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## **Master of International Human Rights Law**

Master thesis

By

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### Humanitarian food aid in the DPRK- A Right to Food Perspective

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# Preface

Very few people in the world have had the chance to experience the spectacular people, culture and beauty of the Democratic People's Republic of Korea, or North Korea as it is more commonly known. I am one of the blessed people who have had the chance to do so; a unique opportunity offered to me by the United Nations World Food Programme. In this respect I would like to express my deepest appreciation to my former colleagues in Pyongyang.

As much as the DPRK is a wonderful country it is also a deeply troubled one. Everyday its citizens suffer countless abuses of their most basic human rights, including the right to food. Years of political oppression, economic downturn and international isolation have left them vulnerable and hungry yet still proud and loving. My second acknowledgement goes to all the Korean people I met and during my 20-month stay in Pyongyang. Although coming from such opposing systems, ideologies and beliefs, we shared equally many laughs and good times as frustrations and misunderstandings. Living, working and travelling with them gave me a better understanding of reality of life in the DPRK than I could ever have wished for. My wish is only that one day the situation will have changed to allow us to meet again in another part of the world as regular friends would do.

# Abbreviations

CEDAW	Convention on the Elimination on All Forms of Discrimination Against Women
CFSAM	Crop and Food Supply Assessment Mission
CHR	Commission on Human Rights
CRC	Convention on the Rights of the Child
CESCR	Committee on Economic, Social and Cultural Rights
DHA	Department of Humanitarian Affairs
DMZ	De-Militarised Zone
DPRK	Democratic People’s Republic of Korea (“North Korea”)
ECHO	European Commission Humanitarian Aid Department
FAO	Food and Agriculture Organization
FDRC	Flood Damage Rehabilitation Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
KPA	Korean Peoples’ Army
KWP	Korean Workers’ Party
NCC	National Coordinating Committee
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
PDC	Public Distribution Centre
PDS	Public Distribution System
ROK	Republic of Korea (“South Korea”)
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNICEF	United Nations Children’s Fund
UNTS	United Nations Treaty Series
US	United States of America
USAID	United States Agency for International Development
USD	United States Dollars
USSR	Union of Socialist Soviet Republics
WFP	World Food Programme
WFS	World Food Summit
WHO	World Health Organization

# 1 Introduction

## 1.1 UNGA Resolution 60/173

On 16 December 2005, for the first time, the United Nations General Assembly (the UNGA) passed a resolution condemning the human rights record of the Democratic People's Republic of Korea (the DPRK or North Korea) citing torture, public execution, political prison camps, infant killings and kidnapping of foreigners.<sup>1</sup> The resolution was long overdue and hardly came as a surprise to anybody with even the slightest knowledge about the DPRK - a country most famous for its repressive Communist-style dictatorship, nuclear arsenal and severe food shortages. What was perhaps more noteworthy was rather how the resolution, while urging the DPRK to guarantee its people human rights and basic freedoms, also explicitly called on the DPRK to provide humanitarian organizations such as the World Food Programme (WFP) with full, free, safe and unimpeded access to every part of the nation.<sup>2</sup>

Although the resolution failed to make direct reference, the foundation of the above request is the fundamental economic, social and cultural right to food as spelled out in numerous international human rights instruments, most notably the Universal Declaration of Human Rights (UDHR)<sup>3</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>4</sup> Ever since the food shortages experienced by this reclusive State came to the knowledge of the outside world in the early 1990s, there have been constant criticisms directed at the DPRK Government for its failure to uphold this basic human right to its 23 million citizens. Sometimes the object of the criticism has been the state-run Public Distribution System (PDS) - a highly discriminatory and poorly operating central mechanism through which staple foods are distributed to almost 70 percent of the population. Far more frequent however are criticisms like that of the UNGA Resolution directed at the Government's policy for distribution of humanitarian food assistance provided by external actors such as the United Nations food aid agency WFP.

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<sup>1</sup> UNGA Resolution A/ 60/173 of 16 December 2005. Resolutions of this kind had previously been passed by the United Nations Commission on Human Rights, *see for example* Resolution E/CN.4/2005/L.30 adopted on 14 April 2005. The resolution has since been followed by the very similar UNGA Resolution A/61/174 of 19 December 2006.

<sup>2</sup> *Ibid.* para. 4.

<sup>3</sup> Universal Declaration of Human Rights, adopted by UNGA Resolution 217 (III) of 10 December 1948.

<sup>4</sup> International Covenant on Economic, Social and Cultural Rights, adopted by UNGA Resolution 2200A (XXI) of 16 December 1966, 993 U.N.T.S. 3.

## 1.2 Humanitarian food aid in the DPRK

Starting in 1995 as a response to the DPRK's famine appeal following a summer of disastrous floods, WFP has provided over 4 million tonnes of food aid valued over USD 1.7 billion to feed an average of 6 million people per year.<sup>5</sup> As far as international actors in North Korea come, WFP has had the largest presence, enjoyed the greatest access and collected more information on the humanitarian food situation than anyone else. For many years it remained the largest single-country operation that WFP ran but also the most controversial.

The main argument of its adversaries was that WFP's access to the country in general and to the beneficiaries of the food aid in particular was so restricted that it was impossible to properly monitor its distribution and impact.<sup>6</sup> Without commenting upon the accuracy of such allegations, it is clear that the DPRK Government continuously imposed severe restrictions on WFP's humanitarian operations. Regular and unrestricted access for needs assessments, the provision of assistance and follow-up monitoring is usually a prerequisite for WFP interventions. Questions of access and safe passage of food assistance are also directly related to issues of respect for international humanitarian and human rights law, including the right to food. Thus, as evidenced by UNGA Resolution 60/173, and far from the intention of the agency itself, WFP's operations in the DPRK increasingly became a yardstick with which to measure the Government's compliance with their obligations under the right to food.<sup>7</sup>

At the time the UNGA Resolution was passed I was working for WFP in the DPRK and was on a daily basis confronted with issues of humanitarian access. The UNGA Resolution drew attention to the relevance of WFP's work in the context of international human rights and prompted me to examine the human rights regime of relevance to humanitarian food aid. This thesis came through as an attempt to substantiate and/or refute the allegations of the UNGA Resolution by thoroughly breaking down the Government's obligations under the right to food and related human rights and comparing them to all aspects of access restrictions imposed on WFP humanitarian food aid operations.

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<sup>5</sup> WFP DPRK *Facts and Figures*, September 2005.

<sup>6</sup> See for example, Haggard, Stephen and Noland, Marcus, *Hunger and Human Rights- The Politics of Famine in North Korea*, Washington D.C, U.S. Committee for Human Rights in North Korea, 2005.

<sup>7</sup> WFP's official policy has for a long time been to adopt a needs-based approach rather than a rights-based approach when carrying out food relief, recovery and development programmes. With the momentum of the United Nations reform, WFP is increasingly moving towards incorporating a rights-based approach in its operations. How this will be done is not yet clear, there are some mandate restrictions which will need to be overcome as well as more political issues related to the unwillingness of the US - WFP's main donor to sufficiently recognize the right to food.

## 1.3 Questions at issue

In the same vein as UNGA Resolution 60/173, this thesis will look at humanitarian food aid in the DPRK from the perspective of international human rights law, in particular the right to food. The thesis will first examine the obligations of the DPRK Government as they stand under the international human rights instruments to which the DPRK is a party, as well as under other non-binding instruments of relevance. As a practical assessment of the Government's compliance with the relevant provisions, issues faced by WFP in the distribution of humanitarian food aid will be assessed.

The following questions will be specifically examined:

1. Does the DPRK have an obligation to request humanitarian food aid?
2. Does the DPRK have an obligation to accept humanitarian food aid?
3. Having accepted humanitarian food aid, what are the obligations of the DPRK Government to provide access to:
  - a.) geographical areas?
  - b.) vulnerable groups?
  - c.) information and data?
4. What are the obligations of the DPRK Government with respect to diversions of humanitarian food aid?

## 1.4 Delimitation

I want to start by pointing out that the right to food is not *per se* centered on humanitarian food aid. It is to be primarily realized by the right-holders themselves i.e. the North Korean people through their own activities, and secondarily through the assistance of their Government. However in the case at hand, where domestic food and other resources are insufficient, international humanitarian food aid will supplement individual and national efforts and the right to food will automatically apply also to the provision of such aid. This alone is the focus of the thesis and although it is impossible to discuss food in the DPRK without commenting on the functions of the PDS, I will do my best to not dwell upon it unnecessarily.

Moreover, the thesis will be focusing solely on provision of humanitarian food aid by WFP, and will make no attempt at discussing the provision of bilateral food assistance. This may seem an unusual position to take, judging from the fact that the DPRK actually receives more food aid bilaterally than it does through WFP.<sup>8</sup> However, the reason for the delimitation is simple: none of the major providers of bilateral food assistance, i.e. the Republic of Korea (ROK or South Korea) or China, make

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<sup>8</sup> WFP internal data compilation shows that bilateral food aid and imports/concessional loans accounted for 60 percent (6,516,100 tons) of the total food aid provided between 1995 and 2005.



any significant attempts to monitor or target their food aid and consequently are not suffering from restrictions on humanitarian access.

The focus of the thesis will be on international human rights law and not on international humanitarian law (IHL) despite the fact that the latter contains a more comprehensive framework governing humanitarian food aid. This is due to the fact that IHL is only applicable during times of armed conflict. Despite the absence of a peace agreement following the Korean War, it is hard to argue for a continuous application of this legal regime into the 1990s and 2000s to what could at most be classified as a low-intensity conflict. However, in as much as IHL can provide guidance, this thesis will draw upon its framework to interpret concepts familiar to both regimes. It is also of relevance to point out here that this thesis will stay clear of political reasoning, although it is evident to anyone familiar with the DPRK that considerations of this nature have a very high impact on the humanitarian aid regime.

In terms of temporal limitation, this thesis will mainly focus on the period 1995-2005, i.e. the period when WFP was implementing large-scale emergency operations and before the DPRK decided to stop international humanitarian food aid. In 2006, WFP reoriented its programmatic focus to a considerably smaller protracted relief and recovery operation, with a limited geographic focus and smaller beneficiary numbers. As applicable, aspects of the post-2005 food security situation will be discussed to provide the reader with a more comprehensive picture.

Finally a note on terminology: unless otherwise indicated, for the sake of simplicity the thesis will throughout use 'the right to food' as a general term encompassing both the right to adequate food and the right to freedom from hunger.

## **1.5 Disposition and methodology**

The thesis will start by providing a brief overview of North Korea's political, economic, cultural and social history in Chapter 2. This will not only assist the reader in understanding the special security environment under which the humanitarian aid efforts are taking place, but it will also paint a background picture of the cause of the food shortages. A more detailed account of the food security issues in the DPRK will be provided in Chapter 3.

The normative content of the right to food and the relevant legal instruments will be discussed in Chapter 4, which will be succeeded by an assessment of the Government's obligations in Chapter 5. The parameters of the DPRK's obligations identified, the thesis will proceed to examine practical examples humanitarian food aid in the DPRK to determine what does and does not constitute a violation of the right to food. In the final chapter, conclusions will be drawn and a summary of violations will be presented.

## 1.6 Material

Despite thorough research I was unable to find any legal material exclusively devoted to the subject of the right to food and the provision of humanitarian food aid. A few general studies have been made; the most useful one was published by the Food and Agriculture Organization of the United Nations (FAO) in 2002. For proper understanding and interpretation of the legal regimes governing the subject, I was mainly limited to consulting General Comments, guidelines and United Nations resolutions.

As a consequence of being the world's perhaps most closed-off state, very few books have been written about the DPRK. When I first started writing this thesis I was living and working in the DPRK and during this time official figures estimated that there were 300 foreigners residing permanently in the country, and almost exclusively in the capital Pyongyang. Consequently it is hard to find good and reliable literature. Another complicating factor is that North Korea and humanitarian food aid are controversial subjects involving many different players and political agendas. Data and stories are often distorted for political or personal gain, both by the beneficiaries, the North Korean Government, donors and humanitarian agencies. Keeping this in mind, I would nevertheless like to acknowledge the comprehensive books written on the food crisis by Andrew S. Natsios, Stephen Haggard and Marcus Noland. For more general and historical accounts of North Korea, the works of Bruce Cumings and Don Oberdorfer proved highly valuable to the thesis.

Finally it should be mentioned that this thesis would not have been possible to produce had it not been for the extraordinary amount of material and knowledge possessed and collected by my colleagues at the WFP Country Office in Pyongyang. WFP staff members have travelled to more places in the country than any other foreigners have and well above that of the average North Korean. Ten years in the country in constant search of information have enabled the organization to gain an unparalleled insight into the food security situation and the lives of the most vulnerable of Koreans. Much of the interesting and hard-to-obtain information of this thesis comes from this extraordinary effort.

## 2. Understanding the DPRK

### 2.1 The founding of the DPRK

Every year on 9 September, the streets of Pyongyang, Wonsan, Sinuiju and other North Korean cities come to life for the celebration of the 1948 Foundation day of the DPRK.<sup>9</sup> The proclamation took place amid the chaos that followed the Second World War. The Japanese colony of Korea had been partitioned into zones of US and Soviet military occupation which led to the division of the peninsula along a fictitiously created border on the 38<sup>th</sup> parallel.<sup>10</sup> Named the premier was a man who called himself Kim Il Sung- a charismatic, politically skilled 36-year-old who had made a name for himself as an anti-Japanese guerrilla fighter.<sup>11</sup>

Although the DPRK was initially established under Soviet patronage, it was in no way a typical Soviet satellite akin to those of Eastern Europe, nor was Kim Il Sung a handpicked puppet devoid of any real political powers. He quickly established his own brand of totalitarian Communism, heavily tainted with Confucian values and rich with persona cult around the *suryōng* – the supreme leader or ‘the Great Leader’ as he came to be known. The USSR withdrew their troops at the end of 1948, and although strong ties continued to exist between the two states, the DPRK was effectively run by the Korean Workers’ Party (KWP) and the Korean People’s Army (KPA) under the ultimate leadership of Kim Il Sung.<sup>12</sup> This indigenous Korean political system has survived the passing of time, including the succession of power to Kim Jong-Il – the eldest son - in 1997. There have been very few substantial changes made and even today its basic structure remains the same.<sup>13</sup>

### 2.2 The Korean War

Three weeks before the DPRK was formed, another Korean State saw the light of day just 192 kilometres south of the capital Pyongyang. Following dubious elections, Syngman Rhee was declared president of the ROK with strong US backing. President Rhee had spent considerable time in Washington, had a doctorate from Princeton and had a strong anticommunist conviction. He quickly and violently cracked down on leftist

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<sup>9</sup> Cumings, Bruce, *Korea’s Place in the Sun- A Modern History*, W.W. Norton, 1997, p. 235.

<sup>10</sup> *Ibid.* p. 186 *et seq.*

<sup>11</sup> For a good account of the “*Legend of Kim Il Sung*” see, Cumings, Bruce, *North Korea Another Country*, The New Press, 2004, p. 102 *et seq.*

<sup>12</sup> Cumings (1997) p. 228.

<sup>13</sup> *Ibid.*, p. 224 *et seq.*

groups and guerrilla insurgencies that sparked around the country, all under the justification of the threat posed by the regime in the North.

When the Korean War eventually broke out on 25 June 1950 with the KPA's attack on the Ongjin peninsula<sup>14</sup> this was in no way an unprovoked attack by the North on the South.<sup>15</sup> It followed guerrilla fighting in the South and several months of smaller conflict that had flared up along the parallel during 1949. Without trying to take the blame of Kim Il Sung - who did indeed raise the civil conflict in Korea to the level of general war- it has been documented that both parties had intentions to launch a reunification war. The end-result was a war with terrible and far-reaching effects. In the three years of fighting that ensued, more than two million Korean civilians, 952,000 Chinese and North Korean communist troops, 400,000 United Nations troops and 36,000 US troops are believed to have died.<sup>16</sup> The North, especially Pyongyang, was so devastated by airdrops that virtually no modern building was left standing and big reservoir dams providing water for 75 percent of the North's food production were destroyed.

Perhaps more of a tragedy is that the war failed to resolve any of the issues that made it start in the first place. When the fighting subsided on 27 July 1953 - following involvement by the Chinese on the side of the DPRK, and the US and the United Nations on the side of the ROK,<sup>17</sup> it was on the basis of a cease-fire agreement. The agreement explicitly spelled out that its objective was to establish an armistice until a final peaceful settlement was achieved and that within three months a high level political conference would be held "to settle through negotiations the question of the withdrawal of all foreign forces from Korea, the peaceful settlement of the Korean question etc".<sup>18</sup> Today, more than 50 years later, this has yet to happen. The tensions and problems remain and so do the social, political and economic differences. Thousands of US troops are still stationed along the heavily mined and guarded De-Militarised Zone (DMZ) created along the 38<sup>th</sup> parallel and around other strategic military locations in the South. Fault of a peace agreement, the two Koreas are technically still at war and both sides are taking measures accordingly.

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<sup>14</sup> According to official North Korean radio this had been preceded by an attack by the South Koreans and was simply retaliation. To this day, the DPRK Government refuses to admit that they launched the first full-on offensive.

<sup>15</sup> Cumings (1997), p. 237 *et seq.*

<sup>16</sup> Oberdorfer, Don, *The Two Koreas- A Contemporary History*, Basic Books 2001, p. 10.

<sup>17</sup> For a useful account of the Korean War, see Malkasian, Carter, *The Korean War (Essential Histories)*, Osprey Publishing Limited, 2001.

<sup>18</sup> Text of the Korean War Armistice Agreement, 27 July 1953, preamble and art. 60.

