

CRIMES AGAINST HUMANITY IN NORTH KOREA:

THE CASE FOR U.S. LEADERSHIP AND ACTION

DAN AUM, ESQ. Donald M. Wilson Fellow, Robert F. Kennedy Center

GREG SCARLATOIU Executive Director, HRNK

AMANDA MORTWEDT OH, ESQ. Research & Development Associate, HRNK

CRIMES AGAINST HUMANITY IN NORTH KOREA:

THE CASE FOR U.S. LEADERSHIP AND ACTION

DAN AUM, ESQ. Donald M. Wilson Fellow, Robert F. Kennedy Center

GREG SCARLATOIU Executive Director, HRNK*

AMANDA MORTWEDT OH, ESQ. Research & Development Associate, HRNK*

TABLE OF CONTENTS

- EXECUTIVE SUMMARY 4

- I. INTRODUCTION 6

- II. ROAD TO THE COMMISSION OF INQUIRY 7
 - A. Commissions of Inquiry: A Vehicle for Objective and Impartial Investigations 7
 - B. Establishment of the COI for North Korea: The Lead-Up to Action 8

- III. THE NORTH KOREAN HUMAN RIGHTS SITUATION 10
 - A. A Brief Summary of North Korea’s Human Rights Record 10
 - B. Human Rights Trends under the Kim Jong-un Regime 10
 - C. The Victims of North Korea’s Crimes against Humanity 11
 - D. COI Findings: Crimes Against Humanity Have Been Committed by Officials of North Korea and Are Ongoing 12
 - E. COI Recommendations..... 13
 - F. The Aftermath of the COI 13

- IV. THE CASE FOR U.S. LEADERSHIP AND ACTION ON NORTH KOREA’S CRIMES AGAINST HUMANITY 15
 - A. The U.S. Should Pursue Human Rights as a Central Feature of its North Korea Policy 15
 - B. A Review of U.S. Prioritization of Security Over Human Rights in the Case of North Korea 16
 - C. A “Human Rights Up Front” Approach is a More Effective and Morally Sound North Korea Policy 20
 - D. Recommendations 22

EXECUTIVE SUMMARY

ON FEBRUARY 17, 2014, THE COMMISSION OF INQUIRY ON HUMAN RIGHTS IN THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA ("COI") FOUND "UNSPEAKABLE ATROCITIES"

committed in North Korea making it all but impossible for the international community to justify further inaction in the face of past and ongoing horrors there. The gravity, scale, and nature of these crimes, this international investigative body concluded, make North Korea "a state that does not have any parallel in the contemporary world."

It is time that the U.S. meets the worst human rights situation in the world with an equally effective and morally sound response – a "human rights up front" approach, similar to one recommended by the COI.

The COI was established by unanimous consent by the U.N. Human Rights Council in March 2013 in response to the longstanding and growing frustration of North Korea's failure to improve its human rights situation and is the U.N.'s most forceful attempt to address North Korea's human rights record. And after collecting public and private witness testimony, expert analyses, and other data points on three continents for almost a year, the COI revealed what North Korea has denied and tried to keep veiled for so long.

The COI found that North Korea can be characterized as a totalitarian state that has been and is committing systematic, widespread, and gross human rights violations – including murder, abduction, torture, starvation, religious persecution, and political imprisonment – against its own people as well as other nationals. It also determined these crimes against humanity lie at the very core of the North Korean regime's *modus operandi*.

The COI's recommendations included a range of actions to the international community, including a U.N. Security Council referral of the situation in North Korea to the International Criminal Court. The report is clear recognition that the Kim regime's systematic persecution must be brought to a halt.

In the seven months following the COI report, the Obama administration has pursued an ongoing policy to promote the COI report and shown increased energy to address the human rights plight in North Korea. This is in welcome contrast to U.S.'s North Korea policy for the past decade, which has been primarily preoccupied with North Korea's nuclear and weapons programs. But developments and lessons learned in the past decade – the failed "security first" policy, South Korea's policy shift on human rights in North Korea, the international community's joined calls for accountability and the protection of human rights in North Korea, and the undeniable gravity, scale, and nature of atrocities committed by the North Korean regime – make it increasingly untenable to justify American foreign policy leaders' tentative action on human rights for perceived, but always elusive, advances in security in its dealing with North Korea.

Only when North Korea begins to develop a record of improvement on human rights can it engage with the U.S. on other issues, including security, the economy, a peace treaty, or eventual normalization of diplomatic relations. Indeed, improving North Korea's human rights record should be the litmus test of North Korea's credibility to engage on other issues. After all, if a government has no regard for the lives of

its own people, what regard does it have for the lives of others? What deters it from provoking a war, or proliferating missile technology and weapons of mass destruction to terrorists?

The U.S. should continue to build upon and increase its efforts to see the COI recommendations fulfilled. Making human rights a central feature in its North Korea policy is profoundly in the U.S.'s interests. And the Obama Administration's professed commitment to human rights will be measured by its actions towards the world's most egregious human rights situation. U.S. leadership on this issue of global concern would significantly advance the U.S.'s international standing and reputation in promoting universal human rights and security on the Korean peninsula. It would also lead to other countries responding in kind, the collective force of which would put unprecedented pressure on North Korea to improve its human rights record. But as long as the U.S. and other nations continue to be steered away from fully holding North Korea accountable for human rights abuses in hopes of nuclear concessions, which North Korea has clearly demonstrated it has no intent to abide by, North Korea will continue business as usual.

We recommend a "human rights up front" approach:

- a. **Congress should pass the North Korea Sanctions Enforcement Act and the current Executive Orders sanctioning North Korean individuals and entities involved in illicit activities should be implemented more effectively. President Obama could also sign a new Executive Order sanctioning specifically those most responsible for human rights violations in North Korea.**
- b. **Human rights should be a central feature in all future negotiations with North Korea, especially in any future Six-Party Talks.**
- c. **The U.S. should pursue accountability measures and the protection of human rights in North Korea through U.N. channels, such as through U.N. Security Council sanctions; a referral to the International Criminal Court; a U.N. General Assembly resolution to create an ad hoc tribunal to try North Korea's officials; and encouraging broader coordination among U.N. agencies to incorporate the COI report and a "rights up front" approach into their North Korea work.**
- d. **The U.S. should press China to end its practice of forcibly repatriating North Korean refugees, to allow international agencies to investigate refugee conditions in China, and to permit and facilitate travel for refugees to neighboring countries.**
- e. **The U.S. should support people-to-people interactions with ordinary North Koreans.**
- f. **The U.S. should continue to support NGOs and other organizations tasked to monitor and report on North Korea's human rights violations as well as those facilitating information exchange in and out of the country through funding and strategic consultation.**

I. INTRODUCTION

***“Now the international community does know. There will be no excusing a failure of action because we didn’t know. It’s too long now. The suffering and the tears of the people of North Korea demand action.”*¹**

-Michael Kirby, Chair, U.N. Commission of Inquiry,
Democratic People’s Republic of Korea

With these words and the accompanying 372-page report issued by the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea (“COI”), Michael Kirby and his two fellow commissioners² made it all but impossible for the world community to justify further inaction in the face of past and ongoing horrors in the Democratic People’s Republic of Korea (“North Korea”). The COI’s report marshalled detailed evidence of human rights violations with respect to all nine areas of investigation mandated by the United Nations (“U.N.”). In short, the report found compelling evidence of state policies rising to the level of crimes against humanity under the Rome Statute, in addition to violations of myriad legal obligations under all six U.N. human rights treaties to which North Korea is a signatory.³

For decades, human rights concerns have taken a back seat to a virtually single-minded focus on security concerns posed by North Korea’s nuclear program and its missile technology. Well founded concerns about the regime sharing sensitive technology with unstable, rogue states only served to further suppress calls to elevate human rights concerns during discussions and negotiations with North Korea. Many argued that raising human rights concerns might fatally undermine progress on the security front. However, with little to no progress having been made on North Korean security issues over the last 30 years,⁴ the U.S. should re-evaluate whether a “security first” strategy is flawed in present circumstances – both practically and morally – and in turn, consider whether a “human rights up front” approach may be the more effective and morally sound North Korea policy.

1 Peter Walker, *North Korea Human Rights Abuses Resemble Those of the Nazis, Says UN Inquiry*, GUARDIAN, Feb. 17, 2014, <http://www.theguardian.com/world/2014/feb/17/north-korea-human-rights-abuses-united-nations>.

2 Sonja Biserko, world-renowned Serbian human rights activist, and Marzuki Darusman, Special Rapporteur on the Situation of Human Rights in the Democratic People’s Republic of Korea, former Indonesian prosecutor general.

3 International obligations include: International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Rights of the Child, Convention on the Elimination of All Forms of Discrimination against Women, Genocide Convention, and Convention on the Rights of Persons with Disabilities (Note: North Korea has signed but not ratified this convention, which means it is bound to refrain from acts that would defeat the object and purpose of the convention.).

4 North Korea formally signed the Nuclear Non-Proliferation Treaty (NPT) in 1985, though rarely met the full measure of requirements as a signatory. The Six Party Talks, initiated in 2003, were a direct result of North Korea’s withdrawal from the NPT during the same year.

II. ROAD TO THE COMMISSION OF INQUIRY

A. COMMISSIONS OF INQUIRY: A VEHICLE FOR OBJECTIVE AND IMPARTIAL INVESTIGATIONS

Recent years have seen an increased reliance by the U.N. on Commissions of Inquiry – whether commissioned by the Security Council, the Human Rights Council, the Secretary General, the General Assembly, or under the authority of the U.N. Office of the High Commissioner for Human Rights – to gather personal testimony and other evidence needed to establish the criminal responsibility of individuals, governments, and state institutions suspected of committing crimes against humanity. These have included well publicized, high profile U.N. Commissions such as those connected to the genocides in the former Yugoslavia and Rwanda, as well as more obscure Commissions that were little noticed by the media and general public.⁵

Although fact-finding is the chief purpose served by Commissions of Inquiry⁶, it is customary for Commissions to issue a final report that also contains recommendations, as is the case with the COI for North Korea. The COI for North Korea is groundbreaking in several respects and is the most significant historical North Korea human rights-related event to date.⁷ For example, it is the:

- first formal international investigative body to explore and subsequently find that crimes against humanity have been committed in North Korea;
- first commission of inquiry to hold public hearings in four nations across three continents; and
- first commission of inquiry to have officially invited the People’s Republic of China to participate (note: in particular, the COI sought to question China about its continued *refoulement* [forced return] of North Korean refugees).

