



*Geoffrey Nice Foundation on*  
**Law, History, Politics, and Society**  
**in the context of Mass Atrocities**

**A Report on the Legal Avenues to deal with  
Human Rights Abuses in the Democratic People's  
Republic of Korea**



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The Hague, 15 March 2021

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# INTRODUCTION

In May 2020, NK Watch, an NGO based in Republic of Korea ('ROK') approached the Geoffrey Nice Foundation ('GNF') seeking a legal evaluation of some 800 files, collected in order to document human rights abuses against the citizens of the Democratic People's Republic of Korea ('DPRK') committed by DPRK state authorities. NK Watch was founded in 2003 by survivors of DPRK political prison camps, with a mandate to raise awareness throughout the world on: the public execution, ruthless torture and beating, sexual violence, famine, disease, forced labour, and many more egregious human rights violations taking place in the DPRK, particularly in political prison camps.

I have been involved professionally in DPRK human rights abuses through different activities in the past 10 years. The GNF, based in The Hague participated in several workshops on DPRK human rights abuses in cooperation with international legal organisations such as the International Criminal Court Assembly of States Parties, NGOs from Europe, the ROK, and elsewhere.

The request by NK Watch to analyse some 800 files collected from defectors from the DPRK in the course of decades, provided an opportunity to assess the gravity of the human rights abuses as *crimes* as well as to explore the possibilities for legal actions to be brought by or on behalf of the victims of the DPRK regime, in order to achieve remedy for, as well as recognition of, the harms inflicted on them and their family members.

Thanks to the GNF network, I was able to involve four legal professionals at the beginning of their careers to do the legal research. Holly Armstrong, Nathan Fuller, Ruby Peacock and Adam Smith went through a very large number of documents and assessed the grievances, suffering, and harm as described by the victims and witnesses through the prism of international humanitarian law and human rights law. Their work forms the basis for this report, which is mostly in their words.

Dr. Nevenka Tromp led the project by organising, administering, and managing communication between the parties. She also contributed to advising the researchers on genocide scholarship - including jurisprudence - and was involved in the writing the final version of the report.

Sir Geoffrey Nice, QC

25 January 2021  
Adisham, Kent

# EXECUTIVE SUMMARY

In order to establish whether a case can be brought in an international tribunal or court, such as the International Criminal Court ('ICC') or the International Court of Justice ('ICJ'), two questions must be answered in the affirmative: (i) Can a legal route be established whereby an international court or tribunal will have jurisdiction over the alleged crimes? (ii) Does the evidence, at first sight, appear to demonstrate that crimes such as crimes against humanity or genocide - as defined by a convention or statute - have been committed?

This report addresses both questions in relation to acts committed by the authorities of the Democratic People's Republic of Korea ('DPRK') over a period of 55 years against citizens of the DPRK. NK Watch provided the Geoffrey Nice Foundation ('GNF') with 810 documents, comprising witness statements and incident reports, which were analysed. From the witness statements, 759 victims were identified.

This report follows on from an authoritative and relatively recent report: the 'Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea', commissioned by the United Nations ('UN') Human Rights Council ('the COI report').<sup>1</sup> The COI report formed an important basis for the research and analysis; this report seeks to build upon the COI report's conclusions wherever possible.

## **(i) Legal route/Jurisdiction**

### *ICC*

There are four ways in which the ICC may assert jurisdiction over alleged crimes and take steps towards a prosecution of individual(s) involved: (i) Where crimes have been committed in the territory of a state<sup>2</sup> which has ratified the Rome Statute (the Statute); (ii) Where crimes have been committed by a citizen of a state which has ratified the Statute; (iii) Where a state which has not ratified the Statute has made a declaration accepting the court's jurisdiction over the crime; (iv) Where crimes within the jurisdiction of the Court - the crime of genocide, crimes against humanity, war crimes, the crime of aggression - may have been committed and the United Nations Security Council (UNSC) has referred the situation to the ICC under Article 13(b) of the Statute.

The DPRK has not ratified the Statute and has not made a declaration accepting the Court's jurisdiction. Therefore, options (ii) and (iii) are not available, and option (i) is not

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<sup>1</sup> The condensed report: UN Human Rights Council, 'Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/63; the detailed report: UN Human Rights Council, 'Report of the detailed findings of the Commission of Inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/CRP.1.

<sup>2</sup> For the purposes of this report the word 'state' is used to the exclusion of the word 'country'.



available in relation to crimes which occurred entirely within the territory and jurisdiction of the DPRK. It *may* be legally possible to bring a case in the ICC where crimes are categorised as ‘cross-border’ crimes i.e., where *part* of a crime committed in the DPRK has been committed within the jurisdiction of a state which *has* ratified the Statute. Although a number of crimes can be identified which occurred in the DPRK, but which began in other states, none of those states has ratified the Statute and therefore ‘cross-border’ case law does not assist with establishing ICC jurisdiction over events in the DPRK. However, there are breaches of the International Covenant on Civil and Political Rights (ICCPR), to which the DPRK is a signatory without any reservation, which is justiciable at the International Court of Justice. Moreover, obligations under international customary law, which do not require the ratification of any treaty, still bind the DPRK. These might give rise to state responsibility and individual criminal liability in certain circumstances.

Finally, in relation to (iv), it appears extremely unlikely that, even if a situation occurs in the DPRK in which one or more crimes within the jurisdiction of the Court appears to have been committed, there will be a referral to the Prosecutor by the UNSC. China has a veto in the UNSC and can block any referral concerning the DPRK which might be attempted.

It therefore appears unlikely that any viable route to prosecution in the ICC can be established at present.

### *ICJ*

The ICJ has limited jurisdiction despite being the World’s highest court. Jurisdiction exists only where the relevant States Party has declared it will recognise jurisdiction of the Court in relation to:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligations; and
- e. States’ declarations recognising jurisdiction may be made unconditionally or on conditions.

For the DPRK, thus, it might be possible to establish ICJ jurisdiction if a member state of the UN refers the DPRK to the ICJ, with all other conditions satisfied.

However, the DPRK is party to relatively few international treaties. One to which the DPRK has acceded (on 31<sup>st</sup> January 1989 – equivalent to having ratified) and that it may have breached is the Convention on the Prevention and Punishment of the Crime of Genocide (‘the Genocide Convention’). Alleging breaches of the Genocide Convention

may be the only viable route through which to bring a case against the DPRK under international law, but it will be necessary to identify a UN member state willing to bring the case. The COI report may prove an important tool in persuading another state to litigate; it described a responsibility falling upon other states to protect citizens of the DPRK from acts committed by its government.<sup>3</sup> However, even if such a case is brought the DPRK is likely to challenge the jurisdiction of the ICJ.

### *Universal jurisdiction*

Finally, 'universal jurisdiction' refers to the ability of some national courts to prosecute individuals for serious crimes contrary to international law. This approach would require either: (i) a 'culpable' official of the DPRK to leave the jurisdiction and be arrested in another state, or (ii) a state to try a 'culpable' official of the DPRK *in absentia* (i.e., without them being present in the state). Option (i) appears unlikely of success, as officials of the DPRK regime tend to remain within the safety (for them) of the DPRK; in addition, it would be entirely a matter of chance whether the state in which the official is found would be willing to arrest and try the official. Option (ii) could be possible but would still require the identification of a state that holds *in absentia* trials willing to hold one for an official of the DPRK.

In sum, prosecution of the DPRK for genocide in the ICJ is presently the most viable legal route.

### **(ii) Factual analysis**

Factual analysis in this report adopts the same 'reasonable grounds' standard of proof used in the COI report.<sup>4</sup>

### *Crimes against humanity*

The Rome Statute identifies a number of acts which may be categorised as crimes against humanity.<sup>5</sup> Those that are relevant in the present case are: murder; enslavement; imprisonment or severe deprivation of liberty; torture; rape and other sexual violence; persecution; enforced disappearance of persons; and deportation or forcible transfer of population.

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<sup>3</sup> UN Human Rights Council, 'Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/63, paras 86 - 7.

<sup>4</sup> UN Human Rights Council, 'Report of the detailed findings of the Commission of Inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/CRP.1, para 22.

<sup>5</sup> UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6.



Overall, there is strong evidence that the murder – state killing other than by lawful execution - of citizens of the DPRK has taken place on a significant scale. However, it may assist to go back to a number of witnesses, particularly those who included evidence relating to the disposal of dead bodies and seek further detail. There is significant evidence within the witness statements to make a case that enslavement occurred. In relation to human trafficking, eight witness statements record that a female victim was trafficked. The COI report suggests that the trafficking was the result of the vulnerability of the female population.<sup>6</sup> However, it would be prudent to go back to those victims and establish whether DPRK officials were involved. There is strong evidence to make a case of: imprisonment or severe deprivation of liberty; torture; rape and other sexual violence; persecution; and enforced disappearance. These appear to be the crimes against humanity for which there is the strongest evidence. On the basis of the witness statements, there is insufficient information available to establish whether forcible transfer of population occurred. There is significant evidence of DPRK citizens being forcibly removed from other jurisdictions. In order to reach a conclusion in relation to this possible crime, more information would need to be collected from the relevant victims about their legal status in the jurisdiction from which they were removed.

In sum, it appears that at least seven acts which may constitute crimes against humanity have been committed by state bodies of the DPRK government against citizens of the DPRK. This conclusion is consistent with the findings of the COI report.<sup>7</sup> The COI report, having clearly declared the occurrence of crimes against humanity, did not see it as necessary to explore the possibility of commission of genocide in great detail; its recommendations focused on bringing the DPRK to justice for crimes against humanity. Given that six years have passed and the DPRK has not been brought before an international tribunal in relation to crimes against humanity, this report seeks to analyse, in more detail, whether a case of genocide *could* now be made against the DPRK.

### *Genocide*

Based on the witness statements provided by NK Watch it appears that there may be evidence of a case to answer relating to charges of genocide against the government of the DPRK.

Genocide, as defined in Article II of the Genocide Convention, means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group

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<sup>6</sup> UN Human Rights Council, 'Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/63, para 44.

<sup>7</sup> UN Human Rights Council, 'Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/63, paras 75 - 6.



conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. Acts (a), (b), (c) and (d) all appear to be sufficiently evidenced within the witness statements.

It is crucial to define the group against which these acts may be occurring. One possible group is nationals of the DPRK itself, which could constitute a national, ethnical and racial group. As the potential perpetrator of the genocide would be the DPRK, this might constitute what has been termed 'autogenocide', but that has never been tested as a legal concept in any court.<sup>8</sup>

Alternatively, the victims might be a qualifying *political* group if the *majority* of victims were from one – the 'hostile'/lowest - of three social classifications established by the state's '*songbun*' system. Political groups do not currently fall under the protection afforded to specific 'protected groups' of the Genocide Convention and to be cast as such a group would require a new interpretation and/or expansion of the definition of a protected group. As a result of the homogenous nature of citizens of the DPRK, individuals classed in the *songbun* system may well *not* qualify in the way that is currently required to identify a protected group. However, there are indications that individuals of low *songbun* are treated as a distinct group by the DPRK authorities, whose membership is permanent, stable and cannot be challenged - key indicators of a protected group within the Genocide Convention definition. Whilst this suggested expansion may be arguable, it would depend upon a *successful* application to the ICJ to amend the definition of a protected group. This in turn, would require a UN member state willing to refer the DPRK to the ICJ and to make such an application. It may prove impossible to find any such willing state. Indeed, neither of the above approaches has been successfully established in an international court or tribunal to date.<sup>9</sup>

Another possibility is to identify a qualifying religious group of Christians. Christians or persons accused of being Christians represent 8.7% of the victims identified in the witness statements. If it can be shown that these victims form a substantial part of the total number of Christians in the DPRK, or if further evidence from additional Christian victims can be collected in order to qualify DPRK Christians as a 'protected group', this could provide evidence of genocide.

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<sup>8</sup> Shaw, M (2007), *What Is Genocide?* (Cambridge: Polity) 6:4, pages 76 - 77.

<sup>9</sup> Scholarship on the matter includes: Bettwy, David Shea (2011) "The Genocide Convention and Unprotected Groups: Is the Scope of Protection Expanding under Customary International Law?" *Notre Dame Journal of International & Comparative Law*: Vol. 2: Iss. 1, Article 4. Available at: <http://scholarship.law.nd.edu/ndjicl/vol2/iss1/4> [accessed 20 January 2021]; Nersessian, David (2010), *Genocide and Political Groups*, Oxford University Press; Jones, Adam, (2006) 'Genocide: A Comprehensive Introduction' (listing proposed definitions from notable scholars from 1959 to 2003, most of which describe targets of genocide as 'groups' or 'collectivities' with flexible or no qualification), available at: <https://www.mcvts.net/cms/lib07/NJ01911694/Centricity/Domain/155/Textbook.pdf> [accessed on 20 January 2021].



Finally, for any chosen approach, it would have to be established that there was intention to destroy, in whole or in part, the identified group. This mental element of the crime will always be difficult to prove. Even without direct evidence of the expressed intentions of DPRK leaders, genocidal intent *may* be inferred from relevant facts and circumstances to prove beyond reasonable doubt the existence of the intent. There are facts which *may* support a finding of such an intention to destroy: various state bodies committed the acts identified as potentially constituting genocide; those state actors were in a clear position of power and authority; certain victims were treated more harshly on the basis of their (perceived) 'political (*songbun*) identity' or religious views; there is significant evidence of deaths occurring in camps and detention centres; there is evidence that corpses were removed from camps and detention centres and disposed of in a systematic way; the witness statements record a high level of cruelty in the acts committed by the DPRK state against its own citizens. However, there are some facts which could undermine a finding of intent. In particular, the acts of the regime of the DPRK *could* be perceived as arbitrary and random, and not therefore sufficiently focused on destruction of any group to demonstrate genocidal intent. If it were possible to identify direct and explicit evidence relating to genocidal intent, such as by policy documents of the regime of the DPRK in relation to an intention to commit genocide, or further witness statement evidence as to whether the victims were treated more severely due to their ranking on the *songbun* system, this might significantly strengthen any case of genocide.

