Report: Inquiry on Crimes Against Humanity in North Korean Political Prisons

A report by the

War Crimes Committee of the
International Bar Association (IBA)

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The War Crimes Committee wishes to express enormous gratitude to the Inquiry panel (the "Panel"), comprised of three renowned jurists – **Navanethem Pillay** (Chair), **Thomas Buergenthal**, and **Mark Harmon** – who presided over the Hearing on 8 December 2016, and devoted countless hours to carefully reviewing the evidence and drafting the instant Inquiry report. They all brought with them many decades of experience as judges and prosecutors on some of the most consequential international criminal tribunals of the last half century. Further, Judge Pillay served as the United Nations High Commissioner for Human Rights from 2008-2014, and it was during her tenure that the UN Commission of Inquiry on Human Rights in the Democratic Republic of North Korea was established. It is also worth noting that, as a member of the Panel, Judge Buergenthal brought with him the unusual perspective of a child prisoner and survivor of Nazi concentration camps, including Auschwitz. His remarkable tale of survival is told in ***A Lucky Child: A Memoir of Surviving Auschwitz as a Young Boy***.

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Additionally, the War Crimes Committee wishes to recognize the contributions of **Mr. Thae Yong-ho**, the Former Deputy Ambassador of Democratic People's Republic of North Korea to the United Kingdom, and the highest-ranking DPRK defector in recent years. Mr. Thae submitted affidavit testimony specifically for this Inquiry; further, by speaking out about the workings of the DPRK regime in his affidavit as well as in media interviews, he has knowingly placed his own life in danger, impeding his ability to travel safely abroad or even in his adopted country, South Korea. Another defector who made significant contributions to this Inquiry is **Mr. Ahn Myung-chol**, a former political prison guard now living in Seoul. His powerful video testimony – pre-recorded in Seoul specifically for this Inquiry and shown at the December 8 Hearing in Washington, D.C. – provided the unique perspective of a state actor formerly involved in administering and meting out punishment in North Korea's prison camps.

The War Crimes Committee also wishes to extend its sincere gratitude to South Korea's former Ambassador for Human Rights **Lee Jong-hoon**, and to **Christine Han** of the North Korea Strategy Center. Their efforts and contributions were essential to the success of the Inquiry. Additionally, the War Crimes Committee wishes to acknowledge many other individuals who made significant contributions to the Inquiry, including: **Roberta Cohen**, **John Fox**, **Jae Ku**, **David McKean**, **Greg Scarlatoiu**, **Suzanne Scholte,** and **Josh Stanton**.

We also wish to recognize the singular contributions made by two renowned North Korea experts – **David Hawk** and **Kenneth Gause** – both of whom provided expert testimony at the Hearing. Their encyclopedic knowledge and their writings on North Korea's political prisons and the workings of the Kim family dynasty helped inform this Inquiry report.

The War Crimes Committee recognizes **Human Rights Watch**'s ("HRW") past and ongoing work with respect to North Korea's political prisons, and in particular the videos that HRW has developed on this subject, portions of which were presented as evidence

at the December 8 Hearing. We also wish to thank **James Victory** for providing expert Korean language interpretation at the Hearing.

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Finally, the War Crimes Committee also wishes to express special gratitude to **Justice Michael Kirby (Ret.)**, who chaired the United Nations Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea and was the lead author of its landmark Commission of Inquiry report, the most authoritative report written on atrocities being committed in North Korea to date. In fact, this Inquiry was inspired by that Report, and relied heavily on its findings. Finally, Justice Kirby, who serves as the Vice-Chair of the IBA's Human Rights Institute, provided valuable guidance to the Inquiry organizers.

More generally, the IBA War Crimes Committee wishes to recognize the very fine work and dedication of North Korean human rights NGOs and individual activists with whom the War Crimes Committee has collaborated over the last two years. These tireless activists have kept the spotlight on the suffering of the North Korean people, advocating on behalf of North Korean human rights in the halls of Congress, the headquarters of the United Nations and beyond. These activists and NGOs take to heart, and seek to fulfill, the promise made by the international community in the wake of World War II and the liberation of Nazi Germany's concentration camps. That promise – encapsulated in the phrase "Never Again" – remains unfulfilled over 70 years after the liberation of Auschwitz and other death camps, the horrors of which are echoed in some of the worst atrocities perpetrated in North Korea's political prisons.

Finally, the War Crimes Committee wishes to dedicate this Inquiry to generations of forsaken North Koreans. For decades, they have endured unspeakable crimes against humanity while the world community has sat on the sidelines, well aware such crimes were and continue to be committed. To date, there has been no meaningful attempt to hold anyone accountable for these now well-documented crimes. In fact, there has not been a single indictment, much less a conviction, during the Kim dynasty's nearly 70-year reign of terror, a period exceeding the Nazi regime's reign of terror by over 55 years. The fact that the leaders of North Korea who devise and carry out the regime's policies have enjoyed impunity for crimes against humanity over such an extended period is, put simply, an indictment against the world community for its failure to pursue justice on behalf of the North Korean people.

CONTENTS

LIST OF DEFINED TERMS

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
COI	The Commission of Inquiry on Human Rights in the DPRK
COI Report	The *Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea* (UN Doc A/HRC/25/CRP.1), first published on 17 February 2014 and formally presented to the UNHRC in Geneva on 17 March 2014
DPRK	Democratic People's Republic of Korea[1]
ECCC	Extraordinary Chambers in the Courts of Cambodia
IBA	International Bar Association
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IMT	International Military Tribunal
JCE	Joint Criminal Enterprise
KPA	Korean People's Army
KWP	Korean Workers' Party
MPS	Ministry of People's Security
NKDB	Database Center for North Korean Human Rights
OGD	Organization and Guidance Department
PAD	Propaganda and Agitation Department
Rome Statute	Rome Statute of the ICC, adopted on 17 July 1998
SAC	State Affairs Commission (replacement to the National Defense Commission)
SPA	Supreme People's Assembly
SSD	State Security Department (also referred to as State Security Administration or SSA)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHRC	The United Nations Human Rights Council, the UN body responsible for the promotion and protection of human rights around the world (as well as its predecessor, the UN Commission on Human Rights)
UNGA	United Nations General Assembly

[1] Commonly referred to as North Korea.

I. EXECUTIVE SUMMARY

> *"The gravity, scale, duration and nature of the unspeakable atrocities committed in the country reveal a totalitarian State that does not have any parallel in the contemporary world."*[2]

Brief Synopsis:

This Inquiry (as defined below) concludes that there is ample evidence to support a finding that crimes against humanity have been – and continue to be – committed on a massive scale in political prisons of the Democratic People's Republic of Korea (the "DPRK," "North Korea," or the "State"). Experts estimate these prisons currently incarcerate 80,000-130,000 prisoners, many of them the children, spouses, parents and other family members of the imprisoned, pursuant to North Korea's longstanding policy of eliminating the "seed" of three generations of "class enemies."

This Inquiry finds evidence that ten of the eleven crimes against humanity enumerated in the Rome Statute of the ICC adopted on 17 July 1998 ("Rome Statute") have been, and continue to be, committed with only the crime of apartheid deemed inapplicable. The ten relevant crimes are: (1) murder; (2) extermination; (3) enslavement; (4) forcible transfer; (5) imprisonment; (6) torture; (7) sexual violence; (8) persecution; (9) enforced disappearances; and (10) other inhumane acts. Based on the evidence presented and reviewed, this Inquiry concludes that there are several classes of individuals who may be subject to prosecution for some or all of the above referenced crimes, including: Kim Jong-un in his capacity as Head of State; members of the Korean Workers' Party and the State Affairs Commission; and members of the State Security Department, including State Security Department Officers, State Security Department Agents, and Prison Guards, who, together, help administer North Korea's political prisons. The legal basis for holding the above defendants liable for crimes against humanity may include their participation in a "joint criminal enterprise" or a finding of "command responsibility," the latter a long-established form of liability under customary international law that holds superiors responsible for the criminal acts of their subordinates.

Recommendations: This Inquiry calls upon the UN to provide the International Criminal Court ("ICC") or a special international tribunal with jurisdiction to appropriately investigate, punish and remedy the crimes against humanity chronicled by this Inquiry, and further calls on the international community to advocate for the UN to take such action. Other recommendations include a call for: North Korea to dismantle its political prison system; third-party states to exercise universal jurisdiction over regime officials where warranted; targeted sanctions against persons responsible for past or ongoing crimes against humanity in North Korea's political prisons and beyond; and a ban on the importation of products made with materials or labor from North Korea's penal system.

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[2] UNHRC, Statement by Mr. Michael Kirby Chair of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea to the 25th Session of the Human Rights Council, Geneva (17 Mar. 2014), http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14385&LangID=E.

This Inquiry represents the culmination of a nearly two-year, civil-society-driven initiative entitled **Inquiry on Crimes Against Humanity in North Korean Political Prisons ("Inquiry")**. This Inquiry sought to advance three goals:

1. to increase public awareness of human rights violations in North Korea's political prisons;

2. to explore the practical and legal options of holding the architects and overseers of North Korea's political prison system accountable for alleged crimes against humanity if the cumulative evidence demonstrates such crimes have been committed; and

3. to develop a model for conducting inquiries that other civil society organizations may wish to replicate when accountability for past or ongoing human rights violations has proven elusive due to inaction by the international community or otherwise.

This Inquiry, which was organized by the War Crimes Committee of the International Bar Association ("IBA") and supported by the IBA's North America Office and numerous partner organizations, is an unofficial follow-up to the United Nations ("UN") Human Rights Council's Commission of Inquiry on Human Rights in the Democratic Republic of Korea ("Commission"). The Commission, chaired by former justice of the High Court of Australia, Michael Kirby, was charged with investigating "the systematic, widespread and grave violations of human rights"[3] in the Democratic People's Republic of Korea.

The Commission's landmark report (2014) chronicled a wide range of crimes of such gravity that it recommended the United Nations Security Council refer the matter to the ICC for the investigation and prosecution of individuals most responsible for committing those crimes. Notably, in March 2017, a UN group of experts focusing on accountability for gross human rights violations in the DPRK conducted its own inquiry and issued a report recommending that the ICC initiate investigations and prosecutions upon a referral by the United Nations Security Council. The focus of the present Inquiry is narrower than the work of the Commission and the UN group of experts referenced immediately above. *This Inquiry focuses primarily on crimes against humanity that were, or continue to be, committed in political prisons ("kwan-li-so") in the DPRK. In some important instances where we received credible testimony, we also reported severe human rights violations that took place in other facilities that detain North Koreans for offenses not permitted under contemporary international law, such as interrogation units that are feeder facilities for the political prison camps.*

This Inquiry relied on a variety of sources, including scholarly works, reports, videos, transcripts, and testimony before the Commission referenced immediately above. This Inquiry also conducted a detailed review of international criminal law jurisprudence, including decisions rendered by the ICC, the International Criminal Tribunal for the Former Yugoslavia, and other tribunals. This Inquiry also draws on evidence introduced at a day-long hearing conducted at the Johns Hopkins School of Advanced International Studies in Washington, D.C., on 8 December 2016 (the "Hearing"). During this Hearing, the authors of this Inquiry report – Judges Navanethem Pillay (Chair), Thomas Buergenthal, and Mark Harmon – heard testimony from former political prisoners and North Korean state actors, including a former prison guard. Two recognized international experts on North Korea's network of political prisons and its political system also testified.

[3] Both the UN Commission of Inquiry Report (A/HRC/25/CRP.1) (hereinafter "COI Report") and the Summary of Findings (A/HRC/25/63) (hereinafter "Summary of Findings") are available at: http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/CommissionInquiryonHRinDPRK.aspx.

Further, the lawyers presenting evidence at the Hearing summarized the content of six of the nine affidavits submitted by former political prisoners exclusively for this Inquiry.

Notably, after the December 8 Hearing, Thae Yong-ho – the DPRK's former Deputy Ambassador to the United Kingdom and one of its highest ranking defectors – submitted a detailed affidavit to this Inquiry. Among other things, Thae testified that political crimes that may result in imprisonment in the *kwan-li-so* include listening to South Korean pop songs, attempting to communicate outside of the country, or creasing a picture of a North Korean leader. He also identified by name several individuals whom he personally knew who were sent to political prison camps in the latter part of 2013 in connection with the purge and execution of Kim Jong-un's uncle, Jang Song-thaek. Further, Thae made clear that "[a]ll North Korean elites are very well aware" that the grave human rights abuses and "systemic violence"[4] perpetrated on the North Korean people have been "planned, orchestrated and ordered by Kim Jong-un."

A. Summary of Findings

Since 1948, a succession of family leaders – Kim Il-sung, Kim Jong-il, and Kim Jong-un – have designed and perpetuated a brutal, totalitarian regime, a signature feature of which is a network of political prisons that has no parallel in the world today.

Today, just shy of its 70th year under Kim family rule, North Korea is widely acknowledged to be the world's most repressive country. The Kim family has declared that its authority is derived from a "Monolithic Ideology System" devised by Kim Il-sung, which vests in the "Supreme Leader" near total control over North Korea. Kim Jong-un, who assumed power upon the death of his father, Kim Jong-il, in 2011, is the Head of State of the DPRK's only political party, the Korean Workers' Party. He is also Supreme Leader of its internal security apparatus – the State Security Department – which is principally responsible for overseeing the DPRK's network of political prisons. To this day, the DPRK continues to deny the very existence of these political prisons. Yet, detailed satellite imagery, as well as the corroborated testimony of scores of former prisoners and state actors with first-hand knowledge of the prisons, established the existence of this prison system, and the horrific practices that occur therein, beyond any doubt. Evidence summarized in this Inquiry report also makes clear that Kim Jong-un and his inner circle directly control the State Security Department and North Korea's network of political prisons.

To date, hundreds of thousands of inmates are estimated to have died in North Korean political prisons. Today, between 80,000 and 130,000 individuals are estimated to be incarcerated in such prisons. Many of these prisoners are family members of individuals accused of political wrongdoing. This form of collective punishment can be traced to Kim Il-sung, who in 1958 said it was critical to eliminate the "seed" of three generations of "class enemies." Identifying "class enemies" is a task accomplished by an elaborate network of secret police, citizen informants, and security personnel. These so-called class enemies (and their families) are subject to arbitrary detention, torture, summary execution, or life sentences in political prison camps. Those sentenced to a prison's "total control zone" effectively have no prospect of release. They are expected to die in these prison camps and are treated as less than human. Those sentenced to a prison's "revolutionizing zone" in theory have some prospect of release following a period of "reeducation." In actuality, many prisoners in revolutionizing zones perish as a result of overwork, starvation, torture, or disease. Some are simply executed outright.

[4] Thae Yong-ho is the former Deputy Ambassador of the DPRK to the UK. His affidavit is dated 23 March 2017.

To assess the criminal liability that may result from the operation and oversight of North Korea's political prisons, this Inquiry examined all eleven crimes against humanity enumerated in the Rome Statute. Crimes against humanity involve serious crimes committed against a civilian population that is widespread or systematic, whether during war or peacetime. The eleven substantive crimes are listed in Article 7 of the Rome Statute as follows: (1) murder; (2) extermination; (3) enslavement; (4) forcible transfer; (5) imprisonment; (6) torture; (7) sexual violence; (8) persecution; (9) enforced disappearances; (10) apartheid; and (11) other inhumane acts. ***This Inquiry finds reasonable grounds to conclude that ten of the eleven crimes above have been committed in the Democratic People's Republic of Korea, with only the crime of apartheid deemed inapplicable under the facts presented.***

Facts gathered by and testimony provided to this Inquiry support a conclusion fully consistent with that of the United Nations Commission of Inquiry - that is, crimes against humanity have been and continue to be, committed. Some of the crimes chronicled in this Inquiry report include the following:

- Christians are heavily persecuted and receive especially harsh treatment in prison camps, with one former prison guard testifying that "Christians were reactionaries and there were lots of instructions . . . to wipe out the seed of reactionaries;"[5]

- multiple witnesses watched prisoners tortured and killed on account of their religious affiliation;

- a prisoner was raped by a security officer, after which the officer stuck a wooden stick inside her vagina and beat her lower body, resulting in her death within a week of the rape;

- an abortion was induced by three men standing on a wooden plank placed on a pregnant prisoner's stomach;

- another witness lost consciousness after enduring a beating designed to trigger premature labor, with prison officials killing her baby before she could regain consciousness;

- rape victims who feared being killed after becoming pregnant self-induced abortions by eating dirt and poisoning themselves with flower roots;

- other rape victims self-induced abortions by inserting a rubber tube in their vaginas;

- rape of teenage girls and their subsequent attempts to commit suicide by jumping in the Daedonggang River were so common that prison guards were deployed to the river to thwart them;

- four pregnant women were executed for protesting the fact guards forced them to run down a mountain in a failed effort to induce miscarriages;

- twelve prisoners were shot and killed in the commotion that ensued after the execution of the four pregnant women referenced immediately above;

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[5] *North Korea: A Case to Answer A Call to Act,* Christian Solidarity Worldwide 64 (2007), http://www.csw.org.uk/2007/06/20/report/35/article.htm (citing testimony of Ahn Myong-cheol).

- a former prison guard witnessed a prisoner's newborn baby, most likely fathered by a high-ranking official, fed to guard dogs and killed;
- female prisoners suspected of being impregnated by non-Korean men (namely Chinese men) are subjected to especially harsh treatment, with one witness describing a prisoner being injected with a labor-inducing drug and having to watch as a guard suffocated her newborn to death with a wet towel;
- a former North Korean army nurse testified that she saw multiple abortions performed by injecting Ravenol (a motor oil) into the wombs of pregnant women and that babies born three to four months premature were "wrapped in newspapers and put in a bucket until buried"[6] behind the detention center;
- deliberate starvation, malnutrition and overwork are extremely common, resulting in the deaths of countless prisoners;
- at one prison camp, 1,500–2,000 prisoners, mostly children, are believed to have died each year from malnutrition, while many other prisoners were beaten to death for failing to meet production quotas;
- starving prisoners are regularly executed when caught scavenging for food;
- at one prison camp, starving prisoners who were found digging up edible plants on a mountainside were shot to death;
- at another camp, a witness saw a fellow inmate executed for stealing potatoes, while in a separate camp a witness described the execution of numerous prisoners caught scavenging for leftover food in prison guards' quarters;
- a prisoner was beaten to death for hiding stolen corn in his mouth;
- public executions by firing squads or other means are common, especially for prisoners caught attempting to escape;
- the existence of mass graves is well documented, including detailed descriptions of mass burial sites at or near prison camps, as well as testimony about bodies being "dumped" on mountainsides near prison camps;
- an undisclosed location near a prison camp was regularly used for nighttime executions, with gunshots clearly audible;
- at a 1990 prison riot, approximately 1,500 prisoners were shot and killed, their bodies discarded in a closed mine;
- in order to satisfy production quotas, inmates – including teenagers – were forced to perform fifteen to sixteen hours of hard labor per day;
- one witness was forced to perform hard labor (carrying logs) when he was nine years old;
- at one mine in particular, prisoners were forced to work 20 hours per day, with a witness testifying that approximately 200 prisoners died each year at that mine alone;

[6] David Hawk, *The Hidden Gulag, Second Edition*, *The Lives and Voices of "Those Who are Sent to the Mountains"*, The Comm. for Human Rights in North Korea, 153 (2012), https://www.hrnk.org/uploads/pdfs/HRNK_HiddenGulag2_Web_5-18.pdf.

- a soldier supervising a forced labor site at a political prison rolled a log down a steep mountainside, killing ten prisoners as they were carrying logs up the mountain;

- the bodies of some prisoners who died as a result of forced labor or torture were thrown into the cells of prisoners in solitary confinement and later strung on barbed-wire fences where they were eaten by crows;

- one witness described a torture chamber with blood and flesh on the walls and decaying corpses of past victims placed in the chamber in order to instill fear in the next prisoner;

- psychological abuse in political prisons is pervasive, with gruesome acts, including executions, carried out in plain view of fellow prisoners in order to terrorize them; and

- torture is a routine feature of life in political prisons, with a 2014 report by Amnesty International concluding that "North Korea's prison camps are very possibly home to some of the most appalling torture in the world."[7]

This Inquiry identifies individuals or classes of individuals who may be held liable for committing some or all of the ten crimes against humanity enumerated in the Rome Statute that are relevant under the facts presented. They are as follows:

1. Kim Jong-un as Supreme Leader;

2. Korean Workers' Party officials;

3. State Affairs Commission officials;

4. State Security Department Prisons Bureau and Main Command officials;

5. State Security Department Investigations Bureau officials;

6. State Security Department Prosecution Bureau officials;

7. State Security Department officers; and

8. State Security Department agents and prison guards.

B. Summary of Conclusions

This Inquiry concludes there is sufficient evidence to establish that perpetrators ranging from Kim Jong-un to lower-level prison guards perpetrated, and continue to perpetrate, crimes against humanity in North Korean political prison camps. At any future trial, these individuals likely would be subject to criminal liability under the principle of joint criminal enterprise or command responsibility, the latter a long-established form of liability under customary international law that holds superiors responsible for the criminal acts of their subordinates. Given North Korea's tightly controlled leadership structure, Kim Jong-un and his inner circle warrant prosecution under the principle of command responsibility. Finally, this Inquiry makes the following recommendations:

- **Cessation of crimes against humanity:** This Inquiry calls upon the Democratic People's Republic of Korea to cease, and the international community to put a

[7] *Torture in 2014: 30 Years of Broken Promises*, Amnesty Int'l 34 (May 2014), https://www.amnestyusa.org/files/act400042014en.pdf.

stop to, illegal acts described in this Inquiry report, including: torture; murder; sexual violence; starvation; slave labor (including children); and persecution of religious citizens, namely Christians;

- **Compliance with United Nations human rights treaties:** This Inquiry calls for the United Nations Security Council to adopt a resolution demanding that the Democratic People's Republic of Korea comply with all United Nations human rights treaties that the Democratic People's Republic of Korea has ratified, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of all Forms of Discrimination Against Women, the Convention on the Rights of the Child and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, and the Convention on the Rights of Persons with Disabilities;

- **Dismantlement of the political prison system:** This Inquiry calls for the Democratic People's Republic of Korea to dismantle its political prison system, commit to a new system of fair and transparent justice that affords proper due process to its citizens and submit to an international monitoring scheme that ensures the present political prison system remains dismantled;

- **Acknowledgement of atrocities and public accounting of past crimes:** This Inquiry calls for public acknowledgement of the atrocities that victims and their families have suffered, including the release of prison records to victims' families and proper memorialization of the deceased;

- **Referral to, or creation of, a tribunal of binding authority:** This Inquiry calls upon the UN to provide the ICC or a special international tribunal with jurisdiction to appropriately investigate, punish and remedy the crimes against humanity chronicled by this Inquiry report, and further calls on the international community to advocate for the UN to take such action;

- **Personal accountability and prosecution of individuals:** This Inquiry calls for culpable individuals to be held accountable for their criminal acts and to be prosecuted and punished accordingly;

- **Exercise of Universal Jurisdiction**: Third-party states who may find within their borders regime officials holding leadership positions who are known or suspected to have committed crimes against humanity in connection with North Korea's political prisons should consider exercising universal jurisdiction over said individuals, and investigate and prosecute these crimes where warranted;

- **Prohibition against the importation of products of forced labor:** This Inquiry calls for the implementation of safeguards by United Nations member states to prevent the importation of products produced in the North Korean penal system; and

- **Targeted sanctions of persons responsible:** This Inquiry calls for issuers of convertible currencies to adopt carefully targeted, coordinated, and multilateral sanctions against persons they mutually agree are responsible for past or ongoing crimes against humanity in the Democratic People's Republic of Korea.

II. INTRODUCTION

1. The Democratic People's Republic of Korea (the "DPRK," "North Korea," or the "State"), an isolated state of 25 million people,[8] is a totalitarian dictatorship controlled by the Kim family. The Kim family has exerted complete control over the country since 1949.[9] The DPRK's dominant political party, the Korean Workers' Party ("KWP"), is under the control of Kim Jong-un, who has held the positions of First Secretary of the KWP and First Chairman of the National Defence Commission since April 2012.[10] North Koreans are required to refer to Kim Jong-un as "Supreme Leader," a title first given to his grandfather, Kim Il-sung, who rose to power in the wake of the Korean War and ruled until his death in 1994.[11] Thereafter, his son, Kim Jong-il, assumed the title of Supreme Leader, ruling from 1994 until his death in 2011.[12]

2. Under the leadership of the Kim family, the DPRK has committed serious human rights abuses.[13] Numerous reports and indices have consistently identified the DPRK as the very worst,[14] or among the very worst, human rights violators in the world.

3. The police and security forces under the Kim family regimes have been used as tools of repression of the North Korean people. The security apparatus enforces strict rules of behavior prescribed by the State, monitoring the movements of, and words uttered by, North Korean citizens through an extensive network of secret police and citizen informants.[15]

4. North Koreans who knowingly or unwittingly run afoul of these prescribed rules are disciplined swiftly, without regard for due process. Those determined to be in violation of the regime's rules may be subject to arbitrary detention, torture, execution, and/or sent to political prison camps ("*kwan-li-so*") for life for a wide range of acts or statements.[16] While the North Korean government denies the existence of political prison camps, their existence has been corroborated by numerous highly credible sources. Experts estimate that 80,000 to 130,000 individuals are incarcerated in these prisons.[17]

5. Persons sent to prison camps are "disappeared," without trial or judicial order. Much of the inmate population has been gradually eliminated through deliberate starvation, forced labor, executions, torture, rape, and the denial of reproductive rights enforced through punishment, forced abortion, and infanticide.[18] The United Nations Commission of Inquiry ("UN Commission of Inquiry," "Commission," or "COI") estimates that hundreds of thousands of political prisoners have perished in these prisons over the past five

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8 Robert Collins, *Pyongyang Republic: North Korea's Capital of Human Rights Denial*, The Comm. for Human Rights in North Korea, 4 (2016), https://www.hrnk.org/uploads/pdfs/Collins_PyongyangRepublic_FINAL_WEB.pdf.

9 COI Report, paras. 110–157.

10 COI Report, paras. 123 n.67, 124, 134, 149–152, 182 and 1193 (in which the U.N. Commission of Inquiry found that "[i]n practice, not a single officially registered political party or civil society organization appears to exist that is not effectively under the control of the state and of the Workers' Party of Korea" and that "[t]he State Security Department, the Ministry of People's Security, the Korean People's Army, the Office of the Public Prosecutor, the judiciary and the Workers' Party of Korea. . . . are acting under the effective control of the leadership of the Workers' Party of Korea, the National Defence Commission, and the Supreme Leader of the Democratic People's Republic of Korea").

11 COI Report, paras. 110–113, 134.

12 COI Report, paras. 110, 134–136, 149–150.

13 *See generally*, COI Report; *see also* Summary of Findings, paras. 24–73, 76.

14 See *Freedom House, Freedom in the World 2016*: North Korea (2016), https://freedom house.org/report/freedom-world/2016/north-korea; see also Freedom House, Freedom in the World 2017: *Populists and Autocrats: The Dual Threat to Global Democracy* (2017), https://freedomhouse.org/report/freedom-world/freedom-world-2017.

15 Ken E. Gause, *Coercion, Control, Surveillance, and Punishment: An Examination of the North Korean Police State*, The Comm. for Human Rights in North Korea, 17–18 (2012), https://www.hrnk.org/uploads/pdfs/HRNK_Ken-Gause_Web.pdf.

16 *See, e.g.,* COI testimony of former Camp 14 and 15 inmates and former prison guards including Seoul Public Hearing: Kim Young-soon, Jeong Kwang-il and Kim Eun-chol, 21 Aug. 2013; morning; Ahn Myong-chol, 21 Aug. 2013, afternoon; and Kang Chol-hwan, 24 Aug. 2013, afternoon.