THE COI FOR NORTH KOREA IS GROUNDBREAKING IN SEVERAL RESPECTS AND IS THE MOST SIGNIFICANT HISTORICAL NORTH KOREA HUMAN RIGHTS-RELATED EVENT TO DATE.

While NGOs such as the Committee for Human Rights in North

.....

5 A non-exhaustive list of U.N. Commissions of Inquiry include:
Yugoslavia: A Commission of Experts was assembled, which ultimately gave rise to the ad hoc International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague. The ICTY has thus far sentenced roughly 70 of those originally indicted, with all appeals scheduled to be completed by 2015. The ICTY is set to transition to a Residual Mechanism.
Timor-Leste: The Commission was mandated to assist the East Timorese government with its investigation of human rights violations committed from 1974-1999, including the deaths of 102,800 Timorese during the three decade conflict. A Special Panel for Serious Crimes, a hybrid court, convicted 84 indicted individuals.
Rwanda: The Commission recommended stringent national-level reforms and the dissolution of armed militias. Subsequent UN efforts gave rise to the International Criminal Tribunal for Rwanda (ICTR). The ICTR is continuing its efforts to satisfy its prescribed mandate and, like the ICTY, is also set to transition to a Residual Mechanism.
Burundi: The Commission concluded that acts of genocide had been committed, although it was unable to identify perpetrators by name. In 2004, the U.N. Security Council dispatched a team to Burundi to establish a second commission as well as a hybrid court. Follow-on efforts to initiate a productive transitional justice process have generated disappointing results.
Sudan (Darfur): The Commission for Darfur was tasked to investigate (1) violations of international human rights and humanitarian law by all parties; (2) whether or not acts of genocide had taken place; (3) the identity of perpetrators; and (4) accountability mechanisms. While the Commission concluded the Sudanese government and Janjaweed militia violated international human rights and humanitarian law, it did not find sufficient evidence of a Sudanese government policy to commit genocide. The Security Council referred the case to the ICC.
Seychelles: The Commission’s findings led to the condemnation of mercenary aggression against the Seychelles government and the creation of an ad hoc committee to coordinate resources for a Special Fund designed to assist victims who suffered economic damages.
Lebanon (Hariri Assassination): The Commission’s findings and recommendations led to the creation of the Special Tribunal for Lebanon, which is set to complete its work by 2015.
Benazir Bhutto Assassination: The Commission delivered a report to the U.N. Security Council citing significant lapses in Pakistan’s security apparatus, though no conclusions were reached regarding the identity of those behind the suicide bombing.

6 U.N. Commissions of Inquiry are to draw “no conclusions about the guilt beyond reasonable doubt of specific persons, but rather, identify individuals reasonably suspected of participation in serious criminal activity.” However, a Commission’s findings of fact may be used in future prosecutions. Office of High Commissioner for Human Rights, *Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste Geneva*, Oct. 2, 2006, <http://www.ohchr.org/Documents/Countries/COITimorLeste.pdf>.

7 For all COI documents, reports, and media resources, see the U.N. COI’s website at <http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/ReportoftheCommissionofInquiryDPRK.aspx>.

Korea (HRNK), tasked to monitor, research and report on the North Korean human rights situation, had been aware and reported on the extent of the North Korean human rights violations for many years, this was the first time that an investigative body was established by the U.N. to determine the extent and gravity of North Korea's human rights abuses.

The COI was persistent in its efforts to obtain the cooperation of all relevant actors, namely the North Korea regime, and to a lesser degree, China. Historically, commissions have benefited from adequate or even exemplary cooperation by member states. In fact, in some instances, member states have requested the U.N.'s assistance in their own investigations, largely because the U.N.'s joint participation would imbue the investigation and subsequent findings with greater legitimacy and credibility (as was the case of the Truth Commission in Timor-Leste from 2002–2005⁸). Such was not the case here, however, as North Korea categorically denied access to or interviews from any persons inside North Korea.

B. ESTABLISHMENT OF THE COI FOR NORTH KOREA: THE LEAD-UP TO ACTION

On March 21, 2013, the U.N. Human Rights Council (HRC) unanimously established a Commission of Inquiry on the human rights situation in North Korea. The European Union (EU) and Japan stepped forward as the primary co-sponsors of Resolution 22/13, which provided the COI with a one-year mandate to investigate “the systematic, widespread and grave violations of human rights within the Democratic People’s Republic of Korea . . . with a view to ensuring full accountability, in particular for violations which may amount to crimes against humanity.”⁹

The resolution, which was adopted with no vote, by consensus of all 47 member states of the Human Rights Council, “reflects longstanding universal concerns about the human rights situation” in North Korea.¹⁰ (Note: Venezuela was the only member state to speak out against the creation of a COI and to disassociate itself from the consensus decision.) The Commission was directed to focus its investigation in the following areas:

- (1) Violations of the right to food;**
- (2) Violations associated with prison camps;**
- (3) Torture and inhuman treatment;**
- (4) Arbitrary arrest and detention;**
- (5) Discrimination;**
- (6) Violations of freedom of expression;**
- (7) Violations of the right to life;**
- (8) Violations of the freedom of movement; and**
- (9) Enforced disappearances and abductions, including nationals of other States.**

8 The case of Timor-Leste is illustrative of mutual cooperation between the U.N. and a member state that led to the establishment of the Independent Special COI for Timor-Leste, as it was the “invitation from the then Minister for Foreign Affairs of Timor-Leste to the Secretary-General” requesting assistance in conjunction with the U.N. Transitional Administration in East Timor (UNTAET). Office of High Commissioner for Human Rights, *Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste* Geneva, Oct. 2, 2006, <http://www.ohchr.org/Documents/Countries/COITimorLeste.pdf>.

9 Office of High Commissioner for Human Rights, *Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea; Introduction*, <http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/AboutCol.aspx>.

10 U.N. COI, *Questions and Answers on the Report of the United Nations Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea*, 1, Feb. 17, 2014, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoIDPRK/Report/coi-dprk-q-and-a.pdf>.

While Resolution 22/13 represents the U.N.'s most forceful attempt to address human rights abuses in North Korea, it was not the first. In 2004, the U.N. appointed Vitit Muntarbhorn as the Special Rapporteur on North Korean Human Rights. Towards the end of his six-year term, Mr. Muntarbhorn recommended that the U.N. establish a commission of inquiry to "make it possible for the human rights issue in North Korea to be dealt with at the ICC".¹¹ Mr. Muntarbhorn was succeeded by Marzuki Darusman, who has served as Special Rapporteur since his appointment in 2010. Over the last four years, repeated stonewalling by the North Korean regime has led Mr. Darusman to conclude, "DPRK is perhaps the only country today that does not recognize that non-cooperation with the human rights mechanism is not an option."¹² Both Special Rapporteurs contended with a regime that, at every turn, erected roadblocks to meaningful progress, including by denying requests to travel to North Korea to conduct on-the-ground investigations of human rights abuses.

The U.N. General Assembly has also passed resolutions on the human rights situation in North Korea since 2005. The annual resolutions consistently: 1) Express serious concern at various human rights abuses, including the operation of political prisoner camps, torture, lack of freedom to move freely within the country, freedom of opinion and religion; 2) underscore concern at unresolved abductions and cases of enforced disappearances; 3) express deep concern at the precarious humanitarian situation in the country including food shortages; 4) commend the Special Rapporteur's commitments and efforts to improve human rights in North Korea; 5) strongly urge the North Korean government to respect all human rights and fundamental freedoms; and 6) decide to continue to closely observe and monitor the human rights situation in North Korea.

After meeting with and hearing from North Korean political prison camp survivors and escapees who suffered forced repatriation, U.N. High Commissioner for Human Rights Navi Pillay firmly endorsed an inquiry into "one of the worst—but least understood and reported—human rights situations in the world."¹³

Despite North Korea's past rebuffs, Justice Michael Kirby sought to fulfill the COI's fact-finding mandate by opening the process to receive information to all relevant actors, including States, private individuals, and the civil society sector. He first extended an offer of cooperation to the North Korean regime. Predictably, these offers were rejected, as were all subsequent attempts by the COI to engage with the regime, including in connection with each of the four public hearings the COI conducted in Seoul, Tokyo, London and Washington, D.C. from August to October of 2013. At these public hearings, the Commissioners heard, among other things, first-hand testimony from more than 80 refugees and conducted 240 private and confidential interviews in order to protect the identities of witnesses and to prevent reprisals against their family members, friends, or colleagues. In addition, the Commission received 80 written submissions from member states and relevant stakeholders.¹⁴

In February 2014, the COI timely delivered its final report to the Human Rights Council at its 25th session in Geneva, Switzerland. The final report contained all relevant findings and recommendations, including that the "Security Council should refer the situation in the Democratic People's Republic of Korea to the International Criminal Court for action in accordance with that court's jurisdiction."¹⁵ A more thorough examination of the COI's findings and potential accountability measures directed at the North Korean regime are contained in the ensuing pages.

11 Kim Hye-lim, *Vitit Muntarbhorn: UN Commission of Inquiry on the Crimes Against Humanity Should Be Set Up*, OPEN RADIO FOR NORTH KOREA, Apr. 1, 2010, <http://english.nkradio.org/news/158>.

12 U.N. News Centre, *DPR Korea Must Act Now to End Human Rights Violations, Says UN Expert*, Nov. 28, 2011, <http://www.un.org/apps/news/story.asp?NewsID=40530&Cr=Democratic&Cr1=Korea#Uzs8HvldVQ2>.

13 Roberta Cohen: *China's Forced Repatriation of North Korean Refugees Incurs United Nations Censure*, INT'L J. KOREAN STUDIES, Summer/Fall Edition 2014, 4, <http://www.brookings.edu/research/opinions/2014/07/north-korea-human-rights-un-cohen>; see also *Freedom from Morbid Concentration Camp, then Gloomy Fate*, DAILY NK, Apr. 25, 2011.

14 Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, *Summary Report*, Human Rights Council, U.N. Doc. A/HRC/25/63, ¶¶ 12–19, Feb. 7, 2014, [hereinafter *COI Summary Report*] <http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/ReportoftheCommissionofInquiryDPRK.aspx>.

15 *Id.* ¶ 94(a).

III. THE NORTH KOREAN HUMAN RIGHTS SITUATION

A. A BRIEF SUMMARY OF NORTH KOREA'S HUMAN RIGHTS RECORD¹⁶

For more than 65 years, North Korea's human rights record has been abysmal. A quarter century after the collapse of communism in the former Soviet Union and Eastern Europe, North Korea's Kim regime has maintained its tyrannical grip on power, while accomplishing two hereditary transitions of power: from Kim Il-sung to Kim Jong-il in July 1994, and from Kim Jong-il to Kim Jong-un in December 2011. The primary strategic objective of the Kim regime continues to be its own self-preservation, regardless of the toll inflicted on the North Korean people.