Available on <[news.findlaw.com/hdocs/docs/korea/kwarmagr072753.html](http://news.findlaw.com/hdocs/docs/korea/kwarmagr072753.html)>, accessed on 20 May 2007.

## 2.3 DPRK's Security

The DPRK's Constitution calls for the implementation of the line of self-reliant defence which entails 'to arm the entire people, [and] fortify the country'.<sup>19</sup> The population is constantly drilled to prepare for war and even on visits to kindergartens and nurseries in the country one can see pictures of guns, tanks and soldiers in the place of the regular nursery pictures of animals and toys. At the heart and soul of the DPRK regime is 'Songun' or the 'military first' principle, which among other things grants military personnel preferential treatment in the distribution of social benefits like food and housing. It also explains the allocation of resources in the DPRK: more than 30 percent of the budget is used for military purposes - higher than any other country in the world.<sup>20</sup> The DPRK's military investment has paid off: the KPA is estimated to be a force of 1.17 million active personnel with a reserve force of over 5 million - the fifth largest military force in the world.<sup>21</sup> Nearly 15,000 underground installations related to national security, including arms factories, jet plane hangars and tank revetments, have been erected around the country. North Korea also has weapons of mass-destruction: chemical and biological agents, missile systems of short- and medium-range, and as now admitted by Pyongyang, nuclear weapons.<sup>22</sup>

So what are the reasons behind this massive militarization and self-imposed reclusiveness? Naturally much of can be traced back to the failure to conclude a peace agreement with the ROK and the continued presence of US forces on the southern part of the peninsula. North Korea very much continues to regard itself as being in a state of war, and gruesome recollections of the atrocities experienced at the hands of the allies has made it determined to defend itself better this time. The DPRK also fear a US-led attack - a fear that was potentially emphasised by the American invasion of Iraq 2003 and continues to have unresolved issues and conflicts with former occupier Japan.<sup>23</sup> To this day, the DPRK is a country in a constant state of heightened security. Its borders are heavily guarded and both the rare foreigners who are allowed entry and the Korean civilians who live there are subjected to severe scrutiny and constant supervision. Large parts of the country are completely sealed off while travel to other parts is restricted and requires specific travel permits. Phone lines and conversations in homes,

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<sup>19</sup> DPRK's Socialist Constitution, Amended and supplemented constitution of the DPRK, adopted on Sept. 5, 1998 by the first session of the 1st Supreme People's Assembly, art. 60. Available on <[www.novexc.com/dprk\\_constitution\\_98.html](http://www.novexc.com/dprk_constitution_98.html)>, accessed on 20 May 2007.

<sup>20</sup> Cumings (2004), p. 1.

<sup>21</sup> Hodge, Homer T., "North Korea's Military Strategy", *Parameters US Army War College Quarterly*, Spring 2003, p.73. Available at: <http://carlisle-www.army.mil/usawc/Parameters/03spring/hodge.pdf> , last accessed on 20 May 2007.

<sup>22</sup> *Ibid.* The DPRK has officially acknowledged that they have nuclear weapons for purposes of self-defence. See for example, Weaver, Lisa Rose, "N. Korea 'admits having nukes'", *CNN*, April 24, 2003; and, Faiola, Anthony, "N. Korea declares itself a nuclear power", *Washington Post Foreign Service*, February 10, 2005.

<sup>23</sup> Hodge (2003), p. 70.

hotels and restaurants is often monitored and while foreigners are allowed internet access and a limited number of cellular phones and short-wave radios, these means of communication are prohibited for Koreans.<sup>24</sup>

## 2.4 The struggle for self-sufficiency

Until the division of the peninsula, Korea had remained a single, ethnically and culturally homogenous country for over thousand years. Its geographic position surrounded by some of the world's strongest nations made it vulnerable to invasions and historically all its neighbours have exerted various degrees of influence. This is believed to be one of the reasons that Koreans in general and North Koreans in particular are isolationist, to the point of being xenophobic. The nationalism of Kim Il Sung built on this historic xenophobia, stressing the 'purity' of all things Korean against the 'contamination' of foreign ideas and installing a sense of fear and animosity in the population.<sup>25</sup> The perhaps strongest exemplification of this sentiment is the principle of '*Juche*' - the ideological tenet that transpires through the DPRK's politics, defence and economics. Founded by Kim Il Sung in 1955, *Juche* is a concept, which in the Constitution is described as "*a world outlook centred on people and a revolutionary ideology for achieving the independence for the masses of people*".<sup>26</sup> More simply put, *Juche* means self-reliance and is a policy of seeking to meet demand entirely through domestic production.

Despite this, the DPRK has throughout history been a country which has relied heavily on other countries, in particular its socialist allies.<sup>27</sup> The Soviet Union was the most important player, offering up strongly subsidized supplies of energy, fertilizer, and manufactured products. Even today it is estimated that North Korea derives one-third of its revenues from aid and concessional trade, another third from conventional exports and roughly one third from unconventional sources including in estimated order of significance, missile sales, drug-trafficking, remittances, counterfeiting and smuggling.<sup>28</sup>

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<sup>24</sup> The use of cellular phones was allowed for a brief period in 2003 but was again prohibited in April 2004 when the authorities discovered the high amount of communication with the outside world. Some believe the ban – which took place shortly after the Ryongchon train accident - was intended to stop saboteurs from plotting against the North Korean regime.

<sup>25</sup> Cumings (1997), p. 137.

<sup>26</sup> DPRK Constitution, art. 3.

<sup>27</sup> Haggard and Noland (2005), 13.

<sup>28</sup> Haggard, Stephen and Noland, Marcus, *Famine in North Korea – Markets, Aid and Reform*, Columbia University Press, 2007, p. 31.

## 2.5 Human Rights and Social Structures

Despite its Communist-style system, the DPRK is a highly class-oriented society, the roots of which can be traced back as far as to the third century AD.<sup>29</sup> During this time, Korea was under the rule of a Silla kingdom which applied a hereditary social stratification system known as 'the bone rank system'. Depending on how close in lineage you were to the ruling or the royal family- 'the holy bone' or 'the hallowed bone'- the better position you would get in society and the better were your benefits. At the lowest end of the echelon were the slaves - Korea has one of the oldest and longest-standing systems of chattel slavery in the world and it was not until 1894 that it was abolished officially.

This strict observance of rank is still alive today in *Songbun*- a three tiered system which divides the population into three political groups: a loyal 'core' class, a suspect 'wavering' class and a politically unreliable 'hostile class'.<sup>30</sup> Individuals are further classified into 51 subcategories according to the political history of one's family (including distant relatives like cousins and grandparents) and their loyalty to the KWP. In a Party Congress held in 1980 it was estimated that 25 percent of the population fell into the core class, 50 percent fell into the wavering class while 25 percent were considered as belonging to the hostile class.<sup>31</sup> One's political classification is not a matter of public knowledge, or necessarily of personal one, but it is firmly recorded in each citizen's personal file. It determines what sort of jobs you can hold, whether or not you can become a member of the KWP as well as your access to housing, medical care and food.<sup>32</sup> This social stratification had important consequences for who did and did not suffer during the period of famine and food shortages.

This social stratification system is naturally contrary to the international human rights regime, which contrary to common belief, the DPRK has also subscribed to. The DPRK has ratified or acceded to four of the main international human rights instruments, including the two Covenants (the ICESCR and the International Covenant on Civil and Political Rights – ICCPR), the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>33</sup> It has increasingly showed its commitment to the

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<sup>29</sup> Becker, Jasper, *Rogue Regime- Kim Jong Il and the Looming Threat of North Korea*, Oxford University Press, 2005, p. 74 *et seq.*

<sup>30</sup> Hassig, Ralph C & Oh, Kongdan, *Political Classification and Social Structure in North Korea*, Institute for Defence Analyses, Panel on "Life inside North Korea", Testimony to the Subcommittee on East Asian and Pacific Affairs, United States Senate Committee on Foreign Relations, June 5, 2003, p. 2.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966, 999 U.N.T.S. 171; Convention on the Elimination of Discrimination Against Women, adopted by General Assembly resolution 34/180 of 18 December 1979, 1249 U.N.T.S. 13; and, The Convention on the Rights of the

human rights regime by submitting a number of the periodic reports required under each instrument. The DPRK is also a signatory to all four Geneva Conventions on the Conduct of Hostilities as well as to the first Additional Protocol thereto.

Nevertheless, the human rights record on the ground is poor to the extent that it has prompted the United Nations to appoint a Special Rapporteur on the situation of human rights in the DPRK<sup>34</sup> - an honour it shares with states like Liberia, Somalia, Myanmar, Haiti and Belarus. His name is Vitit Muntarbhorn, an experienced Thai law professor who has so far not been allowed entry into the country. Similarly, the DPRK has denied access to the Special Rapporteurs on the right to food, on torture, on extrajudicial killings and on violence against women. Evidence of appalling human right violations in all the above fields and any many others have nevertheless come to the attention of the outside world.<sup>35</sup> These have mainly been collected through testimonies from refugees and defectors who have sought asylum in neighbouring countries. Particularly relevant are accounts of life in the political work camps which supposedly house some 200,000 inmates under holocaust-like conditions,<sup>36</sup> stories on public executions and violations of judicial rights, and of what is of most relevance for this thesis: gripping tales of famines and food shortages.

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Child, adopted by General Assembly Resolution 44/25 of 20 November 1989, 1577 U.N.T.S. 3. The DPRK acceded to the two Covenants on 14 December 1981, and ratified the CRC on 21 October 1990, all without any reservations. On 29 March 2001 it ratified the CEDAW attaching a reservation to art 2.

<sup>34</sup> Commission on Human Rights Resolution 2004/13, *Situation of human rights in the Democratic People's Republic of Korea*, adopted at the 50th meeting on 15 April 2004.

<sup>35</sup> For comprehensive accounts on human rights in the DPRK please consult, Annual Reports of Amnesty International and Human Rights Watch ([www.amnesty.org](http://www.amnesty.org) and [www.hrw.org](http://www.hrw.org)). A useful report is Amnesty Special Report, *Starved of Rights: Human Rights and the Food Crisis in the Democratic People's Republic of Korea (North Korea)*, 17 January 2004. Available at < [web.amnesty.org/library/index/engasa240032004](http://web.amnesty.org/library/index/engasa240032004) > last accessed on 20 May 2007.

<sup>36</sup> Hawk, David, *The Hidden Gulag*. Washington: U.S. Committee for Human Rights in North Korea, 2003.



# 3. The North Korean Food Crisis

## 3.1 The origins of the food crisis

The North Korean famine in the 1990s and the subsequent food shortages were the result of a combination of factors. At the core are the agricultural disadvantages of the country; following the partition of the peninsula in 1945 North Korea was left with a highly mountainous territory with poor soils, unsuitable weather conditions and short growing seasons. Estimates are that as little as 17-18 percent - slightly over 2 million hectares - of the country's area is cultivable.<sup>37</sup> As a general matter, it is unimaginable that North Korea would ever grow enough food to sustain its 23-million population, but a series of bad agricultural policies made this even more impossible. Obsessed with the *Juche*-idea, Kim Il Sung tried to expand agricultural land by ordering cultivation of hillsides so steep that heavy rains carried off the soils and dumped them into the country's river system. Trees and shrubs were cut down everywhere to make space for farming which created further risk of erosion and led to river silting and finally floods. Already poor soils were regularly double-cropped and planted with higher-yielding grains of maize and rice that exhausted all fertility, and gave an even smaller agricultural output.<sup>38</sup>

Another policy strategy was to adopt an industrial approach to agriculture, involving a high degree of mechanising, electrification, chemicalization and irrigation. A carbon copy of what Lenin had prescribed to Russian agriculture, this strategy did increase agricultural output in the 1960s and 1970s<sup>39</sup> but it also made the North Korean agriculture highly vulnerable to the availability of inputs. With the collapse of the USSR, an important source for these inputs dried up. There no longer was any imported fuel to power irrigation systems and machinery nor to produce the chemical fertiliser on which the agriculture was now dependent. At the same time, the DPRK lost its market for industrial products and the food subsidies it received in exchange. Despite some concessional trade with China, the DPRK's industry and agriculture decreased rapidly.

## 3.2 A plea for help

In September 1995, the international community was stunned by a request by the DPRK Government for humanitarian assistance to ease severe food

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<sup>37</sup> FAO/WFP, *Crop and Food Supply Assessment Mission to the Democratic People's Republic of Korea (CFSAM) Report*, 2004, p. 6.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.* p.13.

shortages caused by flooding and crop failure.<sup>40</sup> The stupefaction was not so much about the acute food shortages - outside observers had long suspected that not all was rosy inside the hermetically sealed borders of North Korea. Rather, what surprised most people - and perhaps even more so the regime itself - was how a country governed by the *Juche*-idea and preoccupied with displaying military strength could admit such vulnerability that could cause the regime to 'loose face'.<sup>41</sup>

According to the DPRK Government's appeal, summer flooding had resulted in nearly two million tons of lost grain, the destruction of over 300,000 hectares of cropland and the displacement of 5.4 million people.<sup>42</sup> The appeal was misleading for a number of reasons. Firstly, the numbers were highly inflated, the consensus of the international community was that internal displacement was more in the range of 500,000 people and crop losses were not nearly as significant. Secondly, the appeal failed to mention the more structural reasons behind the food shortages and in a bizarre way, the floods of 1995 and subsequent disasters of droughts, tidal surges, hail storms and typhoons came almost as a blessing in disguise to the North Korean population. By blaming the food shortages on these natural disasters, the Government could absolve itself of responsibility, ignoring the years of mismanagement and bad policies that had paved the way for the famine. A good example of this is the naming of the government agency established to oversee the relief effort the Flood Damage Rehabilitation Committee (FDRC). In hindsight, one may say that the simple guise of the truth was indicative of the policy the North Korean Government would employ towards its humanitarian benefactors in the ten years of emergency operations that followed the appeal.

### 3.3 The phases of the food crisis

#### 3.3.1 The famine years

In his comprehensive work "The Great North Korean Famine" the American scholar and subsequent director of the United States Agency for International Development (USAID) Andrew Natsios estimates that 2-3 million people died of hunger and hunger-related diseases during the famine years of 1994-1999.<sup>43</sup> He describes how many of the famine characteristics

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<sup>40</sup> Natsios (2001), pp. 5 and 165. The DPRK had previously tried to get humanitarian food aid in 1991, but refusing to provide any evidence of food needs, it can not be considered as a genuine attempt. In the following, the 1995 appeal will be considered as the first real external appeal for food aid.

<sup>41</sup> 'Face', or *Myonmok* is an important aspect of the Korean culture. It means honour, dignity and reputation amongst others. This is crucial to uphold at all times and 'to loose face' means to be shamed in some way, to be dishonoured and humiliated.

<sup>42</sup> Haggard and Noland (2007), p. 34.

<sup>43</sup> Natsios (2001), p. 200. The numbers of famine deaths have been the subject of much analysis and range from 600,000 to up to 4 million people. For the purpose of this thesis we

were evident during the time, including mass-movements in search of food, increased consumption of alternative foods, populations control and family planning, abandoned children living on the streets, refugee exodus and mass graves. The effects of the famine spread gradually across the North Korean society. During the early stages, non-privileged families, in particular those belonging to the hostile or wavering classes, would get their PDS-rations gradually reduced as food availability dried up. In 1992, rations are reported to have been down by 10 percent, and the Government tried to counter public outcry by launching a propaganda campaign in which citizen's were encouraged to "eat two meals per day" and contribute the third one to the survival of the country.<sup>44</sup> In the years that followed, distributions under the PDS - which at the time were intended to provide 60 to 70 percent of the mostly urban population with their basic daily food needs at highly subsidized prices, became increasingly irregular.<sup>45</sup>

In 1993-1994, the central authorities coped with the sharp decline in food availability by triaging the four eastern provinces of North Hamgyong, South Hamgyong, Ryanggang, and Kangwon.<sup>46</sup> All food shipments to these provinces were discontinued and distributions under the PDS effectively stopped during the summer of 1994 (the notable exception being two to three days worth of rations in celebration of the birthdays of the leaders and Independence Day).<sup>47</sup> The selection was not random: these areas had traditionally been the poorest and least developed of the country, not only because of their distance from Pyongyang, but equally for their rugged mountainous terrain unsuitable for food production and due to historic rivalries with the southern provinces. They were also those considered as politically and militarily less important to the survival of the central government. The triage caused the famine to start two years earlier in the Northeast, which as a result suffered disproportionate cases of death by starvation – according to Natsios as many as 1 million people died.<sup>48</sup> In combination with the proximity to the border areas, these were also the areas which saw the largest refugee exodus to China and Russia.<sup>49</sup>

The privileged few who were still able to collect PDS rations were mainly living in the four western provinces North and South Pyongan and North and South Hwanghae. However, there is evidence that during the peak of

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will use Natsios figures as he has conducted the perhaps most exhaustive research on the subject.

<sup>44</sup> *Ibid*, p. 105. The tradition of having three meals per day was described as 'excessive and unhealthy'.

<sup>45</sup> Haggard and Noland (1997), p. 53; Natsios (2001), p. 105.

<sup>46</sup> Natsios (2001)106 *et seq.* 'Triage' is a medical term used to describe a practice of determining treatment of patients when it is impossible to save all ill or injured, e.g. in an emergency setting such as a war or a natural disaster.

<sup>47</sup> Becker, Jasper, *Hungry Ghosts: Mao's Secret Famine*, First Owl Books, 1998, Postscript: North Korea, 1998, p. 323.

<sup>48</sup> Natsios (2001), p. 91.