17 COI Report, para. 741.

18 Summary of Findings, paras. 59–60.

decades.[19] The atrocities that are being committed against inmates of the *kwan-li-so* resemble the horrors of prisons that totalitarian states established during the twentieth century.[20]

6. At various times and circumstances in the history of the political prison camps, up to three generations of the purported violator's family have also been imprisoned, even if there is no evidence that they are guilty of any claimed wrongdoing.[21] This form of collective punishment – a bad "seed" approach – effectively consigns multiple generations to an early and often violent death in an isolated political prison.[22]

7. As noted above, the scale of human rights violations in the DPRK sets it apart from other countries, but as is explained below, the subject of this Inquiry – ***crimes against humanity committed in the DPRK's network of political prisons*** – is quite narrow. These political prisons and the brutality to which their prisoners are subjected set the DPRK apart from other states with brutal regimes in control. Amnesty International has observed that "North Korea's prison camps are very possibly home to some of the most appalling torture in the world."[23]

III. MANDATE

8. On 21 March 2013, the UN Human Rights Council ("UNHRC") established the UN Commission of Inquiry in response to concerns about serious human rights abuses in the DPRK.[24] The UNHRC selected Michael Kirby of Australia, Sonja Biserko of Serbia, and Marzuki Darusman of Indonesia to serve as members of the Commission, with Mr. Kirby designated to serve as chairman.[25] The mandate of the UN Commission of Inquiry was to investigate "the systematic, widespread and grave violations of human rights in the DPRK," including the "full range of violations associated with prison camps."[26] In 2014, after extensive gathering and analysis of evidence, the Commission published a report confirming that the DPRK has committed, and continues to commit, serious human rights violations, in many instances amounting to "crimes against humanity."[27] Among its principal findings, the UN Commission of Inquiry found:

   (i) crimes of extermination, murder, enslavement, torture, imprisonment, rape, and other sexual violence, persecution on political, religious, racial, and gender grounds, the forcible transfer of populations, the enforced disappearance of persons, and the inhumane act of knowingly causing prolonged starvation were ongoing in the DPRK;

   (ii) the crimes against humanity were ongoing because the policies, institutions, and patterns of impunity that lie at their heart remain in place;

   (iii) North Koreans were detained in political and other prison camps; and those who try to flee the State, Christians, and others considered to introduce subversive influences are the primary targets of the DPRK's

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19 Summary of Findings, para. 60.
20 Summary of Findings, para. 60.
21 Testimony of David Hawk (8 Dec. 2016); *see also* Testimony of Unknown Man (8 Dec. 2016).
22 COI Report, para. 747 (citing testimony of Ahn Myong-chol); *North Korea: New Satellite Images Show Continued Investment in the Infrastructure of Repression*, Amnesty Int'l 20 (2 Dec. 2013) http://www.amnestyusa.org/research/reports/north-korea-new-satellite-images-show-continued-investment-in-the-infrastructure-of-repression.
23 *Torture in 2014: 30 Years of Broken Promises*, Amnesty Int'l, *supra* note 7 at 34.
24 Summary of Findings, para 1.
25 Summary of Findings, para 2.
26 COI Report, paras. 1, 3, 13.
27 Summary of Findings, paras. 24, 80.

systematic and widespread attack against all those considered to pose a threat to the political system and leadership of the DPRK;

(iv) the attack was part of a larger scheme of politically motivated human rights violations perpetuated against the general population of North Korea, including the discriminatory system of classification of persons based on their social class ("*songbun*");

(v) crimes against humanity were committed against starving populations, particularly during the 1990s; and these crimes arose from decisions and policies violating the right to food, which were applied for the purposes of sustaining the present political system, in full awareness that such decisions would exacerbate starvation and related deaths of much of the population;

(vi) crimes against humanity were being committed against persons from other countries who were systematically abducted or denied repatriation, in order to gain labor and other skills for the DPRK.[28]

9. In March 2016, the UNHRC established a panel of experts tasked with holding accountable human rights violators in the DPRK.[29] The UNHRC adopted this resolution at the recommendation of the special rapporteur on the situation of human rights in the DPRK, Marzuki Darusman, who observed that "repression remains unabated" two years after the UN Commission of Inquiry's 2014 report.[30]

10. In March 2017, the Secretariat of the UNHRC issued a "Report of the group of independent experts on accountability" (the "Report").[31] The Report was authored by Sonja Biserko and Sara Hossain, who served as "independent experts on accountability."[32] The Report focused on potential approaches to holding perpetrators accountable for gross human rights violations in the DPRK and recommended that the International Criminal Court ("ICC") initiate investigations and prosecutions upon referral from the United Nations ("UN") Security Council.[33] Due to the number of human rights violations in the DPRK, the Report also called for any potential ICC prosecution to be supplemented with other criminal accountability mechanisms, namely, *ad hoc* tribunals.[34]

11. Compelled in part by the UN Commission of Inquiry's findings and in furtherance of the UNHRC's efforts, the War Crimes Committee of the International Bar Association ("IBA"), the IBA's North America office and various partner organizations[35] conducted this Inquiry. A day-long hearing took place in Washington, D.C., on 8 December 2016 and is described more fully in paragraph 16 below. This Inquiry sought to advance three goals:

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28 Summary of Findings, paras 74–79.

29 Panel of experts is composed of Ms. Sonja Biserko and Ms. Sara Hossain. *See Zeid designates two independent experts to support the work of Special Rapporteur on DPRK*, UNHRC (9 Sept. 2016), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20469&LangID=E.

30 *DPR Korea's 'totalitarian' governing structure 'absolutely denies rights.' UN expert warns*, UN News Centre (14 Mar. 2016), http://www.un.org/apps/news/story.asp?NewsID=53438#.WY4Qn1WGOUk.

31 UNHRC, *Report of the group of independent experts on accountability*, UN Doc. A/HRC/34/66/Add.1 (24 Mar. 2017), http://www.ohchr.org/Documents/Countries/KP/A_HRC_34_66_Add_1.docx.

32 *See generally*, UNHRC, *Report of the group of independent experts on accountability, supra* note 31.

33 UNHRC, *Report of the group of independent experts on accountability, supra* note 31 at para. 75.

34 UNHRC, *Report of the group of independent experts on accountability, supra* note 31 at paras. 75-77.

35 International Bar Association; 9 Bedford Row Chambers London; Hogan Lovells US LLP; The Committee for Human Rights in North Korea; US-Korea Institute at Johns Hopkins School of Advanced International Studies (SAIS); Center for Strategic & International Studies/Korea Chair; Freedom House; Robert F. Kennedy Center for Human Rights; Yonsei Center for Human Liberty; North Korea Freedom Coalition; North Korea Strategy Center United States; Human Rights Foundation; Defense Forum Foundation.

(i) to increase awareness of human rights violations in political prisons in the DPRK;

(ii) to explore the practical and legal barriers associated with holding the architects and overseers of North Korea's political prison system accountable for alleged crimes against humanity if the cumulative evidence demonstrates such crimes have been established; and

(iii) to develop a model for conducting inquiries that other civil society organizations may wish to replicate when accountability for past or ongoing human rights violations has proven elusive due to inaction by the international community or otherwise.

12. The legal team assembled by this Inquiry's organizers provided this Inquiry with a legal brief containing documentary evidence of alleged crimes against humanity in the DPRK.

13. In developing the legal brief, the legal team analyzed a variety of sources on the DPRK generally and the political prisons in particular. These sources included books, reports (*e.g.,* the COI Report), videos, and transcripts. The legal team conducted an exhaustive review of relevant case law, including jurisprudence from every major international criminal tribunal from the Nuremberg International Military Tribunal to the present. These included cases issued by the following tribunals: the ICC, International Criminal Tribunal for the former Yugoslavia ("ICTY"), International Criminal Tribunal for Rwanda ("ICTR"), Extraordinary Chambers in the Courts of Cambodia ("ECCC"), Special Court for Sierra Leone, Special Panel for Serious Crimes ("East Timor"), Nuremberg Trials, Tokyo War Crimes Tribunal, Iraqi High Tribunal, Inter-American Commission and Court of Human Rights, and Special Tribunal for Lebanon.

14. Consistent with the COI Report and the practice of UN fact-finding bodies, this Inquiry report also employed a "reasonable grounds" standard of proof in its factual determinations. This "reasonable grounds" standard refers to the establishment that "an incident or pattern of conduct had occurred whenever [the Commission] was satisfied that it had obtained a reliable body of information, consistent with other material, based on which a reasonable and ordinarily prudent person would have reason to believe that such an incident or pattern of conduct had occurred."[36]

15. Finally, the IBA's North America office twice issued a call for submissions to a large network of individuals and institutions (both governmental and non-governmental) that might possess information relevant to this Inquiry.

IV. DESCRIPTION OF THE PROCEEDINGS

16. This Inquiry held a day-long hearing at the Johns Hopkins School of Advanced International Studies ("SAIS") on 8 December 2016 ("Hearing"). The Hearing was open to the public and also live-streamed on the World Wide Web. Well over 100 people attended the hearing, including representatives of leading non-governmental organizations, lawyers, academics, U.S. and non-U.S. government officials, embassy personnel, journalists, and students. A copy of the Hearing agenda is attached hereto as Appendix 2.

17. We, the judges presiding over the Hearing and the authors of this Inquiry report – Navanethem Pillay (Chair), Mark B. Harmon, and Thomas Buergenthal – collectively drew on our experience as judges on various courts and tribunals, including: the ICC,

[36] Summary of Findings, para. 22.

ICTR, ICTY, ECCC, the Inter-American Court of Human Rights, and the International Court of Justice ("ICJ").[37] Evidence of human rights violations in the DPRK's political prisons was presented by members of the IBA's War Crimes Committee and other counsel who specialize in international criminal and human rights law: Federica D'Alessandra; Steven Kay QC; Gregory W. Kehoe; and Kirsty Sutherland ("Counsel").

18. Ruth Wedgwood, Professor of International Law and Diplomacy at Johns Hopkins, stated in her opening remarks that this Inquiry was "not an ordinary academic gathering," but rather "a purposive active Bearing Witness."[38] The Hearing featured live testimony from three North Korean defectors: Defector No. 1, Kang Cheol-hwan, a former prisoner who spent ten years in a prison camp before escaping from the DPRK in 1992; Defector No. 2, a former regime official who requested that his name be withheld and asked to testify behind a screen to maintain his anonymity; and Defector No. 3, Choi Hyun-jun, a former official in the State Security Department ("SSD")[39] whose responsibilities included identification of alleged spies against the DPRK.[40]

19. The second part of the Hearing featured testimony from two experts on the DPRK's political prison camps and its penal system more generally: Kenneth Gause, Director of the International Affairs Group, CAN Analysis & Solutions; and David Hawk, a consultant for the Committee for Human Rights in North Korea. Both have written extensively on the DPRK and are widely regarded as among the world's leading experts on the aforementioned topics.

20. Counsel presented video evidence that included the pre-recorded testimony of Ahn Myong-chol, a former North Korean prison guard. Mr. Ahn's pre-recorded testimony was provided specifically for this Inquiry and played at the Hearing due to his inability to testify in person. A second video presented at the Hearing was produced by Japanese television channel "Fuji TV" and contained some of the only known footage of a DPRK political prison – Camp 15 (Yodok). This video was smuggled out of the DPRK by a defector.

21. Counsel also introduced into evidence the affidavits of nine former political prisoners, several of which were summarized at the Hearing, and all of which were given specifically for this Inquiry. Several of the affiants have previously provided testimony in other public forums and are well known within the defector and human rights communities.

22. In reaching its factual findings and legal views, this Inquiry also adopted and incorporated by reference testimony and witness statements given in connection with the UN Commission of Inquiry. Lastly, Thae Yong-ho, the DPRK's former Deputy Ambassador to the United Kingdom, provided an affidavit describing his personal knowledge of the political prison camps, those confined in them, and those executed for political crimes.[41]

23. The following sections set forth this Inquiry report's factual findings and legal views related to this Inquiry.

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[37] It was during Judge Pillay's tenure as the United Nations High Commissioner for Human Rights that the UN Commission of Inquiry conducted its investigation and issued its landmark report.

[38] Opening Statement by Ruth Wedgwood (8 Dec. 2016).

[39] Some testimony contained herein makes reference to the SSA, an acronym that is used interchangeably with SSD.

[40] To maintain the integrity of the Inquiry, these witnesses were vetted both before and after the Hearing. We decided to rely on the testimony of four out of the five witnesses who presented live evidence to the Inquiry. Anonymous live testimony given by one of the three North Korean defectors was not considered in reaching the findings and conclusions presented herein. At the Hearing, said testimony was given behind a large screen in order to protect the witness' identity.

[41] *See generally*, Thae Yong-ho Aff. (23 Mar. 2017).

V. FINDINGS: DPRK POLITICAL SYSTEM

24. The Economist Intelligence Unit placed the DPRK last among 167 countries in its 2015 "Democracy Index," assessing it to be an authoritarian regime.[42] Like other authoritarian regimes, the DPRK is characterized by an official ideology, a mass political party (the "KWP"), and an internal security apparatus (the "SSD") that operates akin to a secret police force.[43] Power resides almost exclusively in the "Supreme Leader."[44]

25. The Kim regime is supported by an unyielding propaganda machine.[45] Severe consequences, including summary execution, await those who utter words or take actions that are deemed corrosive to the maintenance of the Kim family's image.[46]

26. The DPRK has a legislative branch – the Supreme People's Assembly ("SPA") – described as a "unitary single-party republic with one legislative house."[47] Previously, the DPRK's legislative branch had nominally consisted of three parties; however, following the purges of the 1950s, the parties other than the KWP existed only as "bureaucratic appendixes of the [KWP]."[48]

27. "Elections" are held every five years in the DPRK.[49] Voters are presented with a single candidate, chosen by the Democratic Front for the Reunification of the Fatherland, the name of the governing coalition controlled by the KWP.[50] Voting "no" or abstaining from voting is viewed as an act of treason.[51] Voting booths do not provide any privacy and dissenting votes must be openly placed into a separate ballot box.[52] As such, these "elections" are a rubber-stamp exercise to validate the Kim family regime.[53] Deputies "elected" to the SPA hold little legislative power, since the SPA is convened infrequently.[54] Instead, the Supreme Leader, supported by the Presidium (which is composed of a select group of senior officials), wields legislative powers.[55]

28. The structure of the DPRK places no limits on the power of the Supreme Leader.[56] This structure is designed to increase the ease with which he may consolidate and exercise power and authority.[57] While on paper various government institutions are vested with specific powers, the reality is that the Kim family exercises absolute control and authority.[58] Further, power is typically exercised outside any legal framework, with most decisions made in secret.[59] The four power centers are:

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42 The Economist Intelligence Unit, *Democracy Index 2015*, 8 (2015), http://www.eiu.com/public/topical_report.aspx?campaignid=DemocracyIndex2015.
43 Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 12–13.
44 COI Report, paras 1191–1192.
45 *See generally*, *e.g., Kim Jong-il: Brief History*, Foreign Languages Publishing House, Pyongyang (1998), http://www.korea-dpr.com/lib/103.pdf.
46 *See* Gause, *Coercion, Control, Surveillance, and Punishment*, *supra* note 15 at 22 (The SSD Investigation Bureau "has devoted much of its time to investigating incidents involving graffiti and leaflets opposing Kim Il-sung and Kim Jong-il and the destruction and damage of their portraits.").
47 Chan Lee et al., *North Korea*, Encyclopedia Britannica (12 Aug. 2017), https://www.britannica.com/place/North-Korea.
48 Fyodor Tertitskiy, *Being a minor party in the North*, NK News.Org (26 Nov. 2014), https://www.nknews.org/2014/11/being-a-minor-party-in-the-north/.
49 T.S., *How North Korea's elections work*, The Economist (5 Mar. 2014), https://www.economist.com/blogs/economist-explains/2014/03/economist-explains-2.
50 T.S., *supra* note 49.
51 T.S., *supra* note 49.
52 T.S., *supra* note 49.
53 T.S., *supra* note 49.
54 T.S., *supra* note 49.
55 T.S., *supra* note 49.
56 *See, e.g.,* COI Report, paras. 1191–1192.
57 Ken E. Gause, *North Korean Civil-Military Trends: Military-First Politics to a Point*, U.S. Strategic Studies Inst. 3–4 (Sept. 2006), http://ssi.armywarcollege.edu/pdffiles/PUB728.pdf.
58 Gause, *North Korean Civil-Military Trends, supra* note 57 at 4.
59 Gause, *North Korean Civil-Military Trends, supra* note 57 at 4.

(i) the KWP apparatus;

(ii) the military and security apparatus;

(iii) a family-based patronage system; and

(iv) three generations of leaders from the same family.[60]

A. Supreme Leader

29. Since 2011, the position of Head of State or "Supreme Leader" has belonged to Kim Jong-un.[61] As noted above, his predecessors were his father, Kim Jong-il, and his grandfather, Kim Il-sung.[62] The Supreme Leader also holds the titles of Supreme Commander, First Secretary of the KWP and the Chairman of the State Affairs Commission ("SAC").[63] As such, he directly controls the KWP (the executive), the military and the SPA (the legislature). Although the structure of the State is complex, all paths of power, whether legislative, as embodied by the SPA, political, as embodied by the KWP, or military, as embodied by the SAC and the Korean People's Army ("KPA"), are controlled directly by Kim Jong-un.[64] Arguably, there is no other country in the world where power is so thoroughly centralized.

30. The only political ideology permitted in the DPRK is that of the Supreme Leader, known as *suryong*.[65] The clear hierarchical structure of the State – with top to bottom control over the entire society by the Supreme Leader – is demonstrated in its application of the Monolithic Ideology System, which was developed in 1967. It consists of ten fundamental principles that were widely promulgated by Kim Il-sung in 1973 (the "Ten Principles").[66]

B. Monolithic Ideology System

31. Kim Jong-il explained his father's Monolithic Ideology System in a 1995 speech:

> The monolithic ideological system of the party is the leader's ideological system and his leadership system. Establishing the monolithic ideological system is the basic way to build the party as the leader's party. Only when the monolith of ideology and leadership is ensured through the establishment of the leader's ideological system and his leadership system is it possible to achieve the ideological unity and organizational cohesion of the party ranks and make the party play its role satisfactorily as a political leadership body. . . . Our Party's struggle to establish the monolithic ideological system has been a struggle to equip Party members thoroughly with the leader's ideas and unite them firmly behind the leader in ideology and purpose; at the same time, it has been a

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60 Gause, *North Korean Civil-Military Trends, supra* note 57 at 4.
61 COI Report, paras. 149–150.
62 See Collins, *Pyongyang Republic, supra* note 8 at 5.
63 Ken E. Gause, *North Korean Political Dynamics of the Kim Jong-un Era*, 25 Int'l J. of Korean Unification Studies 33, 34 (2016); COI Report, para. 152; John G. Grisafi, *North Korea creates new lead government body headed by Kim*, NK News.org (30 June 2016), https://www.nknews.org/2016/06/north-korea-creates-new-lead-government-body-headed-by-kim/.
64 Ken E. Gause, *North Korean House of Cards: Leadership Dynamics Under Kim Jong-un,* The Comm. for Human Rights in North Korea 146–147 (2015), https://www.hrnk.org/uploads/pdfs/HRNK_Gause_NKHOC_FINAL.pdf.
65 Collins, *Pyongyang Republic*, *supra* note 8 at 12, 18–22.
66 *See* Collins, *Pyongyang Republic*, *supra* note 8 at 13, 15, 24, 26–27.

struggle to overcome the heterogeneous ideas and factional elements which conflict with the leader's idea and guidance and disturb unity and cohesion.[67]

32. The Ten Principles comprising the Monolithic Ideology System are designed to govern all aspects of life in the DPRK. No other philosophy is permitted. The Ten Principles are:

(i) struggle with all your life to paint the entire society the single color of the Great Leader Comrade Kim Il-sung's revolutionary thought;

(ii) respect and revere highly and with loyalty the Great Leader Comrade Kim Il-sung;

(iii) make absolute the authority of the Great Leader Comrade Kim Il-sung;

(iv) accept the Great Leader Comrade Kim Il-sung's revolutionary thought as your belief and take the Great Leader's instructions as your creed;

(v) observe absolutely the principle of unconditional execution in carrying out the instructions of the Great Leader Comrade Kim Il-sung;

(vi) rally the unity of ideological intellect and revolutionary solidarity around the Great Leader Comrade Kim Il-sung;

(vii) learn from the Great Leader Comrade Kim Il-sung and master communist dignity, the methods of achieving revolutionary tasks, and the people's work styles;

(viii) preserve dearly the political life the Great Leader Comrade Kim Il-sung has bestowed upon you and repay loyally with high political awareness and skill for the Great Leader's boundless political trust and considerations;

(ix) establish a strong organizational discipline so that the entire Party, the entire people and the entire military will operate uniformly under the sole leadership of the Great Leader Comrade Kim Il-sung;

(x) the great revolutionary accomplishments pioneered by the Great Leader Comrade Kim Il-sung must be succeeded and perfected by hereditary succession until the end.[68]

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[67] Collins, *Pyongyang Republic*, *supra* note 8 at 24–25 (omissions in original). The full text of the 2 Oct. 1995 speech, titled "The Workers' Party of Korea is the Party of the Great Leader Comrade Kim Il-sung," is available at https://korea-dpr.com/lib/109.pdf.

[68] *Ten Great Principles of the Establishment of the Unitary Ideology System*, Citizens' Alliance for North Korean Human Rights (29 June 2012), https://eng.nkhumanrights.or.kr:444/board/bbs_view.php?no=3&board_table=bbs_literature&page=1&word=&searchItem=&cate_id. There are also 65 sub-principles.

33. Kim Jong-un has expressed his firm adherence to the Ten Principles upon which his power is founded:

> The great Comrade Kim Jong-il formulated Comrade Kim Il-sung's revolutionary ideology as Kimilsungism and developed our Party into an ideologically pure and organizationally integrated body in which monolithic ideological and leadership systems are firmly established, into a motherly party which has formed a harmonious whole with the masses and serves them, into a seasoned and experienced party which is possessed of a high level of leadership art and into a promising party which has definitely been assured of the leadership being inherited.[69]

C. Songbun

34. Enforced discrimination in the DPRK is rooted in the system known as *songbun*.[70] It is a major political tool through which the DPRK maintains control over society.[71] There are three major castes and dozens of sub-castes.[72] Designation into one or another caste is based largely on a family's socio-economic background and socio-political behavior.[73]

35. The "core" (*haeksim*) class consists of the most loyal members of DPRK society.[74] People belonging to this caste receive significant privileges and may be allowed to live in Pyongyang.[75] Most importantly, they form the core of the regime, serving in high-ranking positions in the KWP, SAC and other state institutions responsible for sustaining and protecting the country.[76]

36. The "wavering" (*dongyo*) class consists of people whose loyalty to the regime is questionable.[77] Nevertheless, they are still considered loyal enough to serve the country, so long as the DPRK subjects them to constant ideological indoctrination, properly oversees them, and controls them.[78]

37. The "hostile" (*choktae*) class consists of people who are perceived as disloyal to the regime.[79] They are considered to be dangerous, reactionary elements or even class enemies.[80] Members of this class are typically discriminated against in all aspects of life (*e.g.,* education, employment, military service, medical care, housing, access to food, etc.).[81] Because of the perceived threat they may pose, the State seeks to manage all aspects of their lives, including what they do in their free time.[82]

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69 *Political Bureau of C.C. WPK Adopts Resolution*, KCNA Watch (13 Feb. 2015), https://kcnawatch.co/newstream/1451904473-576181759/political-bureau-of-c-c-wpk-adopts-resolution/.

70 *See* COI Report, paras. 273–279; *see also*, Phil Robertson, *North Korea's Caste System*, Human Rights Watch (5 July 2016), https://www.hrw.org/news/2016/07/05/north-koreas-caste-system.

71 Robert Collins, *Marked for Life: Songbun North Korea's Social Classification System*, The Comm. for Human Rights in North Korea 87 (2012), https://www.hrnk.org/uploads/pdfs/HRNK_Songbun_Web.pdf.

72 COI Report, para. 274.

73 Collins, *Marked for Life: Songbun North Korea's Social Classification System, supra* note 71 at 6–7.

74 Collins, *Marked for Life: Songbun North Korea's Social Classification System, supra* note 71 at 6–7.

75 COI Report, para. 331.

76 COI Report, para. 281.

77 Collins, *Marked for Life: Songbun North Korea's Social Classification System, supra* note 71 at 7.

78 Collins, *Marked for Life: Songbun North Korea's Social Classification System, supra* note 71 at 7; see also Paul Eckert, *North Korea political caste system behind abuses: study*, Reuters (6 June 2012), http://www.reuters.com/ article/us-korea-north-caste-idUSBRE85505T20120606.

79 Collins, *Marked for Life: Songbun North Korea's Social Classification System, supra* note 71 at 7.

80 Collins, *Marked for Life: Songbun North Korea's Social Classification System, supra* note 71 at 7.

81 Collins, *Marked for Life: Songbun North Korea's Social Classification System, supra* note 71 at 7.

82 *Report on Human Rights in North Korea*, Korean Bar Ass'n & Int'l Bar Ass'n 198 (2014), https://www.ibanet.org/HumanrightsNorthKoreareport.aspx.

38. A single politically incorrect remark, or use of improper wording when talking about the Supreme Leader or the DPRK, can result in an irreversible downgrade to the lowest classification, placement in a political prison camp, or even execution.[83] It is very difficult to ascend to a higher class during one's lifetime.[84]

D. Korean Workers' Party

39. Over time, the significance and relative power of the military and KWP have evolved. Kim Jong-il focused on the policy of *Songun* or "military first" rendering the military directly subordinate to him and hence superior to other arms of the State.[85] In contrast, the military under Kim Jong-un has been somewhat eclipsed by the KWP.[86] Today, decisions by the Supreme Leader and the KWP are absolute and override laws where there is any inconsistency.[87] The KWP oversees many aspects of North Korean life and "decides on policy regarding domestic affairs, military affairs, foreign affairs, economic and social issues, and specifically human rights denial."[88]

40. Those with the most seniority in the KWP are members of the Politburo, the highest decision-making body outside of Kim Jong-un.[89]

41. The KWP plays a central role in the perpetuation of human rights violations in the DPRK, relying on entities under its control such as the Organization and Guidance Department ("OGD"). The OGD, which directly supports the Politburo, has been referred to as the most influential and powerful organization in the DPRK.[90] Among other things, the OGD "oversees the efficacy of the internal security agencies."[91] The OGD also "approves all policy, including human rights policy."[92]

E. State Security Department

42. The SSD, estimated to include roughly 50,000 personnel, is responsible for conducting wide-ranging counterintelligence, maintaining internal security, and functions generally associated with a secret police force.[93] Its activities include monitoring political attitudes, conducting surveillance on persons returning from foreign areas, and dealing with persons viewed as hostile to the DPRK.[94] The SSD reports directly to the SAC, which is the highest decision-making body in the DPRK.[95] Several of the SSD's operations are carried out covertly and remain unknown to many North Koreans.[96]

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83 Collins, Marked for Life: Songbun North Korea's Social Classification System, *supra* note 71 at 7–8.

84 Collins, Marked for Life: Songbun North Korea's Social Classification System, *supra* note 71 at 7–8.

85 Gause, North Korean Political Dynamics of the Kim Jong-un Era, *supra* note 63 at 40–41.

86 Gause, North Korean Political Dynamics of the Kim Jong-un Era, *supra* note 63 at 42–43.

87 *See* DPRK Const. art. 11, ch. I, https://www.kfausa.org/dprk-constitution/ (provides that the DPRK conducts all activities under the leadership of the KWP); *see also Ten Great Principles of the Establishment of the Unitary Ideology System*, *supra* note 68. (Principle Five of the Ten Guiding Principles provides: *"Observe absolutely the principle of unconditional execution in carrying out the instructions of the Great Leader Comrade Kim Il-sung."*).

88 Collins, Pyongyang Republic, *supra* note 8 at 108 (citing Hyun Seong-il, Bukan-ui gukgajeollyak-gwa pawo elliteu: Ganbu jeonchaeg-ul jungsimeuro, 16 (Seoul: Seonin Publishing, 2007)).

89 Collins, *Pyongyang Republic*, *supra* note 8 at 110.

90 Collins, *Pyongyang Republic*, *supra* note 8 at 112.

91 Collins, *Pyongyang Republic*, *supra* note 8 at 113.

92 Collins, *Pyongyang Republic*, *supra* note 8 at 113. Another unit under the KWP is the Propaganda and Agitation Department ("PAD"), which runs an extensive propaganda and indoctrination program with the purpose of denying North Korean citizens freedom of thought and information. The PAD receives guidance from the OGD, and oversees all self-criticism sessions and ideological training classes for citizens. Collins, *Pyongyang Republic*, *supra* note 8 at 117–118.

93 Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 17.

94 Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 17–18.

95 Gause, *Coercion, Control, Surveillance, and Punishment*, *supra* note 15 at 19. The SSD previously reported to the National Defense Commission; however, at the Fourth Session of the 13th SPA, 29 June 2016, the National Defense Commission was replaced by the SAC, which thereafter assumed the responsibilities of the National Defense Commission but expanded its focus to non-military national concerns. Grisafi, *North Korea creates new lead government body headed by Kim*, *supra*

43. The former Minister of State Security, Kim Won-hong,[97] had six vice-directors reporting to him.[98] These directors were responsible for: organization, propaganda, cadres, inspections, rear services, and liaising with the Ministry of People's Security ("MPS").[99]

44. In January 2017, Kim Won-hong was removed from office allegedly for "charges of corruption, abuse of power and human rights abuses."[100] According to South Korean lawmaker Kim Byung-kee, Kim Won-hong is under house arrest.[101] At least five deputy minister-level officials who worked under him appear to have been executed by anti-aircraft guns.[102]

45. The SSD is understood to have bureaus that include: the General Guidance Bureau, Counterespionage Bureau, Counterintelligence Bureau, Border Security Bureau, Investigation Bureau, Prosecution Bureau, and Prisons Bureau (also known as the Farm Bureau or Farm Guidance Bureau). The Prisons Bureau, the seventh bureau within the SSD,[103] is responsible for the management of political prisons and prisoners,[104] while the SSD's Investigation Bureau is responsible for the investigation and arrest of citizens suspected of "anti-regime activities."[105] While the SSD covers a wide range of functions, its principal aim is to sustain and protect the Kim family regime.[106] As of 2012, it was organized as follows:[107]

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note 63. According to Article 106 of the Constitution of the DPRK, the NDC [now, the SAC] is the "supreme national defense guidance organ of state sovereignty." DPRK Const., art. 106, ch. VI, http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan045234.pdf.