### **Conclusion**

There is very strong evidence to suggest that crimes against humanity took place, but unfortunately no viable route to prosecute such crimes in the ICC. In relation to genocide, it may be possible theoretically to assert a case of genocide at the ICC – but there is no viable route - or at the ICJ. It will be very onerous to make out a strong evidential basis for genocide and may require an expansion of the existing definition of a 'protected group' under international law.

## CHAPTER I: Introduction and overview

1. In order to establish whether a case can be brought in an international tribunal or court, such as the International Criminal Court ('ICC') or the International Court of Justice ('ICJ'), two questions must be answered in the affirmative: (i) Can a legal route be established whereby an international judicial body will have jurisdiction over the alleged crimes? and (ii) Does the evidence, at first sight, appear to demonstrate that crimes such as crimes against humanity or genocide - as defined by a convention or statute - have been committed? This report will address question (i) in section II below and question (ii) in section III below.

### Contextual circumstances of this report

2. This report follows an authoritative and relatively recent report which explored the topic of human rights violations in the Democratic People's Republic of Korea ('DPRK'): the 'Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea', commissioned by the United Nations ('UN') Human Rights Council and authored by a commission of inquiry comprising of former Australian High Court Justice Michael Kirby, Sonja Biserko<sup>10</sup> and the Special Rapporteur on the situation of human rights in the DPRK, Marzuki Darusman ('the COI report'). The COI report formed an important basis for research and analysis; this report seeks to build upon its conclusions wherever possible.
3. Six years have passed since the publication of the COI report. The time which has passed since it was published is significant. Global criticism of the regime of the DPRK has increased during this time, meaning that other states may be more willing now to openly criticise the DPRK government or take steps to bring it to justice. What is concerning, however, is that despite the significant passage of time since the COI report was published, there has been a distinct lack of action. The COI report made 19 distinct recommendations to the DPRK government. The Universal Periodic Review Working Group ('UPRWG') did report some progress by the DPRK, such as by its signing the Convention on the Rights of Persons with Disabilities and establishing 12-year free mandatory education.<sup>11</sup> However, this appears to have been the extent of progress. 83

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<sup>10</sup> Sonja Biserko is the founder and president of the Helsinki Committee for Human Rights in Serbia; has written extensively on the wars of the 1990s in the former Yugoslavia including about the Srebrenica genocide; she is a founding member of a European movement in Yugoslavia and the Centre for Anti-War Action in the Belgrade Forum for International Relations.

<sup>11</sup> Hogan Lovells, 'Crimes against humanity: An independent legal opinion on the findings of the Commission of Inquiry on Human rights in the People's Republic of Korea', May 2014, page 13.

recommendations by the UPRWG were rejected out of hand by the DPRK, including: closure of prison camps, ending public executions and ending forced labour.<sup>12</sup>

4. Moreover, the recommendations emphasised that the *'international community must accept its responsibility to protect the people of the Democratic People's Republic of Korea from crimes against humanity'* and that *'[t]he United Nations must ensure that those most responsible for the crimes against humanity committed in the Democratic People's Republic of Korea are held accountable'*.<sup>13</sup> Despite the fact that the UN adopted a resolution<sup>14</sup> in 2014, which confirmed the findings of the COI report and recommended that the COI report be put before the UNSC for consideration, and the fact that a dedicated office of the UN was set up in Seoul to investigate human rights violations in the DPRK,<sup>15</sup> the international community appears no closer to bringing the DPRK before an international tribunal.

### **Factual basis of this report**

5. The authors of this report analysed 810 files supplied by NK Watch, the majority of which were witness statements and incident complaint forms ('the witness statements') detailing incidents from 1963 to 2018. From those files, 759 individual victims were identified ('the victims'), 505 of whom were female, 254 were male.
6. Each victim was assigned a unique 8-digit identification number. The authors identified six types of case: 'Arbitrary arrest or detention'; 'Enforced or involuntary disappearance'; 'Enslavement'; 'Rape and sexual assault'; 'Torture'; or 'Other inhumane acts'. Each case was assigned a 'primary case type', usually the most serious crime committed against the individual; otherwise, the crime which appears to have the most significance to the individual victim. If relevant on the facts, each case was also assigned secondary, tertiary and quaternary case types. A table is provided below which outlines the number of cases identified within each case type.

<b>Case Type</b>	<b>Number</b>
Arbitrary arrest or detention	667
Enforced or involuntary disappearance	201
Enslavement	300
Torture	536

<sup>12</sup> *Ibid*, page 14.

<sup>13</sup> UN Human Rights Council, 'Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/63, paras 86-7.

<sup>14</sup> UNHRC Resolution 25/25 (UN Doc A/HRC/25/25), 28 March 2014.

<sup>15</sup> Hogan Lovells, 'Crimes against humanity: An independent legal opinion on the findings of the Commission of Inquiry on Human rights in the People's Republic of Korea', May 2014, 14.



Rape and sexual assault	192
Other inhumane acts	24

<b>Victim's Current Status</b>	<b>Number</b>
Missing/unknown	201
Free	554
Deceased	3

7. Patterns emerge from the data; certain case types appear together more often than others. For example, in 173 witness statements, 'Arbitrary arrest or detention' and 'Enforced or involuntary disappearance' were identified as the primary and secondary case types. Furthermore, in 502 witness statements, 'Arbitrary arrest or detention' and 'Torture' were identified as the primary and secondary case types.
8. It also became evident that a small number of state departments were responsible for the majority of the incidents: The National Security Agency was responsible in 407 cases; the State Security Department were responsible in 180 cases; and the Ministry of People's Security were responsible in 102 cases.
9. Furthermore, at least 30 of the witness statements record arrests or involuntary disappearances which occurred *after* the publication of the COI report. This information supports the above observation that little appears to have changed since the publication of the COI report. Interestingly, in a letter sent in February 2021 by Justice Kirby, Sonja Biserko and Marzuki Darusman to the Office of the United Nations High Commissioner for Human rights ('UNHRC') (and seen for the purposes of making this report) the following passage appears:

*'Economic breakdown: Partly in consequence of the endemic inefficiencies of the economy in North Korea; the impact of SC sanctions; the diversion of disproportionate expenditure to the military, to nuclear weapons and missiles; the apparent results of unacknowledged COVID-19 and isolation, North Korea continues to suffer serious recurring economic burdens. A renewal of a famine similar to that suffered in the 1990s has again demonstrated the fundamental inefficiency of North Korea's economy and its vulnerability to dislocation, corruption and distortion. Even in his address to the Eighth Party Congress in Pyongyang, Kim Jong-un in January 2021 Kim Jong-un acknowledged these serious, endemic features. They are continuing as a great burden on human rights.*

*It might have been hoped briefly, that the summit meetings with President Trump could open a possibility of tourism and the injection of financial benefits. However, any such hopes were smashed by the sudden termination of the second summit meeting in Hanoi on 28 February 2019. The consequences of famines, partly natural but mostly man-made, are especially harsh burdens on political prisoners in North Korea's prisons and detention camps. **The COI had hoped that at least some progress might have been made on this problem following its report, backed up by irrefutable satellite images. Although some rationalisation of the aggregate number of detention camps appears to have occurred since the COI report, there is no evidence of any significant overall decrease the overall in numbers of prisoners and detainees.** These are the equivalent of the former Soviet political gulags. Despite denials, their existence can be established beyond question and they demand a convincing response and access to UN officials no longer delayed' [emphasis added].*

10. As this report makes use of information from the COI report, it is important to compare the basis of the COI report with that which is analysed herewith. The evidence supplied by NK Watch to the Geoffrey Nice Foundation differs from the evidence collected by the COI report in two key ways.
11. First, the evidence supplied by NK Watch consisted primarily of witness statements, but also included 'An Overview of the North Korean Detention Facilities', prepared by NK Watch's program director, Mr. Kwan Hyung Lee, and a small number of reports published by NK Watch, The Committee for Human Rights in North Korea and Citizens' Alliance for North Korean Human Rights.<sup>16</sup> By comparison, the UN Commission of Inquiry had access to: numerous expert reports; submissions from 80 States Members of the UN; confidential policy documents; and consultations with government officials, UN entities and other humanitarian actors.<sup>17</sup> The access and resources of the COI report of Inquiry is unparalleled; this report therefore makes regular use of the factual findings and historical information contained with the COI report.
12. Second, it is noteworthy that NK Watch has been able to collect evidence from a larger pool of victims than the COI report of Inquiry accessed. Whereas the Special Commission of Inquiry received evidence from 240 witnesses in total (some of whom were expert

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<sup>16</sup> 'Effects of International Advocacy toward Human Rights of North Korea', NK Watch, 2020; David Hawk, 'The Hidden Gulag, Second Edition: The Lives and Voices of "Those Who are Sent to the Mountains"', Committee for Human Rights in North Korea, 2012; Amanda Won (translator) and Amanda Mortwedt Oh (editor), 'Criminal Law of the Democratic People's Republic of Korea', Committee for Human Rights in North Korea, 2012; David Hawk and Amanda Mortwedt Oh, 'The Parallel Gulag: North Korea's "An-Jeon-Bu" Prison Camps', Committee for Human Rights in North Korea, 2017; Joanna Hosaniak, Kyung Eun Ha, Markus Simpson Bell (translators), 'Ten Great Principles of the Establishment of the Unitary Ideology System', Citizens Alliance for North Korean Human Rights, in Life & Human Rights in North Korea Vol 62 Winter.

<sup>17</sup> UN Human Rights Council, 'Report of the detailed findings of the Commission of Inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/CRP.1, paras 12 - 20.



witnesses - the exact breakdown is not provided in the report), NK Watch has been able to collect evidence from over 700 factual witnesses. This fact may have been influenced by the progression of the global political climate noted above. Further, the fact that NK Watch is an organisation whose founders are themselves survivors of DPRK political prison camps,<sup>18</sup> may have inspired confidence in the victims from whom they received evidence. Indeed, the COI report of Inquiry commented that:

*'The most significant investigative challenge faced by the commission, aside from the inability to have access to the Democratic People's Republic of Korea, was the fear of reprisals by witnesses. Most of the potential witnesses residing outside the State were afraid to testify'.<sup>19</sup>*

This is a significant barrier which any potential litigation involving the DPRK, or its officials, will need to overcome, even when taking NK Watch's unique position into account. Although 759 witnesses is a significant number and represents an important achievement, it most likely represents a small section of the overall victims of the regime of the DPRK; the statements themselves are not lengthy and may not have included all that the witness might have wanted or been able to say in different circumstances. The conclusions drawn in this report are therefore limited by these facts, and should be considered interim conclusions, at least until further information and testimony can be collected and analysed.

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<sup>18</sup> NK Watch's website, 'About NK Watch', available at: [http://www.nkwatch.org/?lang=en&page\\_id=4291](http://www.nkwatch.org/?lang=en&page_id=4291) [accessed 4 January 2021].

<sup>19</sup> UN Human Rights Council, 'Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/63, para 19.



## Chapter II: Litigation Options

### A. International Criminal Court

13. The ICC was established by the Rome Statute and entered into force in 2002, to provide a mechanism to hold individuals to account for gross human rights violations.<sup>20</sup> The ICC has jurisdiction only over the crimes listed in the Statute, but only in specific situations. Under the Statute, the ICC can only act in four situations:

(i) Where crimes have been committed in the territory of a state which has ratified the Statute;

(ii) Where crimes have been committed by a citizen of a state which has ratified the Statute;

(iii) Where a state which has not ratified the Statute has made a declaration accepting the court's jurisdiction over the crime;

(iv) Where crimes have been committed which threaten or breach international peace and security, and the United Nations Security Council ('UNSC') has referred the situation to the ICC pursuant to U.N. Charter Chapter VII.

The ICC will have jurisdiction over a specific set of crimes including genocide and crimes against humanity. References in this section are to options (i) - (iv) above.

#### **How this is applicable to the DPRK**

14. The ICC could assert jurisdiction over individuals in the DPRK if at least one element of a crime was committed in a state that has ratified the Rome Statute. The ICC has jurisdiction only with respect to crimes committed after the entry into force of the Rome Statute on 1 July 2002.<sup>21</sup> If the DPRK becomes a party to this Statute after its entry into force, the ICC can exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for the DPRK, unless the DPRK accepts jurisdiction for acts committed prior to ratification.<sup>22</sup> A State which becomes a Party to the Statute accepts the jurisdiction of the ICC with respect to the core crimes of genocide, crimes against humanity, war crimes and the crime of aggression.<sup>23</sup>

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<sup>20</sup> UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998 ('The Rome Statute'), ISBN No. 92-9227-227-6.

<sup>21</sup> The Rome Statute, Article 11.

<sup>22</sup> The Rome Statute, Article 11(2).

<sup>23</sup> The Rome Statute, Article 12(1).



15. To further extend the possibility of the ICC accepting jurisdiction, the Rome Statute provides for a state voluntarily accepting the exercise of jurisdiction by the ICC on a case-by-case basis if and as requested.<sup>24</sup>
16. Additionally, the Court may exercise its jurisdiction with respect to a core crime in a situation which is:
  - i) referred to the Prosecutor by a State Party;
  - ii) referred to the Prosecutor by the UNSC; or
  - iii) where the Prosecutor has initiated an investigation in respect of such a crime<sup>25</sup>
17. The Court may exercise its jurisdiction in case of points (i) or (iii) above if one or more of the following States are Parties to the Statute or have accepted the Court's jurisdiction, for:
  - i) the State where crimes took place ('the territorial State'); or
  - ii) the State to whom the perpetrator belongs ('the nationality State') is a State Party.<sup>26</sup>
18. The ICC is only an available route, moreover, where the domestic judicial system of a state in which crimes that the ICC might otherwise investigate has been 'unwilling or unable genuinely to carry out the investigation or prosecution' of the alleged crime.<sup>27</sup>
19. Based on the evidence, crimes against humanity or genocide are the crimes which the witness statements most clearly demonstrate (see section III(A)-(B) below).
20. The DPRK is not a party to the Statute and has not made a declaration accepting the ICC's jurisdiction. As such, options (ii) and (iii) outlined in paragraph 13 above are not available.