<sup>49</sup> *For a detailed account of refugee flows caused by the famine, see Committee for Human Rights in North Korea, The North Korean Refugee Crisis: Human Rights and International Response*, 2006.

the famine those traditionally favoured, including residents of Pyongyang and the military were also suffering food shortages. Hungry North Korean soldiers are reported to have deserted their units to rob and attack towns for food. Defected army officers claim that up to 8 percent of soldiers were malnourished and only 20-30 percent could be considered as healthy.<sup>50</sup> Even farmers were affected by the food shortages. Beginning in 1995, North Korea's central authorities reduced the grain ration for farm families from 167 kilograms per person per year to 107 kilograms, which was insufficient to live on.<sup>51</sup> The practice was disastrous to the food distribution system because it reduced the economic incentive to provide food to industrial areas and encouraged farmers to divert production from the agricultural system before the harvest. The hoarding of grain was widespread and an important factor behind the PDS complete collapse. It also contributed to the development of the market system of the DPRK, which will be discussed in the following section.

However, due to the secretive and uncooperative nature of the DPRK it was difficult, if not completely impossible, to find out the true extent of the crisis. Most of the accounts came from asylum-seekers who had entered China and who stood to benefit from exaggerating their stories. The in-country observations at the time were limited: WFP only arrived in the fall of 1995 and its four international staff members were mostly confined to the capital Pyongyang. Despite recurrent pressure from WFP to be allowed to allocate food to the Northeast, it was only in July 1997 - three years into the famine and two years after WFP had arrived - that the first shipment of humanitarian food aid arrived in the port of Wonsan. By then the crisis was a fact. When in 1998 WFP together with UNICEF and the European Commission's Humanitarian Aid Department (ECHO) was allowed to perform the first ever Nutrition Survey, results showed that children in North Korea suffered from the highest malnutrition rates in East Asia: 63 percent of the children were stunted or chronically malnourished (height for age), 16 percent were wasted or acutely malnourished (weight for height) and 61 percent were under-weight (weight for age).<sup>52</sup> The abnormally high stunting rate provides evidence of serious nutritional deprivation during the years of the famine.

### **3.3.2 The food crisis**

WFP emergency operation were gradually scaled up and eventually reaching on average 6 million people per year – almost one third of the North Korean population. With large amounts of humanitarian food aid flowing into the country and a slow recovery of the agricultural situation, the edge of the famine began to wear off at the end of the 1990s. Nevertheless, in its Crop and Food Supply Assessment Mission (CFSAM)

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<sup>50</sup> Becker (1998), p. 317; and, Haggard and Noland (2007), pp. 55-56.

<sup>51</sup> Natsios (2001), p. 91.

<sup>52</sup> WFP, *Nutritional Survey of the Democratic People's Republic of Korea*, January 1999, pp. 2-3.

Report of 1998, WFP/FAO estimated that domestic production would only cover the minimum consumption needs of the population for eight out of twelve months in 1999 and that the country was still “*facing a precarious food outlook*”.<sup>53</sup> When the PDS was resurrected it was still only providing 250 grams of cereals per day- sufficient to cover only half of the kilo caloric needs of an individual.<sup>54</sup> Some improvements could be traced in the nutritional status of the population: stunting dropped from 42 percent in 2002 to 37 percent in 2004 while wasting went from 9 to 7 percent.<sup>55</sup> Although moving in the right direction, these nutritional indicators are high by World Health Organization standards and humanitarian aid workers feared that the situation could actually be even worse.

During this period, important structural changes to the North Korean society were being brought on by the food shortages. The Government had allowed a certain amount of decentralization in 1996 by giving authority for feeding the population from national bureaucracies in Pyongyang to county administrators, but in 1998 it was announced that each individual family was henceforth responsible for feeding itself.<sup>56</sup> The decentralization further pronounced regional and social difference in food accessibility, making it very hard for food-deficit areas to cater for its population. Markets - an anomaly in a Communist society like the DPRK- also began to emerge and increased exponentially in quantity, quality and importance.<sup>57</sup> These so called farmers’ markets were a *de facto* privatization of part of the North Korean economy but in reality simply a reflection of the coping strategies that were being employed by people to overcome food shortages. The new system not only posed a risk to the authority of the regime, but it also changed the way people were able to access food. Market prices were however on average 3 to 3.5 times higher than in the PDS, with one kilo of the main staple rice costing as much as a worker’s full monthly salary. These high prices meant that many poor North Koreans, especially those in urban areas, could simply not afford to complement their meagre PDS-rations with market purchases.<sup>58</sup>

Faced with this new reality, the Government initially tried to impose ever-tighter restrictions but was eventually forced to reform to gain control of the situation. The most notable were the 2002 economic reforms, which in terms of access to food had major impact. Firstly, they resulted in a 20-fold increase in prices – a measure intended to counter the large discrepancy between food prices in the market and the PDS. It was hoped that this would at least in part stifle the blossoming markets and reduce the hoarding, but alas. The drastic price hike sent the North Korean economy into inflation,

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<sup>53</sup> FAO/WFP, *Crop and Food Supply Assessment Mission to the Democratic People’s Republic of Korea*, Special Report, 12 November 1998, p.1.

<sup>54</sup> WFP internal data, Food rations through the PDS 1998-2005.

<sup>55</sup> UNICEF/WFP, *Democratic Peoples Republic of Korea Nutritional Assessment 2004*, March 2005, pp. 2-3.

<sup>56</sup> Natsios (2001), p. 110.

<sup>57</sup> Natsios (2001), p. 97 *et seq.*

<sup>58</sup> Haggard and Noland (2007), p. 193.

with basic food doubling or tripling in price each year. Secondly, decentralization meant local production units in industry and agriculture were left in charge of economic decisions, but similarly that they no longer received government subsidies.<sup>59</sup> For the first time forced to turn a profit and meet budget constraints, many factories went under with disastrous effects for their workforce. WFP estimated that over 30 percent of North Korean workers were either permanently or temporarily unemployed or underemployed in 2004, and that those still working saw their salary cut by up to 80 percent. Not surprisingly women were the most affected; almost 30 percent of women became ‘housewives’ a term almost unknown in a society which previously boasted an almost complete employment rate.<sup>60</sup> During the food crisis, accessibility and not availability of food was the major problem. In the budding North Korean market economy, there were winners and losers and access to food increasingly became a question of who had access to money.

### **3.3.3 The ‘development era’**

On 26 August 2005, WFP and United Nations representatives in Pyongyang were called into the Ministry of Foreign Affairs for an unexpected meeting – the *modus operandi* of DPRK authorities when they had unfavourable news to deliver. The message was clear and unambiguous: after ten years of humanitarian assistance, the agricultural situation in the DPRK had improved and the time had come to stop humanitarian aid all together. WFP and other organizations providing this type of assistance had to close their projects by 31 December, after which only development assistance would be accepted. They further stated concerns over the emergence of a dependency culture and domestic concerns - mainly from homeland security authorities - over the intrusiveness of WFP monitoring. Another non-stated reason was considerable pledges of un-earmarked and unmonitored bilateral food assistance: 500,000 tons from the ROK and 250,000 tons from China (compared to 2005 year’s level of 300,000 tons of humanitarian food aid).<sup>61</sup> The DPRK authorities were feeling confident and triumphantly declared a revival of the PDS: daily rations would in October 2005 be increased to 500 grams of cereals per person per day – sufficient to cover the basic daily kilo caloric needs of an average person.

Within the required date, WFP suspended all operations under the ongoing emergency operation, including distributions and monitoring of food aid to 6.5 million beneficiaries, local production of fortified foods in 19 local WFP-supported factories and shipments of some 12,000 tons of food. Five sub-offices throughout the country were similarly dismantled and efforts were instead focused on negotiating a ‘development-oriented’ presence in the country, something officially stated by the authorities as desirable. The

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<sup>59</sup> *Ibid*, p. 191.

<sup>60</sup> WFP DPRK Monthly Report No. 65, June 2005.

<sup>61</sup> WFP PRRO 10488.0, *Recovery Assistance for Vulnerable Groups in the DPR Korea*, WFP/EB.1/2006/8/3 paras. 7 and 17-18.

result was a considerably smaller two-year Protracted Relief and Recovery Operation (PRRO), targeting some 1.9 million women and children with 150,000 tons of food aid, which was approved by WFP Executive Board in February 2006.<sup>62</sup>

Despite the authorities' insistence that humanitarian food aid was no longer needed, stories of food insecurity continued to come out of North Korea. In response to the DPRK's missile and nuclear tests in July and October 2006, the international community reacted by imposing new economic sanctions through Security Council Resolution 1718 [2006],<sup>63</sup> and the ROK suspended the humanitarian aid pledged. At the same time, the DPRK's long-time ally China failed to live up to its bilateral commitments, delivering only one-third of food aid promised. Food availability was again becoming a problem and many claim that despite the resurrection of the PDS since April 2006 only certain areas of Pyongyang have received rations.<sup>64</sup> Prices of staple foods continue to rise at alarming rates and Government-imposed bans of sales in the markets are making cereals economically inaccessible to most.

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<sup>62</sup> WFP PRRO 10488.0, *Recovery Assistance for Vulnerable Groups in the DPR Korea*, WFP/EB.1/2006/8/3.

<sup>63</sup> United Nations Security Council Resolution 1718 [2006], adopted at the 5551st meeting of the Security Council on 14 October 2006 condemned the test and called for North Korea to give up all nuclear weapons programs. The resolution also imposed sanctions on luxury goods, military equipment and materials that could be used in the production of nuclear weapons or weapons of mass destruction. Humanitarian assistance was specifically exempted from the application of the sanctions.

<sup>64</sup> See for example Hyun, Kwon Yeong, "NK Food Situation, Pyongyang Rationing Also Hits a Snag", *Dandong of China*, available at <[www.dailynk.com/english/read.php?catId=nk01500&num=704](http://www.dailynk.com/english/read.php?catId=nk01500&num=704)> last accessed on 20 May 2007.

# 4. Humanitarian Food Aid and Human Rights

## 4.1 Applicable human rights provisions

The DPRK has ratified a number of international human rights instruments, many of which contain articles relevant for the provision of humanitarian food aid. It should be noted that unlike Africa, Europe or the Americas, Asia-Pacific does not have a regional human rights instrument; consequently all human rights instrument referred to are of universal nature.<sup>65</sup>

### 4.1.1. Article 11 of the ICESCR

With the exception of Article 25 of the UDHR,<sup>66</sup> the most comprehensive human rights provision relating to the right to adequate food is Article 11 of the ICESCR. The first paragraph of the article reaffirms that:

”1. The States parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States parties will undertake appropriate steps to ensure the realization of this right, recognizing the essential importance of international cooperation based on free consent.”

The second paragraph reaffirms *the right to freedom from hunger and malnutrition* and lists measures to be taken individually or through international cooperation in order to bring hunger to an end. This paragraph could be viewed as the most basic form of the right to food, as it refers only to the right to minimum nutritional intake to ensure survival without the ‘adequacy’ standard found in Article 11(1).

According to General Comment 12 -“The Right to Adequate Food”- which is the authoritative interpretation issued by the Committee on Economic, Social and Cultural Rights (CESCR), the core content of the right to adequate food implies:

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<sup>65</sup> For a good example of a regional human rights provision relating to the right to food, see Article 12 of the Additional Protocol to the American Convention of Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador), adopted by the Organization of American States on 17 November 1988.

<sup>66</sup> Article 25 of the UDHR reads:”Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing ....” The UDHR although in many cases reflecting customary law, is not a legally binding treaty.



“The availability of food in quantity and quality sufficient to satisfy the dietary needs of individuals free from adverse substances and acceptable within a given culture”.<sup>67</sup>

This can be broken down into several elements: the food supply should be adequate, which means that the types of food available (nationally, in local markets, at household level and in terms of relief food, what is being distributed), should be culturally acceptable and suitable to the prevailing food or dietary culture of the country. Due regard should also be taken to the different needs of a person throughout the life cycle as well as to gender and occupation.<sup>68</sup> This implies for example that pregnant and lactating women, growing children and people performing particularly strenuous jobs have the right to more nutritious food (quality) or to a larger amount (quantity) to cover their specific needs. The food should also be safe to eat i.e. hygienic, free of toxic elements and contaminants as well as of good quality.

General Comment 12 stresses that food should be both available and accessible to people. The availability aspects means that there must be sufficient food or resources available for a person to be able to feed him/herself directly either through own activities (e.g. farming, natural resources, trading etc) or with help from the State (e.g. food distribution system, social security etc).<sup>69</sup> The accessibility aspect aims to ensure that when there is food and other resources, people can actually get hold of it. Food should be economically accessible, which means that it should not be so costly that people can not afford to buy it without compromising on other basic needs. Food should also be physically accessible which means that everyone, even the most vulnerable groups of the society can access it.<sup>70</sup>

#### **4.1.2. Article 12(2) of the CEDAW**

Despite the all-encompassing nature of Article 11 of the ICESCR, there are human rights provisions on the right to food targeting specifically vulnerable groups. For the protection of women, Article 12(2) of the CEDAW states that:

“...States parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”

This provision is part of a wider effort to eliminate discrimination against women in the field of health care.<sup>71</sup> According to the Committee on the

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<sup>67</sup> General Comment 12, *The Right to Adequate Food (Art. 11)*, E/C.12/1999/5. Adopted on the Twentieth session of the Committee on Economic, Social and Cultural Rights held in Geneva on 26 April-14 May 1999, para. 8.

<sup>68</sup> *Ibid.* paras. 7 and 9.

<sup>69</sup> *Ibid.* 12.

<sup>70</sup> *Ibid.* 13, *in fine*.

<sup>71</sup> The preceding paragraph reads “States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a

Elimination of Discrimination Against Women, it recognizes that women need extra care and attention during pregnancy and lactation and that therefore States Parties must ensure that they have access to adequate health care facilities and resources, including adequate nutrition.<sup>72</sup>

#### **4.1.3. Article 24(2)(c) and 27 of the CRC**

With the adoption of the CRC in 1990, children also received specific protection under the right to food. Two such provisions are contained in the CRC: similar to the CEDAW article the first one concerns itself with the rights of children to adequate health care. It commits State Parties to combating child malnutrition by requiring that they should take appropriate measures:

”To combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious food and clean drinking-water, taking into consideration the dangers and risks of environmental pollution”<sup>73</sup>

The second provision is more similar to the ICESCR article as it proclaims the right to adequate food and nutrition as being connected to the right of a child to have an adequate standard of living. According to article 27:

”States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”

#### **4.1.4 Related human rights provisions**

Every man, woman and child needs to consume a certain amount of food everyday, if not they will get progressively malnourished and ultimately it will lead to death. The right to food, and in particular the core right to freedom from hunger, therefore ties directly to one of the most fundamental of all human rights - a right that can never under any circumstances be suspended even in the worst cases of emergency - *the right to life*. Starvation of a person will thus be not only be a violation of freedom from hunger i.e. the core of the right to food, but also a violation of the right to life as protected in e.g. Article 3 of the UDHR and Article 6 of the ICCPR. Deliberate starvation of a population on the part of a Government also links to Article 1(2) of the ICESCR, which states that in no case may a people be deprived of its own means of subsistence.<sup>74</sup>

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*basis of equality of men and women, access to health care services, including those related to family planning”, Article 12(1) of the CEDAW.*

<sup>72</sup> Committee on the Elimination of Discrimination Against Women, Fact Sheet No.22, *Discrimination against Women: The Convention and the Committee.*

<sup>73</sup> Article 24(2) (c) of the CRC.

<sup>74</sup> Art 1(2) reads: “All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international

Food alone is however not enough: the right to food forms part of the broader right to an adequate standard of living and is intrinsically linked to a number of other human rights. As recognized by the 1999 “Updated Study on the Right to Food” by the then Special Rapporteur on the Right to Food Mr. Asbjorn Eide:<sup>75</sup>

“The ultimate purpose of promoting the right to adequate food is to achieve nutritional well-being for the individual child, woman and man. Human nutritional status is determined by at least three major clusters of conditions which interact in a dynamic fashion, relating to food, health and care, and with education as a cross-cutting dimension. The full realization of the latter depends also on parallel achievements in the fields of health, care for the vulnerable, and education.”

## 4.2. Non-binding instruments

### 4.2.1 The World Food Summit documents

Notwithstanding that the UDHR places all human rights on the same level, international attention to economic, social and cultural rights was appallingly low for several decades and the right to food remained a concept unbeknownst to most. Significant advancement in the recognition and promotion of these rights was made through a series of important world conferences starting in the 1990s, including the 1996 World Food Summit (WFS) in Rome. FAO had called the WFS in response to widespread under-nutrition and growing concern about the capacity of agriculture to meet future food needs and it brought together 180 nation and world leaders. Its aim was to renew the commitment at the highest level to the eradication of hunger and malnutrition and the achievement of food security for all through the adoption of concerted policies and actions. The results of the Summit are contained in two main documents: the Rome Declaration on World Food Security and the World Food Summit Plan of Action.<sup>76</sup> While neither one of them are legally binding instruments, their adoption by the Summit and thus by the majority of world leaders, means that the commitments therein must be considered to have overriding legal, political and moral significance for the world community, and represent at least in part the development of a customary law on the right to food.

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*economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”*

<sup>75</sup> Commission on Human Rights “The right to adequate food and to be free from hunger”. Updated study on the right to food, submitted by Mr. Asbjørn Eide in accordance with Sub-Commission decision 1998/106 (E/CN.4/Sub.2/1999/12), 28 June 1999.

<sup>76</sup> Rome Declaration on World Food Security and World Food Summit Plan of Action, adopted by the World Food Summit on 13 November 1996, available at [www.fao.org/docrep/003/w3613e/w3613e00.htm](http://www.fao.org/docrep/003/w3613e/w3613e00.htm) last accessed on 20 May 2007.