Although North Korea is bound, as a U.N. member state, by the Universal Declaration of Human Rights, and although it is a party to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, the Convention on the Rights of the Child, the Genocide Convention, and the Convention on the Elimination of All Forms of Discrimination against Women, a range of human rights continue to be violated in that country. In the year 2014, 120,000 men, women, and children, continue to be brutally persecuted behind the barbed wire fences of North Korea's political prison camps, subjected to unrelenting induced malnutrition, forced labor, torture, sexual violence as well as public and secret executions. Those suspected of being disloyal to the Kim regime, of being, from the regime's viewpoint, *wrong-thinkers*, *wrong-doers*, of possessing *wrong knowledge*, of having engaged in wrong associations, or of coming from the *wrong family background*, are subjected to extrajudicial arrest and detention, often together with members of three generations of their families. They are held in North Korea's hidden gulag indefinitely, in most cases without charge or hope for recourse.

In the year 2014, pursuant to *Songbun* – a system of social discrimination established in the 1950s – the people of North Korea continue to be divided into three social categories and 51 subcategories, based on their degree of loyalty to the regime, and on the perceived allegiance of their parents and grandparents. Their access to food, jobs, and any type of opportunity continues to depend on their social classification. In the mid to late 1990s, as up to 3 million North Koreans starved to death, the Kim regime continued to invest in the development of its ballistic missile and nuclear weapons programs, and purchased 30 MiG-29 fighters from Belarus and Russia, and 40 MiG-21 fighters from Kazakhstan.

IN THE YEAR 2014, 120,000 MEN, WOMEN, AND CHILDREN, CONTINUE TO BE BRUTALLY PERSECUTED BEHIND THE BARBED WIRE FENCES OF NORTH KOREA'S POLITICAL PRISON CAMPS, SUBJECTED TO UNRELENTING INDUCED MALNUTRITION, FORCED LABOR, TORTURE, SEXUAL VIOLENCE AS WELL AS PUBLIC AND SECRET EXECUTIONS.

B. HUMAN RIGHTS TRENDS UNDER THE KIM JONG-UN REGIME

The human rights situation has deteriorated under the Kim Jong-un regime. Three trends stand out in particular: 1) an aggressive crackdown on attempted defections – the number of North Korean escapees arriving in South Korea declined by almost 50% from 2011 to 2012/2013); 2) an aggressive purge –

.....
 16 Modified excerpt from Greg Scarlatoiu's statement before the U.S. House of Representatives Committee on Foreign Affairs, Subcommittee on Asia and the Pacific, Mar. 26, 2014.

culminating in the execution of Jang Sung-taek, the leader’s uncle, and his associates in December 2013; and 3) the “restructuring” of North Korea’s political prison camp system – facilities near the border with China have been closed, while other camps have been expanded.

C. THE VICTIMS OF NORTH KOREA’S CRIMES AGAINST HUMANITY

There are a horrific number of victims of the Kim family regime, many of whom are still under the ruthless oppression of Kim Jong-un and locked away in political prison camps. As mentioned, the Commissioners took both public and private testimony from more than 300 victims. This number, however, represents just a fraction of the total human cost under the regime. Based on victim testimony and other evidence before the COI, the Commissioners concluded that the Kim regime has such overall control of its officials that “in many instances, the violations found entailed crimes against humanity based on State policies.”¹⁷ The COI also pursued three “interlinked objectives:” further investigating and documenting human rights violations; collecting and documenting victim and perpetrator accounts; and ensuring accountability.¹⁸

Mr. Shin Dong-hyuk was one of the many victims who testified before the Commissioners about his experiences under the Kim family regime. Mr. Shin is the only known person to be born in and escape from a political prison camp in North Korea, and he is the hero of Blaine Harden’s novel, *Escape from Camp 14: One Man’s Remarkable Odyssey from North Korea to Freedom in the West*. The COI cites Shin’s testimony, recalling many tormented years of experience as a child prisoner. The following passage illustrates one moment of Mr. Shin’s first 23 years of life in prison and the extreme brutality of North Korean prison guards:¹⁹

Mr. Shin Dong-hyuk described how a girl of around 7 years of age had slipped a few grains into her pocket. A guard caught her and beat her so badly with a wooden stick that she died from her injuries:

“[A]bout twice a week, [the guards] would choose one kid and do the inspection to see if this person is stealing something or hiding something, but she was so unlucky that she was chosen as the kid to be inspected. And, in her pocket there were some grains and then the guard asked where she got it. Then, she told the guard that she picked them up on the street. There was a wooden stick that the guards used. And, the guard says that’s not the way I taught you, so you went against my teaching. So, she was beaten so badly that she fainted, and we had to take her to her mom. When she didn’t come to school the next day, we learned that she had died.”

Mr. Shin’s testimony offers a glimpse behind a ruthless and oppressive regime’s prison walls. But tragically, there are many more people like Shin Dong-hyuk still waiting for their chance to escape from the Kim family regime.

The COI determined that crimes against humanity target anyone viewed as a threat to the political system and leadership of North Korea, in particular:

.....
¹⁷ *COI Summary Report*, *supra* note 14, ¶ 24.

¹⁸ *Id.* ¶ 5.

¹⁹ Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, *Detailed Report*, Human Rights Council, U.N. Doc. A/HRC/25/CRP.1, Feb. 7, 2014, [hereinafter *COI Detailed Report*] http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoIDPRK/Report/A.HRC.25.CRP.1_ENG.doc.

- the estimated 80,000-120,000 inmates of North Korea’s political prison camps;
- inmates of other detention facilities, including political prisoners;
- persons who try to escape North Korea, in particular those forcibly repatriated by China to conditions of danger;
- religious believers, Christians in particular;
- people considered to introduce “subversive” influences into North Korea, such as those who smuggle South Korean video material, or those who are suspected of having had contacts with South Koreans;
- selected segments of the North Korean population that were deliberately starved to death, in particular during the great famine of the 1990s. The purpose of de facto condemning targeted groups to death by starvation was to preserve North Korea’s leadership and political system; and
- citizens of the South Korea, Japan, and other countries abducted by agents of the North Korean regime.

D. COI FINDINGS: CRIMES AGAINST HUMANITY HAVE BEEN COMMITTED BY OFFICIALS OF NORTH KOREA AND ARE ONGOING

The COI’s investigation culminated in the finding that **systematic, widespread, and gross human rights violations have been and are being committed by North Korea**. It concluded that crimes against humanity have been committed by officials of the Democratic People’s Republic of Korea, pursuant to policies established at the highest level of the State. These crimes against humanity involve **extermination, murder, enslavement, torture, imprisonment, rape, forced abortions and other sexual violence, persecution on political, religious, racial and gender grounds, the forcible transfer of populations, the enforced disappearance of persons and the inhumane act of knowingly causing prolonged starvation**. The COI also established that crimes against humanity continue to be committed in North Korea because the policies, institutions and patterns of impunity that lie at their heart remain in place.

NORTH KOREA CAN BE CHARACTERIZED AS A TOTALITARIAN STATE THAT DOES NOT CONTENT ITSELF WITH ENSURING THE AUTHORITARIAN RULE OF A SMALL GROUP OF PEOPLE, BUT SEEKS TO DOMINATE EVERY ASPECT OF ITS CITIZENS’ LIVES AND TERRORIZES THEM FROM WITHIN.

One of the most important determinations made by the COI is that North Korea can be characterized as a totalitarian state that does not content itself with ensuring the authoritarian rule of a small group of people, but seeks to dominate every aspect of its citizens’ lives and terrorizes them from within. In other words, the COI has found that crimes against humanity and other abysmal human rights violations lie at the very core of the North Korean regime’s *modus operandi*. For these reasons and due to the gravity, scale, and nature of the violations committed, the COI characterized North Korea as a “state that does not have any parallel in the contemporary world.”²⁰

Its report underscores accountability and states that the main perpetrators of these crimes are officials of the following state-run organizations “who are acting under the effective control of the central organs of the Workers’ Party of Korea, the National Defence Commission and the Supreme Leader of the Democratic

.....
20 COI Summary Report, *supra* note 14, ¶ 80.

People’s Republic of Korea:”²¹ 1) State Security Department; 2) Ministry of People’s Security; 3) Korean People’s Army; 4) Office of the Public Prosecutor; 5) Judiciary; and 6) Workers’ Party of Korea.²²

The report is clear recognition that the Kim regime’s systematic murder, abduction, torture, starvation, religious persecution, and political imprisonment of its people must be brought to a halt.²³

E. COI RECOMMENDATIONS

The COI emphasized that the international community has the responsibility to protect the population of North Korea from further crimes against humanity, as their own State distinctly fails to do so. The COI recommended a multi-faceted approach to implement this responsibility to protect, by combining urgent accountability measures with a reinforced human rights dialogue. The COI pointed out that, due to the North Korea government’s unwillingness to prosecute its own officials, the U.N. will have to ensure that those most responsible for crimes against humanity are held accountable.

The COI further recommended that the U.N. Security Council refer the North Korea situation to the International Criminal Court. The European Union, together with the U.S., Japan, Australia, and South Korea clearly stated their support for Security Council referral to the International Criminal Court this year, following the formal submission of the COI report to the U.N. Human Rights Council on March 17th.

The COI additionally recommended that the U.N. High Commissioner for Human Rights establish a field-based presence in the region to document ongoing human rights violations in the North Korea, in particular where they amount to crimes against humanity, in order to continue to focus international attention on the dire human rights situation. After both Bangkok and Seoul were considered as possible locations, the South Korean government agreed to host the field office in Seoul.²⁴

Due in particular to potential opposition by the People’s Republic of China, a permanent member of the U.N. Security Council, the referral of the North Korean case by the U.N. Security Council to the International Criminal Court is unlikely, at least over the short term. However, it can be argued that, by bringing the case to the U.N. Security Council and thus forcing a Chinese veto, the spotlight will be on China, which continues to unconditionally extend its support and protection to the Kim regime, and to refuse North Korean escapees access to the process leading to their acquiring political refugee status. In a letter dated December 16, 2013, the COI urged the Government of the People’s Republic of China to warn relevant officials that the forcible repatriation of North Korean refugees to conditions of extreme danger – involving persecution, torture, prolonged arbitrary detention, sexual violence, forced abortions, and infanticide – could amount to the aiding and abetting of crimes against humanity.