### **Cross-Border Crimes**

21. The recent case concerning *Myanmar* brought at the ICC, which concerns '[t]he situation in *Bangladesh/Myanmar*', illustrates how the ICC may accept jurisdiction over a non-States Party if crimes have been committed across the border out of a state which *has not* ratified the Rome Statute into one which *has*.<sup>28</sup> These crimes would have to be physical acts that began in a party state and continued across the border into the jurisdiction of a non-States Party. The situation in *Bangladesh/Myanmar*, before the ICC on this basis, is said to

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<sup>24</sup> The Rome Statute, Article 12(3).

<sup>25</sup> The Rome Statute, Article 13.

<sup>26</sup> The Rome Statute, Article 12(2).

<sup>27</sup> The Rome Statute, Article 17.

<sup>28</sup> Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar ICC-01/19-27.



include large scale crimes against humanity, committed against victims numbering from 600,000 to 1,000,000.<sup>29</sup>

22. This is a process unlikely of success in bringing the DPRK to justice, first because it would require the ICC to contemplate accepting jurisdiction in a situation that is the reverse of the Myanmar situation. A citizen or official of the DPRK would have to be shown to have been a party to a criminal, cross-border human rights violation started in another state that *had* ratified the Statute. Of the DPRK's neighbours, Russia has signed (but not ratified) the Statute, whilst the Republic of Korea (ROK) ratified in 2002 and Japan ratified in 2007. Jurisdiction could thus theoretically be established if the physical element (as opposed to the mental element<sup>30</sup>) of a crime is started on the territory of a States Party, e.g. the ROK, with the crime continuing into the DPRK.<sup>31</sup>
23. Crimes of this general 'cross-border' nature have occurred in very different ways in the past, decades before the ICC was created: for example, the DPRK abducted Japanese citizens in the 1940s from coastal areas of Japan.<sup>32</sup> A recent attempt by Rodney Dixon QC has been made to bring China into the ICC's jurisdiction for very different modern forms of these earlier crimes which may, nevertheless, be seen as reverse in form of the Myanmar-Bangladesh crimes, and so meriting ICC investigation.<sup>33</sup> The communication to the ICC alleged that Chinese officials are responsible for acts amounting to genocide and crimes against humanity committed against Uyghurs falling within the territorial jurisdiction of States Parties to the Rome Statute.<sup>34</sup> Specifically, it is alleged that the crimes occurred in part on '*the territories of State Parties Cambodia and Tajikistan, as some of the victims were arrested (or 'abducted') there and deported to China as part of a concerted and widespread persecution and destruction of the Uyghur ethnic group*'.<sup>35</sup> In this case, however, the precondition for the exercise of the Court's territorial jurisdiction did not appear to be met

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<sup>29</sup> *Ibid.*

<sup>30</sup> Broadly speaking, the mental element of a crime encompasses issues such as intention and premeditation to commit a crime, whilst the physical element of the crime relates to acts that are physically committed by one person/group to another.

<sup>31</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar ICC-01/19-27 at [49]

<sup>32</sup> Investigation Commission on Missing Japanese Probably Related to North Korea ('COMJAN'), available at: <https://web.archive.org/web/20161101225515/> [accessed 19 January 2021]. Archived from the original on 1

November 2016, available at: <https://www.chosa-kai.jp/indexeng.htm> [accessed 19 January 2021]. See also Committee for Human Rights in North Korea (2011), 'Taken! North Korea's Criminal Abduction of Citizens of Other States', available at: [https://www.hrnk.org/uploads/pdfs/Taken\\_LQ.pdf](https://www.hrnk.org/uploads/pdfs/Taken_LQ.pdf) [accessed 19 January 2021].

<sup>33</sup> TG Chambers (2020) 'Complaint filed at International Criminal Court (ICC) on behalf of the East Turkistan Government in Exile', available at: <https://tgchambers.com/news-and-resources/news/complaint-filed-at-international-criminal-court-icc-on-behalf-of-the-east-turkistan-government-in-exile/> [accessed 4 January 2021].

<sup>34</sup> ICC, *Report on Preliminary Examination Activities 2020*, 14 December 2020, pages 18-20, available at: <https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf> [accessed 4 January 2021].

<sup>35</sup> *Ibid.*, page 18.



given that the majority of crimes alleged as the physical element of each of the crimes appear to have been committed solely by nationals of China within the territory of China (a non-States Party).

24. For now, the ICC has refused to open an investigation into this form of cross-border crime due to a lack of evidence but has said it will allow evidence to be submitted for a potential future investigation to be launched.<sup>36</sup> It is worth bearing this in mind when considering future attempts to bring the DPRK to justice and keeping up to date with any further developments in the attempt made by Rodney Dixon.
25. At present, however, bringing the DPRK into the ICC's jurisdiction by asserting that cross-border crimes have been committed does not appear a viable option. This is because, as noted above and in para 113 below, a review of the witness statements demonstrates that victims were arrested and forcibly repatriated, detained or even subjected to forced labour by the DPRK in locations outside the DPRK: China (in 442 witness statements); Russia (in 20 witness statements); Kuwait (in 2 statements); Vietnam (in 1 statement); and Malaysia (in 1 statement); all states that have not ratified the Rome Statute (Russia has only signed but not ratified it).

### **Referral by the UNSC to the ICC**

26. An alternative approach could be to use option (iv) above at paragraph 13, which would require referral of the DPRK to the ICC Prosecutor by the UNSC. This was one of the key recommendations made in the COI report.<sup>37</sup> Following the publication of the COI report, attempts were made to refer the DPRK to the ICC Prosecutor.<sup>38</sup> However, a referral of the DPRK has not yet been successful.<sup>39</sup>
27. It is, of course, possible that China will slowly withdraw support from the DPRK in the years to come. Indeed, a report commissioned by Human Liberty and undertaken by

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<sup>36</sup> The Guardian, *ICC asks for more evidence on Uighur genocide claim*, 11 December 2020, available at: <https://www.theguardian.com/world/2020/dec/11/international-criminal-icc-china-uighur-genocide-claims> [accessed 4 January 2021].

<sup>37</sup> UN Human Rights Council, 'Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/63, para 94(a).

<sup>38</sup> Sengupta, S (2014) 'United Nations Security Council Examines North Korea's Human Rights', *New York Times*, available at: <https://www.nytimes.com/2014/12/23/world/asia/united-nations-security-council-examines-north-koreas-human-rights.html> [accessed 4 January 2021].

<sup>39</sup> Whilst the DPRK was condemned following the General Assembly resolution by the UNSC, no vote for referral was ever made. See UN Security Council, "Resolution 7353," (S/PV.7353), December 22, 2014, available at: [http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_pv\\_7353.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7353.pdf) [accessed 4 January 2021]. China has attempted to remove votes via procedural motions on multiple occasions in the past. For details, see: <https://www.reuters.com/article/northkorea-rights-un/china-fails-to-stop-u-n-meeting-on-n-korea-human-rights-abuses-idUSL1N1OB0VU> [accessed 4 January 2021].

Hogan Lovells ('the Hogan Lovells report'), which looked into the reliability of the COI report suggested:

*'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'.<sup>40</sup>*

28. The Hogan Lovells report was published over 6 years ago, and the circumstances forecasted have not yet arisen. The DPRK appears to have continued committing the acts for which it was condemned by the COI report.
29. It therefore appears that, unless China ceases to hold a veto or change its foreign policy in relation to the DPRK, this is unlikely to be a viable route.

### **Merits of the pursuit of the DPRK through the ICC**

30. The ICC has jurisdiction to prosecute individuals for crimes against humanity and is a specialist court in doing so.<sup>41</sup> As a public and international court, the accounts of the victims given at the court can be heard around the world, exposing the brutality of the DPRK regime. The ICC is a victim-centred court, with more avenues for victim participation and reparation than alternatives. The ICC has also, through the *Myanmar* case, demonstrated willingness to prosecute cross-border crime.

### **Demerits of the pursuit of the DPRK via the ICC**

31. The difficulty of gathering evidence would be a hurdle for any prosecutor to overcome, amplified by the probable non-compliance of the DPRK with any ICC process.
32. The major obstacle is the DPRK's failure to ratify the Statute. In consequence, ICC jurisdiction would, in reality, require a reference by the UN Security Council. China has previously exercised its power in the UNSC to prevent such a referral even being voted on.<sup>42</sup>
33. The ICC, furthermore, has no power to arrest individuals. DPRK officials would have to be arrested by states on which individuals are located being willing to do so, sending them

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<sup>40</sup> Hogan Lovells, 'Crimes against humanity: An independent legal opinion on the findings of the Commission of Inquiry on Human rights in the People's Republic of Korea', May 2014.

<sup>41</sup> See ICC website, 'About', available at: <https://www.icc-cpi.int/about> [accessed 4 January 2021].

<sup>42</sup> See footnote 30 above.

onwards for trial at the ICC. States would have free choice of whether to do this, with the potential for political interference preventing them by the DPRK or, more likely, a DPRK-supporting state. Nonetheless, a warrant for arrest issued against officials of the DPRK by the ICC would in itself be a significant symbolic action.

34. There may also be an issue in reaching the ICC's gravity threshold. This threshold may be met if the person being tried is in a position of seniority within the regime of the DPRK or if the crimes committed are done on a large scale. To get the ICC involved in respect of cross-border crimes it would not only need to be proved that crimes were committed across a border but were done on a sufficiently large scale. Compared to *Myanmar*, the number of provable possible cross-border movements into the DPRK may not be sufficient. If Kim Jong-un was personally prosecuted, however, his seniority might be sufficient to meet the threshold.
35. Despite the DPRK not having ratified the Rome Statute, crimes against humanity may be found to have occurred under the International Covenant on Civil and Political Rights (the ICCPR).<sup>43</sup> A States Party to the Covenant may declare to the Human Rights Committee that another States Party is not fulfilling its obligations. The States must first attempt to resolve the matter amongst themselves through communication and domestic remedies. If this is not achieved the Committee shall deal with the matter by receiving submissions and information from the respective parties, and subsequently submit a report. The First Optional Protocol of the Covenant establishes an individual complaints mechanism, allowing individuals to complain to the Human Rights Committee about violations of the Covenant.<sup>44</sup>
36. Findings under the ICCPR can at best lead to a report and solution found between States themselves. It is unlikely the DPRK would engage with such a process.

### **Possible outcomes**

37. First, the mere act of announcing that the DPRK was the subject of an ICC investigation would draw global attention to the DPRK's human rights abuses. The investigation itself

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<sup>43</sup> Under Articles 21(1) of the Rome Statute, customary law is the secondary source of applicable law for the ICC. The advantage of applying customary law in some forums is that it is not necessary for a State formally to accept a rule in order to be bound by it, as long as the overall State practice on which the rule is based is widespread, representative and virtually uniform. It fills in a legal gap in protection provided to victims. This type of law can be considered at an independent people's tribunal, for example, which would not face the jurisdictional issues of an international court. It is of little relevance for present purposes.

<sup>44</sup> OPI-ICCPR, Article 1.



could place additional pressure on the DPRK to comply with human rights standards.

38. Second, an investigation could lead to the issuing of arrest warrants. This would send an important message that human rights may not be violated with impunity. Arrest warrants would also publicise specific instances of wrongdoing and specific perpetrators, thereby enhancing global awareness of the DPRK's human rights abuses.
39. Third, an investigation might just possibly result in a criminal trial or trials, and ultimately the passing of sentence(s). The process of a trial would be valuable, particularly as it may uncover new information about the situation in the DPRK.

## **B. The International Court of Justice; Gambia's referral of Myanmar to the ICJ**

40. Pursuing the DPRK in the International Court of Justice ('ICJ') would not be a criminal prosecution (as would be process at the ICC) but is instead litigation between UN member states governed by legal provisions in the UN Charter, the ICJ Statute, and the Convention on the Prevention and Punishment of the Crime of Genocide ('the Genocide Convention'). Recently, Gambia referred Myanmar to the ICJ, despite having no geographic or Gambia-citizen/victim connection to the alleged crimes. The ICJ was asked to intervene and enforce compliance with the Genocide Convention.
41. In this case, it was held that the Gambia has an interest in Myanmar's compliance with its obligations under the Genocide Convention without having to prove special interest. Myanmar, and their actions against the Rohingya, were within the ICJ's jurisdiction.
42. Under article 41(2) of the ICJ statute, the ICJ's provisional measures orders that were made in the first hearings of the Gambia-Myanmar process were automatically sent to the UNSC.
43. These orders should increase pressure on the UNSC to take concrete action in Myanmar, including through a binding UNSC resolution to Myanmar to address some of the indicators of genocidal intent.

### **How this is applicable to the DPRK**

44. Another state can bring a case against the DPRK at the ICJ if they are both signatories to the same treaty, and it is the treaty which confers jurisdiction on the ICJ. Before the ICJ may proceed with a case, it has to be shown that it has jurisdiction.
45. If a dispute of the kind envisaged in a treaty arises between the signatory States, they bring the matter to the ICJ. However, states cannot be forced to submit to the ICJ; states must consent to its jurisdiction. Myanmar and Gambia have consented by ratifying the Genocide Convention which falls under the Court's jurisdiction.
46. To pursue a claim in the ICJ, it is necessary to find another state signatory to the same treaty as the DPRK willing to invoke ICJ jurisdiction. The DPRK, having ratified the Genocide Convention, can be brought to the ICJ on an allegation of genocide.