96 *See, e.g.*, Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 17.

97 *North Korea Leadership Watch: State Security Department*, 38 North & The US-Korea Inst. (2010), https://nkleadershipwatch.wordpress.com/dprk-security-apparatus/state-security-department/.

98 Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 24.

99 Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 20–21, 24.

100 Ju-min Park & Jack Kim, *North Korea sacking minister of state security Kim Won Hong marks 'crack in the elite', says key defector*, The Independent Online (3 Feb. 2017), http://www.independent.co.uk/news/world/asia/north-korea-sack-minister-of-state-security-kim-won-hong-kim-jong-un-aide-crack-in-the-elite-key-a7561576.html.

101 Euan McKirdy, *North Korea executed 5 security officials, South Korea says*, CNN.com (28 Feb. 2017), http://edition.cnn.com/2017/02/28/asia/north-korea-officials-executed/.

102 McKirdy, *North Korea executed 5 security officials, supra* note 101.

103 *Compare Political Prison Camps in North Korea Today,* Database Ctr. for North Korean Human Rights 76, 200–201 (2011), http://rageuniversity.com/PRISONESCAPE/UK%20ANTI-TERROR%20LAW/Poltical-Prison-Camps-in-North-Korea.pdf *with* Gause, *Coercion, Control, Surveillance, and Punishment*, *supra* note 15 at 22; *White Paper on Human Rights in North Korea 2014*, Korea Inst. for Nat'l Unification 136–137 (2014), https://books.google.com/books?id=S3B1BgAAQBAJ&pg=PA137&lpg=PA137&dq=prisons+bureau+SSD+bureau+no.+7&source=bl&ots=QKmaE5ouLd&sig=xX8wxawHw1L12SxSlcsaKrsdcGE&hl=en&sa=X&ved=0ahUKEwjinbnuoJfWAhXG5CYKHXf2BAYQ6AEIQjAE#v=onepage&q=prisons%20bureau%20SSD%20bureau%20no.%207&f=false; and *White Paper on Human Rights in North Korea 2015*, Korea Inst. for Nat'l Unification 112 (2015), https://books.google.com/books?id=3GdQCwAAQBAJ&pg=PA112&lpg=PA112&dq=prisons+bureau+SSD+bureau+no.+7&source=bl&ots=OCwyqb1N5V&sig=WCzMCwt5nKMou4i3_P1GXUEtYps&hl=en&sa=X&ved=0ahUKEwjinbnuoJfWAhXG5CYKHXf2BAYQ6AEIPTAD#v=onepage&q=prisons%20bureau%20SSD%20bureau%20no.%207&f=false.

104 Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 21–23.

105 Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 22.

106 *See* Collins, *Pyongyang Republic, supra* note 8 at 120.

107 Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 24.

F. State Security Department and Political Prisoners: The Investigation Bureau, Prosecution Bureau and Prisons Bureau

46. Articles 122 and 124 of the DPRK's Criminal Procedure Law vest the SSD with exclusive jurisdiction to deal with political crimes.[108] If the MPS, which operates as a more typical police organization, arrests a person suspected of a political crime, they are normally required to transfer the case to the SSD.[109] The SSD's Investigation Bureau then controls the investigation of suspected political criminals.[110] The Interrogation Department takes over the case once suspects have been identified by the Investigation Department.[111] The Investigation Bureau is particularly feared by many citizens in the

[108] Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 69–70.
[109] Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 70.
[110] Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 22.
[111] Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 38.

DPRK because of its reputation for arbitrarily carrying out executions for personal political gain.[112]

47. The SSD's Prosecution Bureau determines how to proceed with adjudication.[113] It is believed that the Bureau acts as both prosecutor and the court of judgment,[114] and that "legal procedures are often violated or simplified to the point that they are meaningless."[115]

48. The SSD's Prisons Bureau oversees the operation of political prisons, and is responsible for the "management and control of political prisoners and political confinement facilities" within the DPRK.[116]

49. SSD officers are encouraged to view and treat prisoners as subhuman. At the hearing, a former SSD officer provided testimony about how SSD officers view political prisoners:

> There is no such thing as human rights in North Korea, especially in these [political] prisons. So, in order for there to be human rights, you have to have a human being to start with. These people who are in the prisons, in the camps, these are not considered to be humans; they are treated less than a beast. . . . In the camps we would raise pigs, and we have prisoners, the inmates who would be taking care of the pigs. If a pig were to die, the prisoner would be beaten to death. So, the prisoner could die, but the pig cannot.[117]

G. State Security Department: Regional Departments and Political Prison Camps

50. Each of the DPRK's nine provinces has at least one SSD headquarters.[118] The provincial offices are run by chiefs and deputy chiefs who oversee section chiefs and guidance members.[119] Each provincial SSD headquarters has approximately 200–300 personnel.[120]

51. Political prison Camps 14, 15, and 16 are operated exclusively by the SSD.[121] A "Chief Administrator" possesses overall responsibility for the operation of the prison camps and is assisted by a "Political Officer."[122] Each prison camp includes the following bureaus: a political bureau, a SSD bureau, a security and guard bureau, and an administrative bureau that oversees sections responsible for maintenance, procurement, ammunition, finance, transportation, and communication.[123] The SSD maintains a vertical chain of command, from the SSD officers at the top of the chain, to prison guards that supervise prisoners, including at work sites.[124]

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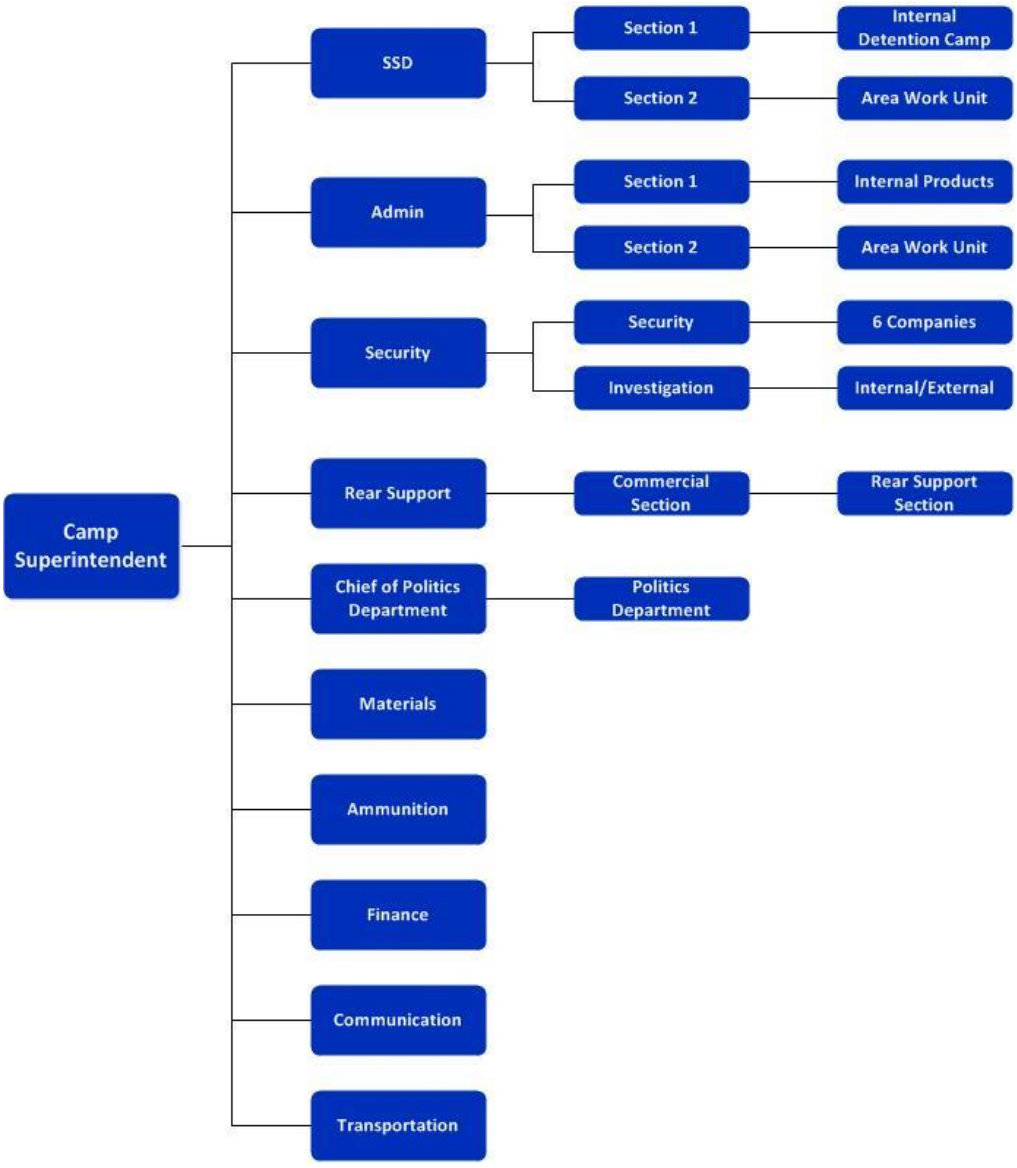
[112] Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 22.
[113] Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 22.
[114] Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 70–71.
[115] Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 70.
[116] Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 22.
[117] Testimony of Choi Hyun-jun (8 Dec. 2016).
[118] Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 25.
[119] Gause, *Coercion, Control, Surveillance, and Punishment*, *supra* note 15 at 25. "Security guidance officers employ informants from among the soldiers, who report on spies that have infiltrated the units, rumors about the Kim family, and individual soldiers' behavior." Gause, *Coercion, Control, Surveillance, and Punishment*, *supra* note 15 at 40.
[120] Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 25.
[121] *See Political Prison Camps in North Korea Today, supra* note 103 at 125–126.
[122] *Political Prison Camps in North Korea Today, supra* note 103 at 203.
[123] *Political Prison Camps in North Korea Today, supra* note 103 at 203.
[124] *Political Prison Camps in North Korea Today, supra* note 103 at 203.

52. While the SSD technically answers to the SAC,[125] in practice it is the KWP that controls the arrest and treatment of many political prisoners.[126]

53. While SSD personnel are also responsible for monitoring prisoners, some political prisoners are called upon to monitor other prisoners.[127] In many instances, prisoners are organized according to a strict hierarchy in order to lessen the need for additional SSD officials.[128] They are formed into work units, with each unit assigned a single SSD officer.[129]

54. Based on testimony,[130] the structure of prison camps run by the SSD resembles the following:



125 *North Korea Leadership Watch: State Security Department, supra* note 97.
126 See *Political Prison Camps in North Korea Today, supra* note 103 at 530; White Paper on Human Rights in North Korea 2015, *supra* note 103 at 112.
127 *See, e.g., Political Prison Camps in North Korea Today, supra* note 103 at 212, 232.
128 *See, e.g., Political Prison Camps in North Korea Today, supra* note 103 at 208–209.
129 *See, e.g., Political Prison Camps in North Korea Today, supra* note 103 at 208–209.
130 *Political Prison Camps in North Korea Today, supra* note 103 at 203–204.

H. Overview of Political Prison Camps 14, 15, 16 and 25

55. The DPRK established its political prison system in the 1950s to sequester and punish political prisoners, pursuant to state policy.[131]

56. Because prison camps generate resources or revenue with few offsetting costs, they provide an economic benefit to the regime.[132] Put differently, profits generated by the prisoners' forced labor are not reinvested in the prisons.[133]

57. According to satellite imagery, *kwan-li-so* are situated on large tracts of land, surrounded by electrified fences and barbed wire.[134] They have numerous guard towers, with barracks on the perimeter of the prison grounds.[135] The prisons and their boundaries are visible in satellite photographs.[136] State authorities have denied the existence of the *kwan-li-so,* but the combination of high resolution satellite imagery and eyewitness testimony from former guards, inmates and local witnesses leaves no doubt about their existence.[137]

58. Some *kwan-li-so* are established as "total control zones" to which people are typically sent with no prospect of release.[138] Hundreds of thousands of political prisoners have been sent to political prisons over the past 50 years,[139] with up to three generations of families detained together and forced into slave labor, mostly to work in mines, logging and agriculture.[140]

59. When Kim Il-sung spoke to SSD officials in 1958, he informed them that the purpose of the prison camps was to eliminate the "seed" of three generations of class enemies.[141] This message was perpetuated over generations by billboards in the prisons reminding the guards of Kim Il-sung's instruction.[142]

60. Lee Baek-lyong corroborates this statement, recalling that in Camp 15 in 1996, there were message boards all around the prison with slogans such as: "There is no reconciliation or negotiation with enemy of the class!"[143]

61. There are four known political prison camps – Prison Camps 14, 15, 16 and 25 – that incarcerate political prisoners.[144] It is estimated that between 80,000 and 130,000 political prisoners are currently detained in the *kwan-li-so*.[145]

62. Additionally, based on satellite imagery, the Committee for Human Rights in North Korea believes that a new prison camp may have been established in 2007 in a region known as the Ch'oma-bong Restricted Area.[146]

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131 COI Report, paras. 730, 733.
132 Phil Robertson, *North Korea: Ruling Party Benefits from Forced Labor*, Human Rights Watch (7 Oct. 2015), https://www.hrw.org/news/2015/10/07/north-korea-ruling-party-benefits-forced-labor.
133 COI Report, para. 801.
134 David Hawk, *The Hidden Gulag IV: Gender Repression & Prisoner Disappearances*, The Comm. for Human Rights in North Korea, 8–9 (2015); https://www.hrnk.org/uploads/pdfs/Hawk_HiddenGulag4_FINAL.pdf.
135 Hawk, *The Hidden Gulag IV, supra* note 134 at 8–9, 46–50.
136 *See, e.g., Hawk, The Hidden Gulag IV, supra* note 134 at 46–50.
137 Hawk, *The Hidden Gulag IV, supra* note 134 at 8.
138 Hawk, *The Hidden Gulag IV, supra* note 134 at 5.
139 Summary of Findings, para. 60.
140 Testimony of David Hawk (8 Dec. 2016).
141 COI Report, para. 747 n.1098 (citing confidential testimony of former guard, Ahn Myung-chol).
142 COI Report, para. 747.
143 *I Was a Prisoner of North Korea's Political Prison Camp (Testimony of Lee Baek-lyong)*, Citizen's Alliance for North Korean Human Rights (19 Jan. 2016), http://eng.nkhumanrights.or.kr/eng/datacenter/related_write.php?mode=view&bbs_idx=4323&search_mode=&search_word=Lee Baek&pg=1.
144 Testimony of David Hawk (8 Dec. 2016).
145 COI Report, para. 741.

63. In recent years some political prison camps have been decommissioned. Most notably, Camp 22 is believed to have been decommissioned in 2012, while Camp 18 is believed to have been downsized and relocated.[147] Political prison camps are often referenced by their geographic location and also by special code names. For example, Kang Cheol-hwan testified at the Hearing that the official name for Camp 15 (Yodok), where he was imprisoned for ten years, was Section 2915 of the Security Guard of KPA.[148]

64. Persons who are found by the SSD to have engaged in political crimes are sent without any meaningful trial or formal proceedings to these political prison camps.[149] Political crimes include any conduct believed to be contrary to the interests of the State.[150] Most political prisoners are accused of having violated the Ten Principles of the Monolithic Ideology.[151]

65. Prisoners also include those who have been exposed to allegedly subversive, outside influences.[152] For example, prisoners of war and civilians abducted during the Korean War were sent to prison camps as enemies of the State.[153] Individuals returning from Japan in the 1950s and 1960s were sent to political prison camps for fear they might spread subversive information about what they had seen abroad.[154] A number of younger citizens of the DPRK who had studied in Eastern Europe and the Soviet Union suffered the same fate around 1989, a time of upheaval marked by the fall of the Berlin Wall and the Soviet Union's collapse in 1991.[155]

66. The UN COI Report determined that "crimes against humanity have been committed in the [DPRK], pursuant to policies established at the highest level of the State."[156] With respect to the DPRK political prison camps specifically, the UN Commission of Inquiry found that prisoners had been subjected to "deliberate starvation, forced lab[or], executions, torture, rape and the denial of reproductive rights enforced through punishment, forced abortion, and infanticide."[157] The Commission estimated that hundreds of thousands of political prisoners died in prison camps over the last five decades.[158]

1. Political Prison Camp 14

67. Camp 14 appears to occupy approximately 150 square kilometers of mountainous terrain near Kaechon City in South Pyongan Province.[159] It appears to have been in existence

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146 *See,* Joseph S. Bermudez Jr., Andy Dinville, & Mike Eley, *North Korea Ch'oma-bong Restricted Area*, The Comm. for Human Rights in North Korea & AllSource Analysis 3 (17 Mar. 2016), https://www.hrnk.org/uploads/pdfs/ASA_HRNK_Chmbg_201603_FINAL.pdf.

147 *White Paper on Human Rights in North Korea*, Seoul: Korea Inst. for Nat'l Unification, 398–399 n.410 (July 2016).

148 Testimony of Kang Cheol-Hwan (8 Dec. 2016).

149 Summary of Findings, para. 59.

150 Hawk, *The Hidden Gulag IV, supra* note 134 at 25.

151 *See* Collins, *Pyongyang Republic*, *supra* note 8 at 27 (citing Hyun Seong-il, *Bukan sahoe-e daehan nodongdang-ui tongjecheje*, *in* Bukan josa yeongu (North Korean Issues Research Ctr., Aug. 1998)).

152 *See, e.g.,* Thae Yong-ho Aff. (23 Mar. 2017).

153 Testimony of David Hawk (8 Dec. 2016).

154 COI Report, para. 750; *see also Political Prison Camps in North Korea Today, supra* note 103 at 44–45, 49–50, 83, 96, 102, 115–117, 134, 139, 173–174, 303–307.

155 Testimony of David Hawk (8 Dec. 2016).

156 Summary of Findings, para. 75.

157 Summary of Findings, para. 60.

158 Summary of Findings, para. 60.

159 Joseph S. Bermudez Jr., Andy Dinville, & Mike Eley, *North Korea Imagery Analysis of Camp 14*, The Comm. for Human Rights in North Korea & AllSource Analysis, 2 (30 Nov. 2015), https://www.hrnk.org/uploads/pdfs/ASA_HRNK_Camp14_v7_highrezFINAL_11_30_15.pdf. The GeoCoordinates of the central area of Camp 14 are 39.557817N, 126.0114999E.

since the 1960s, but was moved to its present location in the early 1980s.[160] All inmates are serving life sentences.[161] Camp 14 is visible in satellite images.[162]

2. Political Prison Camp 15

68. Camp 15 appears to occupy approximately 6.6 square kilometers in Yodok County, South Hamgyong Province.[163] Camp 15 had both a "total control zone" and a "revolutionizing zone."[164] The total control zone inmates who are considered ideologically irredeemable are incarcerated for life and are separated from prisoners in the revolutionizing zone.[165] Prisoners in the revolutionizing zone are incarcerated for less serious violations, with some coming from more privileged families; such prisoners have some chance of being released after several years if they persuade prison authorities of their ideological rehabilitation through hard work, diligent participation in daily indoctrination sessions and, in some cases, the payment of bribes.[166] Camp 15 is visible in satellite images.[167]

3. Political Prison Camp 16

69. Camp 16 occupies 540 square kilometers of rugged terrain in the Hamgyong-sanmaek mountainous region.[168] Part of the prison camp is located in close proximity to the P'unggye-ri nuclear test site.[169] Another part of the camp is located near the Orang-ch'on No. 2 Power station.[170] Camp 16 was not listed in announcements by South Korean intelligence authorities until the early 1990s.[171] No direct testimony is available for Camp 16, as it is the only camp with no known witnesses or escapees.[172] However, housing infrastructure is believed to be located in various areas within the prison camp compound.[173] Camp 16 is visible in satellite images.[174]

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160 *Political Prison Camps in North Korea Today, supra* note 103 at 77.
161 *Prisons of North Korea Fact Sheet,* U.S. Dep't of State (25 Aug. 2017), https://www.state.gov/j/drl/rls/fs/2017/273647.htm.
162 *See, generally,* Bermudez Jr. et al., *North Korea Imagery Analysis of Camp 14, supra* note 159.
163 *See* Joseph S. Bermudez Jr., Andy Dinville, & Mike Eley, *North Korea Imagery Analysis of Camp 15 "Yodok" Closure of the "Revolutionizing Zone"*, The Comm. for Human Rights in North Korea 2 (18 Sept. 2015), https://www.hrnk.org/uploads/pdfs/ASA_HRNK_Camp15_RevZone_HQ.pdf. GeoCoordinates of the central area of Camp 15 are 39.671450N, 126.852357E; *see also Prisons of North Korea Fact Sheet, supra* note 161.
164 Bermudez Jr. et al., *North Korea Imagery Analysis of Camp 15, supra* note 163 at 3.
165 *Political Prison Camps in North Korea Today, supra* note 103 at 17.
166 Seoul Public Hearing: Kim Young-soon, Jeong Kwang-il, Kim Eun-chol, 21 Aug. 2013, morning; Ahn Myong-chol, 21 Aug. 2013, afternoon; and Kang Cheol-hwan, 24 Aug. 2013, afternoon. Some observers fear that releases from the revolutionizing zones are no longer carried out. *See* testimony of David Hawk, Washington Public Hearing, 31 Oct. 2013, afternoon.
167 *See, generally,* Bermudez Jr. et al., *North Korea Imagery Analysis of Camp 15, supra* note 163.
168 Joseph S. Bermudez Jr., Andy Dinville, & Mike Eley, *North Korea Imagery Analysis of Camp 16*, The Comm. for Human Rights in North Korea 3 (15 Dec. 2015), https://www.hrnk.org/uploads/pdfs/ASA_HRNK_Camp16_v8_fullres_FINAL_12_15_15.pdf. The GeoCoordinates for the central area of Camp 16 are 41.231091N, 129.412216E.
169 Bermudez Jr. et al., *North Korea Imagery Analysis of Camp 16, supra* note 168 at 3–4.
170 Bermudez Jr. et al., *North Korea Imagery Analysis of Camp 16, supra* note 168 at 4.
171 *Political Prison Camps in North Korea Today, supra* note 103 at 88.
172 Bermudez Jr. et al., *North Korea Imagery Analysis of Camp 16, supra* note 168 at 3.
173 Bermudez Jr. et al., *North Korea Imagery Analysis of Camp 16, supra* note 168 at 9.
174 *See, generally,* Bermudez Jr. et al., *North Korea Imagery Analysis of Camp 16, supra* note 168.

4. Political Prison Camp 25

70. Camp 25 is located near Chongjin City, North Hamgyong Province.[175] It appears to have more than 5,000 prisoners.[176] Defector descriptions of its mission match that of other *kwan-li-so*. However, its physical characteristics, as observed in satellite imagery,[177] are more similar to the nation's *kyo-hwa-so*, or long-term felony penitentiaries and prison camps.[178] For example, Camp 25 is highly contained and has a main block surrounded by a high wall.[179] In contrast, the other *kwan-li-so* are characterized by sprawling encampments.[180]

I. Overview of Political Prison Camp 22

71. Camp 22, now decommissioned, was located within the North Hamgyong Province.[181] It is estimated to have held 50,000 prisoners[182] and was notoriously harsh, with 1,500 to 2,000 prisoners, mostly children, estimated to have died yearly from malnutrition.[183] Further, many prisoners died each year from beatings, some of them for not meeting their production quotas; additionally, every year roughly ten prisoners were executed outright, many of them after being "caught eating from recently harvested food stocks."[184]

J. Ministry of People's Security: Camp 18

72. Camp 18 was based at Pukchang County until it was largely decommissioned in early 2007.[185] Camp 18 was a hybrid prison run predominantly by the MPS with a smaller SSD presence.[186] Evidence indicates that Camp 18 has been partially re-located to Dongrim-il, Gaecheon, South Pyeongan Province and continues to be operated by the MPS.[187]

73. Camp 18 consisted of: (i) an MPS department; (ii) an SSD department; (iii) a KWP department; and (iv) an administration department.

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175 *Political Prison Camps in North Korea Today*, *supra* note 103 at 124; Joseph S. Bermudez Jr., Andy Dinville, & Mike Eley, *North Korea Camp No. 25–Update 2*, The Comm. for Human Rights in North Korea 3 (29 Nov. 2016) https://www.hrnk.org/uploads/pdfs/ASA_HRNK_Camp25_Update2.pdf. The GeoCoordinates for Camp 25 are 41.834384N, 129.725280E.

176 *Political Prison Camps in North Korea Today, supra* note 103 at 110, 124.

177 *See, generally,* Bermudez Jr. et al., *North Korea Imagery Analysis of Camp 25, supra* note 175.

178 Hawk, *The Hidden Gulag: Second Edition, supra* note 6 at IX.

179 *See Political Prison Camps in North Korea Today, supra* note 103 at 108–109; *see also* Bermudez Jr. et al., *North Korea Imagery Analysis of Camp 25, supra* note 175 at 20, 23.

180 Hawk, *The Hidden Gulag: Second Edition, supra* note 6 at 27.

181 Joseph S. Bermudez Jr., Amy Opperman & Katelyn Amen, *North Korea's Camp 22,* The Comm. For Human Right in North Korea & Digital Globe 3 (22 Oct. 2012), https://www.hrnk.org/uploads/pdfs/HRNK%20CAMP%2022%20REPORT%20FINAL%20(1).pdf.

182 *Democratic People's Republic of Korea*, U.S. State Dep't 5, https://www.state.gov/documents/organization/160466.pdf (last visited 6 Sept. 2017).

183 *Prisons of North Korea Fact Sheet, supra* note 161.

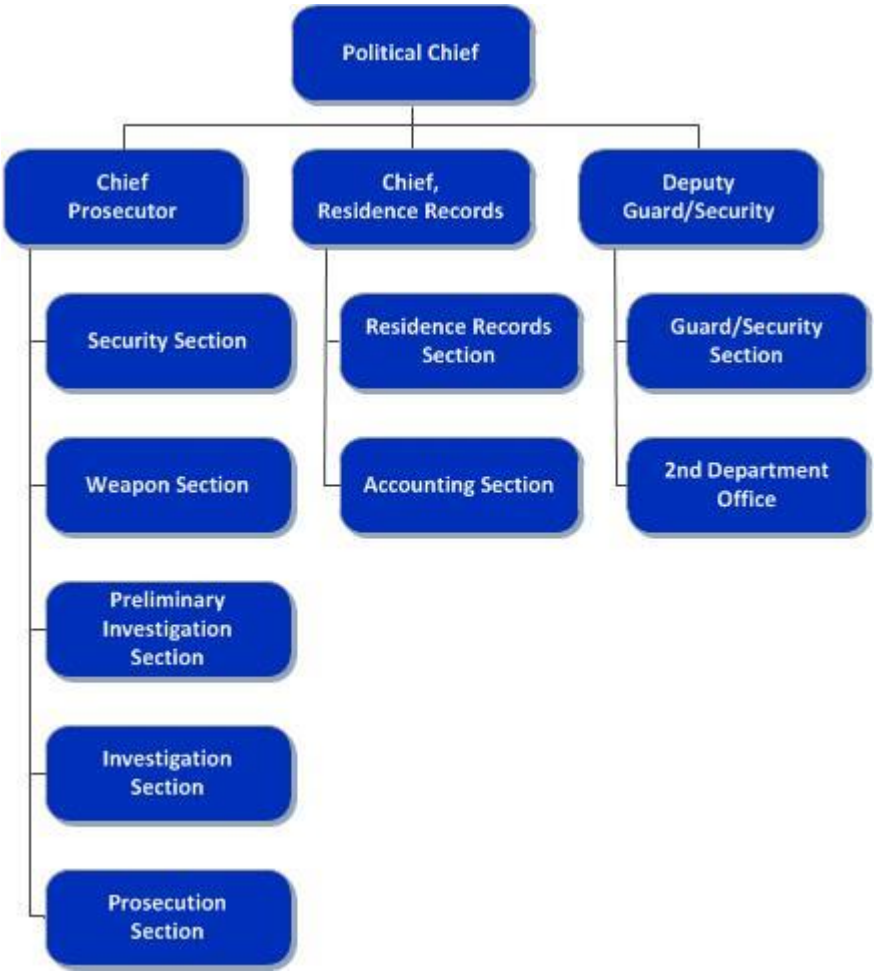
184 Hawk, *The Hidden Gulag, Second Edition, supra* note 6 at 78.

185 *Political Prison Camps in North Korea Today*, *supra* note 103 at 91, 97–98. Witness testimony suggests that around 80 families from the Camp were transferred to another camp, while remaining prisoners were released. *Political Prison Camps in North Korea Today*, *supra* note 103 at 97–98 (quoting A09, former prisoner, Pongchang-ni, Camp 18, 1975-2000).

186 Testimony of David Hawk (8 Dec. 2016).

187 *White Paper on Human Rights in North Korea, supra* note 147 at 399–402.