F. THE AFTERMATH OF THE COI

On March 26, 2014, a little over a month after the COI published its report, the U.N. Human Rights Council overwhelmingly passed a resolution²⁵ endorsing the COI’s findings with respect to crimes against humanity in North Korea and calling on the U.N. General Assembly to refer the situation to the U.N. Security Council

21 *Id.* ¶ 24.

22 *Id.*

23 Roberta Cohen, as cited by the Committee for Human Rights in North Korea (HRNK), *Press Release: HRNK Welcomes the Report by the UN Commission of Inquiry (COI) on North Korean Human Rights*, Feb. 16, 2014, <http://hrnk.org/events/announcements-view.php?id=14>.

24 Oh Se-hyek, *UN to Establish NK Human Rights Office*, DAILY NK, May 29, 2014, <http://www.dailynk.com/english/read.php?num=11912&catald=nk00100>.

25 The vote fell to thirty States in favor of the resolution and six States against it. Human Rights Council, *Press Release, Human Rights Council Extends Mandates on Syria, Iran, Democratic People’s Republic of Korea and Myanmar*, Mar. 28, 2014, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14455&LangID=E>.

(“UNSC”) for consideration of sanctions and possibly even criminal indictment.²⁶

On April 17, 2014, the U.S., France, and Australia co-sponsored an Arria-Formula meeting for the discussion of human rights violations in North Korea, citing the international attention of the recently released COI report on the human rights situation in North Korea.²⁷ The Arria-Formula meeting heard from former chairman of the COI, Justice Kirby, as well as the two other commissioners. In addition, the 13 representatives in attendance heard testimony from two North Korean escapees, Mr. Shin Dong-hyuk and Ms. Lee Hyeon-seo.

The purpose of the Arria-Formula meeting was to provide “an opportunity to discuss the human rights situation faced by the people of the DPRK and its impact on the maintenance of international peace and security” and to facilitate an open dialogue about how the U.N. and its member states can implement the COI’s recommendations.²⁸ During the meeting, Justice Kirby noted that North Korea is already on the UNSC agenda and that the discussion should simply be broadened to include human rights as a component of the security mandate. On the issue of bringing the North Korean leaders to the ICC, several UNSC members including Luxembourg, the UK, the U.S., Australia, France, and South Korea, were united in supporting the recommendation.

While many members publicly expressed support for the COI’s recommendations, it is unclear how much political will there is to push for any formal Council follow up. The U.S., Europe, and South Korea could push for a non-consensus resolution to put North Korean human rights on the UNSC agenda, but it takes nine votes.²⁹ China and Russia would almost certainly veto ICC referral or human rights-related sanctions, and many Council members seem wary of confronting China on human rights for fear of undermining ongoing efforts to secure its support on the non-proliferation file. Therefore, Council members seem keen to play down expectations of any near-term push for action in the Council in response to the COI’s report and instead suggest that the Arria-Formula meeting should not necessarily be seen as a first step toward greater Council involvement. Rather, the Arria-Formula meeting should be an opportunity to focus attention more broadly on the human rights situation in North Korea, to raise awareness about the report, and to educate the wider U.N. membership about its findings.

The General Assembly’s Third Committee is currently in session until November, and during the April 17th Arria-Formula meeting, members discussed the possibility of setting up an investigative and prosecutorial body, separate from the UNSC. Action on this suggestion could come during the General Assembly.

**THE U.N. HUMAN RIGHTS COUNCIL
PASSED A RESOLUTION ENDORSING
THE COI’S FINDING WITH RESPECT TO
CRIMES AGAINST HUMANITY IN NORTH
KOREA TO REFER THE SITUATION TO
THE U.N. SECURITY COUNCIL FOR
CONSIDERATION OF SANCTIONS AND
POSSIBLY EVEN CRIMINAL INDICTMENT**

26 *Situation on the Human Rights in the Democratic People’s Republic of Korea*, Human Rights Council, U.N. Doc. A/HRC/25/L.17, Mar. 26, 2014.

27 “Arria-Formula” meetings involve informal, confidential gatherings of Security Council members, aiming to bring certain issues to the Council’s attention. Convened by one or several members of the Security Council, such meetings do not constitute a formal activity of the Council. Named after Ambassador Diego Arria of Venezuela, the practice was initiated in 1992.

28 *Arria-Formula Meeting with the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea (DPRK)*, What’s in Blue, Apr. 16, 2014, <http://www.whatsinblue.org/2014/04/arria-formula-meeting-with-the-commission-of-inquiry-on-human-rights-in-the-democratic-peoples-repub.php>.

29 North Korea’s nuclear weapons and missiles are already on the U.N. Security Council agenda. Including a new issue on the agenda is a procedural matter requiring nine out of fifteen votes of permanent and non-permanent security council members. Permanent member veto is not applicable. Once an issue is included in the agenda it becomes substantive, and thus subject to a potential permanent member veto.

IV. THE CASE FOR U.S. LEADERSHIP AND ACTION ON NORTH KOREA'S CRIMES AGAINST HUMANITY

A. THE U.S. SHOULD PURSUE HUMAN RIGHTS AS A CENTRAL FEATURE OF ITS NORTH KOREA POLICY

In the eight months following the COI report, the Obama administration has pursued an ongoing policy to promote the COI report and shown increased energy to address the human rights plight in North Korea. This is in welcome contrast to U.S.'s North Korea policy for the past decade, which has been primarily preoccupied with North Korea's nuclear and weapons programs, an urgent but not disconnected issue.

The U.S. as a world leader has a moral and strategic imperative to make human rights a central feature in its North Korea policy. In a speech at a Human Rights First Summit in 2013, Susan Rice, U.S. National Security Advisor, said, "[R]espect for human rights is central to our foreign policy. It's what our history and our values demand, but it's also profoundly in our interests."³⁰ Glyn Davies, the Special Representative for North Korea Policy, stated before the Senate in 2013 that "U.S.-DPRK relations cannot fundamentally improve without sustained improvement in inter-Korean relations and human rights."³¹ And upon the release of State Department's 2014 annual country reports on human rights, Secretary of State John Kerry highlighted that North Korea's status as one of the highest national security concerns was undoubtedly linked to North Korea's "wholesale torture and crimes against humanity" of its people.³² In August, Secretary Kerry voiced strong condemnation for "the utter, grotesque cruelty of North Korea's system of labor camps and executions," and said these "gulags should be shut down—not tomorrow, not next week, but now."³³

THE U.S. AS A WORLD LEADER HAS A MORAL AND STRATEGIC IMPERATIVE TO MAKE HUMAN RIGHTS A CENTRAL FEATURE IN ITS NORTH KOREA POLICY.

Ultimately, improving the human rights situation in North Korea will advance the U.S.'s dual interests of human rights and security. North Korea's showing tangible improvements in human rights, which it is bound to do by international treaties,³⁴ customary international law,³⁵ and *jus cogens* norms,³⁶ would signal its willingness to respect the sanctity of international agreements. Only then can North Korea begin to develop a record of credibility to engage on other issues with the U.S., including security, the economy, a peace treaty, or eventual normalization of diplomatic relations.

Indeed, improving the human rights and humanitarian situation should be the litmus test of North Korea's willingness to verify disarmament of its nuclear and ballistic arsenal. It is also a litmus test of North Korea's regard for human life, which drives the pursuit of peace. After all, if a government has no regard for the lives of its own people, what regard does it have for the lives of others? What deters it from provoking a

.....

30 Susan Rice, Remarks by National Security Advisor Susan E. Rice at the Human Rights First Annual Summit, Dec. 4, 2012, <http://www.whitehouse.gov/the-press-office/2013/12/04/remarks-national-security-advisor-susan-e-rice-human-rights-advancing-am>.

31 Testimony of Glyn Davies, Special Representative for North Korea Policy, before the Senate Committee on Foreign Relations, Washington, D.C., Mar. 7, 2013, <http://www.foreign.senate.gov/hearings/us-policy-toward-north-korea>.

32 John Kerry, Remarks on the Release of the Annual Country Reports on Human Rights, U.S. STATE DEP'T, Press Briefing Room, Feb. 27, 2014, <http://www.state.gov/secretary/remarks/2014/02/222645.htm>.

33 John Kerry, Remarks, U.S. Vision for Asia-Pacific Engagement, Aug. 13, 2014, <http://www.state.gov/secretary/remarks/2014/08/230597.htm>.

34 See *supra* note 3.

35 Restatement (Third), US Foreign Relations Law § 702 (1987) (includes slavery or slave trade, murder or causing the disappearance of individuals, torture or other cruel inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, genocide, and a consistent pattern of gross violations of internationally recognized human rights).

36 For instance, a prohibition on the state practice of torture as *jus cogens* has been affirmed in a myriad of case law across courts. See, e.g., *Siderman De Blake v. Argentina*, 965 F.2d 699, 717 (9th Cir. 1992); *Prosecutor v. Furundzija*, IT-95-17/1-T, ICTY, Dec. 10, 1998, ¶ 144.

war, or proliferating missile technology and weapons of mass destruction to terrorists?

As Susan Rice said herself, “[O]ver time, we know that our core interests are inseparable from our core values, that our commitment to democracy and human rights roundly reinforces our national security. The greatest threats to our security often emerge from countries with the worst human rights records. *Witness Iran and North Korea . . .*”³⁷ (emphases added)

But, so long as the U.S. and other nations are steered away from holding North Korea accountable for human rights abuses in hopes of nuclear concessions, which North Korea has clearly demonstrated it has no intent to abide by, North Korea will continue business as usual.³⁸

B. A REVIEW OF U.S. PRIORITIZATION OF SECURITY OVER HUMAN RIGHTS IN NORTH KOREA

For a quarter of a century, U.S. diplomatic strategy has sought to separate and narrow its disagreements with North Korea, to solve them sequentially. Yet the path to solving all of these disagreements is barred by the same obstacle – North Korea’s isolation and secrecy. The agreed framework of 1994 and 2007 agreement both broke down over verification.³⁹ Similarly, without transparency, the World Food Program cannot monitor the access to food aid, the International Atomic Energy Agency cannot monitor disarmament, and North Korea will deny that its prison camps even exist – including one that is directly adjacent to its nuclear test site.⁴⁰ Without transparency, there can be no verification. Transparency in humanitarian matters such as food aid and the treatment of prisoners cannot be sidelined if there is to be a verifiable denuclearization of North Korea.