### **Merits of pursuing the DPRK via the ICJ**

47. A state can take action without being directly affected. The state may file a request for a provisional measures order which has a binding effect for the Parties to a dispute before the ICJ. Moreover, other states may intervene, making arguments for or against the allegations made.
48. The DPRK acceded to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity on 8th November 1984. This treaty prevents limitation (i.e., a time limit for bringing a claim) from applying in relation to genocide.<sup>45</sup> Thus, even if the DPRK cannot be brought to the ICJ now, there is no time limit on attempting to do so in future.
49. Finally, under article 94 of the UN Charter, all member states must abide by ICJ decisions in cases to which they are a party, and in the event of non-compliance, the UN Security Council may '*decide upon measures to be taken to give effect to the judgment*'.

### **Demerits of pursuing the DPRK via the ICJ**

50. The challenge must come from another state. The Court has no jurisdiction to deal with applications from individuals, non-governmental organizations, corporations or any other private entity. It cannot provide them with legal advice or help them in their dealings with national authorities. This is likely to be a significant hurdle which will need to be overcome in order for the DPRK to be brought before the ICJ. However, as noted above, the COI report expressed the responsibility upon other states to protect DPRK

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<sup>45</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968, Article 1(b).



citizens in strong terms.<sup>46</sup> That such a detailed and authoritative report places this responsibility upon the shoulders of the international community could prove to be an important tool in persuading another state to litigate against the DPRK.

51. Myanmar, it should be remembered, explicitly recognised the ICJ's authority. However, as was highlighted in the COI report, the DPRK publicly stated that it would '*totally reject and disregard*' the report, prior to the report being written or published.<sup>47</sup> It is therefore clear that the DPRK is fully prepared to publicly reject the authority of international organisations and could not be relied upon to recognise the jurisdiction of the ICJ or to comply with the Court's orders and decisions.
52. Additionally, there may be a violation of provisional measures. As with Myanmar,<sup>48</sup> a state found liable in the ICJ may still reject the findings of the Court and refuse to implement them.

### **Possible outcomes**

53. Remedies available to be granted by the ICJ appear limited. Claimants can, in respect of an alleged Genocide Convention breach seek declaratory judgments or reparation.<sup>49</sup>

## **C. Universal Jurisdiction**

54. Some national courts may prosecute individuals for any serious crimes against international law, such as crimes against humanity, war crimes, genocide and torture. This is called universal jurisdiction. Certain international treaties, such as the Geneva Conventions and the Convention Against Torture, oblige states parties to enact necessary legislation to give effect to the international treaties.<sup>50</sup> Where a state has enacted the necessary legislation to do so, crimes against humanity and genocide could be prosecuted in this manner.

### **Myanmar Rohingya: Government rejects ICJ ruling**

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<sup>46</sup> UN Human Rights Council, 'Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/63, paras 86-7.

<sup>47</sup> *Ibid*, para 9.

<sup>48</sup> 'Myanmar Rohingya: Government rejects ICJ ruling', *BBC News* (23 January 2020), available at: <https://www.bbc.co.uk/news/world-asia-51229796> [accessed 4 January 2021].

<sup>49</sup> ICJ Statute article 36 (2) '[...]the jurisdiction of the Court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.'

<sup>50</sup> See, for example, Article V Convention on the Prevention and Punishment of the Crime of Genocide 1951.



55. While successful prosecutions under universal jurisdiction are not common the number of trials using universal jurisdiction has been increasing.<sup>51</sup> Moreover, defendants might, at least in theory, be tried without being present (trial *in absentia*), the trial to make something of political or humanitarian statement although discouraging the target of any arrest warrant from coming to the state of the trial.<sup>52</sup>

### **How this is applicable to the DPRK**

56. If Kim Jong-un, or another high-ranking ‘culpable’ official leaves the territory of the DPRK travelling to a state that has, and is prepared to apply, universal legislation for a relevant crime, that official *could* be prosecuted. Such persons are unlikely to leave the safety, for them, of the DPRK without guarantees of the state to which they go that they will enjoy ‘safe passage’.

### **Merits of pursuing the DPRK via Universal Jurisdiction**

57. Using universal jurisdiction could enable prosecution of high-ranking individuals in domestic criminal courts. This would most likely be cheaper and quicker than pursuing proceedings via the ICC, and probably more likely of some success if and when any trial happened. The outcome could involve imprisonment of the official.
58. As a theoretical alternative, universal jurisdiction could be used at trials *in absentia* to highlight human rights abuses in the DPRK and apply political pressure to the regime by proof of universal crimes. Conviction without the defendant being present, would theoretically allow for immediate arrest of the subject of the conviction, in this case a DPRK officials, should they enter the state that held the trial.

### **Demerits of pursuing the DPRK via Universal Jurisdiction**

59. For a successful prosecution, Kim Jong-un or other high-ranking officials would need to leave the DPRK and be detained by authorities in another state. Given that DPRK officials rarely leave the DPRK, the circumstances required for this approach may never materialise. Even if high-level officials were to leave the state, the officials may be able to

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<sup>51</sup> Máximo Langer, Mackenzie Eason, The Quiet Expansion of Universal Jurisdiction, *European Journal of International Law*, Volume 30, Issue 3, August 2019, pages 779 – 817.

<sup>52</sup> See, for example, the UK case where an arrest warrant was issued against Tzipi Livni: Ian Black and Ian Cobain, ‘British court issued Gaza arrest warrant’, *The Guardian* (14 December 2009), available at: <https://www.theguardian.com/world/2009/dec/14/tzipi-livni-israel-gaza-arrest> [accessed 4 January 2021].





claim diplomatic immunity. The extent to which this immunity would be respected would depend on the state and judiciary concerned.

60. Trying officials in their absence will always be extremely difficult given the obvious difficulty of identifying a national prosecution authority willing to indict the perpetrators. A risk-averse nation and its judiciary may be very wary of being seen to become involved in foreign policy.

### **Possible outcomes**

61. If this route is pursued, it may be effective in making a political statement. However, as an option for legal redress, it appears that conviction leading to sentence of any individual is extremely unlikely.

## **D. Summary of routes of potential legal recourse**

### **Crimes against Humanity - Jurisdiction**

62. Crimes against humanity cannot be prosecuted other than in the ICC or through universal jurisdiction (see section II(C) above). There is no possibility of bringing the DPRK to the International Court of Justice on allegations of crimes against humanity. The possibility of prosecution of crimes against humanity under Universal Jurisdiction will depend on whether a state has created domestic legislation to allow for this. The extent to which crimes against humanity have been committed in the DPRK is discussed in detail in section III(A) below.

### **Genocide - Jurisdiction**

63. There are two main routes to pursue the DPRK for genocide, either through the ICJ via the Genocide Convention or in the ICC via Article 6 of the Rome Statute ('the Statute'). The DPRK has ratified the Convention, so whilst prosecution via the ICC is unlikely it may be possible to bring the DPRK to justice at the ICJ for breach of the Convention (see section II(B) above). The extent to which genocide has been committed in the DPRK is set out in section III(B) below.

### **International customary law and state responsibility**

64. As expressed in the COI report, obligations expressed under customary law also bind the DPRK.<sup>53</sup> Definitions set out by customary international criminal law overlap to a large extent with those expressed in the Rome Statute.<sup>54</sup> Crimes against humanity and genocide are acts that give rise to state responsibility and individual criminal liability.
65. The International Law Commission's ('ILC') Articles on Responsibility of States for internationally wrongful acts provide clear guidance on State responsibility. According to the ILC's Articles on Responsibility of States, there is an internationally wrongful act of a State when conduct consisting of an action or an omission:
- (i) is attributable to the State under international law; and
  - (ii) constitutes a breach of an international obligation of the State.<sup>55</sup>
66. Although the Rome Statute only establishes individual criminal responsibility for grave international crimes, the Statute is the most recent and widely ratified global treaty defining crimes against humanity, as a codification of existing customary international law. Customary international law refers to international obligations arising from established international practices, as opposed to obligations arising from formal written conventions and treaties. As the COI report reflects, the DPRK is bound by obligations expressed in international law, including international criminal law.<sup>56</sup>
67. Articles 6 and 7 of the Rome Statute reflect customary international law in all aspects that are relevant for this report. While the DPRK has yet to ratify the Statute, these Articles apply by way of customary law, irrespective of whether the DPRK has signed or not. The crimes and their definitions in Articles 6 and 7 of the Rome Statute apply, including elements that explicitly reference individual criminal responsibility. The legal standards and definitions of the Statute are applicable to the DPRK's actions.
68. That '*international law imposes duties and liabilities upon individuals as well as States has long been recognised*'.<sup>57</sup> Thus, the DPRK has a duty not only to prevent the commission of the crimes enumerated in this report, but also to bring to justice the perpetrators of such crimes and further devise measures and safeguards to ensure that these crimes are not repeated and committed in the future. The General Assembly Resolution 3074 paragraph

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<sup>53</sup> UN Human Rights Council, 'Report of the detailed findings of the Commission of Inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/CRP.1 para 63.

<sup>54</sup> *Ibid*, para 65.

<sup>55</sup> International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts', November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Available at: <http://www.unhcr.org/refworld/docid/3ddb8f804.html> [accessed 4 January 2021].

<sup>56</sup> UN Human Rights Council, 'Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/63, para 63.

<sup>57</sup> Judgment of International Military Tribunal, Trial of Major War Criminals, 1947, Official Documents Vol. I, page 223.



(1) declares that, *'crimes against humanity, wherever they are committed shall be subject to investigation and the person against whom there is evidence [...] shall be subject to tracing, arrest, trial and if found guilty, to punishment'*.<sup>58</sup>

69. State responsibility for breaches of customary law does not, however, expose a culpable state or its leaders to any particular legal pursuit other than by the mechanisms dealt with elsewhere in this report.

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<sup>58</sup> General Assembly Resolution 3074, 'The Principles of International Cooperation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity', 3 December 1973.



## Breach of the International Covenant on Civil and Political Rights

70. There are similarly breaches of the International Covenant on Civil and Political Rights (ICCPR), to which the DPRK is a signatory without any reservation, including: torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9). General Comment 31 of the ICCPR states that when *'committed as part of a widespread or systematic violation these violations of the Covenant are crimes against humanity'*.<sup>59</sup>
71. The legal obligation under Article 2(1) ICCPR is described as:  
*'... both negative and positive in nature. State Parties must refrain from violation of the rights recognised by the [ICCPR]... any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights'*.<sup>60</sup> It is also implicit in Article 7 that States Parties have to take *'positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power'*.<sup>61</sup>
72. Article 2(2) requires States to adopt *'such legislation or other measures as may be necessary'* to give effect to the rights recognized in the ICCPR.<sup>62</sup> General Comment 31 further interprets, *'the requirement under Article 2, paragraph 2 [...] is unqualified and of immediate effect'*.<sup>63</sup> It finds that *'administrative mechanisms are particularly required to give effect to the general obligations to investigate allegations of violations promptly, thoroughly, and effectively'*.<sup>64</sup> The failure of a States Party to investigate allegations of violations could in and of itself give rise to a separate breach of the ICCPR.<sup>65</sup>
73. The February 2021 letter from Kirby, Biserko and Darusman to the UNHRC records the following:

*'As stated, North Korea formally withdrew from the NPT in 2003. It attempted to withdraw from the International Covenant on Civil and Political Rights (ICCPR) on 25 August 1997. It was*

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<sup>59</sup> General Comment No. 31(80) 'The Nature of Legal Obligations Imposed on the State Parties to the Covenant', CCPR/C/21/Rev. 1/Add. 13 26 May 2004, paras 15 and 18.

<sup>60</sup> *Ibid*, para 6.

<sup>61</sup> *Ibid*, para 8.

<sup>62</sup> ICCPR, Article 2(2).

<sup>63</sup> General Comment No. 31(80) 'The Nature of Legal Obligations Imposed on the State Parties to the Covenant' CCPR/C/21/Rev. 1/Add. 13 26 May 2004, para 14.

<sup>64</sup> *Ibid*, para 15.

<sup>65</sup> *Ibid*, paras 14 and 15.

*informed by the Secretary-General there was no mechanism for withdrawal from that treaty, so that it could only withdraw if all other parties to the NPT agreed. This is something that has not happened. North Korea appears to have accepted that it is still bound by the ICCPR – a position also adopted by the UN Secretary-General. The result is the present apparent impasse. North Korea is a member of the UN. The mechanics of its suspension, expulsion or withdrawal are not presently available. In any case, membership of the UN and of the ICCPR establish the duties of North Korea to fulfil the objectives of the UN. It must be held to those duties. That means all of the objectives, including those of, and under, the Charter for the human rights of its people and its neighbours affected by its actions’.*



## Chapter III. Factual Analysis

### A. Crimes Against Humanity

74. This section of the report analyses the witness statements in the context of the Rome Statute, in particular, the crimes against humanity as defined in Article 7. Evidentially, proving crimes against humanity may be easier than proving genocide. The Hogan Lovell report summarises the difference between crimes against humanity and genocide thus: *'[...] 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'*.

As will be noted at paragraphs 119 to 128 below, the major evidential hurdles in relation to genocide are those features which are *not* necessary in the context of crimes against humanity:

- i) demonstrating the existence of a specific group as defined in the Convention; and
  - ii) proving genocidal intent.
75. Article 7(1) of the Rome Statute defines crimes against humanity as offences which occur when particular acts (listed at Article 7(a)-(k)) are committed against any civilian population as part of a widespread systematic attack against said population, and where the perpetrator possesses knowledge of that attack. 'Attack directed against any civilian population' is defined as *'a course of conduct involving the multiple commission of acts [those listed at Article 7(a)-(k)] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'*.<sup>66</sup> Crimes against humanity are relevant in the context of the DPRK, as it does appear that there was an organised regime in the DPRK which involved state bodies (such as the State Security Department, Ministry of People's Safety, and National Security Agency) systematically arresting, detaining and treating large numbers<sup>67</sup> of the civilian population in a manner contrary to international law.
76. This section of the report will address each of the relevant acts defined under Article 7 and reach a preliminary conclusion on whether the evidence analysed is capable of demonstrating crimes against humanity. Those that are relevant in the case of the DPRK

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<sup>66</sup> The Rome Statute, Article 7(2)(a).