The participants of the WFS pledged to reduce the number of undernourished people to half their present level by 2015. In relation to the right to food, the Rome Declaration reaffirmed "*the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger*". The Plan of Action called for a better definition of the right to food as contained in Article 11 of the ICESCR, which started the process which led to the adoption of General Comment 12.

### **4.2.3. The Voluntary Guidelines**

To check on progress made, nations met again in 2002 at the World Food Summit: five years later, a significantly less attended event.<sup>77</sup> The final Declaration of the WFS: *Five Years Later: International Alliance against Hunger* re-affirmed "*the right of everyone to have access to safe and nutritious food*" and restated the goal of the 1996 WFS to halve the world's hungry. The Declaration endorsed in Paragraph 10 the "*progressive realization of the right to adequate food*" and requested FAO to establish an intergovernmental working group staffed by interested parties, including NGOs, charged with the task of formulating voluntary guidelines on food rights. The result, the "Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security" was adopted by the FAO Council in November 2004. While certainly providing interesting insight into the right to food, in particular in relation to humanitarian aid and access issues, the Voluntary Guidelines do not establish legally binding obligations. Their objective is to provide practical guidance to States on how to implement the right to food in their national context in order to achieve the goals of the WFS Plan of Action.<sup>78</sup>

### **4.2.4. UNGA and other United Nations Resolutions**

UNGA Resolution 60/173 on the Situation of human rights in the DPRK referred to in the introductory chapter was issued by the United Nations General Assembly, under powers given to it by the Charter of the United Nations Article 13(1)(b). According to this provision, the UNGA can initiate studies and make recommendations for the purpose of "*Assisting in the realization of human rights and fundamental freedoms for all*". Legal experts generally consider most General Assembly resolutions to be non-

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<sup>77</sup> As stated by the Director-General of FAO, it was "*the poor's summit: we invited all the Premiers of the rich countries, but no one came*". Out of 180 Governments represented at the Summit, of the 80 heads of State present, industrialized nations only sent two. FAO, *World Food Summit: five years' later*, Rome, 10 to 13 June 2002, available at [www.ishr.ch/hrm/reports\\_and\\_analysis/FAO/FAO-WFSfyl.pdf](http://www.ishr.ch/hrm/reports_and_analysis/FAO/FAO-WFSfyl.pdf) last accessed on 20 May 2007.

<sup>78</sup> FAO Council, *Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security*, adopted by the 127th Session of the FAO Council in November 2004. Preface, para 9.

binding and the Charter refers to them simply as recommendations.<sup>79</sup> However, given the general obligation of Member States under articles 55 and 56 of the Charter to act in cooperation with the United Nations, the impact of a General Assembly recommendation may be particularly strong in the case of a text adopted unanimously, by consensus or without dissenting vote. They certainly have a considerable degree of authority and may contribute to the development of customary law.

Other United Nations bodies also issue resolutions on human rights. The now dissolved Commission on Human Rights issued several resolutions on the DPRK during its 60 years of existence. The Human Rights Council which replaced the Commission in March 2006<sup>80</sup> has yet to issue any resolutions on the DPRK, although it has on a couple of occasions pronounced itself on the human rights situation in the country, including the systematic violation of the right to food. Similarly to those issued by the UNGA, resolutions by the Commission of Human Rights/ Human Rights Council or any of its sub-committees are not legally binding on member states. Compared to the former, their relevance as soft law or customary opinion should be lower as they are adopted by a smaller number of member states. It is however important to point out that most of the UNGA resolutions have been preceded by one or several Human Rights Commission resolutions which are often times almost identical in wording.

#### **4.2.5 Reports by Special Rapporteurs**

For the purpose of this thesis, two special rapporteurs are of particular importance: in terms of thematic mandate reports by the Special Rapporteur on the Right to Food (at present Mr. Jean Ziegler<sup>81</sup>) and in terms of country mandate reports by the Special Rapporteur on the Situation of Human Rights in the DPRK (Mr. Vitit Muntarbhorn).

With regard to legal value it is not entirely clear how special rapporteur reports should be classified. Their role is to examine, monitor, advise, and publicly report on human rights under their mandate.<sup>82</sup> The Rapporteurs form part of the 'Special Procedures' mechanism created by the Commission of Human Rights (mandate now transferred to the Human

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<sup>79</sup> UNGA Resolutions which can be considered as binding are those dealing with matters internal to the United Nations, such as budgetary decisions or instructions to lower-ranking organs.

<sup>80</sup>United Nations General Assembly Resolution 60/251, *Human Rights Council*, adopted at the 60<sup>th</sup> session on 15 March 2006.

<sup>81</sup> Established by Commission on Human Rights Resolution 2000/10, *Right to Food*, adopted at the 52nd meeting on 17 April 2000.

<sup>82</sup> Fact sheet No. 27, *Seventeen frequently asked questions about the United Nations special rapporteurs*, Office of the United Nations High Commissioner for Human Rights, date of publication unclear, available at [www.ohchr.org/english/bodies/chr/special/index.htm](http://www.ohchr.org/english/bodies/chr/special/index.htm) last accessed 31 December 2006.

Rights Council<sup>83</sup>). They are appointed as experts within their particular field and as such their reports and statements could presumably have a legal value similar to legal doctrine (it is also a fact that many special rapporteurs are from academia). Their reports and accompanying recommendations are presented to the Commission of Human Rights/Human Rights Council, the UNGA and occasionally even directly to the Secretary-General depending on the mandate. Their direct access to the decision-making bodies thus means that they have the potential of exerting significant influence on the interpretation and development of human rights under their mandate.<sup>84</sup>

## 4.3 DPRK Domestic Legal Framework

### 4.3.1 The Socialist Constitution of the DPRK

The DPRK Constitution is the supreme law of the country; every state law originates in it and each authority is to be subordinated to and bound by it.<sup>85</sup> The Constitution consists of 166 articles and seven chapters: Politics; The economy; Culture; National defence; Fundamental rights and duties of citizens; The structure of the state; and, Emblem, flag, anthem and capital.

The right to food is not mentioned at all within the Constitution although other economic, social and cultural rights such as the right to work, medical care and education receive an unclear degree of protection under articles 70, 72 and 73. The only mention of food or nutrition is a vague reference in Article 25: “*The State shall provide all working people with every condition for obtaining food, clothing and housing.*” Framed more as a policy statement than a human rights provision, there is consequently limited constitutional protection of the right to food in the DPRK and the Constitution generally does not offer good protection to human rights. For this reason the DPRK Constitution has received much criticism: in November 2003, the CESCR expressed its concern over the “*legislative provisions of its Constitution, that [...] have an adverse impact on the protection of all human rights guaranteed under the Covenant.*”<sup>86</sup>

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<sup>83</sup> UNGA Resolution 60/251, para. 6.

<sup>84</sup> There are also documents adopted by NGOs and other organizations which deal with the provision of humanitarian assistance. These documents are voluntary codes of conduct and although they reaffirm many of the human rights principles they do not represent State practice and will not be dealt with further in this thesis. *See for example, IFRC et al, Code of Conduct for NGOs in Disaster Relief* adopted by the International Red Cross and Red Crescent Movement and various NGOs, (date unknown) available at <[www.ifrc.org/publicat/conduct/code.asp](http://www.ifrc.org/publicat/conduct/code.asp)>, last accessed on 25 May 2007.

<sup>85</sup> DPRK Constitution, preface.

<sup>86</sup> CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Democratic People's Republic of Korea*, 12/12/2003, E/C.12/1/Add.95, paragraph 9. The Human Rights Committee expressed similar concerns in July 2001, *Concluding Observations of the Human Rights Committee: Democratic People's Republic of Korea*, CCPR/CO/72/PR, 27/08/2001, para. 8.

### 4.3.2. Other domestic legislation

It has been very difficult to find accurate and updated domestic laws and regulations, in fact even while residing within the country such requests were normally met with either astonishment, suspicion or outright refusal from my national colleagues. According to the Government's own accounts it has adopted various policies and legislative steps to meet the requirement of the people for better food, clothing and housing.<sup>87</sup> The State has introduced the policy of supplying food to all working people and according to Article 70 of the Labour Law the State supplies workers, office employees and their dependants with provisions at a low price. Similar regulations exist under the Regulation on National Food Provision which governs the provision of food to old people, children and students. Those under old age pension or social security and their dependants are also equally supplied food by the State under this Regulation.<sup>88</sup> Although never confirmed to me by my North Korean colleagues, this appears to be the legal foundation for the PDS, framed more as a governmental policy than as a right for the people. There does not seem to be any way for a citizen to claim the right to food in case he or she is deprived of it, which means that this legislation offers very little protection.

It therefore appears that there is a considerable discrepancy between the protection offered under the ICESCR and the domestic legal framework. For the protection of the right to food and other human rights, this is in theory not a problem. When questioned about the relationship between provisions of international human rights instruments and domestic laws and regulations, the Government has stated that the former enjoy the same status as the latter and can be applied directly. In case of conflict between the two legal regimes, the provisions of the international human rights instruments will be applied directly.<sup>89</sup>

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<sup>87</sup> Economic and Social Council, Implementation of the International Covenant on Economic, Social and Cultural Rights, *Replies by the Government of the DPRK to the list of issues (E/C.12/Q/DPRK/1) to be taken up in connection with the consideration of the second periodic report of the DPRK concerning the rights of the ICESCR*, E/1990/6/Add.35, from the 31<sup>st</sup> session of the Committee on Economic, Social and Cultural Rights held in Geneva on 10-28 November 2003, p. 50.

<sup>88</sup> *Ibid.* para 52.

<sup>89</sup> *Ibid.* para 2.

# 5 The Obligations of the DPRK Government

By virtue of being a signatory to the ICESCR, the CEDAW and the CRC, North Korea has obligations uphold its citizens' right to food. This chapter will look closer at what this entails as regards the provision of humanitarian food aid.

## 5.1 Progressive realization and immediate obligations

The obligation of the DPRK with regard to the right to food is regulated in Article 2 of the ICESCR. The nature of the general legal obligation has been interpreted in General Comment 3 issued by the CESCR, which make it clear that State Parties like the DPRK have obligations both of conduct and of result.<sup>90</sup> The former obligation recognizes the constraints faced by many countries due to limited resources and merely requires States to '*take steps*' with a view to achieving progressively the full realization of the rights in the Covenant. However, this should not be viewed as an excuse for States' failure to act. While it allows for the full realization to be achieved progressively, it does require that steps in the right direction be taken within a reasonably short time after the Covenant's entry into force and that such steps be '*deliberate, concrete and targeted*' towards meeting the obligations of the Covenant.<sup>91</sup> It is up to the discretion of each State to decide what steps to take, as long as they are 'appropriate', however the ultimate judgement is cast by the CESCR when reviewing States Reports or Individual Complaints. Steps or measures which the CESCR proposes to be adequate include but are not limited to legislative, judicial, administrative, financial, educational and social measures.<sup>92</sup>

The Covenant also gives rise to a number of obligations which are of immediate nature. Firstly, State Parties are required to guarantee that all rights are exercised without discrimination of any kind i.e. race, colour, sex, language, religion, political opinion, origin, property, birth or other status.<sup>93</sup> The non-discrimination principle is a fundamental rule of international law, which can be traced all the way back to the Charter of the United Nations. It is the cornerstone of the international human rights framework and of fundamental importance to the implementation of all other human rights.

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<sup>90</sup> General Comment 3, *The nature of States parties obligations (Art. 2, para.1 of the Covenant)*, E/C.14/1990/12. Adopted on the Fifth session of the Committee on Economic, Social and Cultural Rights held in Geneva on 26 April-14 May 1990, para. 1.

<sup>91</sup> *Ibid.* para. 2.

<sup>92</sup> *Ibid.* paras. 5 and 7.

<sup>93</sup> Art. 2(2) and 3 of the ICESCR and General Comment 3, para. 1.



Secondly, States are required to try to achieve the rights ‘*to the maximum of its available resources*’. This paragraph is interesting as it limits a State’s discretion when it comes to allocation of resources. While having limited resources may be an excuse to justify the progressive realization of the rights, unjustified spending of the same is not excusable. A State’s behaviour in this area can be particularly relevant when it comes to determining potential violations of the Covenant as it can provide important evidence of whether a State’s failure to guarantee a right is due to inability or to unwillingness.

Thirdly, States have the immediate obligation to pursue the realization of the rights ‘*by all appropriate means*’. This paragraph contains both a qualitative and quantitative obligation. The quality is assured by attaching the standard of appropriateness to the measures while the quantitative aspect requires that *all* measures be undertaken as opposed to some or a determined number. The ultimate judge of whether a State has lived up to this obligation will as mentioned previously be the CESCR.

Lastly, the Covenant requires that States ensure the satisfaction of at the very least the minimum essential levels of each of the rights in the Convention.<sup>94</sup> In terms of food, this immediate obligation is at the same level as that contained in article 11(2), namely to uphold everyone’s right to freedom from hunger. Consequently, this right should be considered as absolute - not only because of its direct link to the right to life - but also in its own right as the minimum core obligation of the right to food.

## 5.2. Three levels of obligations

Like any other human right, the right to food gives rise to three levels of obligations for State parties: the obligation *to respect*, *to protect* and *to fulfil*.<sup>95</sup>

The obligation to respect the right to food requires States to refrain from taking any measures which would prevent its citizens from having access to food. This ties back to the fact that the right to food is primarily to be realized by right holders themselves through their own activities, and that they should enjoy the necessary freedom to carry out such activities to achieve food security. In such a situation, States simply have the duty to not unduly hinder the exercise of those lawful activities.

The obligation to protect requires States to ensure that the right to food of its citizens is protected from interference of third parties e.g. non-state actors, groups and individuals. Failure to do so can result in the State being held liable and several judgments and reports issued by international human rights bodies (although with regard to other human rights) have held States

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<sup>94</sup> General Comment 3, para. 10.

<sup>95</sup> *Ibid.* para. 15.

responsible because of the lack of due diligence to prevent the violation by non-State actors or to respond to it.<sup>96</sup> General Comment 12 also highlights amongst its list of violations the “*failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others*”.<sup>97</sup>

The obligation to fulfil the right to food can be divided into the obligation to facilitate and the obligation to provide.<sup>98</sup> The former requires States to adopt specific measures to improve right-holders’ access and utilisation of resources and their means to ensure a livelihood. According to Article 11(2) of the ICESCR this could be measures of production, conservation and distribution of food that make full use of technical and scientific knowledge; the dissemination of knowledge of the principles of nutrition; and, the development or reform of agrarian systems to achieve the most efficient development and utilisation of natural resources.

The obligation to provide can be regarded as the provision of last resort, as it requires States to actually provide food ‘*whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal.*’<sup>99</sup> The obligation will be activated in regard to vulnerable groups such as sick or injured people, small children and the elderly as well as during times of natural disasters and conflict.

## **5.3 DPRK obligations in practice**

### **5.3.1. Availability of food - the obligation to request humanitarian food aid**

International human rights are first and foremost intended to create rights for individuals and groups of individuals with corresponding obligations for their national governments. When these individuals or groups of individuals fail to meet their food needs through their own actions, the State in question has the ultimate responsibility to ensure freedom from hunger and to provide for the right to food for its population. States are nevertheless not left completely to their own devices. Both the Covenant and General Comment 12 make it clear that there is an international aspect to the right to food.<sup>100</sup> When taking appropriate steps to ensure the realization of this right, States Parties should recognize the essential importance of international cooperation and comply with their commitment to take joint and separate action to achieve this goal. More specifically, States have a joint and individual responsibility to provide disaster relief and humanitarian assistance in times of emergency. Thus, while a State has the primary responsibility to uphold the right to food to its citizens (when they are

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<sup>96</sup> FAO Legislative Study 77 (2002), chapter 2.2.4.

<sup>97</sup> General Comment 12, para 19.

<sup>98</sup> General Comment 12, para. 15.

<sup>99</sup> *Ibid.*

<sup>100</sup> ICESCR Article 11 (1) and General Comment 12, paragraph 36, 38 and 40.

unable to do so themselves), it is nevertheless bound to consider the framework of international cooperation of both bilateral and multilateral nature to supplement its domestic efforts.

Although considerable discretion is granted to a State as to how to achieve the realization of the right to food, States are nevertheless required to justify their actions when they fail to uphold this right. According to General Comment 12, a State claiming that it is unable to carry out its obligation for reasons beyond its control must prove that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food aid.<sup>101</sup> Failure to do so will amount to a violation of the right to food. More recently, FAO - an organization increasingly involved in right-to-food-issues as a result of the World Food Summits – has stated that the failure to call for adequate and timely international assistance during an emergency may also be a violation of a State's obligation to fulfil the right to food.<sup>102</sup> With regard to the amount and type of food aid required, the obligation covers at least the minimum essential food required to ensure freedom from hunger to everyone within its jurisdiction.<sup>103</sup> However, as the right to adequate food is not to be interpreted in a narrow or restrictive sense, fulfilling simply the most basic kilo caloric needs is not enough. States could potentially also be considered obliged to apply for food aid even in times when people are not starving but when the domestic food availability is so low that it is inadequate to meet the dietary needs of the population. According to the CESCR, the right to food does not imply a stagnant state of affairs; inherent in the progressive realization comes also a right '*to the continuous improvement of living conditions*' meaning basically that the Government as conditions improve should seek also to improve the quality of the enjoyment of the right to food.

