accepting the jurisdiction of the Court; or

(b) the UN Security Council refers the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.

Given that the DPRK has not signed up to the Rome Statute, the circumstances in which the ICC may exercise its jurisdiction in relation to the DPRK are limited. We discuss in section 7.2.2 the possibility that the ICC may have jurisdiction in respect of crimes committed by the DPRK authorities outside the territory of the DPRK and within the territory of a State party to the Rome Statute. In addition, the COI Report correctly notes that the UN Security Council could refer the situation in the DPRK (since 2002) to the ICC based on Article 13(b) of the Rome Statute and Chapter VII of the UN Charter.

The COI noted that this would have the practical advantage that an established institutional framework, rules of procedure and professional staff are already in place, and impunity enjoyed by the perpetrators of crimes against humanity could be addressed without further delay.

6.5 Conclusions

As noted in section 1.2 above, the COI was mandated to:

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367 COI Report, para. 1201(2).
368 COI Report, para. 1218.
369 COI Report, para. 1225(a).
370 Article 5 of the Rome Statute.
371 Article 11 of the Rome Statute.
372 Article 17(1) of the Rome Statute.
373 Article 12(2) of the Rome Statute.
374 Article 13(b) of the Rome Statute.
375 COI Report, para. 1201(1).
376 COI Report, para. 1201(1).
conduct its investigations with a view to ensuring full institutional and personal accountability, in particular where violations may amount to crimes against humanity.\textsuperscript{377}

While the COI addressed its recommendations in relation to institutional accountability to the DPRK, suggesting for example that it implement "profound political and institutional reform",\textsuperscript{378} it addressed recommendations as to individual accountability to both the DPRK\textsuperscript{379} and the international community.\textsuperscript{380} In particular, it recommended a reference by the Security Council to the ICC.\textsuperscript{381} We agree with the COI that, given the grave crimes against humanity that have been committed in the DPRK, there are very strong arguments in support of such a reference.

\begin{footnotes}
\item[378] COI Report, para. 1220(a).
\item[379] COI Report, para. 1220(p).
\item[380] COI Report, para. 1225(a).
\item[381] COI Report, para. 1225(a).
\end{footnotes}
7. **RECOMMENDATIONS**

7.1 **INTRODUCTION**

The Istanbul Protocol provides that commissions of inquiry should include in their reports, "recommendations based on the findings of the commission". The mandate of the COI expressly included a requirement for the report produced by the COI to include recommendations.

This section considers the recommendations of the COI based on the findings of fact discussed in the preceding sections, as well as discussing some possible further recommendations.

The COI Report sets out a number of recommendations that are addressed to the DPRK directly. These include recommendations that the DPRK:

- **undertake profound political and institutional reforms without delay to introduce genuine check and balances upon the powers of the Supreme Leader and the Workers' Party of Korea.** Such changes must include an independent and impartial judiciary, a multi-party political system and elected peoples' assemblies ...

- **acknowledge the existence of human rights violations ...**

- **abolish vaguely worded "anti-state" and "anti-people" crimes ...**

- **ensure that citizens can enjoy the right to food and other economic and social rights without discrimination ...**

- **allow separated families to unite ...**

- **prosecute and bring to justice those persons most responsible for alleged crimes against humanity.** Appoint a special prosecutor to supervise this process. Ensure that victims and their families are provided with adequate, prompt and effective reparation and remedies, including by knowing the truth about the violations that have been suffered.

We fully support and endorse these recommendations. In particular, we support the decision of the COI to make positive suggestions to the DPRK as to the ways in which it might ensure, for itself, that those persons responsible for crimes against humanity are properly brought to account and that institutional accountability is ensured in future.

The COI Report also sets out a number of recommendations that are aimed at other States. These focus in particular on the issues of refugees, human trafficking and abductions. We fully support and endorse these recommendations.