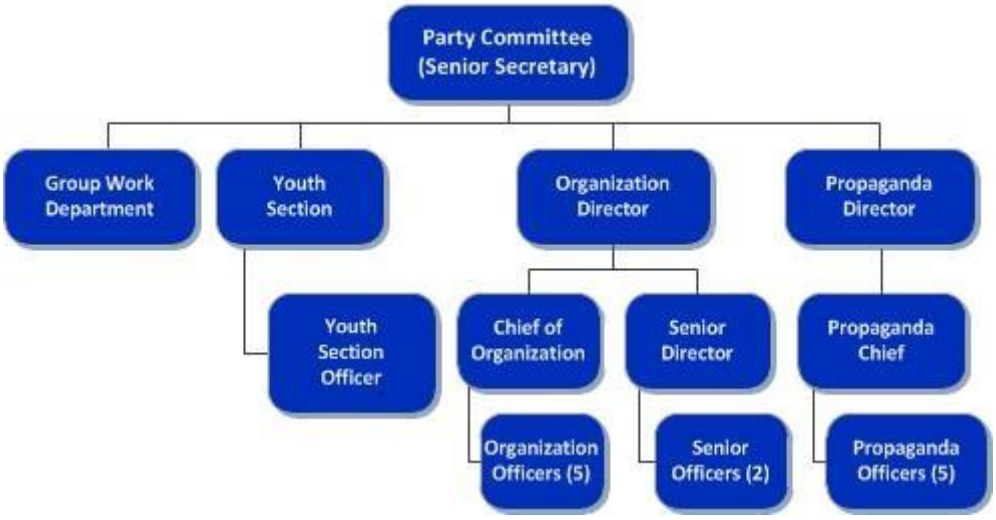
(i) The MPS Department's presence at Camp 18 had the following structure:[188]



(ii) The SSD's lesser presence at the prison had the following structure:[189]

[188] *Political Prison Camps in North Korea Today, supra* note 103 at 207.
[189] *Political Prison Camps in North Korea Today, supra* note 103 at 207.

(iii) The KWP's presence at the prison had the following structure:[190]



74. Although prison camps run by the MPS technically are operated by the National Police Ministry, they are normally controlled by the KWP, which appoints the prison's top-ranking party officers.[191]

VI. LEGAL FRAMEWORK

A. Definition of Crimes Against Humanity

75. The definition of crimes against humanity, first promulgated in 1945 in Article 6 of the Charter of the International Military Tribunal at Nuremberg, provided that such crimes are as follows:

> [N]amely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. [192]

Since then, the definition has evolved and been informed by jurisprudence not just from the Nuremberg trials, but also from the Tokyo tribunals, the ICTY, the ICTR, the Special Court for Sierra Leone and national courts.[193] On 17 July 1998, the Rome Statute of the ICC ("Rome Statute") was adopted and its definition for crimes against humanity distilled from the jurisprudence of prior tribunals and courts as well as the negotiations of the 148 countries present at the Rome Diplomatic Conference for an ICC.[194] As of September 2017, 124 countries have ratified the Rome Statute, demonstrating its wide acceptance by the international community.[195] It is important to note that, by relying on the definition

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190 *Political Prison Camps in North Korea Today, supra* note 103 at 208.
191 *Political Prison Camps in North Korea Today, supra* note 103 at 201.
192 UN, *Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, 82 U.N.T.S. 280, art. 6(c) (8 Aug. 1945), http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf.
193 *See* COI Report, para. 1026.
194 Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, 3 Insights (11 Aug. 1998), https://www.asil.org/insights/volume/3/issue/10/results-rome-conference-international-criminal-court.
195 *The State Parties to the Rome Statute*, ICC, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited 2 Sept. 2017).

of crimes against humanity contained in Article 7 of the Rome Statute, the authors of this Inquiry report are not suggesting that the ICC is the sole, or even optimal, venue for any future prosecution of perpetrators of crimes against humanity in the DPRK's political prisons. Instead, the Rome Statute's definition of crimes against humanity is a useful guide and arguably the most commonly used definition of such crimes.[196] Further, just as many international courts and tribunals regularly draw on the jurisprudence of other courts in cases involving crimes against humanity, so too does this Inquiry report draw on decisions from various courts.

76. Crimes against humanity consist of serious crimes committed in an attack against a civilian population that is widespread or systematic, whether in times of war or peace.[197] Article 7 of the Rome Statute does not require any nexus with an armed conflict.[198] Further, this international crime can be committed by a government against its own citizens within its internal borders.[199] The substantive crimes committed within the context of crimes against humanity are listed in Article 7(1) of the Rome Statute as follows:

(i) murder;

(ii) extermination;

(iii) enslavement;

(iv) deportation or forcible transfer of population;

(v) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(vi) torture;

(vii) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(viii) persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court;

(ix) enforced disappearance of persons;

(x) apartheid; and

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196 *See Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, para. 577 (Int'l Crim. Trib. For Rwanda 2 Sept. 1998); *Prosecutor v. Mucić*, Case No. IT-96-21-T, Judgment, paras. 309, 321 (Int'l Crim. Trib. for the Former Yugoslavia 16 Nov. 1988).

197 Prof. Antonio Cassese et al., *International Criminal Law*, 90 (Oxford Univ. Press eds., 2d ed. 2008).

198 The ICTY statute made such a requirement for the Yugoslavia conflict as a "jurisdictional prerequisite." *Prosecutor v. Kunarac*, Case No. IT-96-23/1-A, Appeal Judgment, para. 83 (Int'l Crim. Trib. for the Former Yugoslavia 12 June 2002); U.N, *Report of the International Law Commission on Its Sixty-Seven Session*, 59 (2015), http://legal.un.org/docs/?symbol=A/70/10.

199 *See Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, para. 312 (ECCC 26 July 2010) (noting that crimes against humanity are committed against "any civilian population" and "may therefore include a State's attack on its own population," when discussing the ECCC Law).

(xi) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[200]

B. Modes of Criminal Responsibility

77. Criminal responsibility for crimes committed within and through a state institutional framework extends from the direct physical perpetrators on the ground to the highest levels of the organizational structure as long as they have knowledge of the broader widespread attack on the civilian population.[201] Participants in collective criminality may be held criminally liable for the perpetration of the criminal act, even where they have not participated directly in the material commission of the criminal act, under the principle of: (i) joint criminal enterprise ("JCE"); or (ii) command responsibility.

1. Joint Criminal Enterprise

78. JCE is a mode of co-perpetration recognized under customary international law, with three different forms (JCE I, JCE II, and JCE III, respectively).[202] JCE's underlying principle is enunciated in *Tadic*, as follows:

> [T]he Statute [of the ICTY] does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime, or otherwise aid and abet in its planning, preparation, or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions.[203]

79. All three forms of JCE share the same *actus reus* elements, as follows:

(i) a plurality of persons;[204]

(ii) the existence of a common plan, design, or purpose, which constitutes or involves the commission of an international crime;[205]

(iii) participation of the accused in the common plan involving the perpetration of an international crime;[206]

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200 *See* Rome Statute, art. 7.1, https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

201 *See Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, para. 656 (Int'l Crim. Trib. for the Former Yugoslavia 7 May 1997); *see also Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, para. 248 (Int'l Crim. Trib. for the Former Yugoslavia 15 July 1999).

202 *See Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging,* Case No. STL 11-01/I, Appeals Chamber, paras. 236–239 (Special Trib. for Lebanon 16 Feb. 2011).

203 *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, para. 190 (Int'l Crim. Trib. for the Former Yugoslavia 15 July 1999).

204 *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, para. 227 (Int'l Crim. Trib. for the Former Yugoslavia 15 July 1999).

205 *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, para. 227 (Int'l Crim. Trib. for the Former Yugoslavia 15 July 1999). Common design has been established as a form of accomplice liability "in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent)". *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, para. 220 (Int'l Crim. Trib. for the Former Yugoslavia 15 July 1999).

206 *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, para. 227 (Int'l Crim. Trib. for the Former Yugoslavia 15 July 1999). The Appeals Chamber held that "this participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose."

(iv) those liable under JCE must possess intent to participate in the JCE, which, it is held, can be inferred from knowledge;[207] and

(v) the accused's contribution to the common plan does not have to be necessary or substantial but it must be significant.[208]

a. JCE I

80. JCE I is the most direct form of joint criminal enterprise. It holds all participants liable for acts agreed and acted upon pursuant to a common plan or design, where the participants share the intent to commit the concerted crime, although only some of them physically perpetrate the crime, so long as their contribution in the furtherance of the common criminal plan or design is significant.[209] A significant contribution may be through omission.[210]

b. JCE II

81. JCE II encompasses members of the military or administrative units, *i.e.*, those acting pursuant to the concerted plan within an institutional framework. The Appeals Chamber in *Tadic* held that:

> The second distinct category of cases is in many respects similar to [JCE I] and embraces the so-called 'concentration camp' cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; *i.e.*, by groups of persons acting pursuant to a concerted plan.[211]

82. The requisite *mens rea* comprises: (i) knowledge of the nature of the system of ill treatment; and (ii) intent to further the common design of ill-treatment.[212] Such intent may be proved either directly or as a matter of inference from the nature of the accused's authority within the prison or organizational hierarchy.[213] Knowledge of the criminal

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[207] *Prosecutor v. Kvocka*, Case No. IT-98-30/1-A, Judgment, para. 367 (Int'l Crim. Trib. for the Former Yugoslavia 28 Feb. 2005): "The Appeals Chamber recalls that discriminatory intent must be distinguished from the motive for doing so. The Trial Chamber inferred Radić's discriminatory intent from his knowledge of the persecutory nature of the crimes, and his knowing participation in the system of persecution pervading Omarska camp. The Appeals Chamber finds that it was reasonable to reach the conclusion that Radić acted with discriminatory intent from the facts of the case, regardless of his personal motives for doing so. His personal motives may become relevant at the sentencing stage, but not as to the finding of his criminal intent." *See also Prosecutor v. Krnojelac*, Case No. IT-97-25A, Judgment, paras. 100, 102 (Int'l Crim. Trib. for the Former Yugoslavia 17 Sept. 2003): "Shared criminal intent does not require the co-perpetrator's personal satisfaction or enthusiasm or his personal initiative in contributing to the joint enterprise. . . . The Appeals Chamber notes that customary international law does not require a purely personal motive in order to establish the existence of a crime against humanity. The Appeals Chamber further recalls its case law in the *Jelisic* case which, with regard to the specific intent required for the crime of genocide, sets out 'the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.' It is the Appeals Chamber's belief that this distinction between intent and motive must also be applied to the other crimes laid down in the Statute."

[208] *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Judgment, para. 430 (Int'l Crim. Trib. for the Former Yugoslavia 3 Apr. 2007).

[209] *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging,* Case No. STL 11-01/I, Appeals Chamber, para. 237 (Special Trib. for Lebanon 16 Feb. 2011).

[210] *Prosecutor v. Gotovina*, Case No. IT-06-90-T, Judgment Vol. II, paras. 2370, 2581–2582 (Int'l Crim. Trib. for the Former Yugoslavia 15 Apr. 2011); *Prosecutor v. Kvocka,* Case No. IT-98-30/1-A, Judgment, paras. 187, 195 (Int'l Crim. Trib. for the Former Yugoslavia 28 Feb. 2005); *but see Prosecutor v. Milutinovic*, Case No. IT-03-70-1, Judgment, paras. 23, 103 (Int'l Crim. Trib. for the Former Yugoslavia 25 Sept. 2003).

[211] *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, para. 202 (Int'l Crim. Trib. for the Former Yugoslavia 15 July 1999).

[212] *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, para. 203 (Int'l Crim. Trib. for the Former Yugoslavia 15 July 1999).

[213] *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, paras. 220, 227 (Int'l Crim. Trib. for the Former Yugoslavia 15 July 1999). The Appeals Chamber held that "this participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or

system and intent to further its criminal purpose can be determined by the actual role of an individual within, for example, a prison camp.[214]

83. Knowledge of crimes in a prison camp-type environment is strong evidence of intent to further a crime under JCE II. In *Kvocka*, the ICTY Trial Chamber found:

> The concentration camp cases seemingly establish a rebuttable presumption that holding an executive, administrative, or protective role in a camp constitutes general participation in the crimes committed therein. An intent to further the efforts of the joint criminal enterprise so as to rise to the level of co-perpetration may also be inferred from knowledge of the crimes being perpetrated in the camp and continued participation which enables the camp's functioning.[215]

84. In *Kvocka*, the ICTY Trial Chamber found that:

> Due to the high position Kvocka held in the camp, the authority and influence he had over the guard service in the camp and his very limited attempts to prevent crimes or alleviate the suffering of detainees, as well as the considerable role he played in maintaining the functioning of the camp despite knowledge that it was a criminal endeavor, the Trial Chamber finds Kvocka a co-perpetrator of the joint criminal enterprise of Omarska camp.[216]

85. Approving silence also is evidence of intent to further a crime under JCE II if it encourages the criminal acts. With regard to imposing liability on those persons with authority under JCE II, it was stressed in *Kvocka* that:

> It may be that a person with significant authority or influence who knowingly fails to complain or protest automatically provides substantial assistance or support to criminal activity by their approving silence, particularly if present at the scene of criminal activity.[217]

c. JCE III

86. JCE III covers circumstances where the direct perpetrator of a criminal act diverges from the plan to commit another crime that was foreseeable, such that the other perpetrators had willingly taken a risk that such a crime would occur in executing their criminal plan.

87. To incur liability under JCE III, the perpetrator must have the "intention to participate in and further the criminal activity or criminal purpose of the group and to contribute to the JCE or in any event to the commission of a crime."[218] In addition, if the perpetrator is to be culpable for a crime not intended in the criminal plan, it must be: (i) foreseeable that such a crime might be perpetrated by another member of the group; and (ii) that the

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contribution to, the execution of the common plan or purpose." *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, para. 227 (Int'l Crim. Trib. for the Former Yugoslavia 15 July 1999).

214 *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, para. 111 (Int'l Crim. Trib. for the Former Yugoslavia 17 Sept. 2003): "The Appeals Chamber holds that, with regard to Krnojelac's duties, the time over which he exercised those duties, his knowledge of the system in place, the crimes committed as part of that system and their discriminatory nature, a trier of fact should reasonably have inferred from the above findings that he was part of the system and thereby intended to further it. The same conclusion must be reached when determining whether the findings should have led a trier of fact reasonably to conclude that Krnojelac shared the discriminatory intent of the perpetrators of the crimes of imprisonment and inhumane acts. As the Trial Chamber rightly recalled, such intent must be established for Krnojelac to incur criminal liability on the count of persecution on this basis."

215 *Prosecutor v. Kvocka*, Case No. ICTY-98-30/1-T, Judgment, para. 278 (Int'l Crim. Trib. for the Former Yugoslavia 2 Nov. 2001).

216 *Prosecutor v. Kvocka*, Case No. ICTY-98-30/1-T, Judgment, para. 414 (Int'l Crim. Trib. for the Former Yugoslavia 2 Nov. 2001).

217 *Prosecutor v. Kvocka*, Case No. ICTY-98-30/1-T, Judgment, para. 309 (Int'l Crim. Trib. for the Former Yugoslavia 2 Nov. 2001).

218 *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, para. 228 (Int'l Crim. Trib. for the Former Yugoslavia 15 July 1999).

accused willingly took the risk that the crime might occur.[219] It is important to note that there is no requirement that the accused actually knows of the commission of the unintended act.[220]

88. Criterion (i) discussed above imposes a requirement that, objectively, in the eyes of a reasonable person, the unintended crime might occur. Criterion (ii) discussed above imposes a subjective standard: the accused must have been aware that such an outcome was possible, or else he could not willingly take a risk that it might occur. As such, the test is that of subjective recklessness, or *dolus eventualis*.[221] The individual characteristics and knowledge of each accused are therefore relevant in deciding what he or she might have foreseen: "what is natural and foreseeable in one person participating in a systemic joint criminal enterprise, might not be natural and foreseeable to another, depending on the information available to them."[222]

89. In some cases, the unintended act can be such a natural consequence of the criminal plan that it can be concluded that any perpetrator must have foreseen its possible commission, regardless of his or her characteristics or knowledge. In *Karemera and Ngirumpatse*, the Trial Chamber concluded that during a genocidal campaign "a natural and foreseeable consequence of that campaign will be that soldiers and militias who participate in the destruction will resort to rapes and sexual assaults unless restricted by their superiors."[223]

2. Command Responsibility

90. Command responsibility is a long-established form of liability under customary international law that holds superiors responsible for the criminal acts of their subordinates. The modern principle that superiors are accountable for the actions of their subordinates was first enunciated at a multi-national level in the Hague Conventions of 1899 and 1907.[224] The principle of command responsibility subsequently was codified in Additional Protocol I to the Geneva Conventions.[225] Its status as a tenet of customary international law in both international and non-international armed conflicts was confirmed by its inclusion as a mode of liability in the Statutes of the ICTY and ICTR.[226] The principle is also included in the Rome Statute.[227]

91. Command responsibility imposes liability upon a superior to ensure the proper compliance with international law of those under his/her command by imposing criminal

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219 *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, para. 228 (Int'l Crim. Trib. for the Former Yugoslavia 15 July 1999).
220 *Prosecutor v. Krstic*, Case No. IT-98-33-A, Judgment, para. 150 (Int'l Crim. Trib. For the Former Yugoslavia 19 Apr. 2004).
221 *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, para. 220 (Int'l Crim. Trib. for the Former Yugoslavia 15 July 1999); *Prosecutor v. Stakic*, Case No. IT-97-24-A, Judgment, paras. 99–103 (Int'l Crim. Trib. For the Former Yugoslavia 22 Mar. 2006).
222 *Prosecutor v. Kvocka*, Case No. IT-98-30/1-A, Judgment, para. 86 (Int'l Crim. Trib. for the Former Yugoslavia 28 Feb. 2005).
223 *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Judgment and Sentence, para. 1476 (Int'l Crim. Trib. for Rwanda 2 Feb. 2012).
224 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, Annex to the Convention, Ch. 1, art. 1, 29 July 1899, https://ihl-databases.icrc.org/ihl/INTRO/150?OpenDocument; Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations respecting the Laws and Customs of War on Land, The Hague, Annex to the Convention, Ch. 1, art. 1, 18 Oct. 1907, https://ihl-databases.icrc.org/ihl/INTRO/195.
225 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, arts. 86 & 87, available at https://ihl-databases.icrc.org/ihl/intro/470. Further, Article 91 imposes liability for acts committed by members of its armed forces onto the state. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, art. 91.
226 ICTY Statute, art. 7(3); ICTR Statute, art. 6(3).
227 Rome Statute, art. 28.

responsibility for failure to prevent or punish violations perpetrated by those under his/her effective command.[228]

92. The doctrine of command responsibility applies in both military and civilian contexts, applying to military commanders, political leaders, and other civilian superiors exercising authority.[229]

93. The ICTY employs a three-part test to establish the existence of command responsibility:

(i) the existence of a superior-subordinate relationship between the accused as superior and the perpetrator of the crime as his subordinate;

(ii) that the superior knew or had reason to know that the crime was about to be or had been committed; and

(iii) that the superior failed to take the necessary and reasonable measures to prevent the criminal acts or punish the perpetrators thereof.[230]

a. Superior-Subordinate Relationship

94. The existence of a superior-subordinate relationship may be established on either a *de jure* or *de facto* basis. *De jure*, or legal, command may be held by military or civilian state organizations.[231] *De facto* command exists where the superior exercises "effective control" over his or her subordinate(s), with "effective control" defined as "a material ability to prevent or punish criminal conduct."[232]

95. The superior may incur responsibility even if the subordinate is far down the chain of command and there are intermediate superiors. The superior does not need to know the identity of the subordinate.[233] In other words, every person in the chain of command who exercises effective control over subordinates is responsible for the crimes of those subordinates, provided that the other requirements of superior responsibility are met.[234]

96. Indicia of "effective control" include: the accused's official position, his/her capacity to issue orders, the procedure for their appointment, the accused's position in the military or political structure, and the actual tasks that he/she performed.[235]

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228 *Prosecutor v. Halilović,* Case No. IT-01-48-T, Judgment, paras. 72–100 (Int'l Crim. Trib. for the Former Yugoslavia 16 Nov. 2005); *Prosecutor v. Brima* et al., SCSL-04-16-T, Judgment, para. 783 (Special Ct. for Sierra Leone 20 June 2007).

229 *Prosecutor v. Delalić (Čelebići case)*, Case No. IT-96-21-A, Judgment, paras. 195–196, (Int'l Crim. Trib. for the Former Yugoslavia 20 Feb. 2001); *Prosecutor v. Aleksovski*, Case No. IT-95-14/1- A, Appeal Judgment, para. 76 (Int'l Crim. Trib. for the Former Yugoslavia 24 Mar. 2000); *Prosecutor v. Blaškić,* Case No. IT-95-14-A, Judgment, para. 484 (Int'l Crim. Trib. for the Former Yugoslavia 29 July 2004); *Prosecutor v. Baglishema*, Case No. ICTR-95-1A-A, Judgment, para. 51 (Int'l Crim. Trib. for Rwanda 3 July 2002) (Reasons); *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A, Judgment, para. 85 (Int'l Crim. Trib. for Rwanda 23 May 2005); *Prosecutor v. Brima* et al., SCSL-04-16-T, Judgment, para. 782 (SCSL 20 June 2007).

230 *See, e.g., Prosecutor v. Halilović,* Case No. IT-01-48-T, Judgment, paras. 55–100 (Int'l Crim. Trib. for the Former Yugoslavia 16 Nov. 2005); *Prosecutor v. Blaškić,* Case No. IT-95-14-T, para. 294 (Int'l Crim. Trib. for the Former Yugoslavia 3 March 2000).

231 *Prosecutor v. Delalić (Čelebići case)*, Case No. IT-96-21-A, Appeals Judgment, paras. 192–197, (Int'l Crim. Trib. for the Former Yugoslavia 20 Feb. 2001); *Prosecutor v. Aleksovski*, Case No. IT-95-14/1- A, Appeal Judgment, para. 76 (Int'l Crim. Trib. for the Former Yugoslavia 24 Mar. 2000*); Prosecutor v. Baglishema*, Case No. ICTR-95-1A-A, Judgment (Reasons), para. 50 (Int'l Crim. Trib. for Rwanda 3 July 2002); *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgment, para. 85 (Int'l Crim. Trib. for Rwanda 23 May 2005); *see Prosecutor v. Brima* et al., SCSL-04-16-T, Judgment, para. 782 (Special Ct. for Sierra Leone 20 June 2007).

232 *Prosecutor v. Delalić (Čelebići case)*, Case No. IT-96-21-A, Appeals Judgment, para. 256 (Int'l Crim. Trib. for the Former Yugoslavia 20 Feb. 2001).

233 *Hadzihasanovic & Kubura*, Case No. IT-01-47-T, Judgment, para. 90 (Int'l Crim. Trib. for the Former Yugoslavia 15 March 2006).

234 *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, para. 542 (ECCC 26 July 2010).

235 *Prosecutor v. Delalić* et al. *(Čelebići case)*, Case No. IT-96-21-A, Appeals Judgment, para. 197 (Int'l Crim. Trib. for the Former Yugoslavia 20 Feb. 2001).

b. Superior's Knowledge of Subordinate's Crime

97. The superior must have actual or constructive knowledge of the involvement of the subordinates in a crime.[236] Actual knowledge cannot be presumed, but may be established through circumstantial evidence.[237]

98. In determining whether a superior possessed the requisite knowledge, the following indicia*, inter alia*, may be considered: the number of illegal acts; the type of illegal acts; the scope of illegal acts; the time during which the illegal acts occurred; the number and type of troops involved; the logistics involved; the geographical location of the acts; the widespread occurrence of the acts; the tactical tempo of operations; the *modus operandi* of similar illegal acts; the officers and staff involved; and the location of the superior at the time (which may affect the evidence required vis-à-vis reporting and monitoring mechanisms).[238]

99. Constructive knowledge requires that a superior "had reason to know" of his/her subordinates' criminal behavior or intended criminal behavior.[239] The standard for "reason to know" is whether the superior was on notice, or in some circumstances possessing information "sufficiently alarming to justify further inquiry."[240] The superior is not able to negate this element by deliberately evading relevant information.[241]

c. Superior's Failure to Prevent or Punish

100. The superior must have failed to prevent the commission of the crimes or to punish the subordinates. The duty to prevent arises upon the superior's acquisition of actual or constructive knowledge of criminal behavior or imminent criminal behavior.[242] The duty to punish arises once the crime has been committed.[243] The duties are distinct and concern different scenarios: where a superior falls under a duty to prevent, his/her failure to do so cannot be "cured" by *ex post facto* punishment.[244]

101. The superior must take the necessary and reasonable measures within his/her material ability to fulfill these duties. A lack of formal legal competence to take necessary measures does not preclude the superior's criminal responsibility.[245]

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236 *Prosecutor v. Brima* et al., SCSL-04-16-T, Judgment, para. 792 (Special Ct. for Sierra Leone 20 June 2007).

237 *Prosecutor v. Brima* et al., SCSL-04-16-T-628, Judgment, para. 792 (Special Ct. for Sierra Leone 20 June 2007).

238 *Prosecutor v. Delalić (Čelebići case)*, Case No. IT-96-21-T, Judgment, para. 386 (Int'l Crim. Trib. for the Former Yugoslavia 16 Nov. 1998).

239 Prof. Antonio Cassese et al., *International Criminal Law*, *supra* note 197 at 189 (citing First Additional Protocol, art. 86(2) to the Geneva Conventions of 12 Aug. 1949, available at: https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf).

240 Prof. Antonio Cassese et al., *International Criminal Law*, *supra* note 197 at 190 (internal citations omitted). *See Prosecutor v. Delalić* et al. *(Čelebići case)*, Case No. IT-96-21-A, Judgment, paras. 226, 238, 241 (Int'l Crim. Trib. for the Former Yugoslavia 20 Feb. 2001). In *Brima*, the SCSL Trial Chamber found that Brima Bazzy Kamara, as deputy commander of the AFRC troops, had constructive knowledge of certain killings and mutilations because he was aware of the substantial likelihood that his presence would provide moral support and assist the commission of killings in the Fourah Bay area and killing and mutilations during "Operation Cut Hand" in Freetown. *Prosecutor v. Brima* et al., SCSL-2004-16-A, Judgment, paras. 241–255 (Special Ct. for Sierra Leone 22 Feb. 2008).

241 *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, paras. 542-544 (ECCC 26 July 2010).

242 *Prosecutor v. Halilović,* Case No. IT-01-48-T, Judgment, para. 72 (Int'l Crim. Trib. for the Former Yugoslavia 16 Nov. 2005); *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Judgment, para. 314 (Special Ct. for Sierra Leone 2 Mar. 2009).

243 *Prosecutor v. Halilović,* Case No. IT-01-48-T, Judgment, para. 72 (Int'l Crim. Trib. for the Former Yugoslavia 16 Nov. 2005); *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Judgment, para. 314 (Special Ct. for Sierra Leone 2 Mar. 2009).

244 *Prosecutor v. Halilović,* Case No. IT-01-48-T, Judgment, para. 72 (Int'l Crim. Trib. for the Former Yugoslavia 16 Nov. 2005); *see also Prosecutor v. Blaškic,* Case No. IT-95-14-A, Judgment, para. 83 (Int'l Crim. Trib. for the Former Yugoslavia 29 July 2004); *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Judgment, para. 314 (Special Ct. for Sierra Leone 2 Mar. 2009).

245 *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, para. 395 (Int'l Crim. Trib. for the Former Yugoslavia 16 Feb. 1998).

VII. LEGAL ANALYSIS: CRIMES AGAINST HUMANITY

102. This Part VII outlines the elements, relevant case law, evidence, analysis and conclusion of each of the individual crimes against humanity by first evaluating elements specific to each individual crime and then evaluating the two elements that are common across all crimes against humanity.

A. Murder

103. As detailed below, evidence has been presented that the State committed numerous and documented acts of summary execution and other killings in DPRK political prison camps. Based upon the principles of international law and after reviewing the evidence presented, we find this evidence compelling, providing reasonable grounds to believe that the crime against humanity of murder has been committed in North Korean political prison camps and related facilities.

1. Elements of Murder

104. The ICC Elements of Crimes states that murder is the causation of the death of a human being.[246] This definition is in conformity with jurisprudence from both the ICTY and ICTR.[247] ICTR, for example, defines murder as the "unlawful, intentional killing of a human being."[248]

105. Tribunal jurisprudence establishes the *mens rea* of murder as: (i) the intention to kill; or (ii) the intention to inflict grievous bodily harm likely to cause death and recklessness as to whether death ensues.[249]

106. The elements of the crime against humanity of murder, under both the Rome Statute and customary international law, consist of the following:

(i) the perpetrator killed one or more persons;

(ii) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

(iii) the perpetrator knew that the conduct was part of, or intended the conduct to be part of, a widespread or systematic attack against a civilian population.[250]

2. Prior Cases

107. International tribunals have found the crime against humanity of murder has occurred within the context of a prison camp. For example, the ICTY sentenced Haradin Bala, a Kosovo Liberation Army prison camp guard, to thirteen years' imprisonment for his direct participation in imprisonment, inhumane treatment (including torture), and murder at the

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246 ICC, *Elements of Crimes*, art. 7(1)(a).

247 *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Judgment, para. 589 (Int'l Crim. Trib. for Rwanda 2 Sept. 1998); *Prosecutor v. Jelisic*, Case No. IT-95-10, Judgment, para. 35 (Int'l Crim. Trib. for the Former Yugoslavia 14 Dec. 1999); *Prosecutor v. Kupresic,* Case No. IT-95-16, Judgment, paras. 560–561 (Int'l Crim. Trib. for the Former Yugoslavia 14 Jan. 2000).