In the case of North Korea it is clear that following the collapse of the USSR, the country's critical source of foreign currency and cheap food imports dried up almost completely. The Government was no longer able to fulfil its policy commitment under the Labour Law or the Regulation on National Food Provision and provide food to all its population by means of the resources available. The PDS system collapsed and the food crisis commenced. The sad state of the economy certainly explains the DPRK's inability to respect its citizens' right to food but it does not deprive it of responsibilities under the ICESCR. The obligation to provide requires that the DPRK pro-actively engage in activities to strengthen people's access to food and as specifically stated in Article 11, this includes taking measures through international cooperation.<sup>104</sup> Although neither the Covenant nor the General Comment explicitly state that North Korea has an obligation to apply for international food aid, it places a burden of proof on North Korea

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<sup>101</sup> General Comment 12, para. 17.

<sup>102</sup> FAO, "Food: a fundamental human right", available at <http://www.fao.org/FOCUS/E/rightfood/right2.htm>, last accessed on 30 December 2006.

<sup>103</sup> General Comment 12, para 14.

<sup>104</sup> ICESCR, article 11 (2).

to justify its failure to provide food to its population.<sup>105</sup> In literature and United Nations documents it is regularly recognized that States have an obligation or duty to request assistance when there are food shortages in the country.<sup>106</sup>

As history will tell, the DPRK did appeal for international humanitarian food aid in September 1995, fulfilling as it may seem its obligation to its citizens. The request opened the door to what would soon become the world largest humanitarian food operation saving lives and improving the nutritional status of many vulnerable people. Given limited international insight and the closed-off nature of North Korea, it is unlikely that the world would ever have been able to enter had it not been for the Government's specific request. However, while the DPRK should certainly be complemented for its decision to request food aid, the timing of the appeal raises concerns. Evidence suggests that the food shortages had existed at least since 1994 and in some places (e.g. the northeastern provinces) even in the early 1990s. Although clear proof of how many lives were lost to starvation during those initial years of the famine is at present impossible to come by, there is sufficient evidence and personal accounts to place it beyond doubt that people were starving to death in a large scale. The Covenant requires the DPRK to move as expeditiously as possible towards the full realization of the right to food. Deliberate delays in seeking international cooperation and applying for humanitarian aid should therefore not be acceptable. A delay of up to four years in requesting the assistance during a period when large segments of the people of North Korea were unable to achieve their minimum food requirements to be free from hunger does create a presumption that the Government was in violation of the right to food. The ultimate test however will be in determining whether the failure can be attributed to the Government's unwillingness or whether it was due to inability.

Did the regime not know what was happening in the country at the time? Or, was the regime simply willing to let its people starve? The lack of any clear policy statements available to outsiders makes it hard to gauge the intentions of the regime. The political structure and class-nature of the North Korean society leaves the leadership up to a very small group centred around the *suryōng* - most of which are with the military. Other people have little to no ability to influence Government policy, which to all extent is governed by the *Songun*-military first principle. This could suggest that the true nature of the crisis may not always have reached the North Korean leader, who was often times sheltered from uncomfortable news, advised mainly by privileged military advisors and geographically isolated from the most affected areas and population groups.<sup>107</sup> Ignorance is however not a

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<sup>105</sup> General Comment 12, para. 17.

<sup>106</sup> See for example, FAO Legislative Study 77 (2002), chapter 2.2.6.; and, Commission on Human Rights, *Report of the Special Rapporteur on the right to food (Mr. Jean Ziegler)*, E/CN.4/2006/44, 16 March 2006, paragraph 24.

<sup>107</sup> Natsios (2001), p. 136. Kim Jong-Il reportedly complained that party cadres had been trying to hide the extent of the food crisis to avoid criticism.

defence for a Government when related to human rights abuses in its own country nor does it exclude responsibility. Moreover, the few public announcements made in the early years of the famine e.g. the infamous 1992 media campaign seems to suggest that the regime was aware and was trying unsuccessfully to address the food crisis. The delay of the appeal for humanitarian food aid was not due to unwillingness but more related to the *Juche*-principle of self-sufficiency, the importance of maintaining not loosing face and the Koreans historic isolationist nature. While this combination of factors can certainly explain the Government's failure to request international humanitarian food aid it does not excuse it. The failure to apply as expeditiously as possible for international food aid, at the time when domestic resources were insufficient to guarantee at minimum the freedom from hunger to its citizens, was due to the Governments unwillingness and represents a clear violation of the right to food.

Here it will be of interest to make a slight detour from the subject of the thesis, and briefly look at the question of whether it is justifiable for the DPRK to request international humanitarian food aid in the first place. Although the unfavourable agricultural climate and the unfortunate recurrence of natural disasters are partly to blame for the food shortages, equally certain is the fact that economic policy prioritizations, most notably those favouring the military are equally or even more to blame. The issue is not whether North Korea is entitled to have an army - this is inherent in the right to individual and collective self-defence as spelled out in Article 2(4) of the UN Charter.<sup>108</sup> Rather, the question will be whether North Korea can be deemed to have taken appropriate measures to realize the right to food and whether it has made full use of its available resources to do so.<sup>109</sup> Defending the DPRK in this situation will be difficult; on average military spending amounts to between 25 and 40 percent of their Gross Domestic Product (GDP) compared to 2-4 percent in countries like China, the US, the United Kingdom and France.<sup>110</sup> Although it is hard to say how much would be reasonable to spend (presumably this would involve a calculation of the degree of military threat objectively faced by the DPRK) the figure does seem excessive. Moreover, a focus on such advanced weaponry as nuclear and biological arms at a time when it is failing to provide food to its starving population is certainly not justifiable. It indicates that the DPRK has not only failed in its obligation of result (as people are starving) but

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<sup>108</sup> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security".

<sup>109</sup> ICESCR article 2 (1), General Comment 3, paras. 4 and 9.

<sup>110</sup> It is estimated that in relation to GDP, military spending amounts to 4.06 percent for the US, 4.3 percent for China, 2.6 percent for France and 2.4 percent for the UK (2005 estimates). CIA – The World Fact book, available at <[www.cia.gov/cia/publications/factbook/index.html](http://www.cia.gov/cia/publications/factbook/index.html)> last accessed 31 December 2006. Figures on North Korea military spending are normally in the range of USD 5.2 – 5.5 billion and 25-30 percent of GDP. See for example US State Department Figures and Centre for Arms Control and Non-proliferation <[www.state.gov/r/pa/ei/bgn/2792.htm](http://www.state.gov/r/pa/ei/bgn/2792.htm)> and <[www.armscontrolcenter.org/archives/002244.php](http://www.armscontrolcenter.org/archives/002244.php)> both accessed on 31 December 2006.

similarly in its obligation of conduct (by taking inappropriate policy decisions and not using the maximum of its available resources) – both of which amount to a violation of the rights under the Covenant, including the right to food.

### **5.3.2. Availability of food - the obligation to accept humanitarian food aid**

The DPRK's 1995 request for food aid became the starting point for large amounts of humanitarian food aid that streamed into North Korea between 1995 and 2005. Many international donors, most notably the US, Japan, ROK, Australia, Canada, and the European countries put forward unprecedented amounts of money and in-kind assistance to help hungry Koreans when their own Government was unable to provide for them. Is the DPRK then free to reject the aid it is being offered considering its obligations under the right to food?

As a sovereign nation, the DPRK's territorial integrity is protected by the Charter of the United Nations, and it should in principle be free from interference from other States. While the ICESCR requires the DPRK to take steps including through international cooperation to progressively realize the right to food, it also stresses that such cooperation should be based on free consent. Humanitarian food aid operations thus have to be agreed to by the Government to be able to take place in the DPRK. This principle has been reaffirmed in several UNGA Resolutions and also in the WFS Plan of Action, which reaffirmed that international relief operations should be conducted with due respect to national sovereignty.<sup>111</sup>

The Government's decision in August 2005 to halt large-scale humanitarian food aid was officially motivated by an improved domestic agricultural production and a desire to avoid developing a dependency syndrome following ten years of humanitarian assistance. Other unofficial reasons were that the DPRK had received commitments of increased bilateral food aid/concessional loans from the ROK and China and that a reduction of permanently resident aid workers had been demanded for security reasons. The official reasons are certainly valid ones. It is clear that in the case of improved domestic food production, it is only natural that the influx of international food aid be correspondingly reduced and that a recipient-state transitions from humanitarian relief to development assistance and eventually to not being a recipient at all. Indeed, the goal of an organization like WFP is 'to put itself out of business'. It is similarly clear that humanitarian food aid should never be used in a way that causes the recipient-state to be in a dependency situation nor that will undermine its ability to sustain itself. General Comment 12 specifically mentions that food aid should be provided in a way that does not adversely affect local food systems and that it should be organized in a way that facilitates the return to

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<sup>111</sup> WFS Plan of Action para. 43; and FAO Legislative Study 77 (2002), chapter 2.3.1.

food self-reliance.<sup>112</sup> Considerable attention has also been devoted to this issue by the Voluntary Guidelines which recommends that food aid should be provided with a clear exit strategy to avoid the creation of dependency.<sup>113</sup>

Normally decisions to end humanitarian food aid are taken jointly by the recipient-state and the United Nations following a careful examination of the food security situation in the coming years. In the case of North Korea, this was not done. For the first time in ten years, WFP and FAO's request to undertake a CFSAM was denied. No official figures of the 2005 harvest were shared by the Government to support the decision and it was never completely clear if the situation had improved to such an extent that it would be safe to end international humanitarian food aid. To this day, outsiders have not been able to verify the food situation properly and regular tools and assessments such as the CFSAM and the bi-annual Nutrition Survey continue to be denied. While the right to food does not place a specific obligation on the Government to consent to humanitarian aid, it does require that consent is not withheld arbitrarily; else it may be a violation under its obligation to provide.<sup>114</sup> In the spirit of international cooperation it may have been advisable for the DPRK to have justified its decision to end humanitarian aid better and it may eventually be requested to do so by the CESCR under the examination of its State Report.

From media reports and refugee accounts, it is clear that even after humanitarian food aid was halted, considerable food shortages remained. WFP's own analyses indicate a continued cereal shortfall of up to one million tons and regular dysfunctions of the PDS.<sup>115</sup> Even if the food shortages did persist, the measure to stop international humanitarian food aid does not necessarily amount to a violation of the right to food, provided that the DPRK is able to provide a substitute to such aid. At the time of the decision, North Korea had just received significant bilateral food commitments. Although subsequent developments, including the suspension of the ROK's bilateral food assistance and China's failure to live up to its commitment, did result in very little of this food aid being made available, it could be argued that the DPRK did not violate the right to food when it took the decision. The DPRK in good faith believed that with bilateral assistance and improved harvest it would be able to cover the national food gap and provide food to its population. The unwillingness criterion is thus not fulfilled.

One concern needs to be raised in this context though. While the measure does not appear to have affected the food availability in the country it could however have damaging effects on the accessibility to this food by all

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<sup>112</sup> General Comment 12, para. 39.

<sup>113</sup> Voluntary Guidelines, 15.1. See also the Rome Declaration, paragraph 10 (5) reaffirmation to endeavour to "*meet transitory and emergency food requirements in ways that encourage recovery, rehabilitation, development and a capacity to satisfy future needs*" and the WFS Plan of Action, Commitment 5.

<sup>114</sup> FAO legislative Study 77 (2002), chapter 2.3.1.

<sup>115</sup> WFP Internal Document, *DPRK Food Security Update*, March 2007.

people. Unlike humanitarian food aid provided by WFP, bilateral food assistance from the ROK and China is not specifically targeted and there are no restrictions on its usage. Judging by previous discriminatory practices, there is considerable risk that unless required the Government will not distribute the food aid equitably and on the basis of need. Moreover, unlike food aid provided by WFP which consists of a comprehensive food basket with beans, oil and micro-nutrient fortified foods, bilateral food aid consists almost exclusively of rice and is of limited nutritional value. It can thus be argued that while the DPRK is at liberty to choose which measures to adopt to ensure the enjoyment of the right to food for its population, they nevertheless need to ensure that such actions are appropriate. It seems that the DPRK's decision to suspend international humanitarian food aid from WFP for the benefit of bilateral food aid may not have been an appropriate measure. Despite the Government's good intentions, the decision to halt international food aid from WFP could be considered as a measure that prevented the most vulnerable North Koreans from having access to food adequate to meet their special nutritional needs. The examination of the appropriateness of the Government's decision will however be done by the CESCR when examining the DPRK's state reports and will not be examined here any further.

A final reflection on the DPRK's decline of international humanitarian food aid: At the time of the decision, the DPRK was in a precarious situation: the Six-Party Talks was about to resume in Beijing after three previous rounds had ended without any concrete agreements.<sup>116</sup> International pressure was mounting and maintaining a strong and confident position was paramount. The many years of humanitarian assistance, provided mainly by DPRK's adversaries and parties to the talks the US, ROK and Japan, had long smarted the security and political segments of the administration. It was associated with a considerable degree of embarrassment and presented the risk of being perceived as weak in the important talks. As was later discovered, the DPRK was at the same time building up for missile and nuclear tests in 2006, and limiting international presence in the country was likely part of the preparations. It is thus most certain that the decision to suspend international humanitarian food aid was heavily influenced by political and security considerations rather than by pure humanitarian ones. Although the reality is that the two are often intrinsically linked within the international humanitarian food aid business, caution must be taken. Developments within international human rights over the past decades increasingly argue for separation of the two, emphasizing that food should never be used as means of political and economic pressure.<sup>117</sup> Evidence of

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116 The Six-party talks are a series of meetings between China, the DPRK, the US, Russia and Japan aimed at finding a peaceful resolution to the security concerns raised by the North Korean nuclear weapons program. For more information on the various rounds of the talks, please see [http://en.wikipedia.org/wiki/Six-party\\_talks](http://en.wikipedia.org/wiki/Six-party_talks), last accessed on 30 December 2006.

117 See for example, General Comment 12, para. 37; Voluntary Guidelines 16.1; Rome Declaration on World Food Security, paragraph 7 and the WFS Plan of Action, Commitment 5, paragraph 43 ("*National and international relief operations are often the*



nations letting the former take precedent over the latter can support claims that the violation was related unwillingness rather than inability on the part of the Government.

### **5.3.3. Accessibility to food –obligations to grant humanitarian access**

Availability of food in a country is however not sufficient to fulfil obligations under the right to food, equally important is ensuring that people have access to it. As General Comment 12 points out: “*the roots of the problem of hunger and malnutrition are not lack of food but lack of access to available food.*”<sup>118</sup> When it comes to international humanitarian food aid, access to such food will very much be a question of the humanitarian aid providers’ ability to operate effectively – a concept known as ‘humanitarian access.’ Humanitarian access is commonly understood as access for assistance and protection to civilians during armed conflict, as well as military *hors de combat*, as defined in international humanitarian law (IHL). IHL contains several provisions regulating humanitarian access, including the free passage of such essentials as food, medicines and other goods of primary necessity.<sup>119</sup> It is now generally accepted that States’ have an obligations to facilitate humanitarian access and to cooperate, in particular by facilitating the rapid transit of relief consignments and by ensuring the safety of convoys.<sup>120</sup>

International human rights legislation on the other hand, provides very little guidance, despite the fact that humanitarian access restrictions today are far from limited to situations of armed conflict. In non-binding human rights instruments such as UNGA resolutions, mentions of access began to appear at the end of the 1980s, starting with UNGA resolution 43/131 on *Humanitarian assistance to victims of natural disaster and similar emergencies*, which invited States in need of assistance to facilitate the work of organizations, “*in particular the supply of food, medicines and health care for which access to victims is essential*”.<sup>121</sup> With the adoption of UNGA Resolution 46/182 which created the Department of Humanitarian

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*only solution for hungry people facing immediate starvation, and should continue to be a priority and be provided in an impartial and apolitical manner...”).*

<sup>118</sup> General Comment 12, para. 5.

<sup>119</sup> Additional Protocol II, Article 18, Additional Protocol I, art. 70, Fourth Geneva Convention Article 59.

<sup>120</sup> International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva-Dordrecht, 1987, paragraph 4888. For more on the IHL framework, see FAO Legislative Study 77 (2002), section 1.3.

<sup>121</sup> United Nations General Assembly Resolution 43/131, *Humanitarian assistance to victims of natural disaster and similar emergencies*, adopted at the 75<sup>th</sup> plenary meeting on 8 December 1998, para. 4. The statement was reaffirmed in an almost identical resolution in 1990 (UNGA Resolution 45/100, *Humanitarian assistance to victims of natural disaster and similar emergencies*, adopted at the 68<sup>th</sup> plenary meeting on 14 December 1990, para. 4.)

Affairs (today replaced by the United Nations Office of Coordination of Humanitarian Affairs - OCHA) in 1991, the concept was reinforced as States were now called upon to facilitate access. A definition of what access actually meant was however still lacking and humanitarian access was still an unclear concept within human rights law.

Following the World Food Summit and the adoption of General Comment 12, the issue came more to the forefront. General Comment 12 specifically listed the prevention of access for humanitarian food aid in armed conflicts or other emergency situations as amounting to a violation of the right to food. At the same time, several non-binding instruments and statements began to contribute to the formulation of a definition of humanitarian access. For example, CHR resolution 2003/10 on the Situation of human rights in the DPRK called for humanitarian agencies to have “*free and unimpeded access to all parts of the Democratic People's Republic of Korea in order for them to ensure that humanitarian assistance is delivered impartially on the basis of need, in accordance with humanitarian principles*” thus underlining the geographical nature of humanitarian access. UNGA Resolution 58/114, “*Strengthening of the coordination of emergency humanitarian assistance of the United Nations*” from 2004 for the first time focused on access to beneficiaries by calling upon governments to cooperate fully and in conformity with international and national laws with humanitarian agencies to ensure safe and unhindered access of humanitarian personnel as well as supplies and equipment to the affected civilian population.<sup>122</sup> The Voluntary Guidelines have further enlarged the scope of humanitarian access within human rights law to ‘*safe and unimpeded access to the populations in need, as well as for international needs assessments*’.<sup>123</sup>

All these binding and non-binding instruments reveal the increasing acceptance within the international community of a right to receive humanitarian assistance when in need. The corresponding obligation of granting humanitarian access has emerged as a fundamental principle of humanitarian action with basis in human rights (including the right to food), and is now also broadly applied to the need for safe and unhindered access to those affected in natural disasters as well as in complex emergencies. The concept encapsulates issues of freedom of movement of international aid agencies; freedom of access to populations in need; and, safety and protection of humanitarian personnel, aid and property.<sup>124</sup> As safety issues have never been a concern for humanitarian agencies operating in the DPRK, the following sub-chapters will focus on humanitarian access in

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<sup>122</sup> UNGA Resolution 58/114, “*Strengthening of the coordination of emergency humanitarian assistance of the United Nations*”, (A/58/L.39 and Add.1). Adopted at the 75th plenary meeting of the General Assembly 17 December 2003, para. 10.