Finally, the COI Report sets out a number of recommendations aimed at the international community and the UN. We fully support and endorse these recommendations. In addition, we consider that two of those recommendations are particularly worth considering further:

(a) the possibility of an investigation by the ICC; and

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382 Istanbul Protocol, para. 117(j).
384 COI Report, para. 1220(g).
385 COI Report, para. 1221.
386 COI Report para. 1225
(b) targeted sanctions.

7.2 INVESTIGATION BY THE ICC

As noted above in section 6.4.2 above, the ICC has jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression, where these crimes were committed after the entry into force of the Rome Statute and the relevant State is "unwilling or unable" genuinely to carry out the investigation or prosecution.

As also noted above, the circumstances in which the ICC may exercise its jurisdiction in relation to the DPRK are limited. However, we consider there to be two possible ways in which the ICC could exercise its jurisdiction.

7.2.1 Security Council referral

First, and as noted by the COI, the Security Council could refer the situation in the DPRK to the ICC based on Article 13(b) of the Rome Statute and Chapter VII of the UN Charter. This is what the COI recommends:

"The Security Council should refer the situation in the Democratic People's Republic of Korea to the International Criminal Court for action in accordance with that court's jurisdiction."

We support this recommendation, which would allow crimes committed in the DPRK since 2002 to be investigated by the ICC. In order for the ICC to exercise its jurisdiction, it would need to be satisfied that the DPRK is unwilling or unable to prosecute such crimes for itself. In light of the DPRK's public rejection of the COI Report, and of the impunity enjoyed by perpetrators domestically, we consider that it is abundantly clear that the DPRK is unwilling or unable to carry out the prosecutions itself. As such, if the matter is referred to the ICC by the Security Council, we consider that the ICC is likely to find that it has jurisdiction.

7.2.2 Investigation of crimes committed in the territory of other State parties

Secondly, it may be possible for the ICC to exercise its jurisdiction without a Security Council referral in respect of crimes committed by nationals of the DPRK in the territory of States that have signed up to the Rome Statute.

On this basis, the ROK has already made several communications to the OTP in respect of crimes allegedly perpetrated by the DPRK authorities on the ROK territory. In a recent report, the OTP confirmed that:

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387 Article 5 of the Rome Statute.
388 Article 11 of the Rome Statute.
389 Article 17(1) of the Rome Statute.
390 COI Report, para. 1201(1).
391 COI Report, para. 1225(a).
392 COI Report, para. 1216 ("The perpetrators enjoy impunity. The Democratic People’s Republic of Korea is unwilling to implement its international obligation to prosecute and bring the perpetrators to justice, because those perpetrators act in accordance with State policy").
The ROK is a State Party to the Rome Statute since 13 November 2002. The Court may therefore exercise jurisdiction over Rome Statute crimes occurring on the territory of ROK or by its nationals from 1 February 2003 onwards … The DPRK is not a state party. However, because the territorial requirement has been met, the Court may exercise its jurisdiction over the alleged perpetrators.\textsuperscript{394}

This was not, as far as we are aware, a possibility that was addressed by the COI, but we consider that there is a reasonable case for further considering the possibility of ensuring accountability in respect of the on-going abductions of individuals from neighbouring States, and also the apparent enslavement and imprisonment of labourers trafficked abroad by the DPRK.

There are two ways in which such crimes could be investigated by the ICC.

(a) The first is for the State in which the crime has been committed to request that the OTP investigates the crime.\textsuperscript{395}

(b) The second is for the OTP itself to initiate an investigation in respect of such a crime, where it is committed in a State which has signed up to the Rome Statute. This is provided for in Articles 13(c) and 15 of the Rome Statute, which states that the OTP may initiate an investigation if it receives information relating to potential crimes committed within the ICC’s jurisdiction.

These provisions could be used to allow the ICC to exercise its jurisdiction in respect of both the abductions from the territories of State Parties and the DPRK’s practice of sending its citizens to work in foreign countries, while kept in conditions akin to enslavement, provided that these practices can be shown to amount to crimes against humanity.