Yet until recently the U.S. has long maintained its prioritization on security concerns over the human rights and humanitarian issues in North Korea. During the hearings of the COI in Washington, D.C., Victor Cha, former National Security Council Director for Asian Affairs said, “[A]s you’re all aware North Korean Human Rights abuses have not traditionally been a high priority in U.S. policy towards North Korea. The primary focus has been on the security threat.”⁴¹

In practice, pursuing security and human rights through separate channels allowed the U.S. to sideline human rights issues when necessary to seek nuclear and missile concessions from North Korea. Noticeably, the major agreements between the U.S. and North Korea – the 1994 Agreed Framework, 2000 Joint Statement, and the 2012 “Leap Day Deal” – and the multi-lateral 2005 and 2007 Six-Party Talk joint statements, contain zero provisions on human rights. In these deals, the U.S. offered to swap development, energy assistance, and peace assurances in

“HUMAN RIGHTS ABUSES HAVE NOT TRADITIONALLY BEEN A HIGH PRIORITY IN U.S. POLICY TOWARDS NORTH KOREA. THE PRIMARY FOCUS HAS BEEN ON THE SECURITY THREAT.”

37 Susan Rice, *supra* note 30.

38 Choe Sang-hun, *No Trading Nuclear Arms for Aid, North Korea Says*, N.Y. TIMES, Mar. 16, 2013, <http://www.nytimes.com/2013/03/17/world/asia/north-korea-says-nuclear-arms-arent-a-ploy.html>.

39 VICTOR CHA, *THE IMPOSSIBLE STATE: NORTH KOREA, PAST AND FUTURE*, 252-54, 70-71 (2013).

40 Joseph S. Bermudez Jr., *North Korea’s Camp No. 25 Update*, HRNK, June 5, 2014, *available at* <http://www.hrnk.org/uploads/pdfs/Camp%2025%20Update%20Good.pdf>.

41 Statement of Victor Cha, Senior Advisor and Korea Chair in the Center for Strategic and International Studies, before the U.N. Comm’n of Inquiry on Human Rights in the DPRK, Oct. 31, 2013, transcript *available at* http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoIDPRK/PublicHearings/WashingtonCOIDay2Morning_Compiled.doc.

exchange for North Korea's cessation of nuclear and ballistic missile programs and proliferation.⁴²

To be sure, the U.S. has taken steps to improve the human rights situation in North Korea.⁴³ Congress passed the North Korean Human Rights Act in 2004, and reauthorized it in 2008 and 2012.⁴⁴ The Act most notably created the office of the Special Envoy for Human Rights in North Korea, authorized funding for NGOs, radio broadcasting, and supports refugee resettlement in the U.S. U.S. agencies have highlighted human rights violations in its annual government reports,⁴⁵ and U.S. officials have repeatedly called for North Korea to abide by its human rights obligations. But the U.S. prioritization of security issues and their separation from human rights in North Korea remain largely unchanged.⁴⁶

This prioritization and separation was based principally on three reasons:

1. Pyongyang threatened that bringing up its human rights issues was “virtually intolerable” and would cause it to be “hard to expect any progress in solving pending [security] issues between North Korea and the U.S.”⁴⁷ The U.S. ceded to these threats to move the agenda on security talks forward.⁴⁸
2. From 1998 to 2007, the Republic of Korea (“South Korea”) held a North Korea policy that preferred engagement and providing unconditional aid to North Korea in hopes that it would eventually soften its position on security and human rights issues once relations normalized.⁴⁹ The South Korean government censored itself and civil society from bringing up North Korea's human rights and humanitarian crises in public and repeatedly abstained from criticizing North Korea's human rights record through U.N. mechanisms.⁵⁰ As South Korea's long-time military and economic ally in the region, the U.S. sought to align its North Korea policy to South Korea's.⁵¹

THE U.S. PRIORITIZATION OF SECURITY ISSUES AND THEIR SEPARATION FROM HUMAN RIGHTS IN NORTH KOREA REMAIN LARGELY UNCHANGED.

42 *The Six-Party Talks at a Glance*, Arms Control Association, <https://www.armscontrol.org/factsheets/6partytalks> (last visited July 30, 2014); *Backgrounders: The Six Party Talks on North Korea's Nuclear Program*, Council on Foreign Relations, <http://www.cfr.org/proliferation/six-party-talks-north-koreas-nuclear-program/p13593> (last visited July 30, 2014). To be sure, despite posturing by the administration during the negotiations that human rights would be on the Six-Party Talks (SPT) agenda, Jay Lefkowitz, Special Envoy for Human Rights in North Korea at the time, was never invited to participate in any SPT, and human rights was never mentioned in the SPT agreement. 155 CONG. REC. 58, S4481–SF4498 (2009), <http://origin.www.gpo.gov/fdsys/pkg/CREC-2009-04-21/html/CREC-2009-04-21-pt1-PgS4481-2.htm>; see also *Final Report of Jay Lefkowitz, U.S. Special Envoy for Human Rights in North Korea*, U.S. STATE DEP'T, Jan. 17, 2009, [hereinafter *Final Report of Lefkowitz*] <http://www.state.gov/s/enk/115268.htm>.

43 *Country Profiles: North Korea, Human Rights*, U.S. STATE DEP'T, <http://www.state.gov/p/eap/ci/kn/humanrights/index.htm> (last visited Oct. 15, 2014).

44 North Korean Human Rights Act of 2004, 22 U.S.C.A. § 7801 (2004), available at <http://www.humanrights.gov/2010/11/12/north-korean-human-rights-act-of-2004/>.

45 See, e.g., Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices of 2013: Korea, Democratic People's Republic of*, U.S. STATE DEP'T (2014), available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dld=220202>; see also ANNUAL REPORT, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM (2014).

46 Statement by Robert King, *Ambassador King on Human Rights Situation in North Korea*, Mar. 18, 2014, <http://iipdigital.usembassy.gov/st/english/texttrans/2014/03/20140318296536.html#axzz2wt9NAB29>.

47 *KCNA Refutes U.S. Anti-DPRK Human Rights Campaign*, KCNA, Nov. 8, 2005, <http://www.kcna.co.jp/item/2005/200511/news11/09.htm>.

48 Barbara Demick, *Relations with North Korea Possible, U.S. Diplomat says*, L.A. TIMES, Mar. 4, 2008, <http://articles.latimes.com/2008/mar/04/world/fg-norkor4>.

49 Bruce Klingner, *The U.S. Should Support New South Korean President's Approach to North Korea*, HERITAGE FOUND., Apr. 11, 2013, <http://www.heritage.org/research/reports/2013/04/the-us-should-support-new-south-korean-presidents-approach-to-north-korea>.

50 Balbina Hwang, *Furthering North Korean Human Rights Through U.S.-ROK Cooperation*, ASIA FOUND., Apr. 2011, <http://asiafoundation.org/resources/pdfs/HwangNorthKoreaHumanRightsApril2011.pdf>.

51 See *What's Next for the U.S.-Korea Alliance*, Statement before the H. Comm. on Foreign Affairs, Subcomm. on Asia and the Pacific, 112th Congress, 2 (2012) (statement of Victor Cha, Senior Advisor and Korea Chair, Center for Strategic and International Studies); see also Mark Landler & David E. Sanger, *Obama Backs South Korean President's Policy on North*, N.Y. TIMES, Jan. 27, 2009, <http://www.nytimes.com/2013/05/08/world/asia/obama-backs-policy-of-south-korean-president-on-north.html?pagewanted=all>; see also Scott A. Snyder, *U.S. Policy Toward North Korea*, Council on Foreign Relations, Jan. 2013, <http://www.cfr.org/north-korea/uspolicy-toward-north-korea/p29962>.

3. The U.S. was increasingly criticized at the domestic and international level for action it took over seas, especially without the full and widespread support of the international community. Wars, such as in Iraq and Afghanistan, and nation building in the same states were viewed as unilateral interferences into the internal affairs of other states.⁵²

So too was the argument for involvement in North Korea. Through U.N. Security Council sanctions, the international community showed it was willing to sanction North Korea's failure to abide by its denuclearization commitments. But it did not bring similar commitment to passing tangible measures to address North Korea's human rights record. Without international support, possible unilateral U.S. action on North Korea's human rights was criticized as a pretext for a call for regime change and as interference into "internal matters."⁵³

But, key developments over the past decade challenge whether the U.S.'s continued policy of prioritizing security over human rights is still strategically advantageous or morally sound.

1) U.S. priority on resolving the North Korean security challenges has not yielded the desired results. Rather, North Korea has made it clear that it is a nuclear state and has no intention of abandoning its nuclear program. It has done so in rhetoric: "Those who talk about an economic reward in return for the dismantlement of its nuclear weapons would be well advised to awake from their daydream;"⁵⁴ by constitutional amendment proclaiming itself as a nuclear state;⁵⁵ and by developing, testing, and proliferating nuclear and missile technology, in defiance of international sanctions and bilateral and multi-lateral agreements.⁵⁶

**U.S. PRIORITY
ON RESOLVING
THE NORTH
KOREAN SECURITY
CHALLENGES HAS
NOT YIELDED THE
DESIRED RESULTS.**

From North Korea's perspective, its nuclear and ballistic missile arsenal is a vital tool to preserve the regime. There has been no major armed conflict on the Korean peninsula since the July 27, 1953 armistice, with the North Korean regime crediting its formidable arsenal as a significant reason for this relative calm. In fact, the argument has been made that foreign condemnation of North Korea's arsenal reinforces domestic sentiment that these weapons are a necessary deterrent to hostile foreign forces. This has led former U.S. diplomats and scholars to wonder in retrospect whether North Korea will ever be willing to denuclearize.⁵⁷

One thing is clear in the aftermath of the failed security agreements:⁵⁸ a deep lack of trust prevails among all parties involved. Fully aware of the need for a trust-building process, South Korea's President Park has labeled her North Korea policy "trustpolitik." But North Korea has reportedly drawn the wrong lessons from fallen regimes, such as Libya, where disarmament through negotiations was seen as a precursor to

52 JAMES MANN, *RISE OF THE VULCANS: THE HISTORY OF BUSH'S WAR CABINET*, 304-06, 349-58 (2004). (statement of Victor Cha senior adviser, Center for Strategic and International Studies); see also Mark Landler & David E. Sanger, *Obama Backs South Korean President's Policy on North*, N.Y. TIMES, Jan. 27, 2009, <http://www.nytimes.com/2013/05/08/world/asia/obama-backs-policy-of-south-koreas-president-on-north.html?pagewanted=all>; see also Scott A. Snyder, *U.S. Policy Toward North Korea*, Council on Foreign Relations, Jan. 2013, <http://www.cfr.org/north-korea/us-policy-toward-north-korea/p29962>

53 See, e.g. *Memorandum of DPRK Foreign Minister*, KCNA, Mar. 3, 2005; cf. *UN Reports North Korea Torture Camps, Calls for Criminal Investigation*, ALJAZEERA AMERICA, Feb. 17, 2014, <http://america.aljazeera.com/articles/2014/2/17/un-documents-northkoreatorturecamps.html>; *Final Report of Lefkowitz*, supra note 42; see also *N. Korea Denounces Global Call to End Human Rights Abuse*, KOREA HERALD, July 22, 2014, (more recently) <http://www.koreaherald.com/view.php?ud=20140722000959>.