248 *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Judgment, para. 589 (Int'l Crim. Trib. for Rwanda 2 Sept. 1998).

249 *Prosecutor v. Mucic,* Case No. IT-96-21-T, Judgment, para. 426 (Int'l Crim. Trib. for the Former Yugoslavia 16 Nov. 1998); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, para. 589 (Int'l Crim. Trib. for Rwanda 2 Sept. 1998); *Prosecutor v. Kordic*, Case No. IT-95-14/2-T, Judgment, para. 236 (Int'l Crim. Trib. for the Former Yugoslavia 26 Feb. 2001).

250 ICC, *Elements of Crimes*, art. 7(1)(a).

Llapushnik/Lapusnik prison camp.[251] Similarly, Predrag Banović, a Bosnian Serb prison guard, pleaded guilty before the ICTY to charges for his actions at Keraterm death camp, including the murder of five prisoners and beatings of detainees.[252]

108. In 2016, a Romanian appeals court upheld the sentence of Alexandru Visinescu, leader of the Romanian communist criminal justice system and prison commander, for crimes against humanity involving the deaths of twelve political prisoners at the Ramnicu Sarat jail between 1956 and 1963, despite the defendant's argument that he was merely following orders.[253]

109. The principle of JCE has been applied to the crime against humanity of murder.[254] For example, the ICTY found a "joint criminal enterprise to murder the able-bodied Bosnian Muslim men from Srebrenica in July 1995."[255] The ICTY further found a "plan involving a plurality of persons to murder the able-bodied Bosnian Muslim males from Srebrenica and that these persons participated in the common purpose and shared the intent to murder."[256]

110. The principle of command responsibility also has been applied to the crime against humanity of murder.[257]

3. The Evidence Presented

111. Counsel has provided evidence, including witness testimony, demonstrating that DPRK officials committed numerous acts of murder in North Korean political prisons through execution and other means.

112. Affiant Kim Ha-neul testified that prison "trials" followed the same basic format: a recitation of the alleged crime(s) committed, followed by a sentence of death and subsequent execution.[258] According to Ahn Myong-chol, an SSD agent working at a political prison camp enjoys complete control over whether "you are saved or you are executed."[259] We are not aware of any evidence of executed prisoners in prison camps receiving a fair trial before they are executed. The DPRK refuses to acknowledge the documented existence of the political prison camps or the executions about which a significant number of witnesses have testified.

113. The following is a summary of the circumstances that, according to witness testimony, gave rise to the killing or summary execution of a prisoner: (i) being raped by a prison worker and/or becoming pregnant;[260] (ii) seeking or stealing food;[261] (iii) attempting to

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[251] Press Release, UN Int'l Criminal Tribunal for the former Yugoslavia, *Limaj and Musliu Found Not Guilty on all Charges Both to be Released Bala Convicted and Sentenced to 13 Years' Imprisonment*, UN Press Release CT/MO/1028e (30 Nov. 2005), http://www.icty.org/en/press/fatmir-limaj-and-isak-musliu-acquitted-haradin-bala-convicted.

[252] *Prosecutor v. Banović*, Case No. IT-02-65/1-T, Judgment, para. 29 (Int'l Crim. Trib. for the Former Yugoslavia 28 Oct. 2003).

[253] The Guardian, *Romanian Court Makes History with Ruling over Communist-era Crimes*, (10 Feb. 2016), https://www.theguardian.com/world/2016/feb/10/romanian-prison-governors-conviction-for-crimes-against-humanity-upheld.

[254] *Prosecutor v. Popovic,* Case No. IT-05-88-T, Judgment, para. 1047 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010).

[255] *Prosecutor v. Popovic,* Case No. IT-05-88-T, Judgment, para. 1047 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010).

[256] *Prosecutor v. Popovic,* Case No. IT-05-88-T, Judgment, para. 1072 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010).

[257] *See Law Reports of Trials of War Criminals*, The UN War Crimes Comm'n, 35 (Vol. IV 1948), https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-4.pdf.

[258] Kim Ha-neul Aff. (7 Nov. 2016).

[259] COI Report, para. 754 (quoting testimony of Ahn Myong-chol).

[260] *See, e.g.,* COI Report, para. 766 (citing confidential testimony and interviews); Kim Ha-neul Aff. 5 (7 Nov. 2016).

[261] *See, e.g.,* COI Report, para. 772 (referencing testimony of Kim Eun-cheol).

escape;[262] (iv) murders committed in order to deter others from behaving in a certain fashion;[263] (v) deaths resulting from torture or other grave, ill treatment;[264] and (vi) infanticide.[265]

114. In each of the instances cited below, there appears to have been an intention to kill or cause grievous bodily harm with recklessness as to the result, rendering the killing unlawful. Finally, as described below, witnesses testified that certain executions were conducted in secret, with bodies being buried in undisclosed locations.

a. Executions After Being Raped or For Being Pregnant

115. Affiant Kim Ha-neul reported that four pregnant women were executed for protesting against forcible abortions.[266]

116. At Camp 15, Lee Baek-lyong witnessed a woman being raped by a security officer. After the sexual act, the assailant stuck a wooden stick inside her vagina and beat her lower body. Within a week of the rape, the victim died from her injuries.[267]

117. Ahn Myong-chol, a former prison guard at multiple prison camps, stated in his testimony: "[s]urveillance officers would rape the female political prisoners year after year. As long as the female prisoner does not get pregnant, there are no issues with that. If it is discovered that the child's father is a security officer, he would be forced to remove his uniform and would be kicked out to society. The pregnant woman would then be secretly executed, or assigned to the mine gallery of a coalmine, which is the most difficult place to work, after going through a forced abortion. Based on the reason for pregnancy, the punishment differs."[268]

b. Executions For Taking Food

118. Affiant Kim Su-jong testified that starving prisoners at Camp 18 who went up to the mountain to dig up edible plants were shot to death.[269]

119. Affiant Kim Eun-cheol witnessed a fellow inmate being executed in front of other inmates for stealing potatoes at Camp 15.[270]

120. Affiant Kim Hye-sook witnessed the executions of numerous prisoners who were found scavenging for leftover food in the guards' quarters in Camp 18.[271]

121. A witness at the UN Commission of Inquiry testified that he saw two men executed for leaving their living area at Camp 15 to search for food in the mountains.[272]

122. Another witness at the UN Commission of Inquiry who was a prisoner at Camp 18 testified that he saw a fellow prisoner beaten to death after hiding stolen corn in his mouth.[273]

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[262] COI Report, para. 757 (citing testimony of Ahn Myong-chol and Jeong Kwang-il), para. 834 (referencing testimony of and interviews with Ahn Myong-chol, Kim Hye-sook and TLC008); Kim Ha-neul Aff. 5 (7 Nov. 2016); Kim Eun-cheol Aff. 2–3 (11 Nov. 2016).
[263] COI Report, para. 834 (quoting testimony of Ahn Myong-chol).
[264] Kim Ha-neul Aff. (7 Nov. 2016); Kim Eun-cheol Aff. 2–3 (11 Nov. 2016).
[265] COI Report, para. 764 (citing testimony of witness TSH019), 766 (citing testimony of Ahn Myong-chol); Kim Ha-neul Aff. 5 (7 Nov. 2016).
[266] Kim Ha-neul Aff. (7 Nov. 2016).
[267] *Testimony of Lee Baek-lyong, supra* note 143.
[268] Ahn Myong-chol's video testimony conducted at the NKSC headquarters in Seoul, on 9 Nov. 2016 (KST).
[269] Kim Su-jong Aff. (17 Nov. 2016).
[270] COI Report, para. 772 (citing testimony of Kim Eun-cheol).
[271] COI Report, para. 834 (citing testimony of Kim Hye-sook).
[272] COI Report, para. 834 (citing testimony of witness TLC008).

c. Executions for Attempting to Escape

123. Affiant Kim Ha-neul records that twelve people were killed with machine gun fire while attempting to escape. Kim recalls very specifically that this incident occurred around 10:00 A.M. on 10 March 2006.[274]

124. Affiant Kim Eun-cheol saw two prisoners executed at Camp 15 after attempting escape.[275]

125. Affiant Kim Tae-jin reported that the standard practice for dealing with a prisoner attempting to escape from Camp 15 was in "an instant shot to death."[276]

126. Affiant Jeon Kwang-il witnessed two executions of inmates at Camp 15 who stole food and later attempted to flee for fear of being punished.[277]

d. Executions in Order to Set an Example

127. Ahn Myong-chol, who served as a guard in Camp 22, reported that it was common practice to "execute . . . one inmate to set an example for the rest of the inmates."[278] While there were fluctuations in the number of such executions and differences in the underlying (alleged) infractions, Ahn Myong-chol reported that there were as many as 20 in a given year.[279]

e. Execution as a Result of Inhumane Treatment or Torture

128. Affiant Kim Ha-neul records two murderous attacks occurring in 2006.[280] In the first case, SSD agents beat an inmate victim severely, whipping her with a belt while her head was against a concrete wall until her skull was fractured so severely that her brain tissue was visible. They then stabbed her to death.[281] In the second case, the victim, Oh Seong-hwa, was hung upside down and beaten. She died almost immediately from her injuries. According to the affidavit, after the prisoner died, security agents inserted wooden coal stoking rods into her body to remove the money that was hidden in her vagina.[282]

129. Affiant Kim Eun-cheol recalled a prisoner dying immediately after being tortured. Another prisoner died after being tortured for having sexual relations with the Head of Administration, Jeong Gil-hyun.[283]

f. Infanticide

130. A witness reported that she was beaten in order to trigger premature labor at Camp 18. Her baby was born alive, but by the time she awoke after losing consciousness, the baby had already been killed.[284]

131. Former prison guard Ahn Myong-chol saw a prisoner's baby – most likely fathered by a high-ranking official – fed to dogs and killed.[285]

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[273] COI Report, para. 772 (citing testimony of witness TSH029).
[274] Kim Ha-neul Aff. (7 Nov. 2016).
[275] Kim Eun-cheol Aff. (11 Nov. 2016).
[276] Kim Tae-jin Aff. (10 Nov. 2016).
[277] COI Report, para. 757 (citing testimony of Jeong Kwang-il).
[278] COI Report, para. 834 (citing testimony of Ahn Myong-chol) (omission in original).
[279] COI Report, para. 834 (citing testimony of Ahn Myong-chol).
[280] Kim Ha-neul Aff. (7 Nov. 2016).
[281] Kim Ha-neul Aff. (7 Nov. 2016).
[282] Kim Ha-neul Aff. (7 Nov. 2016).
[283] Kim Eun-cheol Aff. (11 Nov. 2016). Jeong Gil-hyun was originally imprisoned at Camp 15 but given the title of Head of Administration due to his status before imprisonment.
[284] COI Report, para. 764 (citing testimony of TSH019).

g. Secret Executions

132. Certain executions reportedly took place in secret, particularly for prisoners who were believed to have committed especially sensitive political crimes. Former prison guard Ahn Myong-chol indicated that an undisclosed area near Camp 22 was used for secret executions. The sound of gunshots coming from the nearby mountains could be heard at night.[286]

4. Analysis and Findings

133. Based on the evidence presented above and applicable principles of international law, we hereby find that all of the elements of the crime against humanity of murder have been established.

134. As discussed above, the element specific to the crime of murder is that the perpetrator in question killed one or more persons. Also discussed above, witness testimony has established that responsible authorities in the DPRK have killed prisoners in North Korean political prisons for a variety of reasons and under various circumstances, including: (i) after a female prisoner is raped and/or becomes pregnant; (ii) to punish a female inmate by committing infanticide; (iii) to punish an inmate for taking food; (iv) to punish an inmate for attempting to escape; and (v) after torture or other severe ill treatment, in order to set an example for other prisoners. This evidence establishes that many individuals have been killed in North Korean political prisons with no form of due process. Accordingly, the first element of the crime has been established.

135. The evidence presented in Part VII(L) below establishes that the common elements of the crime against humanity of murder have been met.

5. Conclusion

136. Based on the evidence presented to the Inquiry, we find reasonable grounds to conclude that the crime against humanity of murder has been committed in North Korean political prison camps and related facilities.

B. Extermination

137. Extermination is a crime against humanity involving "the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of the population," which may be accomplished by means of mass imprisonment.[287] Evidence has been presented, and is discussed in further detail below, that the SSD operated political prison camps in which mass killings of members of the civilian population were carried out through the infliction of conditions of life with the intent to bring about the destruction of part of the population. Civilians suspected of political offenses were, and are, subjected to conditions including: forced labor, starvation, and deprivation of medical care. Based on the evidence presented and consistent with established principles of international law, we find reasonable grounds to believe that the crime of extermination has been committed in the North Korean political prison camps and related facilities.

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[285] COI Report, para. 766 (citing testimony of Ahn Myong-chol).
[286] COI Report, paras. 750, 835 (citing confidential interview with Ahn Myong-chol).
[287] Rome Statue, art. 7(2)(b); *Brief: Inquiry on Crimes Against Humanity in North Korean Political Prisons*, IBA et al., para. 37 n.71 (8 Dec. 2016) (hereinafter "Prosecutor's Br.") (*citing* COI Report, para. 1041).

1. Elements of Extermination

138. The ICC Elements of Crimes, in line with tribunal jurisprudence, establish that extermination is committed where:

(i) the perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population;

(ii) the conduct constituted, or took place as part of, a mass killing of members of a civilian population;

(iii) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

(iv) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[288]

139. Extermination requires a surrounding circumstance of mass killing. The perpetrator must know of this mass killing, which has no numerical quotient, other than it be a large number.[289] The definition also expressly includes indirect means of causing death; that is, there is no need for any direct connection with the actual act of murder.[290]

140. It is not required that the perpetrator is responsible for a substantial number of killings. As set forth above, the ICC Elements of Crimes state that the "perpetrator killed one or more persons."[291]

2. Prior Cases

141. In *Kayishima and Ruzindana*, the ICTR held that planning conditions of life that lead to mass killing constitutes extermination.[292] Examples of such conditions were held to include "imprisoning a large number of people and withholding the necessities of life."[293]

142. The principle of JCE has been applied to the crime against humanity of extermination.[294] The ICTY found that Bosnian Serbs killed thousands of Bosnian Muslims and the "killings were committed in the context of a widespread and systematic attack against the civilian population."[295] The Trial Chamber noted that, "[t]hese murders were committed as part of the common purpose of the JCE to [m]urder or were a natural and foreseeable consequence of it."[296] The Tribunal determined that the killings were systematic in that

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[288] ICC, *Elements of Crimes*, art. 7(1)(b).
[289] *Prosecutor v. Stakic,* Case No. IT-97-24-A, Judgment, paras. 260–261 (Int'l Crim. Trib. for the Former Yugoslavia 22 Mar. 2006).
[290] *1948 History of the United Nations War Crimes Commission and the Development of the Laws of War*, UN War Crimes Commission 194 (London 1948), http://www.unwcc.org/wp-content/uploads/ 2017/04/UNWCC-history.pdf.
[291] ICC, *Elements of Crimes*, art. 7(1)(b), Element 1.
[292] Prosecutor's Br., para. 92 (iii) (citing *Prosecutor v. Kayishema,* Judgement Case No. ICTR-95-1-T, Judgment, paras. 141–147 (Int'l Crim. Trib. for Rwanda 21 May 1999)).
[293] *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgment, para. 146 (Int'l Crim. Trib. for Rwanda 21 May 1999).
[294] *Prosecutor v. Popovic,* Case No. IT-05-88-T, Judgment, para. 2074 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010). *See also supra* Sec. VI.
[295] *Prosecutor v. Popovic,* Case No. IT-05-88-T, Judgment, para. 803 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010).
[296] *Prosecutor v. Popovic*, Case No. IT-05-88-T, Judgment, para. 2071 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010).

they were committed in a highly organized manner and formed part of a single operation given the temporal and geographic proximity of the killings.[297]

143. The principle of command responsibility has been applied to the crime against humanity of extermination under the theory of failing to investigate and punish the criminal acts of one's subordinates.[298] The ICTR found that policemen, administrators, and militiamen launched attacks on members of the Tutsi ethnic group in areas of the Bicumbi commune under the defendant's control over a period of approximately two weeks, "resulting in the deaths of thousands of Tutsi civilians."[299] The Trial Chamber found that the defendant "failed in his duty to take the necessary and reasonable measures to commission an investigation into the crimes committed by his subordinates," or to "take necessary and reasonable steps to ensure [their] punishment."[300]

3. The Evidence Presented

144. Counsel provided substantial evidence to demonstrate that DPRK officials committed several acts involving: (i) mass killings; (ii) smaller-scale, or isolated killings, with knowledge of the broader context of mass killing; and (iii) imposing conditions within the political prisons extremely likely and often designed to cause the death of the prison population.

a. Mass Killings

145. Yong Kim testified that while he was a prisoner in Camp 14, there was a prison riot in 1990. Yong Kim testified that, as a result of this uprising, 1,500 people were shot and killed, with prison officials disposing of the bodies of the executed prisoners into a closed mine.[301]

b. Small Scale Killings Committed With Knowledge of the Context of Mass Killing

146. Kim Ha-neul testified that prisoners at detention centers with confirmed sentences were compelled to perform various forms of penal labor, one of which was logging. In one incident, a supervising soldier rolled a log down a steep mountainside, killing ten prisoners who had been forced to transport logs on the mountain.[302]

147. Kim Ha-neul also testified that four pregnant women were forced to run down a mountain to induce miscarriage. This method failed and the four women protested. The pregnant women's protest was joined by nearly 50 other prisoners. The lead security officers then shot and killed the four pregnant women who had been protesting, causing a state of panic during which some prisoners attempted to escape. Twelve of the escaping prisoners were killed by machine gun fire. [303]

148. Executions, both public and secret, are a regular feature of the political prison system.[304]

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297 *Prosecutor v. Popovic*, Case No. IT-05-88-T, Judgment, para. 805 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010).
298 *Prosecutor v. Rugambarara*, Case No. ICTR-00-59-T, Judgment, para. 3 (Int'l Crim. Trib. for Rwanda 16 Nov. 2007).
299 *Prosecutor v. Rugambarara*, Case No. ICTR-00-59-T, Judgment, para. 3 (Int'l Crim. Trib. for Rwanda 16 Nov. 2007).
300 *Prosecutor v. Rugambarara*, Case No. ICTR-00-59-T, Judgment, paras. 3, 5 (Int'l Crim. Trib. for Rwanda 16 Nov. 2007).
301 *Testimony of Yong Kim*, Citizen's Alliance for North Korean Human Rights (22 June 2016), http://eng.nkhumanrights.or.kr/eng/datacenter/related_write.php?mode=view&bbs_idx=4513&search_mode=&search_word=yong kim&pg=1.
302 Kim Ha-neul Aff. (7 Nov. 2016).
303 Kim Ha-neul Aff. (7 Nov. 2016).
304 *See, e.g., Survey Report on Political Prisoner's Camps in North Korea*, The Nat'l Commission of Human Rights of Korea, 152–157 (30 Aug. 2010), http://www.rwi.lu.se/NHRIDB/Asia/Korea/Prison%20Camp%20Survey.pdf.

c. Extermination Through the Infliction of Conditions of Life Calculated to Bring About the Death of the Population

149. When Kim Il-sung spoke to SSD officials in 1958, he informed them that the purpose of the political prisons was to eliminate the "seed" of three generations of class enemies.[305] This message was perpetuated over generations by billboards in the prisons reminding the guards of Kim Il-sung's instruction.[306] A former prisoner, Lee Baek-lyong, corroborated this statement, recalling that in Camp 15 in 1996, there were message boards all around the prison with incendiary slogans such as "There is no reconciliation or negotiation with enemy of the class!"[307] Further, a former prison guard, Ahn Myong-chol, testified that "[the inmates] are supposed to die in the camp from hard labour."[308]

150. One witness from Camp 18 stated that approximately 200 people died in the mine in which he or she was forced to work each year.[309]

151. The COI Report states that each year, "large numbers of prisoners die from starvation or nutritional deficiency diseases like pellagra, which is characterized by skin eruptions, breakdown of the mental and digestive system, and mental deterioration."[310]

152. Another witness who was imprisoned in Camp 15 testified that, when a prisoner was sent to the punishment block, there was an extremely high chance they would never be seen again.[311]

153. Rations provided to inmates are known to be grossly insufficient, frequently resulting in slow starvation and death.

- Death from starvation is common in the prison camps. The UN Commission of Inquiry found: "Inmates are provided with rations that are so insufficient in quantity, quality and diversity that any prisoner who solely relies on rations would quickly starve to death. . . . Every year, large numbers of prisoners die from starvation or nutritional deficiency diseases like pellagra. . . . Former guards and other security officials interviewed by the Commission indicated that starvation was a deliberate measure to keep prisoners weak and easy to control and to augment their suffering."[312]

- Kim Eun-cheol testified that due to the very small amount of corn or rice provided as rations, many prisoners starved to death.[313]

- Kim Tae-jin subsisted on 300 grams of corn while working twelve hours a day.[314]

- Kim Su-jong, who was born in Camp 18, saw his two older brothers and one younger brother die of starvation.[315] Even in the 1980s, when the DPRK was not

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[305] COI Report, para. 747 n.1098 (citing confidential testimony of witness Ahn Myong-chol).
[306] COI Report, para. 747 (citing interview with witness Ahn Myong-chol).
[307] *Testimony of Lee Baek-lyong, supra* note 143.
[308] COI Report, para. 1045 (quoting testimony of Ahn Myong-chol).
[309] COI Report, para. 779 (citing testimony of witness TAP012).
[310] COI Report, para. 769.
[311] COI Report, para. 760 (citing testimony of witness TLC008).
[312] COI Report, para. 769. *See also* COI Report, para. 770 (citing testimony of Kang Chol-hwan (stating that more than 300 prisoners died of starvation or malnutrition during his ten years at Camp No. 15)); *Testimony of Kim Tae-jin*, Citizen's Alliance for North Korean Human Rights (22 June 2016), http://eng.nkhumanrights.or.kr/eng/datacenter/related_write.php?mode=view&bbs_idx=4361&search_mode=&search_word=kim tae&pg=1 (citing testimony of Kim Tae-jin, stating that at least one person died a week from malnutrition).
[313] Kim Eun-cheol Aff. (11 Nov. 2016).
[314] Kim Tae-jin Aff. (10 Nov. 2016).
[315] Kim Su-jong Aff. (17 Nov. 2016).

experiencing a food shortage, the rations amounted to "[a] handful of corn powder and the outer leaves of cabbage."[316]

- Lee Baek-lyong stated that prisoners at Camp 15 were given just 40 grams of corn gruel three times a day.[317]

- According to her testimony, Kim Hye-sook's family of seven received only 4.5 kilograms of dried corn per month in Camp 18 prior to the nationwide famine in the 1990s.[318]

- Jeong Kwang-il and Kim Eun-cheol, detained in Camp 15 from 2000 until 2003, stated that prisoners were given 120 grams of corn porridge three times a day.[319]

154. Prisoners are forced to work long hours, which, coupled with starvation, results in mass deaths.

- Generally, inmates are forced to do hard labor twelve hours a day, even if they are sick.[320]

- In order to satisfy production quotas, some prisoners are forced to work longer hours. Lee Baek-lyong testified that prisoners were forced to do fifteen to sixteen hours of hard labor per day at Camp 15's revolutionizing zone.[321]

- Kim Hye-sook testified that although there was nominally a system of three shifts, they ended up having to work sixteen to eighteen hours a day to maximize output. She worked in a coal mine from the age of fifteen in Camp 18 where she had to transport the coal to the surface using sacks, buckets, or coal trolleys.[322]

- Lee Young-kuk testified he worked fourteen hours almost every day from 1995-1999 in the revolutionizing zone of Camp 15.[323]

- In a confidential interview, a witness stated that, in order to fulfill a quota at the mine, some prisoners were forced to work for 20 hours per day. The witness estimated that approximately 200 people died each year in that mine alone.[324]

4. Analysis and Findings

155. As detailed below, this evidence establishes all of the elements of the crime of extermination. The facts above establish that extermination was committed in political prison camps through: "(i) mass killings; (ii) small-scale killing committed with knowledge of the context of mass killing; and (iii) through the infliction of conditions of life calculated to bring about the death of the population."[325]

156. As detailed above, mass killings certainly occurred within the North Korean political prison system. Yong Kim's testimony regarding Camp 14 detailed the execution of 1,500 inmates following an unsuccessful prison riot.

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316 Kim Su-jong Aff. (17 Nov. 2016).
317 *Testimony of Lee Baek-lyong, supra* note 143.
318 COI Report, para. 770 (citing confidential testimony of witness Kim Hye-sook).
319 COI Report, para. 770 (citing testimony of Jeong Kwang-il & Kim Eun-cheol).
320 COI Report, para. 775.
321 *Testimony of Lee Baek-lyong, supra* note 143.
322 COI Report, para. 779 (citing confidential witness interview of Kim Hye-sook).
323 *See, e.g.,* David Hawk, ***The Hidden Gulag Exposing North Korea's Prison Camps***, U.S. Comm. for Human Rights in North Korea 62 (2003), https://www.hrnk.org/uploads/pdfs/The_Hidden_Gulag.pdf.
324 COI Report, para. 779 (citing confidential witness interview of TAP012).
325 Prosecutor's Br., para. 92.

157. Similarly, there were smaller-scale killings, though within the context of mass killing. Witness Kim Ha-neul recounted the execution of prisoners. Several other witnesses also offered testimony regarding executions at the prisons, both secret and public.

158. Furthermore, many of the examples of murder set forth above also qualify as extermination, insofar as the perpetrators committed those acts not as isolated instances, but in the backdrop of mass killing and with the knowledge of this context. "Each prison guard or officer would have to be aware of a circumstance of mass killing, since prisoners would die in high numbers periodically in each prison camp."[326]

159. The evidence also convincingly establishes that prison camps are designed to result in mass killing, as prisoners are forced to work exceptionally long hours in labor intensive areas while being fed less than subsistence rations.[327] Starvation, malnutrition, and disease were common place and frequently resulted in death. Thus, the perpetrators imposed severe conditions on the prisoners and these conditions were clearly calculated to bring about the death of the population. [328]

160. Based on the facts above, there is ample evidence that prisoners are forced to work extremely long hours, that their work is arduous, and that they are fed less than subsistence rations.[329] According to testimony from witnesses, these conditions have led to mass killings at prison camps.[330] There is also support for the proposition that the mistreatment of prisoners is designed to result in mass deaths. For example, the intent to inflict mass death is evinced by statements by Kim Il-sung to the SSD that the purpose of the prison camps is to eliminate generations of class enemies, the prevalence of billboards and signage at prisons reinforcing this message, and statements by former prison guards that prisoners are intended to be killed through hard labor.[331]

161. Counsel also convincingly established the second element – that this conduct constituted, or was a part of a mass killing of the members of a civilian population. Even in those instances where a single person was killed – or placed in conditions designed to kill them – those examples were not deaths without context. Rather, given the significant numbers of prisoners dying in those prisons and often the brazen circumstances in which they were killed, it is very evident that it was in a much greater context of mass killing, well known to guards and officials.

162. Given the pervasiveness in each prison camp of deaths resulting from executions, torture, starvation, and labor, each guard and SSD official in each prison camp must have been aware of the circumstances of mass killing surrounding his or her acts. [332] As such, any murders committed within political prison camps also fall within the underlying crime of extermination.

163. Further evidence of mass killings can be found at mass burial sites at or near various prison camps.[333] A former prison guard described dead prisoners being "dumped" on mountainsides near the prison, while others described burial sites with ten to fifteen

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326 Prosecutor's Br., para. 92.
327 *See, e.g.,* Prosecutor's Br., para. 92
328 *See, e.g.,* Prosecutor's Br., para. 92.
329 *See, e.g.,* Kim Ha-neul Aff. (7 Nov. 2016); Kim Dong-nam Aff. (9 Nov. 2016); Kim Eun-cheol Aff. (11 Nov. 2016); Kim Hye-sook Aff. (4 Nov. 2016).
330 *See, e.g.,* Kim Ha-neul Aff. (7 Nov. 2016); Kim Dong-nam Aff. (9 Nov. 2016); Kim Eun-cheol Aff. (11 Nov. 2016); Kim Hye-sook Aff. (4 Nov. 2016).
331 *See, e.g.,* COI Report, paras. 746 (quoting testimony of Ahn Myung-chol), 747 n.1098 (citing confidential testimony of Ahn Myung-chol).
332 *See, e.g.,* Prosecutor's Br., paras. 89–92.
333 *Mapping Crimes Against Humanity in North Korea: Mass Graves, Killing Sites and Documentary Evidence*, Transitional Justice Working Group 31 (July 2017), https://en.tjwg.org/TJWG_Report-Mapping_Crimes_Against_Humanity_in_North_Korea(July2017)-Eng_Final.pdf.

bodies buried together in a single pit.[334] Others have testified about the precise routes taken to the mass burial sites, topographical features of the sites, and in some cases the precise location of the burial sites themselves.[335]

164. The evidence presented in Part VII(L) below establishes that the common elements of the crime against humanity of extermination have been met.