<sup>67</sup> From the data analysed, 747 individual victims were identified. Given the information supplied in the witness statements regarding the crowded conditions in the facilities where the victims were detained, it appears that the total numbers of victims must be significant.

are: murder; enslavement; imprisonment or severe deprivation of liberty; torture; rape and other sexual violence; persecution; enforced disappearance of persons; and deportation or forcible transfer of population.

77. This report adopts the standard of proof outlined in the COI report:  
*'The commission bases its findings on a "reasonable grounds" standard of proof. It concluded that there are reasonable grounds establishing that an incident or pattern of conduct had occurred whenever it was satisfied that it had obtained a reliable body of information, consistent with other material, based on which a reasonable and ordinarily prudent person would have reason to believe that such an incident or pattern of conduct had occurred.'*<sup>68</sup>

### **Article 7(1)(a) – Murder**

78. Murder can, in addition to direct and immediate killing, include *'imprisoning a large number of people and withholding the necessities of life, so that mass death results'*.<sup>69</sup> Deaths caused by beatings constitute murder,<sup>70</sup> as do deaths caused by malnutrition.<sup>71</sup> Proof that a person was murdered does not necessarily require proof that the dead body of that person has been recovered. All that is required to be established is that the only reasonable inference from the evidence is that the victim is dead as a result of acts or omissions of the accused.<sup>72</sup>
79. Within the material considered, seven statements record the fact that the witness observed the death of many fellow detainees and that the witness was required to clean up or in some way assist with disposal of the bodies or witnessed others doing the same. In most cases, the victim noted that the deaths appeared to result from either severe beatings or starvation. Three further statements contain references to smelling, hearing or seeing evidence of deaths in the detention centres and camps on a mass scale.
80. Evidence that certain people were never seen again is considered to be part of a circumstantial case for murder.<sup>73</sup> As noted below, 201 witness statements reviewed included accounts of enforced or involuntary disappearance. In most of these 201 instances, it is believed that the missing person is either detained, has died during detention or has been executed. Furthermore, evidence of the conditions of imprisonment

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<sup>68</sup> UN Human Rights Council, 'Report of the detailed findings of the Commission of Inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/CRP.1, para 22.

<sup>69</sup> *Prosecutor v Ignace Bagilishema*, Case No. ICTR-95-1A-T, Judgment (TC), 7 June 2001, para 90.

<sup>70</sup> *Prosecutor v Ljube Boskoski and Johan Tarculovski*, CaseNo. IT-04-82, Judgement (TC), 10 July 2008, para 331.

<sup>71</sup> *Attorney-General of Israel v Adolf Eichmann*, Judgement (District Court of Jerusalem) (1968) 36 ILR 5, para 129 – 130.

<sup>72</sup> *Krnjelac (IT-97-25)*, para 326.

<sup>73</sup> 'The length of time which has elapsed since the person disappeared' *Supra* [327].

can be part of the circumstances for murder.<sup>74</sup> As noted above, inhumane conditions were recorded in over 180 of the witness statements analysed.

81. Overall, there is strong evidence that the murder of DPRK citizens has taken place on a significant scale. It may assist to go back to some of the witnesses who provided the above-mentioned evidence and ask them more about the exact numbers of bodies they witnessed and the time periods over which they witnessed systematic removal and disposal of corpses within the camps and detention centres.

### **Article 7(1)(c) - Enslavement**

82. 'Enslavement' is defined 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, in particular women and children.<sup>75</sup> Evidence that a person has been subjected to forced labour is suggestive of enslavement. Forced labour was recorded in over 300 of the witness statements.
83. In eight witness statements, the female victims were recorded as having been trafficked and sold to Chinese men as wives. However, there is insufficient information in the witness statements to understand how this system of trafficking occurred and whether any DPRK officials were involved in the trafficking system. The COI report appears to suggest that the trafficking was not itself an act of DPRK officials, but rather was the unpleasant result of the position of vulnerability that women in the DPRK were placed in by gender-based discrimination.<sup>76</sup> Regardless, it would be prudent to return to the victims concerned and confirm the circumstances around their trafficking.
84. In conclusion, there is evidence in the witness statements that acts contrary to Article 7(c) have taken place.

### **Article 7(1)(e) - Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law**

85. One of the acts which, when committed in the circumstances outlined above, may constitute a crime against humanity is '*imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law*'.<sup>77</sup>

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<sup>74</sup> 'The general climate of lawlessness [...] where the acts were committed' *Supra*.

<sup>75</sup> The Rome Statute, Article 7(2)(c).

<sup>76</sup> UN Human Rights Council, 'Report of the detailed findings of the Commission of Inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/63, para 44.

<sup>77</sup> The Rome Statute, Article 7(e).



86. Imprisonment may contravene international law where it is arbitrary i.e., lacks a legal basis or due process.<sup>78</sup> When analysing the witness statements, arbitrary arrest or detention was recorded as a case type for 695 victims in total. Imprisonment may be arbitrary where there is evidence of a failure to reconsider detention as soon as possible using a court or administrative board, a failure to inform victims of the possibilities of release or a failure to provide a fair trial.<sup>79</sup> Such practices were identified in numerous witness statements.
87. The COI report records:  
*'In the past, it was common that the authorities sent entire families to political prison camps for political crimes committed by close relatives (including forebears, to the third generation) on the basis of the principle of guilt by association. Such cases still occur but appear to be less frequent now than in past decades'.<sup>80</sup>*
88. In one witness statement, the victim reports that her parents were falsely accused of murdering her brother, and that she was arrested and detained under the 'guilt by association' system. Another statement records that the victim and their whole family were arrested under 'guilt by association' due to suspicions that his older sister living in the DPRK was contacting his younger sister in the ROK. This arrest occurred in 2014. In another statement, the victim was said to have been subjected to surveillance under the 'guilt by association' system because his mother had previously defected. The victim in that statement recalled being treated as a criminal in DPRK society.
89. In another statement, the victim links her arrest and detention to the fact that her brother was a defector; her torture was believed to have occurred as part of the 'guilt by association' system. Finally, in another statement a victim recalls that his father became considered a political criminal due to a 'slip of the tongue' and that his entire family was arrested. The victim was 8 years old at the time. Other witness statements record victims being threatened with the arrest of their family members under the 'guilt by association' system or explain that they fled the DPRK after a family member was arrested for fear that they too would be punished. These instances of detention, or threatened detention, under the 'guilt by association' system, are highly suggestive of arbitrary detention.

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<sup>78</sup> Universal Declaration of Human Rights, Article (9); International Covenant on Civil and Political Rights (ICCPR), Article 9 and 14.

<sup>79</sup> Commission on Human Rights Resolution 1997/50.

<sup>80</sup> UN Human Rights Council, 'Report of the detailed findings of the Commission of Inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/63, para 59.

90. Imprisonment may contravene international law where there is evidence of interrogations under forced or coercive circumstances.<sup>81</sup> In over 100 of the witness statements, it was said that the victim was interrogated by state officials. In many cases, this interrogation coincided with the infliction of physical beatings, stress positions and other forms of apparent torture. Furthermore, at least four witness statements specifically mentioned being forced through physical beatings and/or stress positions to confess to a crime they had not committed.
91. Imprisonment may also contravene international law where there is evidence of confinement under inhumane conditions.<sup>82</sup> Inhumane conditions were recorded in over 180 of the witness statements analysed. Inhumane conditions will also be evidenced by instances of physical violence. In over 200 statements, victims provided evidence of physical beatings. In over 70 statements, at least one instance of the physical beating was inflicted with a weapon.
92. Imprisonment may further contravene international law where there is evidence of forced labour.<sup>83</sup> Some evidence of forced labour was established in over 150 of the witness statements analysed.
93. In conclusion, there is strong evidence in the witness statements of acts contrary to Article 7(1)(e).

#### **Article 7(1)(f) - Torture**

94. Torture is defined as the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused.<sup>84</sup> However, torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.<sup>85</sup> Torture was recorded as a case type for 536 victims in total.
95. The victim of the torture must be in the custody or under the control of the perpetrator. This was true of the victims in all 536 statements disclosing torture.

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<sup>81</sup> Universal Declaration of Human Rights, Article 5; ICCPR, Article 7; Fourth Geneva Convention, Article 31.

<sup>82</sup> ICCPR, Article 7 and 10.

<sup>83</sup> ICCPR, Article 8.

<sup>84</sup> The Rome Statute, Article 7(2)(e).

<sup>85</sup> *Ibid.*

96. Infliction of pain or suffering by acts of physical violence, such as beating, hitting, kicking, or stomping is highly suggestive of torture.<sup>86</sup> As recorded above, the witness statements provided evidence that over 200 victims were subjected to physical beatings, many of which were inflicted with weapons. Furthermore, the use of stress positions was recorded in over 100 of the witness statements analysed. In over 20 instances, this was enforced using CCTV or other surveillance.
97. Applying electric shocks to prisoners is torture.<sup>87</sup> Electric shock treatment was recorded in at least three of the witness statements. Evidence of keeping victims tightly tied up will also be suggestive of torture.<sup>88</sup> Victims reported being tied up or having their hands tied in at least 10 of the witness statements.
98. Evidence of verbal or sexual humiliation will be suggestive of torture.<sup>89</sup> Sexual harassment/humiliation was recorded in 15 witness statements.
99. Evidence of intimidation, coercion, threats and/or causing fear will be suggestive of psychological torture.<sup>90</sup> Verbal abuse was recorded in over 80 of the witness statements. Threats, including death threats, threats of extended detention and threats of physical violence, were recorded in at least 15 witness statements. Group punishment was recorded in at least 25 statements. This quantitative data builds an overall picture of environments of detention which were calculated to inflict severe mental suffering.
100. Deprivation of food,<sup>91</sup> sleep,<sup>92</sup> and medical assistance<sup>93</sup> will be suggestive of torture. Over 160 victims were recorded as being subjected to deprivation of food and/or malnutrition. Over 28 victims of water deprivation were recorded. Over 33 victims were recorded as being subjected to sleep deprivation, for periods of up to 1 week. Over 60 victims were recorded as being deprived of medical treatment when they were ill or injured.
101. Evidence of rape or sexual assault or abuse will be suggestive of torture.<sup>94</sup> Rape and/or sexual assault was recorded as the primary case type for 27 of the witness statements

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<sup>86</sup> Committee on Civil and Political Rights ('CCPR'), *Khalilova v Tajikistan*, Communication 973/01, 18 October 2005, para 6.2.

<sup>87</sup> CCPR, *Muteba v Zaire*, Communication 124/82, 24 March 1983, para 8.2.

<sup>88</sup> CCPR, *Weinberger v Uruguay*, Communication 28/1978, 29 October 1980, para 2 and 16.

<sup>89</sup> *Prosecutor v Jean-Paul Akayesu*, Case No. Ictr-96-4-T, 2 September 1998.

<sup>90</sup> Inter-American Court of Human Rights, *Tibi v Ecuador*, 7 September 2004. Series C No. 114, par. 146.

<sup>91</sup> European Court of Human Rights, *The Greek case*, *Denmark v Greece*, Communication 3321/67.

<sup>92</sup> Committee on Civil and Political Rights, *Ashurov v Tadjikistan*, 20 March 2007, para 2.2 and 6.2; See also Committee against Torture, Concluding Observations on Israel (1997), UN Doc. A/52/44, para 257.

<sup>93</sup> African Commission on Human Rights, *Malawi African Association and Others v Mauritania*, Communication 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98, 11 May 2000, para 12.

<sup>94</sup> European Court of Human Rights, *Aydin v Turkey*, Communication 23178/94, 25 September 1997.



analysed. If carried out in a discriminatory, disproportionate or humiliating manner, body searches, can constitute forms of sexual violence; if carried out for a prohibited purpose or for any reason based on discrimination leading to severe pain or suffering, these practices can amount to torture.<sup>95</sup> Furthermore, under certain circumstances, invasive body searches can amount to rape.<sup>96</sup> Searches of victims' body cavities (including of the vagina and anus) were recorded in 40 witness statements.

102. Pain or suffering will not be considered torture where it is imposed on the basis of national law and is consistent with international laws and standards.<sup>97</sup> However, it is noted that it is international law and not domestic law which ultimately determines whether a certain practice may be regarded as 'lawful'.<sup>98</sup> It is therefore not necessary to ascertain whether the acts of torture identified in the witness statements were consistent with the domestic laws of the DPRK, because ultimately almost all DPRK methods of punishment contravene international standards.
103. Acts which cause permanent damage will be given due weight when assessing whether the treatment to which the person has been subjected is torture. However, injuries being permanent is not a pre-condition for them to be considered as torture. Many of the witness statements, however, did record long-lasting physical and psychological injuries.
104. In summary, there is a strong evidential basis to suggest that victims were subjected to treatment in contravention of article 7(1)(f).

**Article 7(1)(g) - Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity**

105. As highlighted above, there were numerous examples of rape and sexual harassment or humiliation in the witness statements analysed. Furthermore, article 7(1)(g) may include instances of forced nudity.<sup>99</sup> In over 130 of the witness statements, victims were subjected to a strip search.
106. Although forced abortions are not explicitly listed in this article of the Rome Statute, it appears likely that forced abortion, especially by means of physical violence, would be

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<sup>95</sup> UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 5 January 2016, A/HRC/31/57, para.23.