54 KCNA, *Snubs Call for DPRK's Dismantlement of Nukes*, KCNA, Feb. 19, 2010, <http://www.kcna.co.jp/item/2010/201002/news/19/20100219-07ee.html>.

55 Akihiko Kaise, *N. Korea proclaims itself as a nuclear power in new Constitution*, ASAHI SHIMBUN, May 31, 2012, http://ajw.asahi.com/article/asia/korean_peninsula/AJ201205310066.

56 U.N. Security Council (UNSC), Note by the President of the Security Council, U.N. Doc. S/2014/147, ¶ 164-177, Mar. 6, 2014.

57 See, e.g., Victor Cha, *What Do They Really Want?: Obama's North Korea Conundrum*, 32:4 WASHINGTON QUARTERLY 120 (2009).

58 For instance, while it is reported that from 1994 to 2002, North Korea did not produce plutonium, North Korea was still enriching uranium, an alternative core component to create nuclear weapons. See Han Sung-joo, former Minister of Foreign Affairs for the Republic of Korea, Remarks: The North Korean Nuclear Threat: Evaluating its Twenty-Year Evolution at the Council on Foreign Relations, Apr. 24, 2014, transcript available at <http://www.cfr.org/arms-control-disarmament-and-nonproliferation/north-korea-nuclear-diplomacy-regional-security-northeast-asia/p32859>.

regime change through foreign interference.⁵⁹

Consequently, North Korea is highly unlikely to give up its arsenal absent some drastic change in its security calculus. The U.S.⁶⁰ and South Korea⁶¹ have admitted as much.

Meanwhile, human rights abuses in North Korea have gone undeterred.⁶² And by failing to seriously press North Korea to respect the rights of its people, while hoping that the security issue can be resolved first, the U.S. has advanced neither goal.

2) South Korea has shifted its policy on human rights in North Korea. In South Korea, the “Sunshine Policy” is a relic of past administrations and is unlikely to return in the same shape or form any time soon. After the shooting death of a South Korean tourist at the Mount Kumkang resort in North Korea in 2008, the previous administration of President Lee Myung-bak rejected unconditional aid to and appeasement of North Korea.

The current administration of President Park Geun-hye announced a framework of trustpolitik to build mutual reassurance with North Korea through incremental and tangible returns.⁶³ In the March 28th, 2014 “Dresden Declaration,” President Park proposed inter-Korean cooperation on humanitarian issues, infrastructure development, and restoring a general sense of common nationhood, which would provide a basis for Korean reunification. After long delays, the Unification Preparatory Committee began work in South Korea in mid-July. “The Dresden Declaration,” however, did not include specific mention of human rights in North Korea.

This has not stopped President Park’s administration from calling on North Korea’s leaders to address the human rights failures.⁶⁴ Despite North Korea’s ongoing threats to orchestrate South Korea’s “final destruction,”⁶⁵ South Korea continues to adopt cautious measures to pressure North Korea on its human rights record, such as supporting the creation and functioning of the COI, as well as backing the U.N. General Assembly resolution that endorsed the COI’s conclusions and recommendations. President Park went further to suggest that China should abstain from blocking any upcoming U.N. resolutions to implement the COI’s recommendations.⁶⁶

At home, President Park has continued to stress the importance of respecting human rights as a goal

59 *Rodong Simun Calls for Drawing Lessons from What Happened in Balkans*, KCNA, Apr. 6, 2013, <http://www.kcna.co.jp/item/2013/201304/news06/20130406-17ee.html>; see also *Foreign Ministry Spokesman Denounces US Military Attack on Libya*, KCNA, Mar. 22, 2011, <http://www.kcna.co.jp/item/2011/201103/news22/20110322-34ee.html>.

60 Lee Chi-dong, *Seiler: Seoul-Tokyo stand-off not hampering N. Korea denuclearization efforts*, YONHAP NEWS, Jan. 22, 2014, (The Director for Korea at the National Security Council, Sydney Seiler, said, “So, I don’t believe that the denuclearization of North Korea is being hindered by one particular obstacle other than Pyongyang’s unwillingness to seriously engage in authentic and credible negotiations that lead to concrete denuclearization steps.” He also said the U.S. sees no major policy changes in North Korea under the leadership of Kim Jong-un.) <http://english.yonhapnews.co.kr/news/2014/01/22/26/0200000000AEN20140122000251315F.html>; see also David E. Sanger, *U.S. Confronts Consequences of Underestimating North Korean Leader*, N.Y. TIMES, Apr. 24, 2014 (“We have failed,” said Evans J. R. Revere, who spent his State Department career trying various diplomatic strategies to stop the North. “For two decades our policy has been to keep the North Koreans from developing nuclear weapons. It’s now clear there is no way they will give them up, no matter what sanctions we impose, no matter what we offer. So now what?”), <http://www.nytimes.com/2014/04/25/world/asia/wrong-guesses-about-north-korea-leave-us-struggling-to-adjust.html>.

61 President Park Geun-hye, Press Conference with President Obama and President Park at the Blue House, Apr. 24, 2014, http://seoul.usembassy.gov/p_rorok_042514f.html.

62 Editorial Board, *North Korea’s Crimes Against Humanity Demand Action*, WASHINGTON POST, Apr. 15, 2014, http://www.washingtonpost.com/opinions/north-korea-crimes-against-humanity-demand-action/2014/04/15/d117199e-c4ab-11e3-b574-f8748871856a_story.html.

63 See Klingner, *supra* note 49.

64 See *South Korea Adopts Again Lifting Sanctions on North*, KOREA HERALD, Apr. 7, 2014, <http://www.koreaherald.com/view.php?ud=20140407000894>; see also Park Geun-hye speech, *Trustpolitik and the Making of a New Korea*, Nov. 15, 2012, available at <http://blogs.piie.com/nk/?p=8088> (unofficial translation); see also Chico Harlan, *South Korea Vows Active Support of U.N. Probe in to North Korean Human Rights Abuses*, WASHINGTON POST, Feb. 28, 2013, http://www.washingtonpost.com/world/asia_pacific/south-korea-vows-active-support-of-un-probe-into-north-korean-rights-abuses/2013/02/28/5a7c14c0-8194-11e2-b99e-6baf4be42df_story.html.

65 Tom Miles, *North Korea Threatens South with “final destruction,”* REUTERS, Feb. 19, 2013, <http://www.reuters.com/article/2013/02/19/us-nkorea-threat-idUSBRE9110J520130219>.

66 Chang Jae-soon, *Park Urges China Not to Veto U.N. Report on N. Korea’s Human Rights*, YONHAP NEWS, Mar. 24, 2014, (“Unless China exercises its veto right [over the report], I think the impact will be stronger on North Korea’s human rights”) <http://english.yonhapnews.co.kr/national/2014/03/24/26/0301000000AEN20140324000200315F.html>.

of peaceful reunification⁶⁷ and stated that South Korea should pass a North Korean human rights bill to encourage significant improvement in North Korea's humanitarian and human rights conditions,⁶⁸ which an often bitterly divided partisan legislature has brought back to the house floor.⁶⁹ And South Korea agreed to host a U.N. office in Seoul to monitor the human rights situation in North Korea and continue the work of the COI, a move that reverses its former rejection of a similar proposal.⁷⁰

South Korea could certainly take stronger steps to improve the human rights situation of its northern neighbor, such as using its political and economic leverage in the region to call on its economic trade partners, especially China, to collectively pressure North Korea. But the ROK administration has moved past the old ineffectual policy of appeasement and has taken some initial steps to address human rights issues more forthrightly.

3) There is strong support within the international community to hold North Korea accountable for its human rights violations. The COI was established by unanimous consent of the U.N. Human Rights Council following increased support for UN General Assembly resolutions on North Korean human rights over the years, with fewer and fewer states abstaining or casting a “no” vote.⁷¹ A clear majority in the Human Rights Council adopted the damning conclusions of the COI. Media covered the COI report for days, and governments, NGOs, and academics around the world rallied in support of its findings. The Security Council bypassed the typical route of waiting for the General Assembly to act on the COI report, opting instead to hold an immediate Arria-Formula⁷² meeting to discuss follow-up measures to the COI report. This rising chorus of agitation from States, civil society, and individuals signals strong international support to hold North Korea accountable for its seemingly intractable human rights situation.

Thus, these developments over the past decade – the failed “security first” policy, South Korea's policy shift on human rights in North Korea, the international community's joined calls for accountability and the protection of human rights in North Korea, and the undeniable gravity, scale, and nature of atrocities committed by the North Korean regime – make it increasingly untenable to justify American foreign policy leaders' tentative action on human rights for perceived, but always elusive, advances in security in its dealing with North Korea.⁷³

C. A “HUMAN RIGHTS UP FRONT” APPROACH IS A MORE EFFECTIVE AND MORALLY SOUND NORTH KOREA POLICY.

After the release of the COI report, President Obama said that North Korea's human rights violations “make North Korea probably the worst human rights violator in the world.”⁷⁴ Indeed, the North Korean leadership has proven it is not interested in either nuclear disarmament or serious improvement in the human, economic, social, and political rights of its people. It does not lack the funds to feed its people

67 Chang Jae-soon, *Park Call Unification Jackpot for Neighbors Too*, YONHAP NEWS, Jan. 22, 2014, <http://english.yonhapnews.co.kr/northkorea/2014/01/22/96/0401000000AEN20140122009200315F.html>.

68 See Park, *supra* note 64.

69 Koo Jun-hoe, *National Assembly NKHR Debate Goes On*, DAILY NK, Jan. 15, 2014, <http://www.dailynk.com/english/read.php?catald=nk00100&num=11491>.

70 Chung Min-uck, *Seoul to host UN Office on NK rights*, KOREA TIMES, Apr. 30, 2014, http://www.koreatimes.co.kr/www/news/nation/2014/04/485_156407.html.

71 Roberta Cohen, *North Korea Faces Heightened Human Rights Scrutiny*, 38North.org, Mar. 21, 2013, <http://38north.org/2013/03/rcohen032113/>.