5. Conclusion

165. Based on the evidence presented to this Inquiry, we find reasonable grounds to believe that the crime against humanity of extermination has been committed in North Korean political prison camps and related facilities.

C. Enslavement

166. Enslavement is a crime against humanity involving "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children."[336] Evidence has been presented that the DPRK detained civilian men, women, and children in political prison camps without due process and subjected them to forced labor and harsh living conditions. Based on the evidence presented and consistent with established principles of international law, we find reasonable grounds to believe that the crime of enslavement has been committed in the North Korean political prison camps and related facilities.

1. Elements of Enslavement

167. The ICC Elements of Crimes provides that the crime against humanity of enslavement consists of the following elements:

(i) the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending, or bartering such a person or persons, or by imposing on them a similar deprivation of liberty;

(ii) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

(iii) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[337]

168. The ICC definition is broader than other definitions in international law.[338] In the Elements of Crimes, the ICC notes that such deprivation of liberty may include "exacting forced labor or otherwise reducing a person to a servile status."[339]

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334 Mapping Crimes Against Humanity in North Korea, *supra* note 333 at 31.

335 *Mapping Crimes Against Humanity in North* Korea, *supra* note 333 at 31. Through independent testimony, survivors have corroborated accounts of cremation sites being used to dispose of multiple dead bodies at prison camps, although it is not clear whether the cremated prisoners were killed by prison officials or whether they died from other causes, such as disease. *Mapping Crimes Against Humanity in North* Korea, *supra* note 333 at 31.

336 Rome Statute, art. 7(2)(c).

337 ICC, *Elements of Crimes*, art. 7(1)(c).

338 *Prosecutor v. Kunarac,* Case No. IT-96-23-T; IT-96-23/1-T, Judgment, paras. 539, 541 (Int'l Crim. Trib. for the Former Yugoslavia 22 Feb. 2001).

339 ICC, *Elements of Crimes*, art. 7(1)(c) n.11.

169. We recognize that not all compulsory labor is prohibited. The ICCPR excludes from its prohibition on forced or compulsory labor "the performance of hard labour in pursuance of a sentence to such punishment by a competent court."[340] As discussed below, however, the labor imposed on inmates in North Korean prison camps is not pursuant to a sentence by an independent and impartial court.

2. Prior Cases

170. In *Kunarac*, the ICTY enumerated the following factors as relevant for determining whether the crime against humanity of enslavement has been committed: "the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality, and forced labor."[341]

171. The ICTY Trial Chamber considered such factors in finding three members of the Bosnian Serb army guilty of enslavement, among other crimes against humanity. The Trial Chamber noted that the following facts from the case were of particular relevance in establishing the crime of enslavement:

> (i) The fact that the girls were detained; (ii) the fact that they had to do everything they were ordered to do, including the cooking and household chores; (iii) the fact that [the defendant] asserted exclusivity over [one of the girls] by reserving her for [himself]; (iv) that they were at the constant disposal of [the defendants]; (v) other degrading treatment such as offering one soldier the permission to rape her for DM 100 in the presence of Witness FWS-191; and (vi) that they were effectively denied any control about their lives.[342]

The Appeals Chamber agreed with the Trial Chamber's consideration of these factors.[343]

172. In *Krnojelac*, the ICTY Trial and Appeals Chambers found the defendants guilty of enslavement because they had exacted forced labor, as evidenced by the victims' living conditions. The Trial Chamber asserted, "what must be established is that the relevant persons had no real choice as to whether they would work."[344] Accordingly, the Appeals Chamber considered whether the conditions at the prison camp were "so coercive as to exclude any possibility of consent by the workers."[345] The Appeals Chamber considered evidence of overcrowded conditions, deplorable sanitation, insufficient food, frequent beatings, psychological abuse, and appalling living conditions and concluded that there was "sufficient objective evidence to prove that the detainees were in fact forced to work."[346]

173. The ECCC examined a similar situation in the case of *Kaing Guek Eav* alias *Duch*, in which "[a]ll detainees were strictly guarded day and night, and at work were closely supervised by the guards who by using force and insult, required them to work very

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340 ICCPR, *International Covenant on Civil and Political Rights*, art. 8(3)(b), http://www.ohchr.org/EN/Professional Interest/Pages/CCPR.aspx.

341 *Prosecutor v. Kunarac,* Case No. IT-96-23-T; IT-96-23/1-T, Judgment, para. 543 (Int'l Crim. Trib. for the Former Yugoslavia 22 Feb. 2001).

342 *Prosecutor v. Kunarac,* Case No. IT-96-23-T; IT-96-23/1-T, Judgment Summary at 5 (Int'l Crim. Trib. for the Former Yugoslavia 22 Feb. 2001).

343 *Prosecutor v. Kunarac*, Case No. IT-96-23-A; IT-96-23/1-A, Judgment, para. 119 (Int'l Crim. Trib. for the Former Yugoslavia 12 June 2002).

344 *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, para. 359 (Int'l Crim. Trib. for the Former Yugoslavia 15 Mar. 2002).

345 *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, paras. 193–195 (Int'l Crim. Trib. for the Former Yugoslavia 17 Sept. 2003).

346 *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, para. 195 (Int'l Crim. Trib. for the Former Yugoslavia 17 Sept. 2003).

hard."[347] In some cases, "detainees were used in place of farm animals for ploughing."[348] The detainees knew that "if they did not produce work of the standard required, they would be punished."[349]

174. Like the court in *Krnojelac*, the ECCC considered evidence of poor living conditions, violent interrogations, deprivation of adequate food, lack of sanitation and hygiene, deprivation of medical treatment, and medical experimentation as proof of forced labor.[350] The court found that the staff of the security prison "deliberately exercised total power and control" over the detainees and that the detainees "had no right to refuse to undertake the work assigned to them, and did not consent to their conditions of detention."[351] The ECCC concluded that the detainees' "forced or involuntary labor, coupled with their detention, amounted to enslavement."[352]

3. The Evidence Presented

175. Counsel provided substantial evidence relating to the living conditions and treatment of detainees in the political prison camps to provide reasonable grounds to believe that DPRK officials committed the crime against humanity of enslavement. Most, if not all, of the indicators of enslavement recognized by the ICTY and ECCC are present in the North Korean prison camps, including: (i) control of movement; (ii) forced labor; (iii) poor living conditions; (iv) deprivation of basic needs; and (v) subjection to cruel treatment and abuse.

a. Control of Movement

176. Political prisoners are sent to the prison camps without judicial process. Entire families are sent together for political crimes committed by a family member based on guilt by association.[353] Up to three generations of families have been detained together.[354]

177. Detainees are confined within the boundaries of the prison camps and guards may kill on the spot any detainee caught attempting to escape or believed to be attempting escape. Affiant Kim Su-jong (alias) testified that detainees at Camp 18 who went up to a mountain to forage for edible plants were accused of escaping and shot to death.[355]

b. Forced Labor

178. Forced labor in the prison camps is focused primarily on mining and cutting timber, but other types of forced labor include raising livestock, agricultural production, and/or bicycle manufacturing.[356]

179. As detailed above, detainees typically work twelve hours per day, even if they are sick or disabled.[357] Affiant Kim Eun-cheol recounted the demanding work schedule in detail:

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[347] *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, para. 231 (ECCC 26 July 2010).
[348] *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, para. 231 (ECCC 26 July 2010).
[349] *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, para. 233 (ECCC 26 July 2010).
[350] *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, paras. 260–278 (ECCC 26 July 2010).
[351] *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, para. 346 (ECCC 26 July 2010).
[352] *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, para. 346 (ECCC 26 July 2010).
[353] COI Report, para. 752 (citing *Political Prison Camps in North Korea Today, supra* note 103 at 128).
[354] *See, e.g.,* Prosecutor's Br., para. 27; *see also* COI Report, para. 747.
[355] Kim Su-jong Aff. (17 Nov. 2016).
[356] Testimony of David Hawk (8 Dec. 2016).

> Assigned to the 3rd Platoon of the 2nd Company of Construction Division, I had to work days and nights. In summer, I woke up at 4:30AM to bring fertilizer to Agriculture Division and plowed a field and came back to the barracks at 7AM to have breakfast. From 7:30AM, I had to do base construction and foundation work and knead cement to build a building. During the camp life, I built 6 buildings, a police office, henhouse, goat shed, cattle kraal and warehouse under a terrible environment where about 16 labor[er]s were enforced to build many buildings with insufficient supplies. We were also assigned to logging, burial of bodies and plastering. On days with night work, 3 groups of 6 prisoners or 2 groups of 8 prisoners worked in three shifts, in which the first group worked from 5PM to 1AM, the second group from 1AM to 5~6AM and the last group from 5~6AM to 5PM. Those who did not work efficiently were frequently beaten by officers or other inmates.[358]

180. Detainees work under dangerous conditions, with numerous work-related deaths each year.[359] Affiant Kim Ha-neul reported that prisoners with confirmed sentences were forced to perform various forms of penal labor, one of which was logging, which included a daily quota of 50 logs. In one instance, a soldier supervising the logging rolled a log down a steep mountainside, killing ten prisoners.[360]

181. Detainees work without appropriate safety measures in place. Affiant Kim Hye-sook testified that she was dispatched to work in a coal mine in Camp 18 as soon as she was sixteen years old. She was forced to work every day except for the first day of each month, which was scheduled for machinery maintenance. She stated, "Even before the coal dust and gunpowder settled, we were forced to start coal mining without a mask. We only wore Ssa-ri hat (safety helmet) and were exposed to the coal dust for as long as nine hours a day. . . . I was diagnosed with pneumoconiosis after working in coal mines for fourteen years and still take medicine to this day. It is common for male workers to die before the age of 40 due to severe pain caused by pneumoconiosis. Aside from our regular work hours in coal mines, we were drafted into forced labor even in our breaks to get logs for coal mining and help managers." Kim Kye-sook also testified that her husband passed away in September 1984 due to a coal mine accident.[361]

182. Young children are not exempt from forced labor. Kang Cheol-hwan testified that when he entered Camp 15 as a nine year-old child, he was forced to perform hard labor in the form of carrying logs across a distance of ten *li* [approximately 500 meters]. He recalled an instance in which he and two other children fell down from exhaustion and other children started kicking them because if they fell down, the other children would have to carry the logs in their stead.[362]

183. Failure to meet work quotas results in beatings, deprivation of food rations, and extended working hours.[363] Affiant Kim Tae-jin reported that he was forced to carry stones to be used for construction of a waterway for generators in Camp 15.[364] When detainees showed signs of fatigue or their work was unsatisfactory, they were "beaten with wood chunks until [they] lost [their] mind[s] or stripped off naked and made to stand in the center of yard handcuffed."[365]

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[357] *See, e.g.,* COI Report, para. 775; Kim Hye-sook Aff. (4 Nov. 2016).
[358] Kim Eun-cheol Aff. (11 Nov. 2016).
[359] COI Report, para. 779 (citing testimony of witness TAP012).
[360] Kim Ha-neul Aff. (7 Nov. 2016).
[361] Kim Hye-sook Aff. (4 Nov. 2016).
[362] Testimony of Kang Cheol-hwan (8 Dec. 2016).
[363] COI Report, para. 777.
[364] Kim Tae-jin Aff. (10 Nov. 2016).
[365] Kim Tae-jin Aff. (10 Nov. 2016).

c. Poor Living Conditions

184. Conditions in the DPRK's prison camps are overcrowded, with as many as four or five families living in one flat.[366]

185. Kang Cheol-hwan testified that the detainees' housing looked "like a harmonica" and did not have much protection from the elements.[367] The outside temperature was the same as the temperature inside and he saw many people freeze and die in the winter. Kang Cheol-hwan also testified that no sanitary facilities or products were provided, except sardine oil to be used as soap. Detainees did not bathe, rendering them susceptible to lice infestation.[368]

d. Deprivation of Food, Clothing and Medical Treatment

186. Multiple witnesses testified about the deprivation of adequate food and clothing in the political prison camps.

187. Affiant Kim Tae-jin reported that at Camp 15, prisoners ate anything they could get their hands on, including snakes, frog eggs, mice, and grass roots, in order to have the energy to perform their work satisfactorily and avoid beatings.[369]

188. Kang Cheol-hwan, who was also detained at Camp 15, testified that maize and salt were rationed once per month to each family. Each adult was supposed to receive 500 grams of maize, with children and seniors receiving an even smaller ration. However, due to rampant corruption in the prison they never received the full amount; instead, they received only enough to last half the month. For the remainder of the month, they foraged for grass and stirred it into a soup. Survival was dependent on their ability to catch snakes, frogs, and rats to supplement their rations.[370]

189. Affiant Kim Young-soon testified that "everything that crawls or flies (insects, snakes, mice), [everything] that grows (grass, mushrooms), and even kernels of corn among cow dung are precious.[371]

190. Affiant Kim Eun-cheol reported that prisoners received only a very tiny amount of corn rice and as a result, many prisoners starved to death.[372]

191. Affiant Kim Su-jong reported that all of the prisoners in the prison were small, which was a natural result of being undernourished and being forced to carry heavy loads on their backs every day since elementary school.[373]

192. Detainees are deprived of proper medical treatment. Affiant Kim Young-soon testified that those who were injured while performing forced labor were not provided with medical treatment. She recalled an incident in which an officer forced her to climb a mulberry tree to pick mulberries. She fell and broke her collarbone, but was forced to continue working without medical treatment.[374] In a separate incident, while planting corn, an officer

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366 *Survey Report on Political Prisoner's Camps in North Korea, supra* note 304 at 110.
367 Testimony of Kang Cheol-hwan (8 Dec. 2016).
368 Testimony of Kang Cheol-hwan (8 Dec. 2016).
369 Kim Tae-jin Aff. (10 Nov. 2016).
370 Testimony of Kang Cheol-hwan (8 Dec. 2016).
371 Kim Young-soon Aff. (4 Nov. 2016).
372 Kim Eun-cheol Aff. (11 Nov. 2016).
373 Kim Su-jong Aff. (17 Nov. 2016).
374 Kim Young-soon Aff. 3 (4 Nov. 2016).

stepped on her hand after telling her she was not working hard enough. She testified that her fingers were fractured as a result of this incident.[375]

193. Kang Cheol-hwan stated that some detainees had some medical knowledge, but they could not do much without pharmaceuticals or medical supplies. Kang Cheol-hwan recounted an example in which he had a decaying tooth removed without anesthesia.[376]

194. Kang Cheol-hwan testified that detainees were provided with only one set of vinyl clothing and unusable gunnysacks as underwear when they entered the prison camp, which became very tattered over the years. Shoes were also provided, but they were basically unusable because the bottoms fell out shortly thereafter. Many detainees suffered from frostbite in the winter and had to have their legs or feet amputated to survive.[377]

e. Subjection to Cruel Treatment and Abuse

195. As discussed above, detainees are frequently beaten and subjected to torture.[378]

196. Detainees are subjected to constant psychological abuse. They are surrounded by billboards reminding them of their status as enemies of the State[379] and forced to attend daily self-criticism meetings.[380]

4. Analysis and Findings

197. As discussed below, this evidence establishes all of the elements of the crime against humanity of enslavement. The facts above establish that DPRK officials: (i) exercised the right of ownership over civilian men, women and children by means of detention and forced labor; (ii) as part of a widespread and systematic practice throughout the North Korean political prison system; and (iii) they did so knowingly.

198. The element specific to the crime of enslavement is that the perpetrator "exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending, or bartering such a person or persons, or by imposing on them a similar deprivation of liberty,"[381] and such deprivation of liberty may include "exacting forced labor or otherwise reducing a person to a servile status."[382]

199. We find that the living and working conditions in the North Korean political prison camps are so deficient and the treatment of the detainees so abusive, that the labor was obviously coerced. Numerous witnesses testified to the long work hours, dangerous work conditions, deprivation of food, and beatings for failure to meet work quotas.

200. Importantly, this compulsory labor is not a punishment resulting from a decision rendered by a competent court, which, in some cases, may be justified. Rather, detainees in North Korean political prison camps are subjected to such treatment without due process.

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375 Kim Young-soon Aff. 3 (4 Nov. 2016).
376 Testimony of Kang Cheol-hwan (8 Dec. 2016).
377 Testimony of Kang Cheol Hwan (8 Dec. 2016).
378 *See, e.g.,* Kim Ha-neul Aff. (7 Nov. 2016); Kang Chol-hwan, *The Aquariums of Pyongyang*, 95-96 (New York, Basic Books 2001). The contents of the book were authenticated by Kang in the Seoul Public Hearing, 24 Aug. 2013, afternoon. *See also* COI Report, para. 760 (citing testimony of witness TLC008 & testimony of Ahn Myong-chol); Kim Tae-jin Aff. (10 Nov. 2016).
379 *Testimony of Lee Baek-lyong, supra* note 143.
380 *Survey Report on Political Prisoner's Camps in North Korea*, *supra* note 304 at 74, 84, 205 (quoting testimony of former prisoner, A04).
381 ICC, *Elements of Crimes*, art. 7(1)(c).
382 ICC, *Elements of Crimes*, art. 7(1)(c) n.11.

201. The evidence presented in Part VII(L) below establishes that the common elements of the crime against humanity of enslavement have been met.

5. Conclusion

202. Based on the evidence presented to the Inquiry, we find reasonable grounds to believe that the crime against humanity of enslavement has been committed in North Korean political prison camps and related facilities.

D. Forcible Transfer

203. Under international law, the DPRK is obliged to enforce a universal prohibition against the crime against humanity of "deportation or forcible transfer." For the reasons set forth below, we find reasonable grounds to believe that the crime of forcible transfer has been committed in connection with North Korean political prison camps and related facilities.

1. Elements of Deportation or Forcible Transfer

204. The offense of deportation or forcible transfer, under the ICC Elements of Crimes, consists of the following elements:

(i) the perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another state or location, by expulsion or other coercive acts;

(ii) such person or persons were lawfully present in the area from which they were so deported or transferred;

(iii) the perpetrator was aware of the factual circumstances that established the lawfulness of such presence;

(iv) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

(v) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[383]

205. Deportation refers to displacement across a state border, while forcible transfer may include internal displacement.[384]

206. The deportation or transfer must be forced, but may be achieved by means other than physical force. The threat of force or coercion, psychological oppression, or other means of rendering displacement involuntary is sufficient to satisfy the "force" element of the crime.[385] Displacement is unlawful by virtue of the absence of genuine choice.[386]

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[383] ICC, *Elements of Crime*, art. 7(1)(d).

[384] ILC Draft Code, 1996, art. 18(13), http://legal.un.org/ilc/texts/instruments/english/commentaries/ 7_4_1996.pdf; *Prosecutor v. Stakic*, Case No. IT-97-24-A, Judgment, para. 300 (Int'l Crim. Trib. for the Former Yugoslavia 22 Mar. 2006) (stating that deportation requires the crossing of a *de jure* border); *see also Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, para. 521 (Int'l Crim. Trib. For the Former Yugoslavia 2 Aug. 2001) (stating that forcible transfer refers to displacements within a state).

[385] ICC, *Elements of Crimes*, art. 7(1)(d), n.12.

[386] *Prosecutor v. Dordević*, Case No. IT-05-87/1-T, Public Judgment, para. 779 (Int'l Crim. Trib. for the Former Yugoslavia 23 Feb. 2011).

2. Prior Cases

207. The ICTY has applied the principle of JCE to assign liability for the crime against humanity of deportation or forcible transfer.[387] In the *Prosecutor v. Popović* case, the ICTY found that a "joint criminal enterprise of the Bosnian Serb political and military leadership to forcibly remove the Bosnian Muslim populations" existed.[388] There, the Trial Chamber determined that a plan had been laid out to create a sense of total insecurity and lack of hope among local populations.[389] The implementation of this plan involved the terrorizing and cruel and inhumane treatment of the local populations, with the ultimate aim of forcibly moving the Bosnian Muslim populations out of the area.[390]

208. Criminal liability through command responsibility has also been applied to deportation or forcible transfer.[391] The ICTY found that a Serbian officer was criminally responsible for crimes against humanity, including deportation or forcible transfer, committed by individuals under his authority where he did not prevent the commission of the crimes and did not punish the perpetrators.[392] The Trial Chamber held the officer criminally liable after finding that he was a superior with effective control of the perpetrators, was aware of the commission of the crimes, and did not take necessary and reasonable measure to prevent and punish the crimes.[393]

3. The Evidence Presented

209. Evidence presented to the Inquiry shows that in order to transport suspects and their families to the political prison camps, SSD agents typically arrive at the suspect's home during the night.[394] The person(s) or families are removed from their homes and brought to the political prison camps, often without any idea of why they are being taken or what their sentence is.[395]

210. O Myong-o, a former North Korean political prisoner, testified that "[o]f course, there was no trial for me since I was innocent anyway. There was no trial or judicial proceeding of any kind."[396] The strategy of arresting and detaining in political prisons entire families and generations of relatives without cause (other than relationship to an alleged "offender") qualifies as forcible transfer within the context of crimes against humanity.

4. Analysis and Findings

211. As discussed below, the evidence presented establishes all of the elements of the crime against humanity of forcible transfer. However, the evidence does not demonstrate that individuals were involuntarily and unlawfully evacuated beyond state borders; thus, there are no reasonable grounds to believe that the separate crime of deportation has been

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387 *Prosecutor v. Popović*, Case No. IT-05-88-T, Judgment, para. 1087 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010).
388 *Prosecutor v. Popović*, Case No. IT-05-88-T, Judgment, para. 1087 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010).
389 *Prosecutor v. Popović*, Case No. IT-05-88-T, Judgment, para. 1086 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010).
390 *Prosecutor v. Popović*, Case No. IT-05-88-T, Judgment, para. 1086 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010).
391 *See Prosecutor v. Dordević*, Case No. IT-05-87/1-T, Public Judgment, paras. 2193–2194 (Int'l Crim. Trib. for the Former Yugoslavia 23 Feb. 2011).
392 *Prosecutor v. Dordević*, Case No. IT-05-87/1-T, Public Judgment, paras. 2193–2194 (Int'l Crim. Trib. for the Former Yugoslavia 23 Feb. 2011).
393 *Prosecutor v. Dordević*, Case No. IT-05-87/1-T, Public Judgment, paras. 2169–2195 (Int'l Crim. Trib. for the Former Yugoslavia 23 Feb. 2011).
394 *Survey Report on Political Prisoner's Camps in North Korea*, *supra* note 304 at 52–53 (citing testimony of Kang Cheol-hwan, A11, A06), 172–174 (citing testimony of A14, A15, A12).
395 *Survey Report on Political Prisoner's Camps in North Korea, supra* note 304 at 45.
396 *Survey Report on Political Prisoner's Camps in North Korea, supra* note 304 at 56 (quoting O Myong-o (alias)).

committed. There are reasonable grounds to believe that DPRK officials: (i) forcibly transferred, without grounds permitted under international law, one or more persons who were lawfully present in the area from which they were so transferred to another state or location, by expulsion or other coercive acts; (ii) as part of a widespread and systematic practice throughout the North Korean political prison system; and (iii) they did so knowingly. We find that the displacement of suspects and their families has been carried out in the DPRK by force and without permitted grounds. We find strong evidence that individuals removed from their homes for political offenses were lawfully present in the areas from which they were taken; the perpetrators of the forcible transfers were aware of the lawful presence of these individuals; the forcible transfers were part of a widespread and systemic attack against the population; and the perpetrators were aware of such widespread and systemic attack.

a. Forcible Transfer Without Permitted Grounds

212. The first element specific to the crime of "forcible transfer" is forcible displacement, whether through physical force, threat of force or coercion.[397] The presence of force "is determined by the transferred persons' absence of genuine choice in their displacement."[398] A subject's consent to the transfer is not in itself sufficient to negate the element of force.[399] Rather, proper consent "must be given voluntarily and as a result of the individual's free will, assessed in the light of the surrounding circumstances."[400]

213. SSD agents forcibly remove suspects and their families from their homes during the night, possibly to capitalize on a period of time in which the suspects and their families are alone and more vulnerable.[401] Suspects do not have a genuine choice in leaving their homes. Even if suspects and their families do not physically resist the SSD agents, any form of consent is not given voluntarily. The element of forcible displacement is thus established.

b. Lawful Presence

214. The second element specific to the crime of forcible transfer requires that the transferred individual be lawfully present in the area from which they were removed.[402] Lawful presence is a lower standard than the legal concept of lawful residence and is "intended to exclude only those situations where the individuals are occupying houses or premises unlawfully or illegally."[403]

215. Suspects and their families are typically in their own homes when they are forcibly taken to the political prison camps.[404] There has been no evidence presented or reason to believe that any individuals were illegally present in the areas from which they were removed. The second element is thus satisfied.

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397 ICC, *Elements of Crimes*, art. 7(1)(d).
398 *Prosecutor v. Popović*, Case No. IT-05-88-T, Judgment, para. 896 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010).
399 *Prosecutor v. Popović*, Case No. IT-05-88-T, Judgment, para. 896 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010).
400 *Prosecutor v. Popović*, Case No. IT-05-88-T, Judgment, para. 896 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010).
401 *Survey Report on Political Prisoner's Camps in North Korea*, *supra* note 304 at 52–53 (citing testimony of Kang Cheol-hwan, A11, A06), 172–174 (citing testimony of A14, A15, A12).
402 ICC, *Elements of Crimes*, art. 7(1)(d).
403 *Prosecutor v. Popović*, Case No. IT-05-88-T, Judgment, para. 900 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010).
404 *Survey Report on Political Prisoner's Camps in North Korea*, *supra* note 304 at 52–53 (citing testimony of Kang Cheol-hwan, A11, A06), 172–174 (citing testimony of A14, A15, A12).

c. Awareness of Lawful Presence

216. The third element specific to the crime of forcible transfer is that the perpetrator must be aware of the factual circumstances that established the lawfulness of the victim's presence in the location from which he or she is displaced.[405] In the context of forcible transfer, the ICTY has found that "[i]nhabitants or residents of an area can be accepted readily as lawfully present in it."[406] Testimony in this and other proceedings demonstrates that SSD agents were aware of the fact that the suspects and their families were legally occupying the homes and areas from which they were taken.[407] Thus, the element of awareness of lawful presence is satisfied.

d. Common Elements

217. The evidence presented in Part VII(L) below establishes that the common elements of the crime against humanity of forcible transfer have been met.

5. Conclusion

218. Based on the evidence presented to the Inquiry, we find reasonable grounds to believe that the crime against humanity of forcible transfer has been committed in North Korean political prison camps and related facilities.

E. Imprisonment

219. Imprisonment is a crime against humanity when it occurs as part of "a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[408] Evidence has been presented that the SSD incarcerates political prisoners, and in some cases, their families, under harsh conditions for illegitimate reasons such as: the exercise of human rights guaranteed under customary international law, guilt by association, or simply being born in a political prison. Based on the evidence presented and consistent with established principles of international law, we find reasonable grounds to believe that the crime against humanity of imprisonment has been committed in the DPRK's political prison camps and related facilities.

1. Elements of Imprisonment

220. The ICC Elements of Crimes provides that the offense of imprisonment under the Rome Statute consists of the following elements:

(i) the perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty;

(ii) the gravity of the conduct was such that it was in violation of fundamental rules of international law;

(iii) the perpetrator was aware of the factual circumstances that established the gravity of the conduct;

(iv) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

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405 ICC, *Elements of Crimes*, art. 7(1)(d).

406 *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Public Judgment, para. 1616 (Int'l Crim. Trib. for the Former Yugoslavia 23 Feb. 2011).

407 *See, e.g.,* Kim Ha-neul Aff. (7 Nov. 2016); Kim Hye-sook Aff. (4 Nov. 2016); Young Sun-kim Aff. (4 Nov. 2016); *Survey Report on Political Prisoner's Camps in North Korea*, *supra* note 304 at 138–139, 172–174, 234.

408 Rome Statute, art. 7(1).

(v) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[409]

2. Prior Cases

221. The principle of JCE applies to the crime of imprisonment. The ECCC found that Kaing Guek Eav, a former Khmer Rouge leader and prison commander, acted with various individuals and subordinates to operate "a facility dedicated to the unlawful detention, interrogation, and execution of perceived enemies."[410] The ECCC also found the defendant guilty of "participation in the systemic joint criminal enterprise," further holding that "the [a]ccused bears individual criminal responsibility for . . . murder, extermination, enslavement, imprisonment, torture, persecution on political grounds, and other inhuman acts."[411]

222. The ICTY also noted in the *Martić* case that, even if the original purpose of a given activity is to obtain a political objective (in that case the goal was to create a Serb-dominated state)[412] rather than to commit a crime per se, the theory of JCE can still apply to crimes, such as imprisonment of non-Serb populations, carried out in furtherance of the political objective.[413] In that case, defendant Martić's persistence in pursuing the common goals of the JCE led the court to conclude that crimes that were outside of the common purpose of the JCE were foreseeable to Martić.[414] He was found to be individually criminally responsible for the crime against humanity of imprisonment.[415] The ICTY stated that "widespread and pervasive crimes against the non-Serb population. . . must have made such crimes common knowledge" and that in spite of this knowledge, there was little evidence that Martić intervened to punish those of his subordinates who carried out such crimes.[416] In another case involving a political leader and military commander, the ICTY found individual criminal liability as a co-perpetrator for imprisonment of civilians;[417] the Appeals Chamber, in upholding individual criminal liability for planning imprisonment, noted that the political leader approved certain attacks with awareness of the substantial likelihood that other crimes, such as unlawful detention would occur, and that detentions could be considered as being part of a preconceived plan.[418]

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409 ICC, *Elements of Crimes*, art. 7(1)(e).