<sup>123</sup> Voluntary Guidelines 15.3 and 16.6.

<sup>124</sup> FAO Legislative Study 77 (2002), chapter 2.3.2; and, WFP Policy Document, *Note on Humanitarian Access*, WFP/EB.1/2006/5-B/Rev.1, pp. 6-7.

relation to geographical areas, in relation to persons of concern as well as in relation to relevant information and data.

### **5.3.3.1. Humanitarian access - geographical**

After the 1995 appeal and acceptance of humanitarian assistance, the food problem in North Korea shifted from one of availability to one of accessibility. Ensuring that all those in need gained access to food aid was however difficult and geographical humanitarian access was subjected to severe limitations. WFP – the international humanitarian organization that has enjoyed the widest coverage - has at the most been allowed to travel to some 160-171 out of 203 counties/districts, covering around 87 percent of the population. Occasionally monitoring trips even to these counties have been cancelled or previously accessible areas were declared inaccessible. For example, in October 2004 WFP was without justification refused access to 10 districts, including the entire Chagang Province. The remaining counties (between 32 and 43 counties depending on the geographical classification system and access restrictions in place) were areas to which WFP was never allowed access. As it is the Government that handles the inland transport of food commodities in the DPRK, the restriction of access is not in the physical form of WFP trucks being directly obstructed from reaching the populations in need. The prevention of access is instead the result of a government declaration of which counties are and are not accessible for international humanitarian food aid monitors. In practice, the Government responds to WFP's travel plans for monitoring of food aid, submitted one to two weeks in advance, granting or declining access to certain geographical areas. As WFP operates a strict "no access, no food"-policy, preventing WFP staff to undertake monitoring missions to certain counties/districts will indirectly result in a suspension of food distributions to such areas.

Experience has shown that when WFP gains or regains access to counties/districts of the DPRK previously cut off from humanitarian food aid, the food security situation is particularly severe. As previously explained despite recent decentralization efforts, provincial or district authorities have little means to dispose of freely and are often unable to provide sufficient food to cover the needs of the population. The food deficit provinces, mainly Ryanggang, Chagang and North and South Hamgyong are in a tough position and even if at times local officials are able to provide basic staple foods to guarantee the survival of their residents, they are almost always unable to provide a fully balanced food basket of protein, fats, minerals and vitamins. It is thus certain that by preventing WFP geographical access, residents of food deficit areas will suffer food shortages.

In order to determine whether the DPRK has been in violation of the right to food by preventing WFP humanitarian access to certain geographical areas, one must first examine what scope economic, social and cultural rights offer

for limitations. According to Article 4 of the ICESCR, a State may subject the rights under the Covenant only to limitations determined by law and only in so far as such limitations are compatible with the nature of these rights. Furthermore, the limitations should only be imposed for the purpose of promoting the general welfare in a democratic society. In relation to the right to food, the CESCR has not pronounced itself on the issue of limitations, but in other General Comments statements on the application of Article 4 have been made. For example, in General Comment 14 which deals with the right to adequate health, the CESCR has stated that the limitation clause is primarily intended to protect the rights of individuals rather than to permit the imposition of limitations by States.<sup>125</sup> Unlike the ICCPR which provides for derogations to the rights therein on grounds of public emergency,<sup>126</sup> the ICESCR does not offer States this possibility. It has been argued that the very nature of economic, social and cultural rights precludes this and that it is hard to imagine a situation where limiting the application of these rights would be necessary to maintain peace and security.<sup>127</sup> On the contrary, such limitations may actually worsen a public emergency situation. Legal experts who have interpreted this provision in the so-called Limburg Principles have expressly limited its application by stating that Article 4 is not meant to introduce limitations on rights affecting the subsistence or survival of the individual.<sup>128</sup> This may seem a superfluous statement; limiting rights related to food to the extent that it fails to ensure the subsistence or survival would already be in violation of the core food right freedom from hunger as well as the non-derogable right to life. However, the CESCR has not precluded limitations on the right to adequate food which means that there may be scope for the DPRK to limit its application provided that it applies Article 4 very restrictively and complies with the protective safeguards contained therein.<sup>129</sup>

Putting this into context, the rationale behind North Korea's geographical humanitarian access restrictions has never been fully explained. Fault of clarification from the authorities, DPRK scholars have speculated as to why certain areas have been declared inaccessible to WFP and other humanitarian aid providers. Through several interviews with defectors and Korean and non-Korean officials familiar with the DPRK, it appears that many of these areas contain sensitive military installations.<sup>130</sup> This has also

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<sup>125</sup> CESCR, General Comment 14, *The right to the highest attainable standard of health* (Art. 12): (E/C.12/2000/4). Adopted at the 22<sup>nd</sup> Session of the CESCR held in Geneva on 25 April-12 May 2000, para. 28. See also, General Comment 13, *The right to education* (Art. 13), (E/C.12/2000/4). Adopted at the 21<sup>st</sup> Session of the CESCR held in Geneva on 15 November -3 December 1999. For a general overview see S epulveda, Magdalena, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, School of Human Rights Research, 2003, pp. 277-303.

<sup>126</sup> ICCPR, Article 4.

<sup>127</sup> S epulveda (2003), p. 295.

<sup>128</sup> Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (UN doc. E/CN.4/1987/17), No. 46; and *Human Rights Quarterly*, vol. 9 No. 2 (1987), pp. 122-146.

<sup>129</sup> S epulveda (2003), p. 279.

<sup>130</sup> Martin (2004), p. 557 *et seq.*

been stated as a reason by the DPRK authorities and could certainly hold true for inaccessible counties along the border areas with Russia and close to the DMZ such as part of Kangwon Province, Ongjin peninsula in South Hwanghae and the northernmost counties of Chagang Province. There may also be areas not on the border containing defence industries or weapons factories, e.g. Kanggye County in Chagang Province and several counties in North Pyongan Province. However, despite the DPRK's extensive militarization, it seems unlikely that all the inaccessible areas contain installations of that nature.

There is considerable evidence supporting claims that many of the closed-off counties host prisons, labour camps or other form of detention or 're-education' centres. According to David Hawk, who has written the most comprehensive report on the North Korean prison camp system, there are two distinct systems of incarceration: *kwan-li-so*, an extremely brutal gulag of political penal-labour colonies, and, *kyo-hwa-so*; long-term prison-labour facilities for convicted felons.<sup>131</sup> The main difference between *kyo-hwa-so* prisoners and *kwan-li-so* prisoners is that the former are almost always subjected to a judicial process and, upon conviction, are given a sentence of set length, while the latter, along with their families, are simply purged and put away for life. The camps are located mostly in the valleys between high mountains in the northern provinces of North Korea, and as demonstrated by satellite images and testimonies from defectors, many of these counties overlap with the counties inaccessible to WFP food aid monitors.

A third reason for closing off geographical areas for humanitarian aid workers echoed amongst DPRK experts is that conditions in some of these counties, most of them located in the mountainous food-deficit provinces Ryanggang or North Hamgyong, are simply too appalling and harsh. Given the DPRK's antiquated infrastructure and constant fuel and energy shortages, overcoming the remoteness and the difficult terrain was too cumbersome that the authorities could not be bothered to transport food into these areas, let alone bring foreign aid workers to witness the misery.<sup>132</sup> Doing so would mean a considerable 'loss of face', and the authorities preferred to write these regions off. As horrible as this may sound, it is not a completely ludicrous accusation. There is strong evidence indicating that the practice of triage was applied during the famine years to cut off the Northeast from PDS rations and it is quite likely that it was applied also to the distribution of humanitarian food aid.<sup>133</sup>

In relation to counties/districts with military installations and weapons factories, it can be argued that limitations imposed on humanitarian food aid may not be incompatible with the nature of the right. By virtue of the *Songun*-principle, these areas will be provided with food from other sources and limiting humanitarian food aid to these areas may not affect the access

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<sup>131</sup> Hawk (2003), pp. 15, 24 and 43.

<sup>132</sup> Martin (2004), pp. 560-61.

<sup>133</sup> Natsios (2001), p. 106.

to food. The humanitarian food aid was intended for civilians who generally do not live in these counties/districts. Although the ICESCR does not permit for derogations on the grounds of public emergency, is it possible to argue that military preparations may be for the purpose of the general welfare of the society? Potentially yes; in legal terms, the Korean War never ended and in the eyes of the North Koreans, rightly or wrongly so, attacks from the ROK, Japan and even the US are imminent threats. Although limiting access may not further the well-being of the people as a whole, in a society as plagued by war and occupation as North Korea, having a military capacity as a deterrent could be genuinely synonymous with general welfare and be in the interest of the society as a whole.<sup>134</sup> However, the way the limitations have been imposed fall short of meeting the safeguards of Article 4. There does not appear to be any clear national legislation accessible to everyone supporting the limitations and the apparent randomness with which they have been imposed gives a presumption that it is not being done in a legal and just manner.

As for limitations to areas containing prison-labour camps or suffering from particularly poor conditions, it is obvious that they are not in conformity with Article 4. As opposed to areas with military installations, these counties are civilian areas with a large presence of vulnerable groups and their location mainly in the food deficit Northeast suggest that they are in considerable need of food aid. Limiting access to these areas would thus neither be compatible with the nature and essence of the right to food (i.e. to guarantee access to food to all and to prioritize vulnerable groups) nor would it be in the interest of the general welfare of the society as a whole. Even if national laws would be enacted to support such limitations, the laws would clearly be arbitrary, unreasonable and discriminatory and in violation of the safeguards provided in Article 4.

Even is the above reasoning indicate that there may be some room for the DPRK to limit access at least to military areas, provided it is supported by clear national laws, the decisive factor will be whether it also complies with the reference to a democratic society. According to the Limburg Principles, the burden is upon a State to “*demonstrate that the limitations do not impair the democratic functioning of a society*”.<sup>135</sup> According to the same principles, there is no single model for such a society but it should imply respect for the principles of the United Nations Charter and the UDHR.<sup>136</sup> The notion of a democratic society requires respect for the principle of proportionality which means that there must be some balance between the limitations imposed and the reason for imposing them. As a general rule, the imposition of limitations is to be applied restrictively; they can clearly not be unreasonably far-reaching and should only be mandated by the exigencies of the situation.<sup>137</sup> The CESCR also specifically requires that

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<sup>134</sup> Limburg Principles, No. 52.

<sup>135</sup> Limburg Principle No. 53.

<sup>136</sup> *Ibid*, No. 55.

<sup>137</sup> S epulveda (2003), p. 283.

even limitations that are permissible should be of limited duration and subjected to review.<sup>138</sup> In the case at hand, North Korea's continuous restriction of access to up to 43 counties/districts, all areas within included, far exceeds the proportionality requirement. Just like North Korea's militarization seems excessive, so do the limitations. Objectively North Korea can not possibly justify that the limitations imposed comply with each of the elements under Article 4, and the restrictions would as explicitly stated by the CESCR thus constitute a violation of the Covenant.<sup>139</sup> Fault of permissible limitations, the DPRK can thus be considered to have taken a measure that limits access to food to its citizens in breach of its obligation to respect the right to food.

### 5.3.3.2 Humanitarian access – vulnerable groups

Hunger and malnutrition is today affecting over 850 million people across the world, the majority of them living in developing countries in Asia (64 percent), Sub-Saharan Africa (25 percent), Latin America (6 percent) and the Near East and North Africa (5 percent).<sup>140</sup> In addition to being unevenly spread out across the globe, hunger and malnutrition is also disproportionately affecting the society with certain vulnerable groups bearing the brunt of the problem. Children are particularly affected, today accounting for over 20 percent or 167 million of the world's hungry people.<sup>141</sup> Every day some 18,000 children die of hunger and malnutrition. Without adequate food and nutrition during their first five years, children suffer from physical stunting and limited intellectual development, condemning them to early death or a marginal existence for the rest of their lives. Child malnutrition often begins in the womb of malnourished women, another group keenly affected by poverty and hunger due to women's unequal social status and discrimination in the allocation of resources.

The international human rights regime has recognized the vulnerability of these and other groups and have incorporated provisions in its framework to correct the imbalance. As discussed above, protection for the right to food is afforded by the CRC for children and by the CEDAW for women. General Comment 12 pays particular attention to physically vulnerable people (including children), the disabled, ill and other specially disadvantaged groups. For their protection, the right to food imposes the most elevated level of responsibility on its State Parties; Governments are here committed to actually providing the food - be it through food of their own domestic production or import or through the provision of food aid by external sources like WFP. The obligation occurs in relation to individuals or groups

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<sup>138</sup> General Comment 14, para. 29.

<sup>139</sup> Sépulveda (2003), p. 285 and General Comment 13 para. 59.

<sup>140</sup> FAO, *The State of Food Insecurity in the World*, 2006, pp. 14, 17, 20 and 23. Available at <[www.fao.org/docrep/009/a0750e/a0750e00.htm](http://www.fao.org/docrep/009/a0750e/a0750e00.htm)> last accessed 16 May 2007.

<sup>141</sup> WFP Annual Report 2004, p. 4 and information collected from WFP website: *Faces of the Hungry*, Available at <[www.wfp.org/aboutwfp/introduction/hunger\\_who.asp?section=1&sub\\_section=1](http://www.wfp.org/aboutwfp/introduction/hunger_who.asp?section=1&sub_section=1)> last accessed on 19 January 2007.

of individuals who for reasons beyond their control are unable to achieve the right to food by themselves e.g. due to illness, handicap, age or other vulnerabilities or who are victims of natural or other disasters.<sup>142</sup>

Vulnerable food-insecure groups are the same in North Korea as in the rest of the world. As noted by the CESCR when examining the DPRK's second periodic report in 2003:

“ The Committee is concerned about the consequences of the widespread famine suffered by the country from the mid-1990s and that certain sectors, in particular women, children and older persons, have been more severely affected than others and have not received proper assistance in order to alleviate their plight.”<sup>143</sup>

The DPRK Special Rapporteur has also highlighted the problem in relation to elderly people:

“... the crisis of the mid-1990s has taken a toll among the elderly. They have been affected by the food shortage and by declining social security, social services and medical care. Increasingly, they have had to fend for themselves to survive. It is presumed that a large proportion of the deaths through starvation in the late 1990s were of these older persons.”<sup>144</sup>

WFP assistance in North Korea during the emergency operations had these vulnerable groups as their prime target. On average, children accounted for 40-65 percent of all beneficiaries, with food mainly being channelled through nurseries, orphanages, kindergartens, primary and secondary schools and paediatric wards.<sup>145</sup> The rest of the beneficiaries were pregnant and lactating women, elderly people, former factory workers and victims of floods and other natural disasters. It would thus appear that the DPRK was honouring its obligation under the ICESCR, the CRC and CEDAW by providing food to these vulnerable groups by means of the international humanitarian food aid from WFP. The case is however not that simple. While children, pregnant and lactating women and elderly people certainly accounted for many of the country's food insecure people, concern remains over other vulnerable groups WFP was not able to reach. Homes for the elderly, the disabled or mentally ill, were never made accessible, nor were hospital hosting people suffering from tuberculosis, HIV/AIDS (a disease

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<sup>142</sup> General Comment 12, para. 15. The particular needs of vulnerable groups have also been recognized in the Voluntary Guidelines, Guideline 13.

<sup>143</sup> CESCR (2003), para. 21.

<sup>144</sup> Commission on Human Rights, *Report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea (Mr. Vitit Muntarbhorn)*, E/CN.4/2006/35, 16 March 2006, paragraph 43.

<sup>145</sup> For example, under WFP's 2002 Emergency Operation children accounted for 4.1 million out of 6.46 million targeted beneficiaries (63 percent) while the 2005 Emergency Operation included 2.7 million children out of 6.5 million beneficiaries (41 percent). WFP Project document EMOP 10141.00, *Assistance for Vulnerable Groups*, December 2001; and, WFP Project document EMOP 10141.3, *Emergency Food Assistance to Vulnerable Groups in DPR Korea*, December 2004.



the DPRK Government even denies exists in North Korea<sup>146</sup>) and other illnesses. WFP on several occasions expressed concern for the nutritional status of these groups as reports from other humanitarian organizations indicated that they were receiving inadequate treatment.<sup>147</sup> Human rights groups have reported that people with disabilities are systematically sent away from the capital city Pyongyang and particularly those with mental disabilities are detained in areas or camps.<sup>148</sup> Defectors from North Korea testify without exception that there exist collective camps designated according to the inmates' physical deformity or disability.