72 UNSC, Note by the President of the Security Council, U.N. Doc. S/2010/507, ¶ 65, July 26, 2010.

73 JEFFREY A. BADER, *OBAMA AND CHINA'S RISE: AN INSIDER'S ACCOUNT OF AMERICA'S ASIA STRATEGY* (Brookings Institution Press, 2012); see also Robert Gates, *The U.S. is Bribed by North Korea — Again*, WASHINGTON POST, Mar. 12, 2012, (“I don't want to buy the same horse twice.”) http://www.washingtonpost.com/opinions/the-us-is-bribed-by-north-korea-again/2012/03/12/gIQA51HD8R_story.html.

74 Barack Obama, Press Conference with President Obama and President Park of the Republic of Korea, White House, Apr. 25, 2014, <http://www.whitehouse.gov/the-press-office/2014/04/25/press-conference-president-obama-and-president-park-republic-korea>.

but only the will to do so.⁷⁵ And under Kim Jong-un, North Korea has sought to tighten its grip over every aspect of its people's lives.

It is time that the U.S. meets the worst human rights situation in the world with an equally effective and morally sound response.

Indeed, the Obama Administration has already taken notable steps to elevate the human rights situation in North Korea compared to some past administrations. Secretary Kerry at a U.N. side event, which included the foreign affairs ministers of South Korea and Japan along with the U.N. High Commissioner for Human Rights, Prince Zeid Ra'ad Zeid al-Husseini, Justice Kirby, and Shin Dong-hyuk, among others, in September called in no uncertain terms and forcefully for the closure of the political prison camps⁷⁶ – an issue once considered too sensitive and difficult to substantiate. The U.S. was involved in drafting and voted for strong language in the Human Rights Council resolution on the COI report. And following the Arria-Formula meeting, the U.S. along with France and Australia called on the Security Council President to formally consider the North Korea human rights issue.⁷⁷ Even now, the Administration is mobilizing votes on a North Korea human rights resolution for the fall U.N. General Assembly.

The U.S. must not lose this unprecedented momentum and should continue to build upon and increase its efforts to pass tangible measures that will address the serious North Korea human rights situation. A “human rights up front” approach, similar to the one urged by the COI,⁷⁸ would provide that response to “one of the globe's most difficult challenges.”⁷⁹ Using improvements in North Korea's human, civil, political, economic, social, and religious rights record as a litmus test would create a better record of credibility for the U.S. to build its relations with North Korea. Taking the lead on an issue of global concern would significantly advance U.S. international standing and reputation for promoting human rights and security, two primary commitments of the current Administration. And U.S. action will likely lead to other countries responding in kind.⁸⁰

IT IS TIME THAT THE U.S. MEETS THE WORST HUMAN RIGHTS SITUATION IN THE WORLD WITH AN EQUALLY EFFECTIVE AND MORALLY SOUND RESPONSE.

U.S. interests run deep on the Korean peninsula in an alliance “forged in blood”⁸¹ since the Korean War in the 1950's. The alliance continues to strengthen in mutual economic and security interests every year.⁸² Improving the human rights of the people in North Korea will inevitably lead to a more stable and secure Korean peninsula to the benefit of the region as well as to the U.S., but perhaps most significantly, would give the North Korean people the audacity to hope for “an unfettered start and a fair chance, in the race of life.”⁸³

75 Joshua Stanton & Lee Sung-Yoon, *Pyongyang's Hunger Games*, N.Y. TIMES, Mar. 7, 2014, <http://www.nytimes.com/2014/03/08/opinion/pyongyangs-hunger-games.html>.

76 John Kerry, Remarks at Event on Human Rights in the D.P.R.K., U.S. STATE DEP'T, Sept. 23, 2014, available at <http://www.state.gov/secretary/remarks/2014/09/232014.htm>.

77 Letter dated 11 July 2014 from the Permanent Representatives of Australia, France and the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2014/501.

78 See *COI Detailed Report*, supra note 19, ¶ 1225(g) (“Rights up Front” strategy”).

79 Doug Bandow, *How to Deal with North Korea*, NAT'L INTEREST, Mar. 11, 2014, <http://nationalinterest.org/commentary/how-deal-north-korea-10023>; see also Shannon Tiezzi, *Why the UN Report on North Korea Won't Change Anything*, DIPLOMAT, Feb. 19, 2014, available at <http://thediplomat.com/2014/02/why-the-un-report-on-north-korea-wont-change-anything>.

80 *Ten Critical Challenges for the Next American President*, Freedom House (2012).

81 Kathleen Stephens, Former U.S. Ambassador to Korea, *The U.S. and Korea: A Regional and Global Partnership*, Delivered to the Korean Council on Foreign Relations, Mar. 20, 2009, http://seoul.usembassy.gov/p_113_061209.html.

82 Mark E. Manjiv et. al, *U.S.-South Korea Relations*, Congressional Research Service, Report R41481, Summary (2014).

83 Abraham Lincoln, Messages to Congress 1861-2, <http://www.historytools.org/sources/lincoln-messages.html>.

D. RECOMMENDATIONS

In view of a “human rights up front” approach, we recommend:

- a. **The U.S. Senate should pass and the President should sign the North Korea Sanctions Enforcement Act (H.R. 1771), a comprehensive bill that provides targeted sanctions against North Korean leaders engaged in human rights violations and other illicit activities, including missile and nuclear technology proliferation, money-laundering, and counterfeiting.⁸⁴ More effective implementation of Executive Orders 13382⁸⁵ and 13551⁸⁶, which primarily target weapons proliferation and illicit activities, is also needed. President Obama could also sign a new Executive Order sanctioning specifically those most responsible for human rights violations in North Korea, including the operation of its political prison camps, torture, public executions, censorship, the denial of the right to food, and the misappropriation of North Korea’s economic resources.**

Despite North Korea having developed and tested nuclear and ballistic missile weapons in violation of U.N. Security Council resolutions, withdrawn from the Nuclear Proliferation Treaty, threatened the U.S. and its allies with nuclear annihilation,⁸⁷ and committed gross human rights violations so egregious to be considered crimes against humanity, U.S. sanctions against North Korea remain relatively weak – a mere 62 North Korean entities are targeted for their involvement only in illicit economic activities and weapons proliferation.⁸⁸ By comparison, the U.S. has imposed sanctions on Iranian,⁸⁹ Burmese,⁹⁰ and Sudanese⁹¹ entities responsible for human rights violations;⁹² has sanctioned most of the top officials of the Belorussian and Zimbabwean governments for subverting democratic processes in those nations;⁹³ has imposed comprehensive financial sanctions on Iran,⁹⁴ Cuba,⁹⁵ and Burma;⁹⁶ has blocked the property of several hundred Iranian and Cuban entities;⁹⁷ and has designated Iran⁹⁸ and Burma⁹⁹ as primary money laundering concerns. Of all of these nations, only Iran arguably poses as great a threat to international security as North Korea, and none is responsible for equally serious human rights abuses.

H.R. 1771, which had 147 bi-partisan co-sponsors when it passed the House unopposed,¹⁰⁰ supports the administration’s stated policy objectives of using pressure to halt North Korea’s proliferation and seek the cessation of its crimes against humanity, using the same tools the administration has used against the other countries mentioned previously. It provides the U.S. the leverage necessary to achieve

84 H.R. 1771, 113th Cong. (2013-2014). The U.S. House of Representatives passed H.R. 1771 on July 28, 2014.

85 Exec. Order No. 13382, 70 Fed. Reg. 38567 (July 1, 2005).

86 Exec. Order No. 13551, 75 Fed. Reg. 53837 (Aug. 30, 2010).

87 Bruce Klingner, *Time to Get North Korean Sanctions Right*, Nov. 4, 2013, HERITAGE FOUND., <http://www.heritage.org/research/reports/2013/11/time-to-get-north-korean-sanctions-right>.

88 Bruce Klingner, *Why Does the U.S. Hesitate to Enforce Its Laws?*, Sept. 17, 2014, KEIA, <http://blog.keia.org/2014/09/why-does-the-u-s-hesitate-to-enforce-its-laws>.

89 Exec. Order No. 13628, 77 Fed. Reg. 62139 (Oct. 12, 2012).

90 Exec. Order No. 13619, 77 Fed. Reg. 41243 (July 11, 2012).

91 Exec. Order No. 13412, 71 Fed. Reg. 61369 (Oct. 13, 2006).

92 U.S. Dep’t of Treasury, List of Specially Designated Nationals and Blocked Persons, available at <http://www.treasury.gov/ofac/downloads/prgrmlst.txt> (last visited Oct. 6, 2014).

93 See, e.g., Exec. Order No. 13469, 73 Fed. Reg. 43841 § 1(a)(iv) (July 29, 2008) (Zimbabwe); Exec. Order No. 13405, 71 Fed. Reg. 35485 § 1(a)(ii)(B) (June 20, 2006) (Belarus).

94 31 C.F.R. § 561.201 (2013).

95 *Id.* §§ 515.201-515.202.

96 *Id.* §§ 537.201-537.208.

97 See List of Specially Designated Nationals and Blocked Persons, *supra* note 92.

98 76 Fed. Reg. 72756 (Nov. 25, 2011).

99 69 Fed. Reg. 19093 (Apr. 12, 2004).

100 H.R. 1771 Cosponsors, available at <https://beta.congress.gov/bill/113th-congress/house-bill/1771/cosponsors> (last visited October 6, 2014).

these interests through diplomacy. The bill, while leaving broad exceptions for humanitarian aid, blocks access to North Korea's offshore accounts and the flow of hard currency that both facilitates and sustains its proliferation, money laundering, and crimes against humanity. Sanctions may be suspended or lifted only after Pyongyang achieves certain irreversible and verifiable benchmarks or by Presidential waiver.

The U.S. government should also continue to pursue action by the U.N. Security Council to address North Korea's crimes against humanity, notwithstanding the likelihood that China would veto such a resolution. The threat of strong U.S. national sanctions¹⁰¹ could serve to deter China from a U.N. veto, and could also set an example by which the U.S. could lead a global effort to isolate Pyongyang from its foreign assets and income, and thereby pressure Pyongyang to cease its crimes against humanity.

- b. Human rights should be a central feature in all future negotiations with North Korea, especially in any future Six-Party Talks, or any other bilateral or multilateral negotiation format.¹⁰² The COI report can be used as an impetus for linking security and human rights concerns with respect to North Korea.**

North Korea may return to the seemingly defunct Six-Party Talks.¹⁰³ While the U.S. should welcome negotiations with North Korea to discuss security concerns, the U.S. should include human rights in any negotiations with North Korea moving forward. The evidence marshalled in the COI report eliminates the option of turning a blind eye on human rights abuses it pervasively documented. Neglecting human rights concerns as a "reward" for North Korea's returning to the negotiating table should no longer be an option.