410 *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, para. 514 (ECCC 26 July 2010).

411 *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, paras. 515–516 (ECCC 26 July 2010).

412 *Prosecutor v. Martić*, Case No. IT-95-11-T, Judgment, paras. 442, 445 (Int'l Crim. Trib. for the Former Yugoslavia 12 June 2007).

413 *Prosecutor v. Martić*, Case No. IT-95-11-T, Judgment, paras. 442, 445 (Int'l Crim. Trib. for the Former Yugoslavia 12 June 2007).

414 *See Prosecutor v. Martić*, Case No. IT-95-11-T, Judgment, paras. 454–455, 480 (Int'l Crim. Trib. for the Former Yugoslavia 12 June 2007) (finding Martic individually criminally responsible for the crime against humanity of imprisonment).

415 *See Prosecutor v. Martić*, Case No. IT-95-11-T, Judgment, paras. 454–455, 480 (Int'l Crim. Trib. for the Former Yugoslavia 12 June 2007) (finding Martic individually criminally responsible for the crime against humanity of imprisonment).

416 *Prosecutor v. Martić*, Case No. IT-95-11-T, Judgment, para. 451 (Int'l Crim. Trib. for the Former Yugoslavia 12 June 2007).

417 *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, para. 1023 (Int'l Crim. Trib. for the Former Yugoslavia 17 Dec. 2004) (upholding the Trial Chamber's conviction of Dario Kordić for being individually criminally responsible under Article 7(1) of the ICTY Statute for imprisonment); *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, paras. 910, 929, and art. XI, at p.299 (Int'l Crim. Trib. for the Former Yugoslavia 17 Dec. 2004) (finding that a reasonable trier of fact could have found beyond a reasonable doubt that Mario Čerkez was a co-perpetrator (committing) under Article 7(1) for imprisonment at the Vitez Cinema, the SDK building and affirming convictions under Article 7(1) for imprisonment. *See also Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-T, Judgment, paras. 800–802, 834, 836 (Int'l Crim. Trib. for the Former Yugoslavia 26 Feb. 2001) (providing factual findings by the Trial Chamber regarding imprisonment and finding individual criminal liability for Dario Kordić and Mario Čerkez for imprisonment).

418 *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, paras. 1016, 1020, 1023 (Int'l Crim. Trib. for the Former Yugoslavia 17 Dec. 2004).

223. Command responsibility is also applicable in cases of imprisonment in the context of crimes against humanity.[419] In the Kaing Guek Eav case, the ECCC found that the former Khmer Rouge leader's criminal liability for the crime against humanity of imprisonment could also be established on the basis of command responsibility. The ECCC noted, however, that because he had been found individually criminally responsible for the crime against humanity of imprisonment, it would instead use command responsibility as a factor in his sentencing.[420]

224. Similarly, Ernst Kaltenbrunner, a Nazi official, was found guilty of crimes against humanity[421] based upon his control and knowledge of the activities of the Reich Security Head Office's mistreatment of prisoners of war and establishment of prisoner labor camps.[422]

3. The Evidence Presented

225. Counsel provided evidence demonstrating that DPRK officials have: (i) committed acts involving imprisonment or severe deprivation of physical liberty; (ii) such conduct being grave enough to violate fundamental rules of international law; (iii) with awareness of the facts of such grave conduct; (iv) as part of a widespread and systematic attack; and (v) with knowledge that such a wide and systemic attack is occurring. The evidence in support of this conclusion is provided below.

226. The DPRK established its political prison system in the 1950s to sequester and punish political opponents.[423] Statements of DPRK leadership indicate that prisons serve to eliminate the "seed" of three generations of class enemies.[424] Testimony from a high level defector has also corroborated that such prisons were originally started to banish "enemies of the party and state–religious persons, landowners, businessmen . . . and even those deemed too popular locally."[425]

227. Former prison guards have also noted that "[the inmates] are supposed to die in the camp from hard labour."[426] The prisons are surrounded by obstacles including electric fences, barbed wire, and guard posts.[427] Inmates are subject to strict movement

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[419] *See Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, paras. 548–549 (ECCC 26 July 2010).

[420] *See Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, paras. 548–549 (ECCC 26 July 2010) (noting that "[t]he Chamber is satisfied that the Accused's criminal liability for these crimes [including imprisonment] could also be established on the basis of his superior responsibility. Indeed, the Accused exercised effective control over the rest of the S-21 [prison] staff, knew that his subordinates were committing crimes, and failed to take necessary or reasonable measures to prevent their commission or punish their perpetrators."). However, the ECCC also noted that "where both a form of 'direct' responsibility and superior responsibility are established in relation to the same conduct, the Chamber will enter a conviction on the basis of the 'direct' form of responsibility only, and consider the accused's superior position as an aggravating factor in sentencing." *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, para. 539 (ECCC 26 July 2010).

[421] Crimes against humanity as defined in the Nuremberg trials did not specifically reference "imprisonment" as a separate offense. However, Kaltenbrunner's conviction was based in part on facts such as his "authority to order protective custody to and release from concentration camps. Orders to this effect were normally sent over his signature. Kaltenbrunner was aware of conditions in the concentration camps." *Prosecutor v. Kaltenbrunner*, Judgment, para. 494 (Int'l Military Trib. at Nuremberg 1 Oct. 1946), http://werle.rewi.hu-berlin.de/IMTJudgment.pdf. As prisoner of war camps, labor camps, and concentration camps serve the purpose of imprisonment and deprivation of individual liberty (including killing such prisoners on a massive scale), it is reasonable to conclude that Kaltenbrunner's conviction for crimes against humanity in part rested upon the crime against humanity of imprisonment or its equivalent.

[422] *Prosecutor v. Kaltenbrunner*, Judgment, paras. 494–496 (Int'l Military Trib. at Nuremberg 1 Oct. 1946).

[423] COI Report, para. 743.

[424] COI Report, para. 747.

[425] Thae Yong-ho Aff. (23 Mar. 2017).

[426] COI Report, para.767 (citing testimony of Ahn Myong-chol).

[427] COI Report, para. 756. *See also North Korea: New Satellite Images Show Continued Investment in the Infrastructure of Repression*, Amnesty Int'l 12, 14–15 (2 Dec. 2013), http://www.amnesty usa.org/research/reports/north-korea-new-satellite-images-show-continued-investment-in-the-infrastructure-of-repression (noting presence of guard posts).

restrictions within the prison camp.[428] Certain areas of political prison camps are considered to be "total-control zones" where prisoners are sent for life.[429] A former senior North Korean official noted in his affidavit that these political prisons are "home to some of the greatest atrocities committed in North Korea and they have lasted twice as long as the Soviet Gulags and five times as long as the Nazi concentration camps."[430]

228. Evidence provided to the UN Commission of Inquiry further suggests that orders that cause disappearances of individuals can be traced up to the level of the Supreme Leader and that given the centralized nature of power in the DPRK, it is unlikely that the SSD could operate the prison camps without approval of the leadership of the DPRK.[431]

229. One of the bureaus directly involved in carrying out the SSD's mandate is the Prisons Bureau, which is responsible for management of political prisons and prisoners.[432] Pursuant to Articles 122 and 124 of the DPRK Criminal Procedure Law, the SSD has jurisdiction over political crimes and the SSD Investigation Bureau controls the investigation and arrest of political criminals.[433] The Prosecution Bureau of the SSD determines how to proceed with adjudication of political crimes.[434]

230. As noted above, the DPRK has four known political prison camps – Prison Camps 14, 15, 16, and 25.[435] These prison camps are operated by the SSD via a Chief Administrator, who oversees the prisons with the assistance of political, SSD, security and guard bureaus, and staffing.[436] The SSD's Prisons Bureau oversees operation of the *kwan-li-so*.[437] The SSD maintains a vertical chain of command, from SSD officers at the top, down to prison guards and prisoners vested with supervisory powers over fellow prisoners.[438] The affidavit provided by Thae Yong-ho also notes that "the actions and tasks of every leadership position within the political prison camp structure are sanctioned politically by the KWP OGD, which reports directly to the supreme leader Kim Jong-un."[439]

231. Suspects of political wrongs are often apprehended and detained at night without any explanation as to why they are being imprisoned in a detention facility.[440] Further, individuals are routinely sent by the SSD to political prison camps without any meaningful trial or proceedings;[441] in fact, some survivors report passing straight from interrogation into prison camps without a trial or any meaningful due process.[442] This is also

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428 COI Report, para. 756.
429 Hawk, *The Hidden Gulag, Second Edition, supra* note 6 at 27.
430 Thae Yong-ho Aff. (23 Mar. 2017).
431 COI Report, paras. 1064–1065 (noting that "[t]he Commission has received information directly indicating that the camp system is controlled from the highest level of the state. In some cases, the Commission was able to trace orders to cause the disappearance of individuals to the camps to the level of the Supreme Leader. Moreover, the [SSD], which decides whether to send individuals to the camp, is subject to the directions and close oversight of the Supreme Leader."). The report further notes that the political prison system run by the SSD operates in conditions such that "[i]t is impossible to believe that such a large-scale and complex institutional system could be operated without being based on a [s]tate policy approved at the highest level given the strongly centralized nature of the state in the DPRK." COI Report, para. 1064.
432 Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 22.
433 Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 22, 69–70.
434 Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 22.
435 *See* COI Report, paras. 735–736.
436 *Political Prison Camps in North Korea Today, supra* note 103 at 203.
437 *See* Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 22, 108.
438 *Political Prison Camps in North Korea Today, supra* note 103 at 203.
439 Thae Yong-ho Aff. (23 Mar. 2017).
440 COI Report, para. 696; *see also Survey Report on Political Prisoner's Camps in North Korea, supra* note 304 at 172, 234.
441 COI Report, para. 696; *see also* Kim Dong-nam Aff. (9 Nov. 2016); *see also* Kim Ha-neul Aff. (7 Nov. 2016) ("[T]rials held at the political prisons were, in actuality, executions of death sentences. In the case of a trial, there was mention of the crime committed and simultaneously, prisoners were sentenced to be executed by a public firing squad or a public hanging").
442 *See, e.g.,* COI Report, paras. 409, 696, 715, 717 (citing testimony of Jeong Kwang-il & Kim Gwang-il); *Testimony of Yong Kim, supra* note 301; Hawk, *The Hidden Gulag Exposing North Korea's Prison Camps*, *supra* note 323 at 31, 33 (citing testimony of An Hyuk, Lee Young-kuk); Kim Eun-cheol Aff. (11 Nov. 2016); Kim Tae-jin Aff. (10 Nov. 2016).

consistent with the SSD's widespread practice of subjecting those accused of political crimes to months of torture and inhumane treatment in order to force a confession (as described in this Part VII).[443] Other prisoners, including witness Kim Tae-jin, report being imprisoned after forcible repatriation to North Korea.[444] In Kim Tae-jin's case, upon repatriation he was directly imprisoned in a political prison camp without a trial, together with other low-level offenders.[445] Acquaintances of Kim Tae-jin had no knowledge of his imprisonment.[446]

232. Sentences in the DPRK's political prison system range from several years in certain "revolutionizing zones," to indefinite periods of detention in "total control zones" where there is no possibility of release.[447]

233. Political crimes that can lead to incarceration include conduct believed to be contrary to the interests of the State, such as criticizing the political system or the Supreme Leader.[448] Prisoners incarcerated in these prisons also include individuals who have been exposed to allegedly subversive outside influences, prisoners of war of the Korean War and individuals who have returned from or travelled abroad.[449] A high ranking North Korean defector indicates that political crimes vary widely and can include "acts as simple as listening to a South Korean pop song."[450] Other politically criminal acts include "attempting to make phone calls outside of the country, creasing the picture of a North Korean leader, or otherwise doing anything to insult the authority of the leadership."[451] In other cases, prisoners are sometimes not even made aware of the crimes they have committed; one witness reported that the then head of Camp 15 told her that "you are here because you unconsciously committed a crime in relation to the 'one and only ideology,'" and that "you may be released if you work hard and if not, will never be freed."[452]

234. Tens of thousands of individuals have been sent to political prison camps or punished on the basis of: speaking of the Supreme Leader in a way that is viewed as negative or in a manner that does not correspond to the state-sanctioned account of his life, possessing knowledge or experience of a state other than the DPRK, expressing interest in or speaking about Christianity, or other political offenses.[453] Individuals can also be imprisoned for violating the Ten Principles of Monolithic Ideology.[454] In these cases, imprisonment is imposed as punishment for the exercise of basic human rights, as recognized by the UN, including freedom of opinion and speech,[455] freedom of religion,

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443 *See, e.g.,* COI Report, paras. 696, 715, 717 (citing testimony of Jeong Kwang-il & Kim Gwang-il); *Testimony of Lee Baek-lyong, supra* note 143; *Testimony of Yong Kim, supra* note 301; Hawk, *The Hidden Gulag Exposing North Korea's Prison Camps, supra* note 323 at 31, 33, 66 (citing testimony of An Hyuk, Lee Young-kuk); Kim Eun-cheol Aff. (11 Nov. 2016); Kim Tae-jin Aff. (10 Nov. 2016).

444 Kim Tae-jin Aff. (10 Nov. 2016).

445 Kim Tae-jin Aff. (10 Nov. 2016).

446 Kim Tae-jin Aff. (10 Nov. 2016).

447 COI Report, para. 755.

448 COI Report, para. 748.

449 COI Report, para. 750.

450 Thae Yong-ho Aff. (23 Mar. 2017).

451 Thae Yong-ho Aff. (23 Mar. 2017).

452 Kim Young-soon Aff. (4 Nov. 2016).

453 Kim Tae-jin reported: "There were 7 Christians inside Yodok Prisoners Camp who used to have a meeting secretly, in which I at times participated. But a prisoner who conducted espionage for prison officers inside the same cell called it in. I was not included in his report luckily, but 7 prisoners were severely tortured and transported to another prisoner's camp, unknown." Kim Tae-jin Aff. (10 Nov. 2016).

454 Thae Yong-ho Aff. (23 Mar. 2017).

455 For example, per the testimony of Kim Ha-neul, one prisoner began shouting inside a prison cell, "Down with North Korean socialism" and "May divine punishment befall the bastard Kim Jong-il." Kim Ha-neul Aff. (7 Nov. 2016). "After hearing the prisoner shouting, three National Security Bureau officers ran to the cell and beat her severely. The agents struck prisoner's head against the rugged cement walls of the cell and whipped her with a belt. As a result, prisoner's skull was fractured, exposing her brain. She died when agents stabbed her stomach with a knife, releasing her internal organs." Kim Ha-neul Aff. (7 Nov. 2016).

and the right to leave any country, including one's own as demonstrated by the examples above.

235. Furthermore, while a basic tenet of criminal law is that there must be some demonstration of intent or *mens rea*[456] in order for criminal liability to attach, there is ample evidence of individuals being imprisoned in North Korea's political prison camps on the basis of guilt by association (*yeon-jwa-je*).[457] Guilt by association is, in effect, punishment for a so-called crime that is committed without any intent, as one cannot ascribe criminal intent to an individual (*e.g.,* infant child) based on their familial relationship with a purported political dissenter. Yet, this form of collective punishment directed at innocent family members has existed in the DPRK for decades.[458] An affidavit from a high ranking North Korean defector corroborates the practice of multi-generational collective punishment, noting that it can lead to indefinite detention or deaths of the offender and three generations of his or her family members.[459]

236. A 2009 survey of former North Korean political prisoners conducted by the Database Center for North Korean Human Rights ("NKDB") found that over 35% had been imprisoned on the basis of guilt by association.[460] While some testimony suggests that the practice of imprisonment on the basis of family association is no longer as widely practiced,[461] evidence demonstrates it is still used in high-profile cases.[462]

237. Imprisonment through guilt by association also includes those who are born inside a prison camp (and thus imprisoned at birth), with their incarceration not predicated on any type of guilt except by association.[463] As noted in the UN Commission of Inquiry's report, marriages are sometimes arranged between prisoners, however, "married" couples are not allowed to live together. Instead, they are brought together for several nights per year for the purpose of engaging in intimate contact.[464] Children born as a result of such relations themselves become prisoners.[465] Affiant Kim Su-jong, for example, was born in Camp 18 and lived there for the first 20 years of his life until 1988.[466]

4. Analysis and Findings

238. As discussed below, this evidence establishes all of the elements of the crime of imprisonment. The facts presented establish reasonable grounds to believe that DPRK officials: (i) deprive men, women, and children of physical liberty; (ii) with such conduct being grave enough to violate fundamental rules of international law; (iii) with awareness

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456 *See*, *e.g.,* Rome Statute, art. 30.

457 COI Report, paras. 745, 747, 752; *Survey Report on Political Prisoner's Camps in North Korea*, *supra* note 304 at 48-49, 51, 167–168. "The survey reveals that family members of those offenders arrested are usually not informed about the arrest, with the exception of those offenders whose families are also arrested." *Survey Report on Political Prisoner's Camps in North Korea*, *supra* note 304 at 47.

458 COI Report, para. 745; *see also* Kim Young-soon Aff. (4 Nov. 2016) (describing how she, her parents (both over 70 years old), and four children (aged ten, eight, six, and two) were sent to Camp 15 (Yodok)).

459 Thae Yong-ho Aff. (23 Mar. 2017).

460 COI Report, para. 752 (citing *Political Prison Camps in North Korea Today, supra* note 103 at 128).

461 "One observer has claimed that from the mid–or late–1990s, after Kim Jong-il became Supreme Leader, instructions were given to the security agencies to only send the family of a political wrongdoer to a political prison camp in special circumstances." COI Report, para. 753, n.1113 (citing Andrei Lankov, *The Real North Korea: Life and Politics in the Failed Utopian State* 47 (Oxford, Oxford Univ. Press, 2013)).

462 TJH019 attests that his parents were arrested for his escape and sent to Camp 15 in 2007. COI Report, para. 753. TLC004 reports that in 2012 the SSD identified a group of mobile phone smugglers, all of whom were falsely accused of planning to sabotage the regime. As a result of their smuggling activities, an estimated 90 people, including family members, were sent to political prisons. COI Report, para. 753.

463 *See, e.g.,* Kim Su-jong Aff. (17 Nov. 2016).

464 COI Report, para. 763.

465 COI Report, para. 763.

466 Kim Su-jong Aff. (17 Nov. 2016).

of the facts of such grave conduct; (iv) as part of a widespread and systematic attack; and (v) with knowledge that such a wide and systemic attack is occurring.

a. Imprisonment of One or More Persons or Severe Deprivation of Physical Liberty

239. The first element specific to the crime of imprisonment is that the perpetrator must imprison one or more persons or otherwise severely deprive them of physical liberty.[467] Deprivation of liberty can occur by either act or omission and must be committed with the intent to deprive a civilian of his or her physical liberty: (i) without due process of law; or (ii) with reasonable knowledge that the act or omission was likely to cause the same.[468] The Special Panel for the Trial of Serious Crimes in the District Court of Dili found that the deprivation of liberty must be severe in terms of duration or the conditions of detention, or both.[469] Evaluation of the conditions of detention and duration necessary to establish the crime of imprisonment "must be assessed subjectively taking into account the circumstances of the case."[470] However, such severity has been found even where detainees were imprisoned for as little as "several weeks in conditions that were unhygienic and without adequate sanitation facilities," and where the detained are "not given food or water regularly."[471]

240. The conditions under which political imprisonment occurs in the DPRK result in severe deprivation of physical liberty and such imprisonment often occurs without due process. As described in the section above, the conditions under which imprisonment occurs is severe, both in terms of conditions and duration; further, people are routinely incarcerated for various political crimes without any trial.[472] Bases for incarceration range from exposure to allegedly subversive outside influences to travelling abroad,[473] with many prisoners never told why they are being imprisoned.[474] Others are imprisoned because of guilt by association.[475] An affidavit from one of North Korea's most recent, high-ranking defectors indicates that political crimes vary widely and can include acts such as listening to South Korean pop songs, attempting to communicate with persons outside of the country, or creasing a picture of a North Korean leader.[476] The same former North Korean senior official stated that crimes punishable by imprisonment include "actions contradictory to the government's wishes, but generally not considered criminal elsewhere in the world."[477]

241. With respect to conditions of imprisonment, evidence provided also suggests the existence of abuses such as starvation, forced labor, executions, torture, rape, denial of reproductive rights, and high death rates.[478] The length and severity of incarceration involved therefore constitutes deprivation of individual liberty sufficiently severe to conclude that criminal imprisonment is occurring.

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467 ICC, *Elements of Crimes*, art. 7(1)(e).
468 *Prosecutor v. Martić*, Case No. IT-95-11-T, Judgment, para. 88 (Int'l Crim. Trib. for the Former Yugoslavia 12 June 2007).
469 *Prosecutor v. Cardoso*, Case No. 04-2001, Judgment, para. 358 (UN-ETTA Dist. Ct. Dili 5 Apr. 2003), http://www.worldcourts.com/un_etta/eng/decisions/2003.04.05_Prosecutor_v_Cardoso1.pdf; Article 10 of the ICCPR.
470 *Prosecutor v. Cardoso*, Case No. 04-2001, Judgment, para. 358 (UN-ETTA Dist. Ct. Dili 5 Apr. 2003).
471 *Prosecutor v. Cardoso*, Case No. 04-2001, Judgment, paras. 358, 360 (UN-ETTA Dist. Ct. Dili 5 Apr. 2003).
472 *See, e.g.,* COI Report, paras. 696, 720–721, 724, 1102.
473 COI Report, para. 750.
474 *See, e.g.,* COI Report, para. 750 (citing testimony of Kang Chol-hwan, a former prisoner whose grandfather disappeared without explanation, and then himself was imprisoned without indictment or trial, or given any explanation as to reasons for imprisonment upon his release).
475 COI Report, para. 753; *see also* Kim Su-jong Aff. 1 (14 Nov. 2016).
476 Thae Yong-ho Aff. (23 Mar. 2017).
477 Thae Yong-ho Aff. (23 Mar. 2017).
478 *See, e.g.,* Kim Ha-neul Aff. (7 Nov. 2016); Kim Eun-cheol Aff. (11 Nov. 2016); Kim Su-jong Aff. (14 Nov. 2016).

b. Gravity of Conduct in Violation of Fundamental Rules of International Law

242. The second element specific to the crime of imprisonment is that the gravity of the conduct involved in imprisonment has to be severe enough to violate fundamental rules of international law.[479] Detaining and imprisoning individuals in an arbitrary manner with no legal basis and imprisonment with no access to procedural safeguards to challenge arrest, detention, or execution of a large number of detainees is a breach of individual rights, on a scale and gravity similar to other crimes against humanity.[480] Arbitrary imprisonment includes "the practice of concentration camps or detention camps," or "other forms of long term detention."[481] In determining whether conduct violates fundamental rules of international law, a tribunal may consider whether arrest was lawful, such as with a warrant of arrest, whether detainees were informed of the reasons for their detention and whether they were informed of their procedural rights.[482]

243. The conditions under which many prisoners of the DPRK's political prison system are incarcerated violate fundamental rules of international law. The evidence shows instances in which prisoners are arrested and imprisoned without charges presented.[483] Evidence further shows that imprisonment is carried out in an arbitrary manner in the DPRK's political prison system. Such treatment does not meet the requirements for justified imprisonment recognized under customary international law. Imprisonment also occurs through guilt by association.[484] An affidavit has also been provided stating that with respect to political criminals, up to "three generations of the individual's family . . . may all be detained indefinitely or killed." Other inmates simply do not know the reasons for their imprisonment.[485] Notably, some individuals are incarcerated for no reason other than being born in prison and are not subject to any legal process, nor are they able to challenge their imprisonment.[486] The testimony of Kim Su-jong, a former prisoner of Camp 18 is instructive; he was born in a prison camp in 1988 and was incarcerated for the first two decades of his life, apparently solely on the basis of his birth in the prison camp and guilt by familial association.[487]

c. Awareness of Factual Circumstances Establishing the Gravity of the Conduct

244. The third element specific to the crime of imprisonment is that the perpetrator must be aware of the factual circumstances of the conduct involved in the crime against humanity of imprisonment.[488] Other tribunals, such as the ECCC, show that the requirement can be met by showing "the perpetrator intended to arbitrarily deprive the individual of liberty, or that he acted in the reasonable knowledge that his or her actions were likely to cause the arbitrary deprivation of physical liberty."[489]

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479 ICC, *Elements of Crimes*, art. 7(1)(e).
480 *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, para. 351 (ECCC 26 July 2010).
481 *Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Judgment, para. 299 (Int'l Crim. Trib. for the Former Yugoslavia 26 Feb. 2001).
482 *Prosecutor v. Ntagerura,* Case No. ICTR-99-46-T, Judgment and Sentence, para. 702 (Int'l Crim. Trib. for Rwanda 25 Feb. 2004).
483 *See, e.g.,* COI Report, paras. 747, 750.
484 COI Report, paras. 750–753.
485 *See, e.g.,* Thae Yong-ho Aff. (23 Mar. 2017); see also COI Report para. 750 (citing testimony of Kang Chol-hwan).
486 COI Report, paras. 747, 763.
487 Kim Su-jong Aff. (17 Nov. 2016).
488 ICC, *Elements of Crimes*, art. 7(1)(e).
489 *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, para. 350 (ECCC 26 July 2010) (*citing Prosecutor v. Simic* et al., Case No. IT-95-9-T, Judgment, para. 64 (Int'l Crim. Trib. for the Former Yugoslavia 17 Oct. 2003)).

245. As Supreme Leader, Kim Jong-un directly controls the KWP, and together they enjoy the power to make final decisions and override laws.[490] The SSD reports to the SAC.[491] Bureaus involved in the SSD's internal security functions include the Prisons Bureau, which is responsible for management of political prisoners.[492] The SSD, pursuant to Articles 122 and 124 of the Criminal Procedure Law, has jurisdiction with respect to political crimes and the SSD Investigation Bureau controls investigation and arrest of suspected political criminals.[493] The SSD also includes within its chain of command Chief Administrators and subordinates who run political prison camps.[494]

246. Given the facts and evidence presented, we find that the leadership of the DPRK as well as state organs have actual and/or constructive knowledge of the conditions of imprisonment in North Korean political prisons and the gravity of the human rights violations that currently occur there.

d. Common Elements

247. The evidence presented in Part VII(L) below establishes that the common elements of the crime against humanity of imprisonment have been met.

5. Conclusion

248. Based on the evidence presented to the Inquiry, we find reasonable grounds to believe that the crime against humanity of imprisonment has been committed in North Korean political prison camps and related facilities.

F. Torture

249. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (commonly recognized as the "Convention against Torture" or "CAT"), provided the first definition of torture in an international legal instrument of such scope:

> For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[495]

250. This definition is closely reflected in the definition of torture contained in Article 7(2)(e) of the 1998 Rome Statute of the International Criminal Court, where "torture" means the "intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."[496]

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[490] *See* COI Report, para. 123; *see also* Gause, N*orth Korean Political Dynamics of the Kim Jong-un Era, supra* note 63 at 33, 34; COI Report, para. 152; Grisafi, *North Korea creates new lead government body headed by Kim, supra* note 63.

[491] *North Korea Leadership Watch: State Security Department, supra* note 97.

[492] Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 22.

[493] Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 22, 69–70.

[494] *Political Prison Camps in North Korea Today, supra* note 103 at 203.

[495] G.A. Res. 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, (10 Dec. 1984).

[496] Rome Statute, art. 7(2)(e). The definition of torture contained in the 1984 Torture Convention is broader than, and includes, the one laid down in the 1975 Declaration of the United Nations General Assembly ("UNGA") and in the 1985 Inter-

251. The prohibition against torture is set forth in several instruments of international humanitarian law. The Universal Declaration of Human Rights ("UDHR") established that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,"[497] a legal obligation that was later further expanded in several instruments.[498]

252. These provisions impose upon states the obligation to both *prohibit* and *punish* torture, as well as to refrain from engaging in torture through their officials. As once stated by the ICTY, "[n]o legal loopholes have been left."[499] As a party to the ICCPR and CRC, the DPRK has made a state commitment to enforce this universal prohibition against torture.

253. Evidence has been presented that the SSD and related parties in the DPRK regime inflicted severe physical or mental pain or suffering upon individuals. Based on the evidence presented and consistent with established principles of international law, we find reasonable grounds to believe that the crime of torture has been committed in the DPRK's political prison camps and related facilities.

1. Elements of Torture

254. Torture is included within the crimes against humanity identified in Article 7 of the Rome Statute.[500] The elements of the crime against humanity of torture, as articulated by the ICC, consist of the following:

(i) the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons;

(ii) such person or persons were in the custody or under the control of the perpetrator;

(iii) such pain or suffering did not arise only from and was not inherent in or incidental to, lawful sanctions;

(iv) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

(v) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[501]

255. There was also debate over an additional requirement that the perpetrator be acting in an official capacity.[502] While this issue was particularly relevant in addressing crimes under *ad hoc* tribunals such as the ICTR and ICTY, it is now commonly understood that such a

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American Convention. *Compare* G.A. Res. 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, (10 Dec. 1984) *with* UNHRC, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.S. Res. 3452, art. 1 (9 Dec. 1975), http://www.ohchr.org/EN/ProfessionalInterest/Pages/DeclarationTorture.aspx *and* the Inter-American Convention to Prevent and Punish Torture, art. 2 (9 Dec. 1985), http://www.oas.org/juridico/english/ treaties/a-51.html (hereinafter "Inter-American Convention").