As set out in section 4.3.6 above, we agree with the COI that the on-going large-scale abductions of foreign nationals are systematic and widespread, and pursuant to State policy. As such, we consider there to be a good argument that these actions do in fact amount to crimes against humanity. On that basis, we consider that there would be good grounds for a State Party to refer these abductions to the ICC. We also consider that the OTP could initiate an investigation into the alleged enforced disappearances carried out by DPRK authorities.

Similarly, as discussed above in section 4.4.1, we have reviewed the available information on the conditions of DPRK workers sent abroad to earn hard currency as part of DPRK Government policy under the control of ‘minders’. In light of this we consider that there is at least a sufficient basis for further investigation into whether, and to what extent, there are reasonable grounds for concluding that such activities amount to enslavement or imprisonment. If such reasonable grounds are found to exist, we consider that there would again be good grounds for other State Parties to request an investigation by the ICC, or for the OTP to initiate its own investigation.

We note that the temporal constraints on the ICC’s jurisdiction over alleged crimes may create a significant stumbling block in relation to establishing ICC jurisdiction for the OTP to investigate abductions of persons from other countries. As noted in the COI Report, by the time criminal acts are eventually fully revealed, it is likely that the victim has long since died.\textsuperscript{396} Further, many of these


\textsuperscript{395} Article 13(a) of the Rome Statute.

\textsuperscript{396} COI Report, para. 1154.
abductions were carried out before the Rome Statute's entry into force in 2002. However, the COI found that:

Although the enforced disappearances [of persons who came from other countries] were carried out over the span of several decades, common elements unite them, making it appropriate to consider them as a single large-scale attack.\(^{397}\)

This finding brings the long history of enforced disappearances and abductions by the DPRK from the territory of other States firmly within the limits of the ICC's jurisdiction.

Based on the accounts referred to in section 4.4.1, the DPRK is continuing (if not increasing) its policy of sending workers abroad and the temporal requirement relating to any alleged crimes of enslavement and imprisonment or otherwise in respect of such workers would be satisfied.

As stated above, in order to support a possible future investigation by the ICC in relation to crimes committed in the territories of State Parties, we consider that reports relating to abductions of foreign nationals and enslavement and imprisonment of DPRK workers abroad warrant further investigation. Such investigative efforts should be coordinated to gather and collate a strong body of evidence to be submitted to the OTP for its consideration. We note, in this respect, that in its resolution of 28 March 2014, the UNHRC required that the recommendations of the COI be followed up,

including through the establishment of a field-based structure to strengthen monitoring and documentation of the situation of human rights in the Democratic People's Republic of Korea, to ensure accountability.\(^ {398}\)

7.3 SANCTIONS

The COI Report recommends that:

The Security Council should ... adopt targeted sanctions against those who appear to be most responsible for crimes against humanity. In the light of the dire social and economic situation of the general population, the Commission does not support sanctions imposed by the Security Council or introduced bilaterally that are targeted against the population or the economy as a whole.\(^ {399}\)

However, the COI Report is also understandably cautious about exactly what such sanctions should target, recommending, for example that:

States should not use the provision of food and other essential humanitarian assistance to impose economic or political pressure on the Democratic People's Republic of Korea. Humanitarian assistance should be provided in accordance with humanitarian and human rights principles, including the principle of non-discrimination. Aid should only be curbed to the extent that unimpeded international humanitarian access and related monitoring is not adequately guaranteed.\(^ {400}\)

\(^{397}\) COI Report, para. 1149.
\(^{399}\) COI Report, para. 1225(a).
\(^{400}\) COI Report, para. 1225(i).
7.3.1 UN Security Council Sanctions

The UN Security Council is empowered to impose sanctions in order to maintain or restore international peace and security. In particular, Article 41 of the UN Charter provides that:

_The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations._

The UN Security Council has adopted a number of resolutions imposing sanctions on the DPRK in response to its nuclear and ballistic weapons programmes and its continued breach of existing sanctions.