Discussions over sensitive strategic and nuclear issues with other governments have not precluded reference to human rights concerns, as was the case with the Helsinki Process involving the former Soviet Union or in contemporary discussions with China.¹⁰⁴ Building on such precedents, the Six-Party Talks and other diplomatic efforts could include a human rights component.

- c. As recommended by the COI, the U.S. should support inter-governmental efforts to curb North Korea's human rights violations, through measures including: U.N. Security Council referral of North Korea's leadership to the International Criminal Court; targeted Security Council sanctions pertaining to North Korea's human rights violations; a U.N. General Assembly resolution to create an ad hoc tribunal that would adjudicate crimes against humanity committed by North Korea's regime; and broader horizontal coordination among U.N. agencies involved in North Korea to incorporate the COI report into their agenda and adopt a "rights up front" approach to their work in that country.**

While the U.S. should continue pursuing Arria-Formula discussions to the extent useful to gauge and bring other Security Council members in alignment with the COI's recommendations, it should pursue

101 See, e.g., Klingner, *Time to Get North Korean Sanctions Rights*, *supra* note 87; see also Stanton & Lee, *Pyongyang's Hunger Games*, *supra* note 75; David Lague & Donald Greenlees, *Squeeze on Banco Delta Asia hit North Korea where it hurt - Asia - Pacific - International Herald Tribune*, N.Y. TIMES, Jan. 18, 2007, <http://www.nytimes.com/2007/01/18/world/asia/18iht-north.4255039.html>.

102 See Jin Dong-hyeok, *Kirby Pushes to Incorporate Human Rights Agenda*, DAILY NK, Apr. 15, 2014, <http://www.dailynk.com/english/read.php?catald=nk00100&num=11771>.

103 See *N. Korea Blames U.S. for Failure to Resume Six-party Talks, Hurting Relations with S. Korea*, ARIRANG, Mar. 25, 2014, http://www.arirang.co.kr/News/News_View.asp?nseq=159759&category=2; see also Media Note from U.S. Dep't of State Office of Spokesperson, *Visit of Six-Party Talks Chairman Wu Dawei*, Apr. 11, 2014, <http://www.state.gov/r/pa/prs/ps/2014/04/224684.htm>.

104 Roberta Cohen, *Time to Address North Korea's Prison Labor Camps*, Asian Institute for Policy Studies (2013); see also *Political Pluralism in the OSCE Mediterranean Partners, Before the Commission on Security and Cooperation in Europe (U.S. Helsinki Commission)* July 9, 2014 (statements of Karin Lee, Carl Gershman, and Frank Jannuzi).

formal U.N. Security Council protocols as well to implement the COI's recommendations on holding the North Korean regime accountable. The U.S. government should pursue this course notwithstanding any veto by China or Russia.

In the event of a veto by a permanent member to address North Korea's crimes against humanity, the U.S. government could support efforts by the government of South Korea, which claims sovereignty over the entire Korean Peninsula, to establish a tribunal to try North Korean officials, perhaps *in absentia*, and using a legal framework similar to the tribunal established under the auspices of the General Assembly to try former Khmer Rouge leaders in Cambodia.

And as in the case of Burma, placing the North Korean human rights situation on the Security Council's permanent agenda may be a feasible and meaningful way to ensure continued international focus on the issue. As a procedural, rather than substantive issue, this only requires nine out of fifteen votes and cannot be vetoed down by a permanent member.¹⁰⁵

The U.S. should support broader lateral cooperation between U.N. agencies involved in North Korea, such as the World Food Program, the World Health Organization, the U.N. Development Programme, Food and Agriculture Organization of the U.N., and U.N. Children's Fund, to incorporate the COI report in their agenda and to maximize the effect of the COI recommendations.

- d. The U.S. should discourage China from its practice of forcibly repatriating North Korean refugees from China to North Korea, where refugees often face arbitrary detention, torture, and possibly even death. The U.S. should also press China to allow the Office of the U.N. High Commissioner for Refugees to investigate refugee conditions in China and to permit and facilitate travel for refugees to other South East Asian countries. And the U.S. should continue to encourage China to accept the COI findings and to support U.N. General Assembly and Security Council Resolutions that implement the COI recommendations.**

China, like North Korea, refused to cooperate with the COI investigation, voted against the adoption of the COI report, and has threatened to veto any Security Council resolution recommended by the COI report. For its protective role, Beijing was also cited in the COI report as a possible aider and abettor of crimes against humanity. The U.S. should pursue implementation of the COI report at U.N. bodies notwithstanding a veto by China. A veto would force China into a position of aiding and abetting a North Korea charged with committing crimes against humanity.¹⁰⁶ This will further raise the cost to China to shield North Korea. In time, if this cost is raised sufficiently, China may instead choose to strengthen its relationship with South Korea, which could become a more useful and stable ally on the Korean peninsula.

- e. The U.S. should continue to condition U.S. humanitarian aid on transparency and monitoring mechanisms to ensure the aid reaches its intended recipients.**¹⁰⁷

- f. The U.S. should support people-to-people interactions with ordinary North Koreans.**

While it is a foreseeable consequence that the measures above may further chill relations between the U.S. and North Korea, the U.S. should not use any of the measures to directly limit people-to-people

105 See, e.g., UNSC, *Situation in Myanmar*, U.N. Doc S/PV.5526, Sept. 15, 2006, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.5526.

106 See Jared Genser, *UN Report Ups Pressure on North Korea... And China*, DIPLOMAT, Feb. 19, 2014, <http://thediplomat.com/2014/02/un-report-ups-pressure-on-north-koreaand-china/>; see also Nicholas Eberstadt, *Time for 'Never Again' on North Korea*, WALL STREET J., Feb. 18, 2014, <http://online.wsj.com/news/articles/SB10001424052702303945704579391290674357858>.

107 See *COI Detailed Report*, *supra* note 19, ¶ 1225(i).

interactions, provided these do not undermine economic pressure on an unreformed regime, or do not present the risk of dual use of skills acquired through such exchanges. Cultural and academic exchanges could help improve each people's understandings of the other and foster informal links between the people of both countries, even though North Korean participants are likely to be chosen from those perceived as most loyal to the regime.¹⁰⁸

The U.S. should increase its people-to-people engagement with ordinary North Koreans, through scholarships and exchange programs with the 27,000 North Koreans living in South Korea, through increased broadcasting to North Korea, through highlighting the testimony of North Koreans living abroad, through assistance to North Korean refugees resettling in the U.S., and by accelerating the development of new communications technologies to break down North Korea's information blockade.

- g. The U.S. should continue to support NGOs and other organizations tasked to monitor and report on North Korea's human rights violations as well as those facilitating information exchange in and out of the country through funding and strategic consultation.¹⁰⁹**

.....
¹⁰⁸ See *COI Detailed Report*, *supra* note 19, ¶¶ 271, 1223.

¹⁰⁹ See *id.* ¶ 1224.

ACKNOWLEDGEMENTS

The authors wish to extend our sincere thanks to the members of civil society and experts from North Korea, South Korea, and the U.S. who took time to speak with us or provided information. Without your contributions, this report would not have been possible. The views expressed in this report are solely those of the Robert F. Kennedy Center and Greg Scarlatoiu and Amanda Mortwedt Oh, staff members of the Committee for Human Rights in North Korea (HRNK) writing in their personal capacity.

We would also like to thank Michael Maya, Jason Davis, and Sandra Ovcinikova of the International Bar Association's North America office in Washington, D.C. for important research they conducted for this paper. And we thank Joshua Stanton, attorney and principal drafter of the North Korea Sanctions Enforcement Act, for his insightful comments to the report.

In addition, our gratitude goes to the following individuals for their consultations, research, and feedback:

ROBERT F. KENNEDY CENTER FOR JUSTICE AND HUMAN RIGHTS:

Santiago A. Canton, Executive Director, Partners for Human Rights

John Heffernan, Executive Director, Speak Truth to Power

Wade McMullen, Staff Attorney, Partners for Human Rights

David McKean, Advocacy Officer, Partners for Human Rights

Jeffrey Smith, Advocacy Officer, Partners for Human Rights

Katharine Valencia, Associate, Partners for Human Rights

Albert Suarez IV, Legal Intern, Partners for Human Rights

Graphic Design: Jennifer Kakalettris

RK ROBERT F. KENNEDY CENTER FOR JUSTICE & HUMAN RIGHTS

WWW.RFKCENTER.ORG

The Robert F. Kennedy Center For Justice & Human Rights was founded in 1968 by Robert Kennedy's family and friends as a living memorial to carry forward his vision of a more just and peaceful world. Today, the RFK Center exemplifies Robert Kennedy's belief that all individuals have the power and responsibility to make a difference, and that individuals working collectively can transform the world.

RFK Partners For Human Rights strengthens human rights defenders through sustained, strategic partnerships and advocacy, extending their reach to legislators, diplomats, international institutions, and corporations.

RFK Speak Truth To Power educates students and the public about human rights issues and provides the tools for creating change in their communities.

The **RFK Compass Program** promotes corporate responsibility by ensuring human rights concerns, fair labor practices, and environmental safeguards are reflected in global investment strategies.

RFK Awards recognize outstanding efforts by journalists and authors through the **RFK Book and Journalism Awards**, and grassroots activists through the **RFK Human Rights Awards**.

The **RFK Europe Training Institute** brings together human rights professionals and activists in the field to share strategies for raising awareness and igniting change.

The **RFK Juvenile Justice Collaborative** joins forces with Massachusetts' RFK Children Action Corps, founder of an innovative model for alternatives to juvenile incarceration, to bring the practice of direct service and the power of advocacy together to strengthen the rights of juveniles and urges more effective policies for adjudicated youth transitioning back into their communities.

Health eVillages provides state-of-the-art mobile health technology including medical reference and clinical decision support resources to medical professionals in the most challenging clinical environments around the world. Health eVillages has conducted small pilot projects in China, Haiti, Kijabe, Kenya, Lwala, Kenya, Uganda and Rural Louisiana.



 Visit us on the web: www.RFKCenter.org

 Follow us on Twitter: [@RFKCenter](https://twitter.com/RFKCenter)

 Add us on Facebook: facebook.com/RFKCenter

 Watch on YouTube: [RFKCenterComm](https://www.youtube.com/RFKCenterComm)

WASHINGTON

1300 19th St, NW, Suite 750
Washington, DC 20036
Phone: 202.463.7575

NEW YORK

515 Madison Avenue, Suite 718
New York, NY 10022
Phone: 917.284.6355

EUROPE

Via Ghibellina 12/a
50122 Firenze, Italia
Phone: +39.055.5389250