Other social groups disproportionately affected by hunger and poverty world-wide are indigenous people, ethnic or religious minorities and low-caste groups. North Korea's decades of isolationism has created the world perhaps most racially and ethnically homogenous society. There are only very limited number of non-Korean people residing within the country, mainly Japanese citizens of Korean ancestry who immigrated to the DPRK in the 1950-60s and who upon return were considered to have been spoiled by their exposure to Japanese liberalism and capitalist prosperity.<sup>149</sup> The same was also considered of North Korean students and diplomats who had been studying or posted to the Soviet Union or Eastern Europe and had been exposed to the collapse of socialist rule. Given the closed-off nature of the North Korean society, their numbers are very small. It is also estimated that there are some 40,000 people (0.2 percent of the population) belonging to religious groups who despite an officially declared freedom of religion are regularly subjected to persecution and harsh treatment from the authorities.<sup>150</sup> In North Korea, the large majority of people vulnerable to food insecurity are instead low-caste groups – i.e. people stratified into the hostile class. There are several testimonies from defectors recounting how people of these categories are forcefully relocated to remote inhospitable parts of the country, or who in the worst case, are sent to the political labour camps for party disloyalty or other perceived wrongdoing.<sup>151</sup> The prison facilities are characterized by very large numbers of deaths in detention

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<sup>146</sup> “Thanks to the lofty living customs handed down for generations and the sound moral education, prostitution and prostitutes have long been disappeared in the DPRK. Until now, there has been no HIV/AIDS cases reported.” CESCR, *Replies by the Government of the DPRK to the list of issues (E/C.12/Q/DPRK/1) to be taken up in connection with the consideration of the second periodic report*, Thirty-first Session, Geneva, 10-28 November 2003, p. 12.

<sup>147</sup> Exceptions to this rule are people suffering physical handicaps from the Korean War as these war-veterans are often highly regarded within the society and receive preferential treatment. Organizations working with these vulnerable groups in the DPRK before 2006 included Handicap International, the ICRC and the French NGO Triangle.

<sup>148</sup> “White Paper on Human Rights in North Korea 2005”, Korean Institute for National Unification, Seoul, 2005, paragraph. 124-5.

<sup>149</sup> Hawk (2003), p.29.

<sup>150</sup> Commission on Human Rights, *Report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea (Mr. Vitit Muntarbhorn)*, (E/CN.4/2005/34) 10 January 2005, paras. 57-58.

<sup>151</sup> Hawk (2003), p. 27; Martin, Bradley K. *Under the Loving Care of the Fatherly Leader*, St Martin's Griffin Books, 2006, p. 558.

from hard labour accompanied by deliberate starvation-level food rations. As the DPRK institutes a philosophy of collective responsibility, or guilt by association — *yeon-jwa-je* — the camps contain large numbers of innocent children and women.

The DPRK's obligation to provide food extends to all these vulnerable groups unable to take care of themselves. They have an obligation to give priority consideration in the allocation of resources so that these groups get adequate food, and unable to do so by means of their own production, must ensure that the international humanitarian food aid is prioritized for distribution to these vulnerable groups. While it is laudable that WFP food aid has been able to reach children, pregnant and lactating women and the elderly, the prevention of WFP's access from other vulnerable groups like disabled and ill people in accessible counties constitutes a clear violation of these individuals international human right to food. Furthermore, the DPRK is also violating the right to food by preventing WFP access to vulnerable groups in inaccessible counties and prison camps, including children, women, the elderly, disabled and ill people, ethnic and religious minorities and low-caste vulnerable people. As the prevention of access, in particularly to vulnerable groups in inaccessible areas, appears to be based on individuals ethnic origin, social status (handicapped) and religious or political affiliation (members of the hostile class), the DPRK is also violating the fundamental non-discrimination principle inherent in all human rights including the right to food. The fact that the prevention is done on discriminatory grounds also support the notion that the DPRK's failure to fulfil their vulnerable citizens right to food is done out of unwillingness rather than inability.

### **5.3.3.3. Humanitarian access - information and data**

For a humanitarian food aid organization like WFP, a substantial amount of data and information is regularly needed to find the hungry and meet their needs.<sup>152</sup> This includes basic country statistics on demographics, population patterns; agricultural information like size of arable/cultivated land, crop cycles (important for the identification of the 'lean season'), relevant metrological indicators and crop yields; statistics on food imports/exports; social data on education, livelihoods and income-levels; and household food security information on food sources and expenditures, nutritional intake and feeding practices. Having provided the food aid, WFP must also monitor it and evaluate the impact it is having on the beneficiaries' health and nutritional status, livelihoods and food sources and functioning of markets and domestic food production. Restricted access to information and data can result in the absence or weakness of needs assessments; the inability to register beneficiary populations appropriately and/or monitor assistance to them; errors in targeting and programmatic design and implementation (e.g. the size of food rations); the exclusion of other

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<sup>152</sup> WFP Policy Document (2006), p. 8.

vulnerable groups from assistance; and diversions and misuse of food assistance. Access to information also carries important consequences for the proper implementation of the humanitarian principle of impartiality - that assistance should be given on the basis of -and in proportion to - need alone. It is also of great importance for WFP and other humanitarian organizations to be able to ensure accountability to the donor community and thus ensure a continuous supply of humanitarian food aid donations.

In North Korea, the collection of necessary data and information for proper targeting and evaluation of the impact of the food aid proved to be very difficult for WFP. Although considerable gains in this area were made over the ten years of the emergency operations, the authorities would sometimes reverse concessions previously made, giving the operations a “two-steps-forward, one-step-back” quality.<sup>153</sup> WFP and FAO were allowed to undertake CFSAMs between 1995 and 2004, but in 2005 the authorities cancelled the mission. While considerable informative gains came out of the 1998, 2002 and 2004 Nutritional Assessments, many shortcomings were evident in their undertaking and in 2006 follow-up assessments were cancelled altogether. In 2002, WFP was also allowed to hold Focus Group Discussions with beneficiaries which allowed for a better understanding of food consumption patterns, diet compositions, coping strategies, the functioning of the PDS, food sources and incomes. This helped WFP develop a more nuanced understanding on household food security of certain target groups and adjust targeting and rations appropriately. However, the participants were always pre-selected by the authorities and all interviews were conducted in the presence of Government officials from the FDRC. Sometimes FDRC officials would even decide that certain questions were inappropriate or irrelevant for the interview. Despite continuous requests, WFP was never allowed to employ native-Korean speakers, thereby further complicating the collection of information.

Moreover, international food aid monitors were never allowed to randomly and spontaneously visit child institutions, schools, hospitals, Public Distribution Centres and beneficiary households even within the accessible counties. Despite several promises, WFP was never provided with a full list of all institutions receiving food aid and monitoring visits in each county seem to be limited to very few of these institutions. The prevention of access to information from beneficiaries and from government’s own records made it was hard, if not impossible, for WFP to assure that food aid actually reached the beneficiaries it was intended for and that the assistance was being provided in the rations designed to meet the beneficiaries dietary needs.

Within the human rights framework on the right to food there is no specific reference as regards State Parties’ obligations to ensure access for humanitarian agencies to relevant information and data. The Voluntary Guidelines did recommend that that States ensure safe and unimpeded

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<sup>153</sup> Haggard and Noland (2007), p. 93.

access for international needs assessments, and by humanitarian agencies involved in the distribution of international food assistance,<sup>154</sup> but as mentioned before, the Voluntary Guidelines are not binding instruments nor do they amend or modify States' obligations under the right to food.<sup>155</sup>

Fault of explicit legal support, it can be argued that the DPRK still must do so under the positive obligation to *facilitate* access of its citizens to food. General Comment 12 explicitly requires States to provide an environment that facilitates the implementation of non-state actors' responsibilities under the right to food.<sup>156</sup> On this basis it can be argued that a certain amount of information be provided to humanitarian organizations to facilitate the correct targeting of food aid and to measure its impact to adjust for future distributions. The obligation clearly covers the most basic information on e.g. population and agriculture. However, according to the obligation to pursue the realization of the right to food to the maximum extent of available resources<sup>157</sup> this could mean that the DPRK has fairly wide responsibilities. Information and data are resources at the disposal of the Government and if making such resources available to humanitarian organizations so that they (jointly with the governments) are able to identify hungry people and design the correct food aid programmes, then the Government is under an obligation to do so. In times of emergency such as the famine and the food shortages the responsibility is even more enhanced. States are then specifically required to cooperate in accordance with the Charter of the United Nations, in the provision of humanitarian assistance, and General Comment 12 even emphasizes that the role of WFP and other United Nations agencies is of particular importance and should be strengthened. The DPRK Government's failure to provide even the most basic information and data, as well as their deliberate efforts to prevent WFP from collecting information relevant to ensure the correct distribution of food can thus be considered as a violation of the Government's obligations to facilitate access to food for its citizens.

#### **5.3.4. Obligations in respect to diversions of humanitarian aid**

Ever since the international community began responding to the North Korean crisis in the mid-1990s, allegations have been made that humanitarian aid was being diverted from the intended beneficiaries to less deserving categories of people, including party officials and the military.<sup>158</sup> Not surprisingly, allegations were particularly common for food aid. Firstly,

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<sup>154</sup> Voluntary Guidelines (2005). Guideline 15.3.

<sup>155</sup> Voluntary Guidelines (2005), preface, para. 9.

<sup>156</sup> General Comment 12, para. 20.

<sup>157</sup> ICESCR, article 2 and General Comment 3, para. 9

<sup>158</sup> *See for example*, Commission on Human Rights, *Economic, Social and Cultural Rights: The Right to Food, Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler* (E/CN.4/2001/53) February 7, 2001; Amnesty International (2004); Good Friends, North Korean Human Rights and the Food Crisis" (Seoul: Good Friends, March 2004); and, US Committee for Human Rights in North Korea, *the North Korean Refugee Crisis – Human Rights and International Response*, 2006.

food aid has constituted the dominant share of international aid flows into the country; estimations are that food accounted for 70 percent of the value of all humanitarian assistance between 1995 and 2005.<sup>159</sup> Secondly, food as such easily lends itself to diversion due its fungible nature. It can be easily mixed with other food, traded or monetized and when removed from original packaging is almost impossible to identify. Thirdly, food is the most basic need of every human being and, in particular during periods of food shortages, it is an attractive commodity very susceptible to diversion and corruption.

The structure of humanitarian food aid efforts in the DPRK and the limitations imposed on WFP during the period of the emergency operations provided substantial room for diversions. Once a food aid shipment arrived in the DPRK, be it by ship or by rail, North Korean FDRC officials accompanied by WFP international observers would be there to receive it and ensure that it was offloaded onto trucks. After this the DPRK authorities through its Ministry of Food Administration assumed responsibility to distribute the food in accordance with distribution plans jointly agreed by the FDRC and the Government. The food would be loaded onto trucks, barges and trains and transported to identified county ware-houses, PDCs and institutions before being distributed to the beneficiaries. Due to government limitations, WFP international monitors did not accompany the food during transport and would only see the food again during monitoring visits to kindergartens, schools, hospitals and PDCs. To ensure correct accountability and track distributions, a system of consignment notes was devised; each shipment would be accompanied by a corresponding waybill identifying the content in Korean and English which would then be verified by WFP staff at county-level when distribution had been completed.

Without confirming or denying the existence or extent of diversions, this section of the thesis will look at the Government's responsibilities *vis-à-vis* the various allegations of diversions that have been brought forward. The first allegation is that the Government systematically diverted humanitarian food aid for party officials and the military, i.e. a sort of large-scale centralized diversion.<sup>160</sup> All food in the PDS, be it from domestic production, bilateral concessional loans or international food aid, would be used to feed the military and the members of the elite and party loyalists (i.e. the core class). The diversion would in this case be done shortly after the food had been offloaded at the point of entry. Alternatively, the diversion would take place after the food had entered the PDS by means of distributing it to beneficiaries other than those identified by WFP. The food would not necessarily be consumed by these groups, the food could also be diverted to markets, where it would be sold for monetary gain to a selected elite. Diversions of this kind would be intentional, mandated and/or performed by the central Government. The second case, described by Haggard and Noland as 'decentralized diversion by lower level officials'

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<sup>159</sup> Haggard and Noland (2007), p. 81 and appendix 2.1, table 1.

<sup>160</sup> *Ibid.*, p 109.

(and potentially also other individuals) entails that the diversion of food aid would take place at county-level, when the food had reached the warehouse or offloading point but before it was distributed to child institutions, hospitals or entered the PDS.<sup>161</sup> It is alleged that also in this case the food would end up either with people other than those identified by WFP, or be monetized in markets. The diversions would not be orchestrated by the central Government nor necessarily done with their awareness.

From the perspective of the right to food, the negative effects of diversions of both kinds are obvious. In the immediate term the food does not get to the most food-insecure people but ends up with less vulnerable ones or with people undeserving altogether. If the food aid gets sold in the markets, it will similarly remain economically inaccessible to the hungriest people, as very few of these groups command sufficient resources to purchase in the markets.<sup>162</sup> In the longer-term, large scale diversions can also undermine donors' credibility in the relief programme, which can lead to diminished political will to provide resources to future operations and less food aid to the needy. The diversion of the food aid has thus affected the access to food for the most vulnerable people and their right to food has been violated.

The question of responsibility for the violation remains. With regard to large-scale centralized diversion, it is obvious that the DPRK Government was the actor and responsible for the violation of the right to food. Firstly, the Government was violating its obligation to *respect* the right to food by refraining from taking measures (i.e. diverting) that affect the access to food for its population. Secondly, as illustrated above, diversions based on the *Songbun*-system are discriminatory in nature, which means the Government was violating also its fundamental obligation of non-discrimination by prioritizing the core class. As for the second case of decentralized diversion, the central Government still retains responsibility. Under the right to food the Government is obligated to *protect* its citizens' access to food (in this case the food aid) from interference by third parties.<sup>163</sup> This means that they must ensure that no one steals, diverts or in other way deprives the hungry people of the food- a responsibility which rests with the Government all along the distribution chain across the North Korean territory. It is possible that the central Government was not always aware of the existence of the diversion, although given the high level of control exercised by the Government in the DPRK, this seems unlikely. Ignorance of what goes on in its own territory is however a poor excuse, and as the Government continuously denied the existence of diversions and consistently failed to demonstrate that measures were being taken to prevent them, it is clear that there was unwillingness on the part of the Government to prevent them. The

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<sup>161</sup> *Ibid.*

<sup>162</sup> In case the food aid being sold in the market is of considerable quantity it may however have positive effects on market prices, thus potentially benefiting also poorer groups. For a thorough discussion on the effects of food aid on DPRK markets, see *ibid* p. 112ff.

<sup>163</sup> General Comment 12, paragraph 15 and 19.

Government has thus failed in its obligation to protect the right to food by failing to prevent diversions which deprived people access to food.

What about a case where diversions of food aid (centralized or by local authorities/third persons) were being done for the benefit of other food-insecure groups? Where the people receiving the food were not individuals identified by WFP targeting criteria, but other individuals in need of international food aid? This could be people residing in non-accessible counties or people belonging to non-targeted social groups. At least during the famine years, the food security situation was so poor that it affected all the people of the country, sparing only the most privileged nomenclature. Travelling in the country evidence of stunting caused by chronic food shortages were painfully evident, even in military units and in the privileged areas like Pyongyang and the provinces in the South. If the diverted food aid was simply provided to other affected groups, does such diversion constitute a violation of the right to food? Well, naturally the Government had to ensure priority consideration in the allocation of food for the most vulnerable groups as a result of the obligation to provide.<sup>164</sup> Once these groups food needs were catered for, be it with WFP food aid or food from other sources, the principle of non-discrimination would remain applicable and limit the Government's ability to distribute the food on the basis of the *Songbun*-principle. But in so far as distributions to non-WFP targeted people in need of food aid was done in a non-discriminatory manner, the right to food did not impose any limitations on the Government, and such diversions could not have been considered to constitute a violation of the right to food. It could however be a breach of the terms of agreements concluded between the Government and WFP on the distribution of the food aid (normally done in the form of a Memorandum or Letter of Understanding) as well as morally reprehensible. This however falls outside the topic of this thesis, and will not be discussed any further.

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<sup>164</sup> See *supra*, chapter 5.3.3.2.

## 6. Summary and Conclusions

The right to food is a prime example of the interdependence and indivisibility of human rights. Belonging to the realm of economic, social and cultural rights, it is regulated first and foremost in the ICESCR (article 11); with similar provisions specifically protecting the right to food for women and children in the CRC (article 24 and 27) and the CEDAW (article 21). The right to food is part of the broader right to an adequate standard of living but as General Comment 12 on the right to food notes; the human right to adequate food “*is indivisibly linked to human dignity and is indispensable for the fulfilment of other human rights*”. Most importantly its core right freedom from hunger is directly tied to one of the most fundamental human rights - the right to life. The right to food is deservedly receiving increasing international attention and is of acute relevance to the world community – over 850 million people are undernourished and food insecure across the globe and every day 18,000 children die of hunger.

In North Korea, lack of food and hunger reached catastrophic proportions in the 1990s. Although never a rich country, poor agricultural conditions, natural disasters, the collapse of Communism and a series of disastrous economic policies, plunged the young nation into one of the worst famines witnessed in modern times. It is estimated that up to 2-3 million people died of starvation between 1994 and 1999 with malnourishment causing irreversible health effects for generations to come. The effects of the famine and subsequent food shortages were exacerbated by the DPRK’s isolationist practice and insistence on the *Juche*-principle of self-sufficiency. After denying the existence of the problem for many years, and imposing ever tighter controls on the population to hide the true extent of the disaster, only in 1995 did the Government make an earnest appeal for external assistance.