The sanctions imposed by the UN Security Council include an arms embargo (including a ban on related financial transactions and technical assistance); an embargo on items related to the DPRK's nuclear and ballistic missile programmes; and a ban on the provision of financial services or the transfer of funds which could contribute to the DPRK's nuclear and ballistic missile programmes or to the evasion of sanctions.

The sanctions also include a travel ban and a freeze on the funds, other financial assets and economic resources of 12 persons and 19 entities designated by the Security Council as connected to the nuclear, WMD and ballistic missile-related programmes of the DPRK. The asset freeze provides for exemptions for humanitarian purposes, to be determined on a case-by-case basis and subject to UN Security Council oversight.

The Non-proliferation Resolution 1718 also introduced a ban on the export of "luxury goods" to the DPRK. However, what constitutes "luxury goods" was not defined by Resolution 1718. Resolution 2094 clarified the meaning by providing a non-exhaustive list of such goods (at annex 4), listing jewellery, yachts, luxury cars, and racing cars. There is currently no exhaustive list of "luxury goods" prohibited under UN sanctions on DPRK.

All 193 UN Member States are required to carry out decisions of the Security Council directly and through their actions in the appropriate international agencies of which they members. Sanctions are generally enforced by Member States through national mechanisms.

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401 Articles 39 and 41 of the UN Charter.
403 Introduced by Resolution 1718 (pars. 8(a)(i) and 8(b)) and extended by Resolution 1874 (para. 9).
404 Resolution 1718, paras. 8(a)(i) and 8(b).
405 Resolution 2094, para. 11.
406 Resolution 1718, paras. 8(d) and 8(e).
407 Resolution 1718, para. 8(a)(iii).
408 Articles 25 and 48 of the UN Charter.
International enforcement of the sanctions imposed on the DPRK is monitored by the 1718 Committee. Under paragraph 12(g) of Resolution 1718, the 1718 Committee reports to the Security Council every 90 days on its work. It also publishes an annual report on its activities in relation to the implementation and enforcement of sanctions by Member States. The 1718 Committee's latest annual report, adopted on 20 December 2013, states that, during the reporting period, 30 Member States reported to the 1718 Committee on the implementation of sanctions and the 1718 Committee received five reports of alleged violations concerning measures imposed by the relevant resolutions.

### 7.3.2 EU sanctions

Separate EU sanctions against the DPRK implement the UN sanctions outlined above and impose additional EU-autonomous measures targeted at those involved in the DPRK's nuclear and ballistic missile programmes. Such measures include an expanded list of persons and entities subject to the asset freeze and travel ban (currently 29 individuals and 34 entities), a very comprehensive and exhaustive list of "luxury goods" prohibited from export to the DPRK, and a wider classification of materials being subject to the EU trade ban than the UN-sanctioned trade ban.

The EU has also banned the import from or export to the DPRK of gold, precious metals, diamonds and newly produced DPRK banknotes and coins, as well as imposing restrictions on EU banks establishing new operations in the DPRK (or vice versa) and on the sale or purchase of bonds issued by the DPRK government and public bodies and DPRK banks.

### 7.3.3 US sanctions

The US has also imposed sanctions against the DPRK. These are broader than those mandated by the UN. The United States maintains the following: (1) a ban against direct or indirect exports to the DPRK of goods, software and technology subject to US law, which includes foreign made goods with US content above certain levels (with some limited exceptions for certain food and medicine); (2) broad restrictions on the direct or indirect import of goods or services from the DPRK; (3) prohibitions on any dealings with persons and entities identified as "Specially Designated Nationals", which include a number of DPRK persons, entities and financial institutions; and (4) prohibitions on registering vessels in the DPRK, obtaining authorisation for a vessel to fly the DPRK flag, and owning, leasing, operating, or insuring any vessel flagged by the DPRK. In addition, certain property of the DPRK government that was previously blocked (frozen) under US law continues to be blocked.