<sup>96</sup> UN Human Rights Council, 'Report of the detailed findings of the Commission of Inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/CRP.1, para. 420; International Criminal Court.

<sup>97</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1.

<sup>98</sup> 1988 Report of the UN Special Rapporteur on Torture, U.N. Doc. E/CN.4/1988/17, para. 42.

<sup>99</sup> *Prosecutor v Jean-Paul Akayesu*, Case No. Ictr-96-4-T, 2 September 1998, [10].

included in *'any other form of sexual violence of comparable gravity'*.<sup>100</sup> Indeed, the COI report included forced abortions within *'other sexual violence'*.<sup>101</sup> The COI report defines a forced abortion thus: *'[f]orced abortion occurs when a woman who wants to carry her pregnancy to full term is required to terminate it against her will'*.<sup>102</sup> In three statements, a victim was subjected to a forced abortion, and in one an attempted forced abortion/miscarriage. In another statement, a victim witnessed safety agents carrying out a forced abortion upon another detainee. In another statement, 5 of the detainees were pregnant including the named victim. Of those 5 detainees, any which were suspected of having been impregnated by a Chinese national were subjected to a forced abortion. This is consistent with the findings of the UN Commission of Inquiry, which noted that *'[f]orced abortions are carried out on the premise that all repatriated'*.<sup>103</sup> In another statement, a victim was forced to clean up the corpses of infants killed during forced abortions inside the facility she was detained in. It appears that forced abortions were or are widespread in the detention facilities and prisons of the DPRK.

107. There is strong evidence that victims were subjected to rape and other forms of sexual violence in contravention of Article 7(1)(g).

#### **Article 7(1)(h) - Persecution**

108. The persecution must be 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.<sup>104</sup> The persecution must also be in connection with any act listed at Article 7(a)-(k) of the Rome Statute or any other crime within the jurisdiction of the International Criminal Court.<sup>105</sup> 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.<sup>106</sup>
109. It has been identified that a number of victims (approximately 60) were arrested and subjected to the above treatment on the basis of being Christian or being suspected of practicing Christianity or being involved with Christian organisations. Furthermore, it has been identified that women appear to have suffered particularly inhumane treatment on a different from that which was suffered by men, often being subjected to sexual violence, sexual humiliation/harassment and disproportionate strip and cavity searches. Finally,

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<sup>100</sup> The Rome Statute, Article 7(1)(g).

<sup>101</sup> UN Human Rights Council, 'Report of the detailed findings of the Commission of Inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/CRP.1, para 76.

<sup>102</sup> *Ibid*, para 424.

<sup>103</sup> *Ibid*, paras 426 and 1215.

<sup>104</sup> The Rome Statute, Article 7(1)(h).

<sup>105</sup> *Ibid*.

<sup>106</sup> The Rome Statute, Article 7(2)(g).



many of the victims were arrested and detained on the basis of their political ideologies or perceived political ideologies. On this basis, it does appear that three identifiable groups - women, Christians, and those with Western/anti-regime political ideologies were subjected to persecution on those grounds, in contravention of article 7(1)(h).

### **Article 7(1)(i) - Enforced disappearance of persons**

110. Enforced disappearance of persons is defined as *'the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time'*.<sup>107</sup> The COI report draws a distinction between the historic practice of the DPRK abducting citizens of other states, and a more recent practice of the DPRK *'abduct[ing] a number of its own nationals and nationals of the Republic of Korea from China'*.<sup>108</sup> The latter type of enforced disappearance featured heavily in the witness statements.
111. 201 witness statements recorded an instance of enforced or involuntary disappearance. In many cases a person simply disappeared from their home and was only noticed as missing weeks or even months later. There is a strong evidential basis in the witness statements to suggest that acts contrary to Article 7(d) have taken place.

### **Article 7(1)(d) - Deportation or forcible transfer of population**

112. Forcible transfer of population is defined as *'forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law'*.<sup>109</sup>
113. If more information were available, it may be possible to analyse whether deportation or forcible transfer of population (under Article 7(1)(d)) has taken place. On the basis of the witness statements, there is insufficient information available to establish whether forcible transfer of population occurred. There is significant evidence of DPRK citizens being forcibly removed from other jurisdictions. In numerous witness statements, victims were arrested in other jurisdictions and forcibly repatriated to the DPRK. Those other jurisdictions were: China (in 442 witness statements); Russia (in 20 witness statements);

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<sup>107</sup> The Rome Statute, Article 7(2)(i).

<sup>108</sup> UN Human Rights Council, 'Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/63, para 66.

<sup>109</sup> The Rome Statute, Article 7(2)(d).

Vietnam (in 1 statement); and Malaysia (in 1 statement). This is consistent with the evidence received by the COI report, which states that *'persons who are forcibly repatriated from China are commonly subjected to torture, arbitrary detention, summary execution, forced abortion and other forms of sexual violence'*.<sup>110</sup>

114. However, it is necessary under the Rome Statute for the citizens which were removed from other jurisdictions and brought back to the DPRK to have been present there legally.<sup>111</sup> This precondition is not fully revealed in evidence presently available; more information would need to be collected from the relevant victims in relation to their status in the jurisdiction from which they were removed, their routes into that jurisdiction, whether any formal process took place to establish their legal status in the jurisdiction, and their reasons for defecting from the DPRK (in order to establish whether they were refugees). The COI report suggests that many of those repatriated were indeed legally present in China as refugees:

*'The Commission therefore finds that many DPRK nationals, deemed by China as mere economic illegal migrants, are arguably either refugees fleeing persecution or become refugees 'sur place', and are thereby entitled to international protection'*.<sup>112</sup>

The actions of the Chinese government in supporting the DPRK to forcibly repatriate citizens would therefore constitute a breach of international customary law, which prohibits the forcible return of refugees to any country where they are at risk. The actions, in turn, of the DPRK government, could be considered the crime against humanity of forcible transfer of population.

### **Preliminary conclusion in relation to the occurrence of crimes against humanity**

115. On the basis of the evidence reviewed, it appears that at least seven of the twelve acts which may constitute crimes against humanity under the Rome Statute have been committed by state bodies of the DPRK government against citizens of the DPRK. This conclusion is consistent with the findings of the COI report:

*'the commission finds that the body of testimony and other information it received establishes that crimes against humanity have been committed in the Democratic People's Republic of Korea, pursuant to policies established at the highest level of the State. These crimes against humanity entail extermination, murder, enslavement, torture, imprisonment, rape, forced abortions and other*

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<sup>110</sup> UN Human Rights Council, 'Report of the detailed findings of the Commission of Inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/CRP.1, para. 1215.

<sup>111</sup> The Rome Statute, Article 7(2)(d).

<sup>112</sup> UN Human Rights Council, 'Report of the detailed findings of the Commission of Inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/CRP.1, para. 447.



*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’.*<sup>113</sup>

116. Crucially, the COI report, having made a finding of crimes against humanity, did not consider it necessary to conduct a more detailed exploration of the legal possibilities in relation to genocide:

*‘The Commission is sympathetic to the possible expansion of the current understanding of genocide. However, in light of finding many instances of crimes against humanity, the Commission does not find it necessary to explore these theoretical possibilities here’.*<sup>114</sup>

Instead, the COI report focussed its recommendations on bringing the DPRK to justice by a referral of the UN Security Council to the International Criminal Court for prosecution in relation to crimes against humanity.<sup>115</sup> However, as noted in paragraph 26 above, such a referral has not been successful in the six years since the UN report was published. For this reason, this report will seek to analyse whether genocide could factually be said to have occurred in the DPRK and to explore all legal possibilities, including a possible expansion of the current understanding on genocide. However, before doing so, it is worth noting that the February 2021 letter from Kirby, Biserko and Darusman to the UNHRC includes this passage:

*‘Absence of prosecutions: The COI report identified possibilities for bringing those responsible for at least the crimes against humanity before an international body to ensure accountability. That was what was done at Nuremburg in 1945, and elsewhere many times since. Although North Korea is not a party to the Rome Statute, establishing the ICC, there is another way to enliven the jurisdiction of that court. This involves referral of the matter to the ICC by the Security Council. That has been done in two instances (Libya and Darfur). The ICC cannot assume jurisdiction unless the SC acts. The SC cannot act unless the matter is placed on its agenda and a resolution is proposed by a member state that persuades the requisite majority of the SC to endorse a relevant resolution. Such a resolution may not be procedural. It could thus be subject to a veto. Yet, even if it might be defeated in the SC, the gravity of the cases identified by the COI suggests that, at least, they deserve serious consideration. Only then might the international community respond as its institutions envisage.*

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<sup>113</sup> UN Human Rights Council, ‘Report of the commission of inquiry on human rights in the Democratic People’s Republic of Korea’, 7 February 2014, A/HRC/25/63, para 75-6.

<sup>114</sup> UN Human Rights Council, ‘Report of the detailed findings of the Commission of Inquiry on human rights in the Democratic People’s Republic of Korea’, 7 February 2014, A/HRC/25/CRP.1, para 1158.

<sup>115</sup> UN Human Rights Council, ‘Report of the commission of inquiry on human rights in the Democratic People’s Republic of Korea’, 7 February 2014, A/HRC/25/63, para 94(a).





*The moral opprobrium for inaction is then shifted from those who seek action but cannot secure it to those who prevent it from happening. Institutions generally abhor ineffectiveness. However, effectiveness sometimes takes a period to manifest itself. Those who would defend tyranny from the requirements of answerability should ultimately be made to wear the shame of maintaining the obstacles'. [emphasis added]*

## **B. Genocide**

117. This section of the report will seek to analyse the witness statements in the context of genocide. Whilst more difficult to prove, owing to the specific mental element to be proved on the part of the perpetrator that presents evidential hurdles, genocide might be the most viable route to a possible legal resolution. This is despite the COI report, which falls short of condemning the DPRK explicitly for genocide.<sup>116</sup>
118. The crimes of genocide are outlined within both Article II of the Genocide Convention and Article 6 of the Rome Statute and the definition remains the same in both sources. For clarity, the Genocide Convention will be referenced throughout this section. Article II states that genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
- a) Killing members of the group;
  - b) Causing serious bodily or mental harm to members of the group;
  - c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - d) Imposing measures intended to prevent births within the group;
  - e) Forcibly transferring children of the group to another group.
119. International law has typically upheld a narrow definition of what constitutes a 'protected group' for the crime of genocide. It appears that genocide would be difficult to argue in this case without expanding the definition of the circumstances in which in the Genocide Convention can be applied. There are two ways in which this expansion may be achieved: (i) arguing for a finding of 'autogenocide'; or (ii) arguing that 'politicide' (in respect of the 'hostile' class of the *songbun* system) should fall under the definition of genocide. Due to the homogenous ethnic, cultural and linguistic nature of the DPRK, individuals classed in the *songbun* system may not differ on any of the objective categories that signify a protected group, but on the basis of the subjective perceptions of the members of these groups. The COI on Darfur noted that as broader interpretations of the concept of

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<sup>116</sup> UN Human Rights Council, 'Report of the detailed findings of the Commission of Inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/CRP.1, paras. 1155-9.



'protected groups' by the two International Criminal Tribunals has so far not been challenged by States, 'It may therefore be safely held that interpretation and expansion has become part and parcel of international customary law.'<sup>117</sup>

### Defining the protected group

120. It is possible to argue for expansion of genocide to include 'autogenocide', the acts of attempting to destroy part or whole of one's own group.<sup>118</sup> All of the witness statements provided are by nationals of the DPRK who, due to the state being exceptionally homogenous, would probably be classed as a single national, ethnical and racial group. There is no legal precedent for a determination of genocide as 'autogenocide'; when prosecuting crimes committed under the Khmer Rouge in Cambodia, autogenocide was not pursued in favour of prosecuting for the genocide of the Vietnamese minority instead.<sup>119</sup> However, the fact that autogenocide has not yet been found by an international tribunal does not preclude any future legal action from seeking to establish it. It does, however, mean that it may be a very complex (and therefore costly) argument to put forward.
121. Alternatively, the victims in this case could be considered part of a political group due to the existence of the *songbun* system, where the state places citizens of the DPRK into three broad social classes.<sup>120</sup> The ascribed status of the *songbun* system determines an individual's residency, occupation, access to food, health care, education and other services.<sup>121</sup> Whilst *songbun* is not formally encoded in law, it is found in internal guidance and training documents<sup>122</sup> and appears to be an important factor in considering the punishment for a criminal offence.<sup>123</sup> Might the lowest *songbun* cadre, the one most imprisoned, count - to some purpose - as a political group, even though political groups do not currently fall under the protection of the Genocide Convention? A lowest cadre *songbun* group identity could be similar in several ways to characteristics to other groups that are protected by the Genocide Convention and Statute. Might establishing the existence of such a 'political' group serve a purpose given that expanding protected

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<sup>117</sup> 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General', 25 January 2005, para. 501.

<sup>118</sup> Case No. 002/19-09-2007/ECCC/TC.