### *Availability – obligation to request humanitarian food aid*

Economic, social and cultural rights such as the right to food are not guaranteed in North Korea’s constitution, nor do they form part of the country’s domestic legal framework. The Government nevertheless has responsibilities. By virtue of having ratified the ICESCR without reservations, the DPRK Government had an obligation to apply for international food aid when it was unable to cover its population’s food needs by means of domestic resources and commercial imports. This follows from the obligation to progressively take steps to realizing the right to food, including by means of international cooperation. The considerable delay in the international appeal – at least four years into the famine - constitutes a violation of the Governments obligation to provide food for its people by ensuring sufficient availability of resources. As evidenced by the large number of deaths during the famine years, the Government also violated its immediate obligations by failing to ensure the satisfaction of the



minimum essential level of food required to be free from hunger – a failure tantamount to a violation of the right to life.

Criticism should also be directed at the Government for its behaviour in the years prior to the famine and food shortages. In particular, the Government's continuous allocation of over 30 percent of its resources to military spending (including nuclear weapons) should be considered incompatible with its immediate obligations to use the maximum of its available resources to progressively realize the right to food of its people. While beyond the scope of this thesis, this inappropriate budgeting can serve as an indication as to the unwillingness of the Government to meet its obligations under the right to food.

*Availability - obligation to accept humanitarian food aid*

The 1995 appeal for assistance opened the door for what was to become the world's largest humanitarian food aid operation at the time. Through WFP - the United Nations food aid agency - more than 4 million tons of food valued at some US\$ 1.7 billion was provided mainly by the DPRK's adversaries the US, Japan and the ROK. This reliance on external assistance ran absolutely contrary to the *Juche*-ideology and was the source of a great deal of embarrassment to the national authorities. The presence of foreign aid workers performing what was considered intrusive monitoring also caused discomfort for the secretive state. In a country where national security and the military comes first, it is thus not surprising that in August 2005 the DPRK unilaterally decided to end international humanitarian aid.

The DPRK's sovereignty and territorial integrity is protected by the Charter of the United Nations, and humanitarian assistance to the country should be with their consent. There is no absolute obligation for the DPRK to accept international humanitarian food aid, but consent should not be withheld arbitrarily. As the domestic harvest improved and bilateral food aid was being offered, the Government was right to review the influx of humanitarian food aid and its concerns over dependency were just. However, such a review should have prioritized humanitarian considerations as opposed to political and security concerns related to the Six-party talks and the unjustified suspicion against foreign aid workers.

Although it is true that post-2005 bilateral food aid/imports from the ROK and China failed to reach anticipated levels, in August 2005 the Government's decision to halt humanitarian food aid did not constitute a violation of the right to food. The Government in good faith believed it would be able to cover its citizens' food needs with the increased harvest and bilateral assistance, both of which appear to be legitimate thoughts at the time. However, given the untargeted and unmonitored nature of the bilateral food as well as its limited nutritional value it may not have been the most appropriate measure, particularly in regard to meeting the special nutritional needs of the most vulnerable groups. However this is a question

which will have to be examined by the CESCR when reviewing the DPRK's State Report under the ICESCR.

*Accessibility - Obligations to grant geographical humanitarian access*

Ensuring availability of food by requesting and accepting humanitarian aid is however not sufficient for the Government to meet its obligations under the right to food - accessibility to the food aid must also be ensured. Once humanitarian organizations such as WFP are in the country, obligations to respect, protect and fulfil its citizens right to food will extend also to the provision of this food aid. Unlike international humanitarian law, which clearly regulates relief assistance and gives rise to obligations of granting humanitarian access to its providers, today's international human rights framework is not as comprehensive. However, while it is not stated in any legally binding treaty, receiving humanitarian assistance necessary for survival, entailing the obligation not to hinder the delivery of aid, is increasingly recognized or implied in numerous non-binding instruments such as resolutions from the General Assembly, the Human Rights Committee/Council of Human Rights and reports from Human Rights Special Rapporteurs. There thus seems to be an emerging right to receive humanitarian assistance which consequently gives rise to obligations for the host-government of ensuring humanitarian access to its providers. According to the CESCR, the prevention of humanitarian access in internal conflicts and other emergency situations amounts to a violation of the right to food under the ICESCR.

Notwithstanding, throughout the emergency operations, the DPRK Government continuously prevented WFP from accessing large parts of the country. By limiting the geographical accessibility, the Government was taking a measure which prevented part of its people access to food, as WFP operated under a strict "no access, no food" policy. The scope for imposing limitations to the right to food and other rights guaranteed in the ICESCR is regulated in Article 4, an article framed to protect the rights of individuals rather than to permit limitations by the State parties. Any limitations imposed must be legally established, non-discriminatory, proportional, compatible with the nature of the right and designed to further the welfare of the society as a whole. The requirements are very strict and the burden of proof falls on North Korea – fault of which the restrictions will amount to a violation of the Covenant.

North Korea's limitation of humanitarian access to counties/districts with military areas may not be incompatible with the nature of the right to food as no civilians reside there and these areas would by virtue of the *Songum*-principle be provided with food from other sources. In a society as plagued by war and occupation as North Korea, the Government may also be successful in arguing that the restriction of access to such areas could be in the interest of the society as a whole. However, the way the limitations were imposed fall short of meeting the safeguards of Article 4 as there were no clear, accessible laws supporting them. As for limitations to areas

containing prison-labour camps or suffering from particularly poor conditions - areas with large numbers of civilians and vulnerable groups in the food-deficit Northeast - such limitations are neither compatible with the nature of the right to food nor can it be deemed to be in the interest of the general welfare of the society. Even if national laws would be enacted to support such limitations, the laws would clearly be arbitrary, unreasonable and discriminatory and in violation of the safeguards in Article 4.

Moreover, all limitations, including to military areas are restricted by the reference to a democratic society, which implies respect for the principles of the United Nations Charter and the UDHR, including the principle of proportionality. North Korea's continuous restriction of access to up to 43 counties/districts, all areas within included, far exceeds the proportionality requirement and the restrictions would thus constitute a violation of the Covenant. In fact of permissible limitations, the DPRK can thus be considered to have taken a measure that limits access to food to its citizens in breach of its obligation to respect the right to food.

*Accessibility – Obligation in respect of vulnerable groups*

Given the particular nature of the DPRK's social and political structure, including the discriminatory *Songbun*-stratification system and the military-first principle, the famine and subsequent food shortages did not have a uniform application on the population. Allocations of food and other resources consistently favoured a 'core class' of party officials, the military, workers of productive factories, residents of Pyongyang and the south-western provinces. Women, children, the sick, handicapped, elderly, residents of the north-eastern provinces and those considered as hostile to the political regime were the first to be cut from food allocations under the PDS. Following the system's complete collapse in 1994, these groups were disproportionately affected by death by starvation. Such practice was in contradiction to the principle of non-discrimination – a fundamental cornerstone of international human rights law - and amounted to a clear violation of the DPRK's immediate obligation under the right to food.

Moreover, with respect to vulnerable groups such as women, children and the elderly, the DPRK Government's obligations under the right to food reach its most elevated level. The Government was obliged to provide food to people unable to enjoy the right to food by the means at their disposal, and should have given priority consideration to such vulnerable groups in the allocation of the food aid. During the ten WFP emergency operations, the DPRK was at least in part fulfilling this obligation by complying with WFP's targeting criteria favouring children, pregnant and lactating women, the elderly and victims of natural disasters. However, priority consideration should also have been extended to other vulnerable groups e.g. disabled and ill people in accessible counties and to all vulnerable groups in inaccessible counties, including inmates in prison camps and people belonging to the hostile class. The continuous prevention of access to international humanitarian food aid for such groups constitutes a clear violation of these

individuals international human right to food and a violation of the Government's obligation to provide to vulnerable people. In so far as such prevention of access to humanitarian food aid was done on the basis of ethnic origin, social status, religious or political affiliation, the DPRK was also violating the fundamental non-discrimination principle and its immediate obligation under the right to food.

#### *Accessibility - Obligations in respect of information and data*

To identify and meet the needs of the hungry, WFP needs information on demographics, agriculture, food imports/exports, health, education, livelihoods and household food security. WFP must also monitor the assistance provided and evaluate its impact on nutritional health, markets and domestic food production. Fault of such information and data, people may end up being wrongly targeted or excluded from food assistance, food aid stands the risk of being misused or diverted and donor confidence may falter, thus leading to less food aid.

WFP's emergency operations were characterized by continuous restrictions on monitoring and severe shortages of information and data. The Government was both reluctant to provide basic already accessible information (e.g. food prices, list of beneficiary institutions) and to let WFP collect it through assessments and surveys. The operating climate was severely restrictive: government officials would accompany WFP at all times, interviews with beneficiaries and local authorities were always prearranged, travel was subjected to advance travel permits and random visits to child institutions, schools, hospitals, Public Distribution Centres and beneficiary households were precluded. Although at present the relevant right to food provisions provide little to no reference as regards State Parties' obligations to ensure access for humanitarian agencies to relevant information and data, general obligations under human rights do.

Under the obligation to facilitate access of its citizens to food, the DPRK must provide an environment that facilitates the implementation of non-state actors' responsibilities. The DPRK also has an obligation in accordance with the United Nations Charter to cooperate in providing humanitarian assistance in times of emergency and should in this respect strengthen the role of WFP. As a general rule under the ICESCR, despite the right to food being a human right to be progressively implemented, the DPRK is required to pursue it to the maximum extent of available resources, including information resources. The DPRK Government's failure to provide even the most basic information available, as well as their deliberate efforts to prevent WFP from collecting data relevant to distribute food can thus be considered as a violation of the Government's obligations to facilitate access to food for its citizens.

### *Obligations in respect of diversions*

WFP's emergency operations in the DPRK remain one of the most controversial food relief operations ever. Various sources assert that much of the food aid was being diverted away from its intended beneficiaries and ended up in the hands of the military, the nomenclature or for sale in the various food markets that began flourishing in the mid 1990s. Without confirming or denying these allegations, the negative effects of diversions are obvious. People identified as most in need will be deprived of food aid for the benefit of less vulnerable ones or people undeserving altogether. Even if the food aid gets sold in the markets, it remains economically inaccessible to the hungriest people. In the longer-term, large-scale diversions undermine donors' confidence, leading to less contributions and food aid being made available. The diversion of food aid has thus affected the access to food for the most vulnerable people.

The structure of humanitarian food aid operations in the DPRK and the limitations imposed on WFP certainly provided ample room for diversions to occur. The Government by virtue of the right to food had important responsibilities to ensure that diversions and misuse of food aid did not take place. With regard to allegations of large-scale centralized diversions of food aid to the military or favoured party officials, such diversions would clearly have been intentional, mandated and/or performed by the central Government. Under the right to food, the Government had a duty to respect the relief effort at hand and a responsibility to refrain from taking actions that would impair its citizens' access to food. Moreover, diversions mandated by the *Songbun*-system and prioritizing the core class would clearly have been in violation of the immediate obligation of non-discrimination.

In the event the diversions were decentralized and performed by lower level officials or other third persons without the concurrence or knowledge of the central Government, important responsibilities nevertheless remained. The Government had an obligation to protect its citizens' access to food from interference by third parties and a responsibility to ensure that no one stole, diverted or in other way deprived the hungry people of the food. Ignorance is not a valid excuse and as the Government consequently denied all diversions, refuted hard evidence presented, and consistently failed to demonstrate that preventive measures were being taken, it seems clear that there was unwillingness on the part of the Government to prevent them. The Government thus violated its obligation under the right to food by failing to protect the food aid from diversions by third parties.

However, even if diverting food aid from people identified as beneficiaries in the Letter of Understanding concluded with WFP may have been morally reprehensible and wrong from a *pacta sunt servanda*-perspective, it may not always have been in violation of the right to food. In case the diversions of food aid were being done for the benefit of people who, although not targeted for WFP assistance, were also food insecure this can be considered

as permissible. There is substantial evidence suggesting that at least during the famine years the entire DPRK population, including the military, were affected by the food shortages and were in need of food aid. Provided that the Government ensured priority consideration in the allocation of food to the most vulnerable groups unable to take care of themselves and in so far as distributions to non-WFP targeted people were non-discriminatory, the right to food did not impose any limitations. Diversion to other food-insecure, non-targeted groups therefore did not constitute a violation of the right to food.

In conclusion, it seems the United Nations General Assembly Resolution 60/173 was right to condemn the human rights situation in the DPRK and to call for increased humanitarian access for WFP. As illustrated above, when it comes to international humanitarian food aid, the Government violated many of its obligations to respect, protect and fulfil (facilitate and provide) the right to food of its citizens.

It is important to keep in mind that even if the acute famine years have past, North Korea's food problems are far from over. Even today the country falls short of meeting its domestic food production by some 1 million tons per year and the majority of the 23-million population struggle to meet minimum daily food needs on a diet deficient in protein, fats and micronutrients. The Government must be pressured to live up to its immediate and progressive obligations under the right to food and to focus all its available resources to work towards ensuring both availability and accessibility of food to its people. If humanitarian food aid is required, the Government must timely appeal for the assistance and ensure that the obligations under the right to food are applied also to the provision of such aid. The humanitarian food aid should be provided in a non-discriminatory way, prioritizing and reaching all vulnerable groups in an access climate favourable enough to enable humanitarian organizations to operate effectively and protective enough to prevent diversions.

Under the international dimension of the Covenant, important responsibilities rest also on the United Nations and the donor community who must continue to cooperate by providing humanitarian food aid in a manner that promotes self-sufficiency. Just like the recipient-government must refrain from putting political and security considerations ahead of humanitarian ones, so too must the international community detangled the aid regime from political agendas such as advancements in the Six-party talks. WFP and other humanitarian organizations must continue to highlight government practice that impede the delivery of aid and support the CESCR and other human rights bodies which monitor the Government's compliance with the right to food. For the most vulnerable women and children of North Korea to get adequately fed and to assist the Government in meeting its obligations, bilateral food providers such as China and the ROK should join in the concerted efforts of the international community and refrain from offering unmonitored and untargeted assistance to the DPRK.



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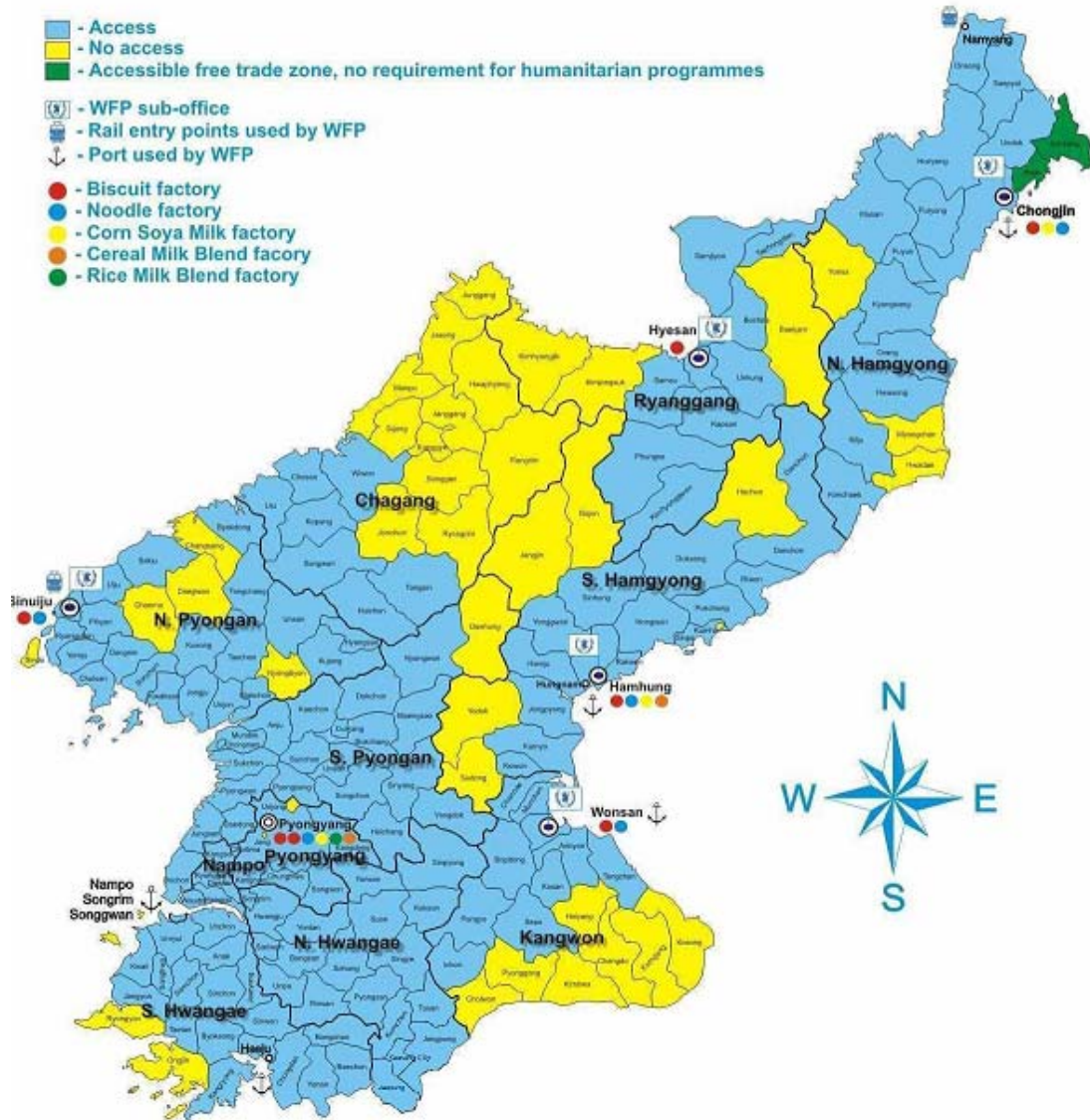
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# Annex

Map 1. – WFP Emergency Operations- Geographical Access



Source: WFP



Map 2 – Selected Prison Camps in the DPRK



Source: Hawk (2003).