While most of the sanctions imposed by the US only affect US persons and entities, the US government also has the legal power to target even non-US persons or entities engaged in the import or export of...
luxury goods to or into the DPRK. The US government can impose restrictions on entities or individuals who engage in (or materially assist or support) exports of luxury goods to, or imports into, the DPRK. Such restrictions could result in the blocking of all their property that is subject to US jurisdiction and the effective loss of access to the US financial system.

### 7.4 Recommendations

In light of the COI Report’s recommendations and the existing sanctions, we are of the opinion that the following steps should be considered by the international community:

(a) imposing further sanctions at UN level that are directly targeted at human rights abuses, including extending existing asset freezing measures and/or travel bans to those involved in such abuses, such as key members of the DPRK leadership and their associates;

(b) a renewed commitment to enforcing the existing sanctions, including the introduction of sanctions against States that fail to enforce the sanctions against the DPRK;

(c) the introduction at UN level of a more comprehensive list of luxury goods which cannot be exported to the DPRK (such as that which is in force within the EU) and strengthening enforcement powers of Member States in respect of such measures.

Sanctions are more likely to be effective if they are targeted where they will have most impact, such as by targeting business sectors in which those involved in human rights abuses have an interest or which are used to fund such abuses. For example, the UN Security Council imposed asset-freezing measures in relation to businesses which it believed provided funding to the Qadhafi regime in Libya. EU and US sanctions are also often targeted in this way so that pressure is put on a regime or particular group, while minimising the impact on the rest of a country’s population.

Sanctions are also more likely to be effective if they are targeted at individuals or entities with assets outside the DPRK, so that such assets can be frozen. The COI Report identified a number of DPRK officials and institutions as the main perpetrators of human rights violations and crimes against humanity. As part of its investigation, the COI recorded information on the particular individuals involved in a confidential database. The UN High Commissioner for Human Rights is authorized to provide access to the database in order to carry out investigations for the purposes of implementing UN-mandated targeted sanctions against particular individuals or institutions, subject to the informed consent of the sources of information and any protection and operational concerns being duly addressed. We recommend that work is begun by the appropriate international bodies to assess the viability of imposing targeted sanctions on the individuals identified in the COI Report.

An alternative measure for consideration is the introduction of a wider sanctions regime which prohibits trade with and financial assistance to the DPRK for any purpose other than humanitarian or developmental purposes. If such a measure was passed by the UN Security Council, this would expand the existing sanctions significantly, by prohibiting all trade, rather than just trade in luxury goods, arms and items related to the nuclear and ballistic missile programmes. Such a measure could be designed to avoid unintended consequences and take account of the COI’s recommendation that sanctions not be targeted against the population or the economy as a whole. The exclusion for humanitarian or developmental purposes would need to be carefully designed so that it enabled such activities to take

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418 See Executive Order 13551, August 20, 2010.
420 COI Report, paras. 79-84 and 1195-1196.
place, without being so broad that it could be used to circumvent the overall prohibition on trade with the DPRK.

7.5 NATIONAL SOVEREIGNTY

We note that the DPRK contends, in its response to the COI Report at Annex 1, that any interference in its internal affairs would offend the principle of the sovereignty of nation States. As such, this section considers the principle of national sovereignty and whether the recommendations given by the COI, as well as those set out in the preceding paragraphs with respect to the potential for ICC investigation and sanctions, might offend this principle.

The notion of sovereignty is the recognition of the supreme authority of a State within that State’s territory and over its nationals. Ever since 1945, it has been accepted and recognized that the protection of human rights is necessary for the maintenance of international peace. Human rights therefore form a cornerstone for the very premise of the UN (as is evident from Articles 1, 55 and 56 of the UN Charter and subsequently, the UDHR).