<sup>119</sup> *Ibid.*

<sup>120</sup> UN Human Rights Council, 'Report of the detailed findings of the Commission of Inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/CRP.1, para 271

<sup>121</sup> *Ibid.*, para. 117

<sup>122</sup> *Ibid.*, para. 279

<sup>123</sup> *Ibid.*, para. 280



groups to political groups – and extension of genocide to ‘politicide’ – was encouraged or supported by the COI report:

*‘In the case of the DPRK’s political prison camps, extermination has been based principally on imputed political opinion and state-assigned social class. Such grounds are not included in the contemporary definition of genocide under international law. However, the notion of eliminating an entire class of people by deliberately inflicting on them conditions of life calculated to bring about their physical destruction evokes notions akin to ‘genocide’. The authorities have also prevented and terminated births within the group by generally prohibiting inmates from reproducing and systematically enforcing this prohibition through forced abortions and infanticide.*

*Such crimes might be described as a “politicide”. However, in a non-technical sense, some observers would question why the conduct detailed above was not also, by analogy, genocide. The Commission is sympathetic to the possible expansion of the current understanding of genocide. However, in light of finding many instances of crimes against humanity, the Commission does not find it necessary to explore these theoretical possibilities here’.*<sup>124</sup>

122. In a panel discussion at a Centre for Strategic International Studies event commemorating the one year anniversary of the report, Justice Kirby said he was disappointed that the Commission was constrained by a ‘very narrow definition’ of what constitutes genocide as they drafted their findings and that ‘[i]t is a 1948 definition [which] was not wide enough for us to find genocide’.<sup>125</sup> This statement by Justice Kirby lends strength to an argument that the Genocide Convention contains an outdated definition in respect of protected groups or should be interpreted more broadly. Although the commission of inquiry was limited to exploring the abuses of the DPRK authorities within the bounds of the existing legal framework, any proposed prosecution or litigation of the DPRK is not so limited. NK Watch could seek to establish an expanded definition to include the political groups identified by Justice Kirby. If amendment is favoured, ‘a request for revision of the present Convention may be made at any time by any Contracting Party by means of notification in writing addressed to the Secretary-General’.<sup>126</sup>

123. 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:<sup>127</sup>

*‘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*

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<sup>124</sup> UN Human Rights Council ‘Report of the detailed findings of the Commission of Inquiry on human rights in the Democratic People’s Republic of Korea’, 7 February 2014, A/HRC/25/CRP.1, paras. 1157-8.

<sup>125</sup> Victor Cha & Marie DuMond, *The Road Ahead - A Conference Report of the CSIS Korea Chair* (Rowman & Littlefield, 2015), p12.

<sup>126</sup> The Genocide Convention (1948), Article XVI.

<sup>127</sup> ICTY, *Prosecutor v Goran Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 70.



*the point of view of those persons who wish to single that group out from the rest of the community.'*

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124. Those with lower *songbun* may not be aware of their precise status but are more likely to be aware of restrictions and limitations that they encounter, indicating that they are viewed as a distinct group by the DPRK authorities. Therefore, useful parallels could be drawn between social classification under *songbun* and the artificial classification imposed on Hutus and Tutsis in Rwanda. The International Criminal Tribunal for Rwanda ("ICTR") recognized that the Hutus and Tutsis were not technically separate ethnic groups, in that they shared a common language and culture.<sup>129</sup> The perpetrators of the genocide viewed the Tutsis as having a distinct ethnicity due to this artificial distinction being imposed upon them by previous colonialist governments and the ICTR held that the Tutsis were a separate ethnic group for the purposes of genocide.<sup>130</sup> Applying this to the DPRK, the differences between the social classes in the *songbun* system are also based on artificial distinctions created by the ruling regime. Whilst it is unlikely that those of low *songbun* could be classified as a different ethnicity, they are clearly a permanent and stable group whose membership is not able to be challenged - key indicators of a 'protected group'.<sup>131</sup> Therefore, it could be argued that, taking into account the objective and subjective considerations, the definition of a 'protected group' should be expanded to cover the *songbun* system in this manner. This would also be in line with the object and scope of the rules on genocide: to protect from deliberate annihilation, essentially stable and permanent human groups, which can be differentiated on one of the grounds contemplated by the Genocide Convention and the corresponding customary rules.
125. However, whilst the proposed expansion is potentially arguable, it would depend upon a successful application to amend the definition of a protected group. This in turn, would require the identification of a UN member state willing to refer the DPRK to the ICJ to intervene and enforce compliance with the Genocide Convention.
126. Finally, there are 66 victims who have been identified as either being Christian or suspected of being Christian that were arrested and tortured, in many cases more severely, due to their belonging to a religious group. Indeed, such communities were

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<sup>128</sup> *Ibid.*

<sup>129</sup> *Developments in the Law: International Criminal Law: IV. Defining Protected Groups Under the Genocide Convention*, (2001) 114 *Harv. L. Rev.* 2007, page 2016.

<sup>130</sup> ICTR, *Prosecutor v Clément Kayishema and Obed Ruzindana* (Case No. ICTR-95-1-T), Judgment, 21 May 1999.

<sup>131</sup> ICTR, *Prosecutor v Jean-Paul Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 511.



eradicated in past purges.<sup>132</sup> That Christians are subjected to harsher treatment is supported by the COI report:

*'Apart from the few organized State-controlled churches, Christians are prohibited from practising their religion and are persecuted. People caught practising Christianity are subject to severe punishments in violation of the right to freedom of religion and the prohibition of religious discrimination'.<sup>133</sup>*

127. If it can be shown that these Christian victims either form a significant part of the total number of Christians in the DPRK, or if further evidence from additional Christian victims can be collected, this could provide an alternative route to proving genocide.
128. Proving genocide might depend upon the suggested expansion of the definition of a 'protected group', it does appear that there is evidence, based on the witness statements provided by NK Watch, of a potential case to answer against the government of the DPRK. The acts outlined in Article 6 (a) - (c) of the Rome Statute will be briefly discussed as charges of genocide against the government of the DPRK.

### **Article II (a) - Killing members of the group**

129. As previously stated, seven statements record the fact that the victim witnessed the death of many fellow detainees and that the victim was required to assist with the disposal of bodies or witnessed others doing the same. In most cases, the victim noted that the deaths appeared to result from either severe beatings or starvation. Three further statements contain references to smelling, hearing or seeing evidence of deaths in the detention centres and camps on a mass scale.
130. Additionally, there are 201 cases of 'Enforced or involuntary disappearance' with at least 4 of those potentially having been killed. As the location of these victims is unknown, it can be taken as circumstantial evidence for killings of members of a group. As previously stated, evidence of the inhumane conditions of imprisonment (appearing in 180 statements) could also be evidence for the circumstances for murder.<sup>134</sup> There is strong evidence that killings of the DPRK citizens have been occurring in large numbers for some time.

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<sup>132</sup> UN Human Rights Council, 'Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/63, para 1095.

<sup>133</sup> *Ibid*, para 31.

<sup>134</sup> ICTY, *Prosecutor v Krnojelac* Case No. IT-97-25, Judgement (TC) para 326; 'The length of time which has elapsed since the person disappeared', *Supra* para 327.



## **Article II (b) - Causing serious bodily or mental harm to members of the group**

131. After analysing the witness statements, 536 instances of Torture, 192 instances of Rape and Sexual Assault and 300 instances of Enslavement have been identified. Threats, including death threats, threats of extended detention and threats of physical violence, were recorded in at least 15 witness statements. 160 victims were recorded as being subjected to deprivation of food and/or malnutrition and 28 victims of water deprivation. There were 33 instances of sleep deprivation, for periods of up to 1 week and 60 instances of victims being deprived of medical treatment when they were ill or injured. Many survivors have detailed long-term medical complications due to the inhumane conditions they were subjected to, with many statements discussing the ongoing psychological impact of these acts and incidents.
132. It is clear from the large number of victims and the particular cruelty of those perpetrating this violence that these acts would cause serious bodily and mental harm to the victims. Indeed, the witness statements detail injuries amongst victims, ranging from long-term psychiatric disorders to permanent bodily disablement. This supports a similar finding in the COI report that *'decisions, actions and omissions by the State and its leadership caused the death of at least hundreds of thousands of people and inflicted permanent physical and psychological injuries on those who survived.'*<sup>135</sup>

## **Article II (c) - Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.**

133. In addition to the inhumane treatment detailed above, the witness statements have detailed 200 victims of physical torture, such as beating, hitting and kicking, many of which were also beaten with weapons. The combination of physical torture, starvation and/or food deprivation, sleep deprivation, the deprivation of medical treatment and the unsanitary conditions of the prison camps are clearly conditions of life calculated to bring about its physical destruction. The DPRK is known to use deliberate starvation as a means of control and punishment in detention facilities which has resulted in the deaths of many prisoners.<sup>136</sup> These conditions seem to be uniform across the many prison camps across the DPRK and have remained unchanged since the 1960s to the present day.
134. The witness statements contain clear evidence of the above four categories of acts which may amount to genocide

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<sup>135</sup> UN Human Rights Council, 'Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/63, para 690.

<sup>136</sup> *Ibid*, para 689.



## Article II (d) - Imposing measures intended to prevent births within the group

135. As to this qualifying act, and as has been outlined in paragraph 106 above, there was significant evidence within the witness statements of forced abortions. They were often inflicted using violence such as kicking of the victim's stomach and were commonplace within the detention centres and camps of the DPRK. Furthermore, there is also evidence within the witness statements of infanticide being carried out. The COI report defines infanticide as '*a mother or other person killing an infant soon after birth*'.<sup>137</sup>
136. In one witness statement, the victim witnessed another detainee give birth to a baby in the Chongjin Labour Detention Facility, only for guards to take the infant immediately after birth and throw it into a hole. In another statement, the victim witnessed another detainee giving birth and the guards then forcing other detainees to drown the infant in a bowl of water. This evidence is consistent with the COI report which explains that forced abortions were common where repatriated women were pregnant and suspected of having conceived with a Chinese man. The report records that where abortion failed or the pregnancy was too late to carry out an abortion when the female detainee was arrested, infanticide instead occurred. The COI report considered that this evidence could be indicative of genocide taking place:  
*'In the case of the DPRK's political prison camps, extermination has been based principally on imputed political opinion and state-assigned social class. Such grounds are not included in the contemporary definition of genocide under international law.<sup>138</sup> However, the notion of eliminating an entire class of people by deliberately inflicting on them conditions of life calculated to bring about their physical destruction evokes notions akin to "genocide". The authorities have also prevented and terminated births within the group by generally prohibiting inmates from reproducing and systematically enforcing this prohibition through forced abortions and infanticide'*.<sup>139</sup>
137. The evidence collected by NK Watch in relation to forced abortions and infanticide could therefore be used to support litigation in relation to genocide. It may assist to go back to female detainees who were imprisoned for long periods of time or were imprisoned in detention facilities and camps where other victims have reported forced abortions and infanticide, to ask victims specifically about whether they witnessed either of these acts.

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<sup>137</sup> UN Human Rights Council, 'Report of the detailed findings of the Commission of Inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/CRP.1, para 424.

<sup>138</sup> In the drafting of the Rome Statute, the delegate of Cuba proposed to expand the definition to political and social groups, but this proposal found no support with other delegations. See William Schabas, *Unspeakable Atrocities*, p. 106.

<sup>139</sup> UN Human Rights Council, 'Report of the detailed findings of the Commission of Inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/CRP.1, para 1157.



**The intention to destroy, in whole or in part, that national, ethnical, racial or religious group, as such**

138. This is the ‘mental element’ of the crime and proving it would, in this particular case, form a substantial part of litigation. At present there is a lack of direct evidence of any official statements or policies regarding an intention to destroy or of meetings where genocidal acts were planned. However, genocidal intent may be inferred from relevant facts, circumstances and even a pattern of purposeful action<sup>140</sup> that *can* lead beyond reasonable doubt to the existence of the intent, provided that it is the only reasonable inference that can be made from the totality of the evidence.<sup>141</sup> These relevant facts and circumstances will be discussed below, along with a number of potential problematic relevant facts that could undermine the inference of genocidal intent.

**Relevant facts relating to intention**

139. It is evident from the witness statements that these victims were subjected to a number of potential crimes committed by various state bodies of the DPRK government between 1963 and 2018. These state actors were in a clear position of power and authority over the victims and would have provided a high level of logistical support in both the transport of prisoners around the DPRK and their detention and subsequent treatment. Many victims have reported being detained, transported to and tortured at several detention houses and camps throughout the state during their detention; a fact also supported by the COI report.<sup>142</sup> This evidence indicates that such movements are likely standard protocol in the handling of detainees.
140. The Unitary Ideology System which prescribes the norms of which govern the lives citizens require them to:

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

Whilst this does not directly refer to any particular group, the provision effectively compels state organisations to treat those who are ‘hostile’ to the norms of the regime as the enemy and to treat them as such.<sup>143</sup>

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<sup>140</sup> ICTR, *Prosecutor v Clément Kayishema and Obed Ruzindana* Case No. ICTR-95-1-T, Judgment, 21 May 1999, para. 93.

<sup>141</sup> *Prosecutor v Tharcisse Muvunyi*, Case No. ICTR-00-55A-T, Judgment (TC), 11 February 2009, para 29.

<sup>142</sup> UN Human Rights Council, ‘Report of the commission of inquiry on human rights in the Democratic People’s Republic of Korea’, 7 February 2014, A/HRC/25/63 para 703.

<sup>143</sup> Collins Report, para. 47.





141. Those victims whose behaviour undermined the DPRK ideology, were also routinely treated more severely and subjected to torture and enforced disappearances. These victims were mainly those attempting to defect to the ROK but also included those who were either identified as Christian or suspected of being Christian. The COI report describes how the DPRK has deployed considerable resources to ensure the arrest, capture and punishment of Christians and others considered to introduce subversive influences. This evidence could indicate a widespread and systematic state policy in both the treatment and selection of political prisoners and in turn could imply the existence of a plan to commit genocide by the state.<sup>144</sup>
142. Seven victims witnessed the death of many fellow detainees and were required to assist with the disposal of bodies or witnessed others doing the same. In most cases, the victim noted that the deaths appeared to result from either severe beatings or starvation. Three additional statements contain references to evidence of deaths in the detention centres and camps on a mass scale. Evidence of a system of consistent killings<sup>145</sup> as well as the disposal of bodies could also potentially indicate genocidal intent.<sup>146</sup>
143. 759 victims have provided witness statements and unmistakably represent only a small proportion of the potential total number of victims. Indeed, the COI report approximates that *'between 80,000 and 120,000 political prisoners are currently detained in four large political prison camps.'*<sup>147</sup> That figure does not account for those who are detained within the many detention centres and waiting rooms of various state bodies, or those who have been detained in the past and released. The 759 victims identified in this report may therefore account for less than 1% of the overall victims of the detention centres and camps. All victims identified as citizens of the DPRK and might be considered as forming a numerically large and significant part of that group. Victims come from all over the DPRK, from both genders, a broad range of ages and were - crucially - civilians.<sup>148</sup>
144. The most compelling facts relate to the level of particular cruelty of the acts perpetrated by the state of the DPRK against its own citizens. Many victims were subjected to a combination of physical torture, starvation and/or food deprivation, sleep deprivation, the deprivation of medical treatment and the widespread unsanitary conditions of the prison camps. Evidence was also recorded of the use of stress positions; victims being tied

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<sup>144</sup> *Prosecutor v Zdravko Tolimir*, Case No. IT-05-88/2-A, Judgement (AC), 8 April 2015, paras. 248-255, 264-269.