The proliferation of international human rights treaties, such as the ICCPR, ICESCR and CEDAW, further demonstrates that human rights are a legitimate matter of international concern. Therefore, the treatment by a State of its own inhabitants is no longer governed only by domestic law but also by international human rights standards as set out in international treaties and customary international law. Furthermore, international crimes, such as crimes against humanity and genocide, exist to protect individuals. A 2004 UN report on the collective challenges facing the international community endorses the emerging norm that States must exercise their sovereignty responsibly to uphold human rights:

When a State fails to protect its civilians, the international community then has a further responsibility to act, through humanitarian operations, monitoring missions and diplomatic pressure.

In signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty but also accept its responsibilities ... (sovereignty) clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community.

In accepting the international standards of human rights (whether by way of treaty or through the development and acceptance of customary international law), States necessarily agree to self-imposed restrictions on their sovereignty. By submitting to the monitoring and other mechanisms of supranational institutions, including the UN and UNHRC, States agree to comply with and to promote human rights standards within their borders.

We note that the DPRK is a party to the ICCPR, the ICESCR, the CEDAW, the CRC and the Genocide Convention, as well as being a UN Member State. It is also subject, like all States, regardless of the treaties to which they have signed up or international organisations of which they are a member, to rules of customary international law.

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For these reasons, we do not consider that the carrying out of the recommendations of the COI would amount to a breach of the principle of the sovereignty of nation States where such recommendations are implemented in accordance with international law.
8. **CONCLUSION AND NEXT STEPS**

8.1 **CONCLUSION**

We have reviewed the methodology, findings and recommendations of the COI Report. In particular, we have considered very carefully the COI’s approach to gathering evidence, and also the legal analysis set out in the COI Report.

Overall, and purely on the basis of that independent analysis, we agree with and fully endorse the findings of the COI. We do not consider there to be any evidence to support the DRPK’s criticisms of the COI Report, as set out in Annex 1. As such, we support the COI’s recommendations without reservation.

On that basis, it is our firm view that the COI Report makes a valuable and persuasive contribution to the previous reports on the situation in the DPRK, including those by supra-national organisations such as the UN, academics, and other analysts. The COI Report has brought to light in a comprehensive and transparent manner the numerous human rights concerns in the DPRK to which the international community must now react.

8.2 **NEXT STEPS**

We agree with the COI’s statement that, although it cannot make final determinations of individual criminal responsibility, it can, and was in the position to, determine whether its findings established reasonable grounds that crimes against humanity had been committed so as to merit a criminal investigation by a competent national or international organ of justice.

Given the grave nature of crimes against humanity, we are in full support of a reference by the UN Security Council to the ICC to enable the OTP to open an investigation into the allegations set out in (among other publications) the COI Report which fall within its jurisdiction. We also recommend that the OTP considers exercising its jurisdiction to investigate the crimes committed by the DPRK in relation to abductions and/or the treatment of DPRK citizens working abroad.

Positive steps are already being taken towards an investigation by the ICC, in that resolution A/HRC/25/25, which was adopted by the UNHRC on 28 March 2014, recommends a referral of the COI Report by the General Assembly to the Security Council. On the basis of our analysis of the COI Report, we strongly support a Security Council resolution to refer the DPRK to the ICC in respect of crimes against humanity.

In preparation for a reference to the ICC or other prosecuting body, we recommend further support for the collection of evidence to a criminal law court standard from victims and other witnesses of the crimes being committed in the DPRK. In particular, it would be beneficial if financial support could be extended in ways that help to ensure that an accurate and ongoing record of the human rights situation in the DPRK is maintained.

The potential genocide of certain groups within the DPRK is a serious matter that requires further investigation, as well as recognition by the DPRK and the broader international community. Such further investigation should be conducted under a similar approach to that of the COI in order to ensure that all evidence gathered is capable of being used in any prosecution brought at a later stage.

We agree with and support the COI’s recommendation that appropriately targeted sanctions could further encourage the regime to engage with the outside world.  