<sup>145</sup> *Prosecutor v Mikaeli Muhimana*, Case No. ICTR-95-1B-T, Judgement (TC), 28 April 2005, para. 496.

<sup>146</sup> *Prosecutor v Radislav Krstić*, Case No. IT-98-33-T, Judgement (TC), 2 August 2001, para. 547.

<sup>147</sup> UN Human Rights Council, 'Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/63, para 61.

<sup>148</sup> *Prosecutor v Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgement (TC), 17 January 2005, paras. 674 - 675.



up for extended periods of time and victims being subjected to electrocution or electric shock treatment.

145. A large number of female victims reported varying levels of sexual violence, sexual harassment and forced invasive cavity searches. Three victims were subjected to a forced abortion, and one an attempted forced abortion/miscarriage. In another statement, a victim witnessed agents carrying out a forced abortion upon another detainee. A number of witness statements describe how if women were suspected of having been impregnated by a Chinese national, they were subjected to a forced abortion.
146. One victim explains how she was forced to clean up the corpse of infants killed during forced abortions inside the facility she was detained in. Another victim describes how she gave birth prematurely after being severely beaten whilst detained. The new-born baby was then placed outside and left to die. The victim was immediately returned to her enforced labour duties, later collapsing from exhaustion. The victim later found the remains of her child had been dismembered by wild rats.
147. Many victims detail the extensive injuries they received including broken limbs, having their teeth knocked out, having pins inserted into their body and being beaten unconscious or until they are permanently disabled. One statement described how another prisoner's spine was broken and the state agents used a wooden pole to hold him upright to continue the interrogation and torture. It is clear that there is substantial evidence of systematic and widespread acts of extreme and particular cruelty that disabled the victims and rendered them defenceless. As a consequence, these acts would not only cause serious and long-term physical and psychological harm to the victims, but also to their families and communities. The acts occurred across many detention facilities and prison camps throughout the state and during the whole time period covered by the witness statements (1963 - 2018). Therefore, as these acts are not confined to small or localised areas, they could be shown to be a state plan or protocol and evidence of the requisite genocidal intent.<sup>149</sup>
148. Finally, as noted by the COI report, the levels of control exerted by the state of the DPRK over its citizens are exceptionally high.<sup>150</sup> Acts committed by officials at the lower levels of the DPRK regime should be viewed within this context. It is harder to make a compelling argument that the acts of, for example, prison officers and officials of the State Security Department are random and arbitrary when viewed within the context of state control in the DPRK. This control is exerted through indoctrination, lack of access to

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<sup>149</sup> *Prosecutor v Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement (TC), 21 May 1999, para. 93

<sup>150</sup> UN Human Rights Council, 'Report of the detailed findings of the Commission of Inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/CRP.1, para 354.



alternative sources of information and laws which require permission for even basic freedoms, such as travel between provinces of the DPRK.

### **Facts that could undermine intention**

149. The primary concern is that whilst the above criminal acts are clearly widespread, the application of these acts to the victims does not appear uniform and some killings seem arbitrary or random which could negate allegations of genocide.<sup>151</sup> Many victims were arrested, detained and released multiple times, even those who attempted to leave the state and defect to the ROK. Whilst others were arrested and disappeared following relatively lower-level infractions. The COI report detailed evidence of how those with higher *songbun* received lighter punishments than those with lower *songbun*, even after committing the same crime.<sup>152</sup> Individuals with lower *songbun*, approximately 27% of the population<sup>153</sup>, are assumed to be 'built' to do bad things, and will receive harsher punishments.<sup>154</sup> In order for conclusions to be made on whether the victims are indeed targeted, treated more severely or killed due to their ranking on the *songbun* system, therefore indicating these acts are not arbitrary or random, further evidence is required of the *songbun* status of each victim

150. In counterbalance of this concern, it is worth noting that the COI report, which, as explained above at paragraphs 10-12, had a far higher level of access to expert testimony and information from UN member states, did not see the human rights violations analysed as random or arbitrary:

*'The commission finds that **systematic, widespread** and gross human rights violations have been and are being committed by the Democratic People's Republic of Korea. In many instances, the violations found entailed crimes against humanity based on **State policies**' [emphasis added].<sup>155</sup>*

*'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**' [emphasis added].<sup>156</sup>*

Furthermore, the COI report saw the human right violations as part of a contrived political system of oppression:

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<sup>151</sup> *Prosecutor v Goran Jelisić*, Case No. IT-95-10-T, Judgement (TC), 14 December 1999, paras. 91-98, 102 – 108.

<sup>152</sup> UN Human Rights Council, 'Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/63, para 280

<sup>153</sup> KINU White Paper, p.208.

<sup>154</sup> UN Human Rights Council, 'Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/63, para 280

<sup>155</sup> UN Human Rights Council, 'Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/63, para 24.

<sup>156</sup> UN Human Rights Council, 'Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/63, para 85.



*'These are not mere excesses of the State; they are essential components of a political system that has moved far from the ideals on which it claims to be founded. The gravity, scale and nature of these violations reveal a State that does not have any parallel in the contemporary world'.<sup>157</sup>*

151. That such an authoritative and thorough inquiry reached such conclusions in relation to the human rights violations in the DPRK, could prove to be highly persuasive in convincing an international tribunal, such as the ICJ, that genocidal intention on the part of the DPRK government did indeed underpin their actions. It does not matter that the COI report did not itself reach a conclusion around genocide; the human rights violations referred to in the COI report are similar in type to those upon which this report concludes that genocide may be alleged.
152. For example, the COI report details a range of witness and expert testimony which suggests that the *'DPRK authorities' disdain for ethnically mixed children* is the reason for their use of forced abortions and infanticide where women are repatriated from China.<sup>158</sup> This evidence suggests that abortions and infanticide did not occur due to random cruelty on the part of individual prison officials but were a part of wider government policy in relation to ethnicity. Furthermore, the COI report also highlights the fact that food deprivation is not simply an indicator of poverty or insufficient supply, but is a tool calculated to further the agenda of the regime:  
*'The state's monopolization of access to food has been used as an important means to enforce political loyalty [...] the Democratic People's Republic of Korea maintains a system of inefficient economic production and discriminatory resource allocation that inevitably produces more unnecessary starvation among its citizens.'<sup>159</sup>*
153. Such evidence would support an argument that the actions of the DPRK officials recorded in the witness statements are not random or arbitrary, but part of a wider system of oppression, punishment and, ultimately, destruction.

### **Preliminary conclusion in relation to the occurrence of genocide**

154. In summary, the witness statements provide clear evidence of criminal acts which *could* amount to genocide. Due to the existence of the *songbun* system, it *could* be argued that the victims in this case could be considered part of a political group. Political groups do not currently fall under the protection of the Genocide Convention and would require an

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<sup>157</sup> Para 80.

<sup>158</sup> UN Human Rights Council, 'Report of the detailed findings of the Commission of Inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/CRP.1, para 426.

<sup>159</sup> UN Human Rights Council, 'Report of the detailed findings of the Commission of Inquiry on human rights in the Democratic People's Republic of Korea', 7 February 2014, A/HRC/25/CRP.1, para 1213.



interpretation and expansion of the definition of a 'protected group'. The artificial distinctions ascribed in an individual's *songbun* status dictates their residency, access to food and appears to be an important factor in considering the punishment done to them for any criminal offence. Individuals of low *songbun* face severe restrictions and limitations in society, indicating that they are viewed as a distinct group by the DPRK authorities. It could be argued that the definition of a protected group should be expanded to cover the *songbun* system in this manner. However, this would also depend upon a successful application to the ICJ to amend the definition, which in turn would rely on the identification of a UN member state willing to refer the DPRK to the ICJ. Without direct and explicit evidence relating to the genocidal intent to destroy these groups, it would need to be inferred from relevant facts. There are a number of key relevant facts in the evidence that could infer genocidal intent, however further information and evidence is required in order to address the facts that would undermine any inference of intent.

### C. Further evidence and information required

155. This report is an interim report, intended to provide NK Watch with preliminary conclusions based on the evidence reviewed thus far. This report does highlight several areas where a thorough analysis requires additional evidence. For ease of reference, those areas are summarised herein:
- i) More evidence is required in relation to murder/mass killing. It would assist to return to victims who are known to have spent long periods in detention and/or to have been detained in camps where other witnesses record mass deaths/large numbers of bodies to ask specifically about this. How many deaths occurred on average each day/week/month? How many bodies were seen? Over how long a period? Who removed the bodies? What did witnesses perceive which gave them the impression deaths were occurring? (see paragraphs 78 to 79, 129 to 130 and 142).
  - ii) More evidence is required in relation to the witnesses who mention being trafficked in their evidence. Who trafficked them? How did this come about? Were officials of the DPRK involved? (see paragraph 83).
  - iii) More evidence is required in relation to the legal statuses of persons arrested in jurisdictions outside the DPRK and forcibly transferred back into the DPRK. How did those persons come to be in the other jurisdictions? Had they regularised their statuses in

the foreign jurisdiction? Why did they leave the DPRK? Do they consider themselves to be refugees? (see paragraphs 113 to 114).

- iv) More evidence is required in relation to the *songbun* system. How was each witness classified in terms of the *songbun* system at the time of their arrest? Do they think their societal/cultural status within the *songbun* system impacted upon their arrest/treatment? Why? (see paragraphs 121 to 124 and 149).

## Conclusion

156. There is clear evidence that the regime of the DPRK has committed a range of criminal acts against its own citizens. Recorded acts appear to constitute seven of the twelve crimes against humanity defined by the Rome Statute and seem to be committed by state bodies of the DPRK government against citizens of the DPRK. The COI report also supports a conclusion that there is strong evidence of crimes against humanity having taken place in the DPRK. However, as the DPRK is not a party to the Rome Statute, and the UNSC has not referred the DPRK to the ICC, the ICC cannot assert jurisdiction over the perpetrators in the DPRK in order to prosecute these crimes.
157. Overall, the evidence which was supplied by NK Watch appears to be factually consistent with that which was received and presented in the COI report. Indeed, the conclusion in relation to crimes against humanity is also consistent with the conclusions of the COI Report. However, it is highly unsatisfactory that, despite a detailed and authoritative report condemning the DPRK for crimes against humanity and calling for the UNSC to refer the DPRK to the ICC, six years on from the COI report the DPRK has not adopted many of the recommendations made by the COI report. Additionally, the international community is no closer to bringing the DPRK or its officials before an international tribunal. This report therefore seeks to address the question which the COI report decided to leave unanswered: is there a novel legal route through which the state of the DPRK can be held accountable for genocide?
158. Whilst genocide is more difficult to prove than crimes against humanity, owing to the specific mental element on the part of the perpetrator that is not easy to prove, the DPRK has ratified the Genocide Convention which could provide two avenues for legal recourse: either via referral to the ICJ, or; by any national court using universal jurisdiction to prosecute these alleged crimes under international law. The facts in this case could support a prosecution relating to crimes amounting to genocide as there is clear evidence

of a range of cruel and extreme acts from which it *could* be inferred were committed with the intent to destroy, one of the key elements of genocide.

159. These acts must be committed with the intent to destroy a national, ethnical, racial or religious group, namely a 'protected group' defined within the Genocide Convention. The identified victims may be classed as forming part of a political group, due to the existence of the *songbun* system where the state places its citizens into three broad social classes. Political groups do not currently fall under the protection of the Genocide Convention and would require an interpretation and expansion of the definition of a 'protected group'. Due to the homogenous ethnic, cultural and linguistic nature of the DPRK, individuals classed in the *songbun* system may not differ on any of these objective categories that identify a protected group, but on the basis of the subjective perceptions of the artificial distinctions ascribed in an individual's *songbun* status. An individual of low *songbun* would be subject to severe restrictions and limitations, indicating that they are viewed as a distinct group by the DPRK authorities, whose membership is permanent, stable and cannot be challenged - key indicators of a 'protected group'. However, whilst this suggested expansion could be arguable, it would depend upon a *successful* application to the ICJ to amend the definition of a protected group. This in turn, would require the identification a UN member state willing to refer the DPRK to the ICJ (such as Gambia's referral of Myanmar) to intervene and enforce compliance with the Genocide Convention.
160. Additional concerns arise about being able to prove beyond reasonable doubt that the regime of the DPRK committed these acts with genocidal *intent*. There is a distinct lack of direct evidence of any statements or policies regarding an intention to destroy or participation in meetings where genocidal acts were planned. Therefore, genocidal intent would have to be inferred from relevant facts and circumstances. Whilst there is a significant amount of evidence from which this intention could be inferred, a concern lies with how these acts may not have been committed uniformly and could seem arbitrary or random. Further witness statement evidence is required as to whether the victims are treated more severely or killed due to their ranking on the *songbun* system. This would support an argument that the actions of the DPRK officials recorded in the witness statements are not random or arbitrary, but part of a wider system of oppression, punishment and, ultimately, destruction.

GEOFFREY NICE FOUNDATION

March 2021