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425 COI Report, para. 1225(a).
Finally, we note the DPRK's response to the COI Report and recommend that all states in the international community, particularly those with ties to the DPRK, encourage and persuade the DPRK to engage with human rights inspectors, the Special Rapporteur and other UN bodies. In particular, we would support any attempt to grant such independent inspectors physical access to the DPRK. Such action would lend much credibility to the DPRK's position and enable the concerns raised by the COI and civil society to be refuted or verified.
Extracts from the DPRK’s response to the COI Report were published in the press in the days following the COI Report’s publication.

We have been provided with a copy of that response, the original Korean version of which is set out below. This version is followed by an English translation, for which we are grateful to TransPerfect Legal Solutions.

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ANNEX 1:  
RESPONSE OF THE DPRK

COI 보고서에 대한 북한 반응

1. COI는 주권 - EU 등의 사방국가가 인권이라는 명분으로 사회주의의 제거하기 위해 억제한 정책적 방편의 일환으로, 북한 정부는 정책적으로 남조한 북한 인권 관련 문제제기를 절대적으로 부정함

2. EU 등의 사방국가의 인권 문제를 비난하는 것은 말도 안 되는 부당한 처사이며, 북한에 대한 인권 문제 제기는 절차히 조작, 남조된 것으로 국제 문제에 대한 사방국가의 부당한 개입임

3. 북한인권 COI는 미국 등의 적대세력이 인권이라는 미명하에 배후에서 조종하는 척도가 아닌 바, 인권이라는 이름으로 국가의 주권을 침해하는 국내문제 간섭은 결코 용인될 수 없을

4. 미국 및 사방국은 UN 협약의 주권존중 원칙을 위반하고, 소위 정권교체를 위해 여타국의 국내 문제에 간섭하며 주권국가의 본안정성을 심화시켜 왔으며, 심지어 불법으로 다른 국가를 공격하고 민간인을 살상하였음

5. UN 총회와 인권이사회에서 지지되는 국별 인권결의안의 강제적 체택은 인권의 정치화 · 선별성 및 이중 기준의 사례로서, 전적으로 거부함

6. 사방 국가들은 마치 자신들이 인권 보호관임 것처럼 행동하며, 좋아하지 않는 나라의 인권 문제를 선별적으로 문제 삼고, 사방 동맹의 인권 문제는 무시하고 있음

7. 북한은 김정은의 지휘로운 지도하에 인간 중심의 주체사를 지도원칙으로 삼아 인간에 대한 존중과 사랑의 정치, 건전한 인권 보호 및 중진 정책을 지속하고 있음
1. Where the COI (Commission of Inquiry) represents another of the instruments in the political strategy on the part of the nations of the West, such as the United States, Japan, and the EU to eliminate socialism under the pretext of “human rights,” the Government of North Korea completely rejects the raising of human rights issues related to North Korea.

2. The criticism of other countries’ human rights issues by Western countries such as the EU and Japan is nonsensical, unjust treatment and the raising of human rights issues concerning North Korea is a total fabrication and concoction, representing unjust interference in domestic issues by the West.

3. Because the COI for North Korean Human Rights is no more than a puppet that is controlled from behind by the United States and other hostile powers under the guise of human rights, such interference, in the name of human rights, in internal affairs which infringes upon a nation’s sovereignty never can be accepted.

4. The United States and Western countries, violating the principle of respect for sovereignty in the UN Charter, have interfered in other countries’ internal issues for purposes of so-called “regime change” and have deepened the instability of sovereign states, even going so far as to attack other countries illegally and kill and wound civilians.

5. We totally reject the continual forced adoption of human rights resolutions on individual countries in the UN General Assembly and the Human Rights Council as instances of the politicization of human rights, and of selectivity therein and of the double standard thereon.

6. The Western countries, acting as if they were judges of human rights, selectively raise human rights issues regarding the countries they do not like, while ignoring the human rights issues of the Western alliance.

7. Under the wise guidance of Kim Jong Un, North Korea, which has adopted people-centered Juche Thought as its guiding principle, is continuing its governance with respect and love for humanity and its policies of true protection for and enhancement of human rights.
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