497 G.A. Res. 217 (III) A, *Universal Declaration of Human Rights* art. 5 (10 Dec. 1948).

498 Such as the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950; the United Nations Covenant on Civil and Political Rights of 1966, hereinafter "ICCPR"; the Inter-American Convention on Human Rights of 1969; the African Charter on Human and Peoples' Rights of 1981; the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 1984, hereinafter "Torture Convention"; and the Inter-American Convention to Prevent and Punish Torture of 1985.

499 *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Judgment, para. 146 (Int'l Crim. Trib. for the Former Yugoslavia 10 Dec. 1998).

500 Torture is also inscribed as a war crime under Article 8. *See* Rome Statute, art. 8.

501 ICC, *Elements of Crimes*, art. 7(1)(f).

502 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, para. 594 (Int'l Crim. Trib. for Rwanda 2 Sept. 1998).

requirement is *not* an essential element of the crime of torture and is not part of the definition of torture in international criminal law.[503]

256. As recognized by the CAT and the Inter-American Torture Convention, the essential distinguishing feature between torture and other forms of cruel and inhumane treatment is that torture must be intentionally inflicted or performed.[504]

2. Prior Cases

257. ICC cases have provided guidance regarding the crime of torture. Among such cases, *Kunarac* et al. and *Furundžija* are often cited for their legal analysis.

258. The Court in *Furundžija,* held that under current international humanitarian law, in addition to individual criminal liability, "[s]tate responsibility may ensue as a result of [s]tate officials engaging in torture or failing to prevent torture or failing to punish torturers. If carried out as an extensive practice of [s]tate officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly grave wrongful act generating [s]tate responsibility."[505]

259. International law bars not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman and degrading treatment). "It follows that international rules prohibit not only torture but also: (i) the failure to adopt the national measures necessary for implementing the prohibition; and (ii) the maintenance in force or passage of laws which are contrary to the prohibition."[506]

260. In *Kunarac*, the Appeals Chamber defined torture as an act or an omission giving rise to "severe pain or suffering, whether physical or mental," but did not specify the degree of pain and suffering required for the act to amount to torture.[507] In fact, the Appeals Chamber stated that it was erroneous to argue that the suffering must be visible. In this context, for example, sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental and in this way can be characterized as an act of torture, even without a medical certificate of the injuries. [508]

261. The Court in *Furundžija* determined that in certain circumstances rape can constitute torture.[509] Other international judicial bodies have reached a similar conclusion.[510]

262. Indeed, in *Kunarac* the Appeals Chamber held that, "even if the perpetrator's motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering,

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503 In *Kunarac*, the Trial Chamber took the position that the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture. *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, paras. 496–497 (Int'l Crim. Trib. for the Former Yugoslavia 22 Feb. 2001).

504 *See* G.A. Res. 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1 (10 Dec. 1984); Inter-American Convention, art. 2.

505 *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Judgment, para. 142 (Int'l Crim. Trib. for the Former Yugoslavia 10 Dec. 1998).

506 *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Judgment, para. 148 (Int'l Crim. Trib. for the Former Yugoslavia 10 Dec. 1998).

507 *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgment, para. 149 (Int'l Crim. Trib. for the Former Yugoslavia 12 June 2002).

508 *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgment, paras. 150–151 (Int'l Crim. Trib. for the Former Yugoslavia 12 June 2002).

509 *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Judgment, para. 171 (Int'l Crim. Trib. for the Former Yugoslavia 10 Dec. 1998).

510 *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Judgment, para. 171 (Int'l Crim. Trib. for the Former Yugoslavia 10 Dec. 1998).

whether physical or mental, since such pain or suffering is a likely and logical consequence of [such] conduct."[511]

263. The Rome Statute does not require that a perpetrator be acting in an official capacity for torture to be elevated to a crime against humanity. The court in *Kunarac* followed this approach and found that individuals may be held accountable for acts of torture regardless of their affiliation with the state.[512]

3. The Evidence Presented

264. Witness testimonies indicate that witnesses were subject to torture or observed torture being inflicted upon prisoners.[513]

a. Inflicted Severe Physical or Mental Pain or Suffering Upon One or More Persons

265. Former SSD official Choi Hyun-jun testified at the Hearing that torture with water or electricity was considered to be standard practice.[514] Some other methods of torture he observed included sticking needles under the detainee's fingernails or digging sharp pipes into the detainee's tailbone.[515] Further, affiant Kim Ha-neul recalled, "I was first taken to the torture chamber in March when the weather was extremely cold. My flesh became frozen after I was placed in a water tank. . . . In the corner was a water tank and fireplace to allow for both water torture and fire torture. Approximately five metal wires hung from the ceiling and were used for hanging prisoners. . . . There were seven expert torturers who handled torture. I was stripped and hung inverted and beaten, tortured with fire or water and tortured with water mixed with spicy pepper, which was poured into my nose and mouth."[516]

b. Person or Persons Were in the Custody or Under the Control of the Perpetrator

266. Several testimonies refer to the acts performed within prison camps and under custody of the regime. Former detainee at Camp 15, Kang Cheol-hwan, recalled a "sweatbox" that was used to punish prisoners.[517] It was so small that the prisoner was forced to kneel in such a way that the circulation to his legs was cut off and his buttocks were left "solid black with bruising."[518]

c. Pain or Suffering Did Not Arise Only From and Was Not Inherent in or Incidental to, Lawful Sanctions

267. Affiant Kim Tae-jin recounted the following attack during his third year in Camp 15: "[S]ecurity officer Yang Su-cheol . . . beat me with a burning wood chunk and roasted my legs, which has left a sever[e] trauma and [a] physical scar, still visible. I was also enforced to sit on calcium oxide under rain, from the chemical reaction of which burnt my hip ruthlessly."[519] A security officer indicated to Kim Tae-jin that the nature of his crime

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511 *Prosecutor v. Kunarac*, Case No. IT-96-23-T; IT-96-23/1-A, Judgment, para. 153 (Int'l Crim. Trib. for the Former Yugoslavia 12 June 2002).
512 Rome Statute, art. 7(2)(e); *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, paras. 493–497 (Int'l Crim. Trib. for the Former Yugoslavia 22 Feb. 2001).
513 Prosecutor's Br., para. 118.
514 Testimony of Choi Hyun-jun (8 Dec. 2016).
515 Testimony of Choi Hyun-jun (8 Dec. 2016).
516 Kim Ha-neul Aff. (7 Nov. 2016).
517 COI Report, para. 760 (citing Kang Cheol-hwan, *The Aquariums of Pyongyang: Ten Years in the North Korean Gulag* 95–96 (2005)).
518 COI Report, para. 760 (citing Kang Cheol-hwan, *The Aquariums of Pyongyang: Ten Years in the North Korean Gulag* 95–96 (2005)).
519 Kim Tae-jin Aff. (10 Nov. 2016).

was an anti-government offense after Kim Tae-jin was caught for having crossed the river into China for work sixteen months earlier.[520]

4. Analysis and Findings

268. We find that all of the elements of the crime against humanity of torture have been established by direct testimony and other evidence.

269. Witness testimonies demonstrate the extent to which severe physical and mental pain and suffering are suffered by many, if not all, of those subject to detention and punishment in the political prison camps.[521]

270. Several testimonies indicated that North Korean officers have tortured a large number of prisoners and the methods used are painful, with different forms of beatings the favored method of torture.[522] Indeed, some witnesses recall that the beatings were so severe that death as a result of such methods was common.[523]

271. Witness testimony shows that the use of torture was a major component of the operation of the political prison camps,[524] and prisoners were under custody without judgment or due process.[525]

272. The acts of torture described in the witness testimonies cannot be characterized as "lawful sanctions." As former SSD official Choi Hyun-jun testified, the reasons for being sent to the prison camps varied widely, from those who were found to be anti-regime to those who watched just one foreign movie or stole because they were starving.[526]

273. The evidence presented in Part VII(L) below establishes that the common elements of the crime against humanity of torture have been met.

5. Conclusion

274. Based on the evidence presented to the Inquiry, we find reasonable grounds to believe that the crime against humanity of torture has been committed in North Korean political prison camps and related facilities.

G. Sexual Violence

275. As a party to the CRC and the ICCPR, the DPRK is obligated to enforce a universal prohibition against sexual violence. For the reasons set forth below, we find reasonable grounds to believe that the crime against humanity of sexual violence has been committed in North Korean political prison camps and related facilities.

1. Elements of Sexual Violence

a. Sexual Violence

276. Sexual violence is a crime against humanity under both customary international law and the Rome Statute, and consists of the following elements:

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520 Kim Tae-jin Aff. (10 Nov. 2016).
521 *See e.g.,* Prosecutor's Br., paras. 98, 118.
522 *See e.g.,* Prosecutor's Br., para. 118.
523 *See e.g.,* Prosecutor's Br., para. 118.
524 *See, e.g.,* Prosecutor's Br., paras. 87(vi), 118.
525 *See, e.g.,* Prosecutor's Br., paras. 110–111.
526 Testimony of Choi Hyun-jun (8 Dec. 2016).

(i) the perpetrator committed an act of a sexual nature against one or more persons or caused one or more persons to engage in an act of a sexual nature by force or threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent;

(ii) such conduct was of a gravity of the conduct was comparable to the other offences in Article 7(1)(g);

(iii) the perpetrator was aware of the factual circumstances that established the gravity of the conduct;

(iv) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

(v) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[527]

b. Rape

277. The offense of rape, under both the Rome Statute and customary international law, consists of the following elements:

(i) the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;

(ii) the invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent;

(iii) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

(iv) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[528]

2. Prior Cases

278. While sexual violence has been a perennial feature of war, rape was not established as a crime against humanity or a war crime until the 1990s, when the international tribunals for the former Yugoslavia and Rwanda were created.[529] In *Prosecutor v. Kunarac* et al., the Trial Chamber of the ICTY noted that a lack of consent, particularly in the detention camp context, is crucial to rape as a war crime:

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[527] ICC, *Elements of Crimes*, art. 7(1)(g)-6.
[528] ICC, *Elements of Crimes*, art. 7(1)(g)-1.
[529] Erica Feller, *Presentation: Rape is a War Crime: How to Support the Survivors: Lessons from Bosnia-Strategies for Kosovo*, UNHRC (18 June 1999), http://www.unhcr.org/admin/dipstatements/42a418a72/presentation-ms-erika-feller-director-department-international-protection.html.

> Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant. In practice, the absence of genuine and freely given consent or voluntary participation may be *evidenced* by the presence of the various factors specified in other jurisdictions – such as force, threats of force, or taking advantage of a person who is unable to resist. A clear demonstration that such factors negate true consent is found in those jurisdictions where absence of consent is an element of rape and consent is explicitly defined not to exist where factors such as use of force, the unconsciousness or inability to resist of the victim, or misrepresentation by the perpetrator.[530]

279. In *Prosecutor v. Dragan Nikolić*, also in the ICTY, the Appeals Chamber recognized that wartime sexual violence can go beyond individual acts of rape.[531] Nikolić, a Bosnian-Serb commander in charge of a detention camp, was convicted of aiding and abetting rapes committed by his subordinates.[532] In another case of aiding and abetting rape, the ICTR found Laurent Semanza, a bourgmestre (mayor) and de facto leader of the Interahamwe, a paramilitary organization, guilty of "instigating rape" even where it was not proven that he held effective control over the individuals who committed the rapes:[533]

> For an accused to be convicted of instigating, it is not necessary to demonstrate that the accused had "effective control" over the perpetrator. The requirement of "effective control" applies in the case of responsibility as a superior under Article 6(3) of the Statute. In the case at hand, even though the Trial Chamber found that it had not been proven that the Appellant had effective control over others (and thus refused to convict him on the basis of his superior responsibility), this does not mean that the Appellant could not be convicted for instigating.[534]

280. Thus, even one who does not control others can be held liable for rape if it is found that he or she encouraged another to rape. In *Prosecutor v. Jean-Paul Akayesu*, the Tribunal found that:

> The Accused aided and abetted . . . acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal, while he was present on the premises [or] . . . in his presence . . . and by facilitating the commission of these acts through his words of encouragement in other acts of sexual violence, which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place.[535]

281. A tolerance for a climate of sexual violence can therefore be sufficient to create liability for sexual violence. This is especially true when such a climate is promulgated by upper level officials in a coercive environment such as a prison camp.

282. Further, the crime of sexual violence covers broad categories of actions. In the trial court decision of *Prosecutor v. Kvocka* et al., the court noted that "[s]exual violence would also include such crimes as sexual mutilation, forced marriage, and *forced abortion* as well as the gender related crimes explicitly listed in the ICC Statute as war crimes and crimes

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530 *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, paras. 457–458 (Int'l Crim. Trib. for the Former Yugoslavia 22 Feb. 2001).
531 *Prosecutor v. Nikolić*, Case No. IT-94-2-T, Judgment, paras. 87–90, 117 (Int'l Crim. Trib. for the Former Yugoslavia 18 Dec. 2003).
532 *Prosecutor v. Nikolić*, Case No. IT-94-2-T, Judgment, paras. 87–90, 117 (Int'l Crim. Trib. for the Former Yugoslavia 18 Dec. 2003).
533 *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment, para. 551 (Int'l Crim. Trib. for Rwanda 15 May 2003).
534 *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Judgment, para. 257 (Int'l Crim. Trib. for Rwanda 20 May 2005).
535 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, para. 693 (Int'l Crim. Trib. for Rwanda 2 Sept. 1998).

against humanity, namely 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization" and other similar forms of violence.'"[536]

3. The Evidence Presented

283. Counsel provided persuasive evidence to demonstrate that DPRK officials committed acts of sexual violence in the form of forced abortion and rape in the political prison camps and in detention centers.

a. Forced Abortion

284. Victims of rape in political prison camps who become pregnant are subject to forced abortions or their child is killed at birth.[537] While many forced abortions on pregnant women repatriated from China occur during detainment in detention centers, if a pregnancy goes undetected during a political prisoner's time in the detention center, a forced abortion will then be carried out in a political prison once the prisoner has been transferred.[538]

285. There is extensive evidence that female prisoners who were forcibly repatriated from China and who were impregnated in China were either forced to have an abortion or faced threats that their baby would be killed at birth, as it was assumed the father might be Chinese.[539] Women who were impregnated by Chinese men were "routinely punished and their babies killed, accompanied by racial slurs and refusal to accept children who were part Han Chinese." [540] This resulted in countless abortions at detention facilities, with some prisoners sent thereafter to political prison camps.[541]

286. Former prisoner No. 8 witnessed six forced abortions at Chongjin provincial SSD detention center in mid-2000.[542] Lee Chun-shim saw multiple abortions induced through injections of the drug Ravenol into the prisoner's womb, causing babies to be born alive prematurely.[543] She observed that "three to four month premature fetuses were born crying and moaning, but the fetuses were wrapped in newspapers and put in a bucket until buried in a yard behind the jail."[544] Affiant Kim Ha-neul testified to witnessing an abortion being induced by men standing on a plank placed on top of a pregnant woman's stomach at the Soo-sung Detention Camp.[545]

287. In cases where pregnancy went undetected in a detention center or was detected but left unaddressed (*e.g.,* by paying a bribe or other means), abortions would later be carried out in political prisons through various ways.[546] One witness was sent to Camp 18 while pregnant and, near the end of her pregnancy, was kicked by a guard until she went into

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536 *Prosecutor v. Kvocka*, Case No. ICTY-98-30/1-T, Judgment, para. 182 n.343 (Int'l Crim. Trib. for the Former Yugoslavia 2 Nov. 2001) (emphasis added). "The Nuremberg Judgment and the ICTY recognized forced abortion as a crime against humanity." COI Report, para. 1055 n.1572.

537 COI Report, para. 766.

538 COI Report, para. 425. Although this Inquiry focuses primarily on conduct within the DPRK's political prisons, for purposes of this section, the Inquiry report has included forced abortions that also occur in detention centers due to their connection with the DPRK political prison system.

539 *See* COI Report, para. 426; *see also* James Brooke, *N. Koreans Talk of Baby Killings*, The N.Y. Times, (10 June 2002), http://www.nytimes.com/2002/06/10/world/n-koreans-talk-of-baby-killings.html.

540 *See* Hawk, *The Hidden Gulag Exposing North Korea's Prison Camps, supra* note 323 at 72; Hawk, *The Hidden Gulag, Second Edition, supra* note 6 at 152–154.

541 *See* Hawk, *The Hidden Gulag Exposing North Korea's Prison Camps, supra* note 323 at 72; Hawk, *The Hidden Gulag, Second Edition, supra* note 6 at 152–154.

542 Hawk, *The Hidden Gulag Exposing North Korea's Prison Camps, supra* note 323 at 72.

543 Hawk, *The Hidden Gulag, Second Edition, supra* note 6 at 153.

544 Hawk, *The Hidden Gulag, Second Edition, supra* note 6 at 153.

545 Kim Ha-neul Aff. (7 Nov. 2016).

546 COI Report, para. 426.

premature labor.[547] The guards beat her until she let go of her baby and when she regained consciousness, she found her baby in a pile of corpses.[548]

288. Unauthorized pregnancies that occur within the camps are also forcibly aborted. One prisoner from Camp 15 witnessed two cases where "women who became pregnant without authorization were forced to have an abortion."[549] One of the two cases of forced abortion included an injection causing premature delivery late in the pregnancy term.[550] The prisoner was required to help the pregnant women deliver the dead fetus.[551]

289. Some rape victims would self-induce an abortion for fear they would be killed if their pregnancy were discovered.[552] Methods of abortion included eating dirt and poisoning oneself by eating boiled peony flower roots.[553] Additionally, some rape victims induced abortions by inserting a rubber tube into the vagina, which was described as feeling as if "something is piercing deep inside the [pregnant] woman's belly."[554]

b. Rape

290. Kim Su-jong testified that his mother was raped by Officer Paik at Camp 18. His mother was so ashamed she took her own life.[555] He also testified that the rape of teenage girls at Camp 18 and their subsequent decision to commit suicide out of shame was so common that guards were deployed to the Daedonggang River into which prisoners had been jumping in order to thwart such suicide attempts.[556]

291. A22, a former SSD officer, reported that rape was very common in prison camps: "Pretty women among other female prisoners are working in the garment factory. The SSA officers can get all the women there if they want. If a woman refuses to accept the demands of SSA officers, the officers make an excuse and easily kill her."[557]

292. A20, a former prison camp officer in Camp 18, reported that: "[Rape] happened quite often. . . . Party officers and camp officials usually committed rape and they were later criticized at party meetings. Prisoners involved in rapes are subject to legal punishments. But few female victims would appeal. Rapes did occur, but they seldom led to legal disputes."[558]

293. According to *Political Prison Camps in North Korea Today*, "[i]t is reported that the percentage of rape cases in political prison camps was quite high, because female prisoners were exposed to the risk of rape by SSA officers and fellow male prisoners."[559]

294. Although rape is not formally condoned and SSD agents and guards have been ordered not to have sexual engagement with the prisoners, the punishments are typically light for those SSD personnel who are caught.[560] Former prison guard Ahn Myong-chol stated that, while ordinary guards could face punishment for sexual activity with inmates, higher-

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547 COI Report, para. 764 (citing testimony of TSH019).
548 COI Report, para. 764 (citing testimony of TSH019).
549 COI Report, para. 764 (citing testimony of TLC018).
550 COI Report, para. 764 (citing testimony of TLC018).
551 COI Report, para. 764 (citing testimony of TLC018).
552 *Political Prison Camps in North Korea Today, supra* note 103 at 492.
553 *Political Prison Camps in North Korea Today, supra* note 103 at 492.
554 *Political Prison Camps in North Korea Today, supra* note 103 at 493.
555 Kim Su-jong Aff. (17 Nov. 2016).
556 Kim Su-jong Aff. (17 Nov. 2016).
557 *Political Prison Camps in North Korea Today, supra* note 103 at 489 (quoting testimony of A22 (former SSD officer, Camp 22, 1987–1990)).
558 *Political Prison Camps in North Korea Today, supra* note 103 at 491–492 (quoting A20 (former camp officer, Pongchang-ni, Camp 18, 1989–2006)).
559 *Political Prison Camps in North Korea Today, supra* note 103 at 491.
560 COI Report, para. 766.

ranking SSD agents could sexually abuse inmates with impunity as long as the woman did not become pregnant.[561] Where pregnancy occurred, the official would be dismissed, whilst the pregnant inmate would either be secretly executed or assigned to harsh mining work. In one case, Ahn Myong-chol presented testimony that the commander of his unit raped and impregnated a prisoner. When the woman gave birth she was taken to the punishment block, and her newborn baby was fed to prison guard dogs.[562] Ahn Myong-chol records another young woman being raped by a guard and subsequently sent to the punishment block.[563] He noted that the young woman was tortured and "reassigned to harsh labor in a coal mine, where she lost both of her legs in an accident."[564]

4. Analysis and Findings

295. For the reasons set forth below, we find that Counsel has proven all of the elements of sexual violence, and that there are reasonable grounds to believe that the crime against humanity of sexual violence in the form of forced abortion and rape has been committed within the DPRK's political prisons.

296. For the reasons set forth below, we find that the elements of the crime of sexual violence have been proven and that the crime against humanity of sexual violence has been committed within North Korean political prisons.

297. The first element specific to the crime against humanity of sexual violence requires that the perpetrator committed an act of a sexual nature against one or more persons or caused one or more persons to engage in an act of a sexual nature. We find that the evidence provided demonstrates that sexual violence, including rape, sexual assault, and forced abortion, is rampant in the prison camps and has been perpetrated by prison guards and officials at various levels of command against prisoners over whom they exert control.

298. The first element of the crime of sexual violence further requires that the act was procured by force or threat of force or coercion. "Coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion and coercion may be inherent in certain circumstances such as . . . military presence . . . at the bureau communal."[565] Such coercive circumstances certainly existed at the prison camps. As noted above, prisoners are powerless to resist sexual advances from prison guards and officials. They are in constant fear of punishment, whether it be execution or forced abortion and have no agency to make decisions regarding their own bodily integrity. Additionally, the evidence convincingly establishes that female prisoners who became pregnant through rape had their pregnancies forcibly aborted and that those prisoners who chose to abort their pregnancies "voluntarily" did so due to fear of punishment if they did not abort the fetus; thus, we agree with the prosecution's view that "any voluntariness is vitiated by the presence of a coercive environment and the threat of force."[566] As such, these abortions also fall within the category of forced abortions.

299. The second element specific to the crime of sexual violence requires that the gravity of the conduct is comparable to the other offences in Article 7(1)(g).[567] The other sexual violence committed by officials in these prison camps against their prisoners, including

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561 COI Report, para. 766.
562 COI Report, para. 766.
563 COI Report, para. 766.
564 COI Report, para. 766.
565 *Prosecutor v. Gombo*, Case No. ICC-01/05-01/08, Judgment, para. 103 (ICC 21 Mar. 2016) (citing *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, para. 688 (Int'l Crim. Trib. for Rwanda 2 Sept. 1998)).
566 Prosecutor's Br., para. 127.
567 ICC, *Elements of Crimes*, art. 7(1)(g)-6.

forced abortion and other sexual assault, is of a similar nature as rape. Further, the circumstances under which inmates suffered sexual violence are of a similar coercive nature and have a similar demoralizing effect as rape. Both crimes violate the prisoner's sexual autonomy.

300. The third element specific to the crime of sexual violence requires that the perpetrator was aware of the factual circumstances that established the gravity of the conduct. This element is satisfied for the reasons set forth in Part VII(L). The extreme and gruesome nature of the above-described assaults, forced abortions and other punishments to which prisoner-victims are subjected for their involvement in any sexual activity, consensual or otherwise, are further evidence that the prison camp guards carried out these activities not on an isolated basis but rather as part of a program of terror and oppression targeting female prisoners. Women punished for sexual "indiscretions" served as a convenient example by which the prison guards, led by their superiors in the SSD and higher branches of the DPRK government, could ensure that all female prisoners understood the degree to which their captors controlled them.

301. The first element specific to the crime of rape requires that the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.[568] "While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual."[569] The facts set forth above (including compelling evidence that female prisoners were impregnated by their captors) establish that prisoners had sexual organs inserted into their bodily orifices, constituting rape under international law.

302. The second element specific to the crime of rape requires that the invasion was committed by force or by threat of force or coercion.[570] The facts above establish that the sexual invasions of prisoners were committed without the victims' consent. As noted above, the prisoners were powerless to refuse any sexual advances from their captors, as the evidence indicates that a refusal to submit to an official's sexual advances would often result in harsh treatment under the authority of the official in question.

303. The evidence presented in Part VII(L) below establishes that the common elements of the crime against humanity of sexual violence in the form of forced abortion and rape have been met.

5. Conclusion

304. Based on the evidence presented to the Inquiry, we find reasonable grounds to believe that the crime against humanity of sexual violence in the form of forced abortion and rape has been committed in North Korean political prison camps and related facilities.

H. Persecution

305. Persecution is a crime against humanity involving the "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity," with the specific intent of discriminating against the victim.[571] Under the Rome Statute, persecution against "any identifiable group or collectivity on

[568] ICC, *Elements of Crimes*, art. 7(1)(g)-1.
[569] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, para. 596 (Int'l Crim. Trib. for Rwanda 2 Sept. 1998).
[570] ICC, *Elements of Crimes*, art. 7(1)(g)-1.
[571] Rome Statute, art. (7)(2)(g); Prosecutor's Br., para. 37 n.76 (*citing* COI Report, para. 1057).

political, racial, national, ethnic, cultural, religious, gender, or other grounds recognized as impermissible under international law" is considered a crime against humanity.[572] Evidence has been presented that the SSD and related parties in the DPRK regime persecute individuals on the basis of their religious, political, or ethnic identity. This persecution has resulted in severe harm to the regime's victims, including complete deprivation of liberty through incarceration in political prison camps, torture and even death. Based on the evidence presented and consistent with established principles of international law, we find reasonable grounds to believe that the crime of persecution has been committed in the DPRK's political prison camps and related facilities.

1. Elements of Persecution

306. Under the Rome Statute and customary international law, the offense of persecution consists of the following elements:

(i) the perpetrator severely deprived, in violation of international law, the fundamental rights of one or more persons;

(ii) the persons were targeted by reason of their identity with a group or collectivity or the group was targeted collectively as such;

(iii) the targeting of the person(s) was based on political, racial, national, ethnic, cultural, religious, or gender grounds as defined in Article 7(3) of the Rome Statute, or other grounds that are universally recognized as violating international law;

(iv) the conduct was committed in connection with any act referred to in Article 7(1) of the Rome Statute or any crime within the jurisdiction of the applicable court;

(v) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

(vi) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[573]

307. Persecution need not be accompanied by other violations of international law to be impermissible. The discrimination itself is sufficient to make the act inhumane.[574]

308. Persecution encompasses a wide range of discriminatory acts, including physical or economic discrimination that violate a person's basic fundamental rights.[575] However, the discrimination must be based on one of the enumerated bases for which such discrimination is not permitted under the Statute (*i.e.*, political grounds, race, ethnicity, culture, religion, or gender) and be of a gravity or severity similar to those other crimes enumerated under the Statute.[576]

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572 Rome Statute, art. (7)(1)(h).
573 ICC, *Elements of Crimes*, art. 7(1)(h).
574 *Prosecutor v. Kupresic*, Case No. IT-95-16-T, Judgment, para. 616 (Int'l Crim. Trib. for the Former Yugoslavia 14 Jan. 2000).
575 *Prosecutor v. Kupresic*, Case No. IT-95-16-T, Judgment, para. 616 (Int'l Crim. Trib. for the Former Yugoslavia 14 Jan. 2000).
576 *Prosecutor v. Kupresic*, Case No. IT-95-16-T, Judgment, para. 619 (Int'l Crim. Trib. for the Former Yugoslavia 14 Jan. 2000).

2. Prior Cases

309. The principle of JCE has been applied to the crime of persecution under the theory that the perpetrator's knowing participation in the system furthers the crime.[577] Although the Prosecution must establish that the individual contributed to the system, "participation need not involve commission of a specific crime . . . but may take the form of assistance in, or contribution to, the execution of the common plan or purpose."[578]

310. In *Kvocka,* the ICTY found the JCE to persecute non-Serbs among the leadership at a prison camp through the application of extreme physical and mental violence to non-Serbs imprisoned in the prison camps, even though that leadership did not personally administer any violent acts.[579] The Court found that by contributing to the administration and functioning of the prison, the knowledge of abusive treatment and criminal nature of the prison and willingness to remain in a position of authority and influence, rendered the leadership liable under the theory of JCE.[580]

3. The Evidence Presented

311. A number of events described in detail at the Hearing implicate the crime of persecution and are shown to be a usual occurrence in political prison camps.

a. Targeting on the Basis of Membership With a Particular Group and Enumerated Characteristics

312. The following evidence was submitted to show targeting of individuals based on characteristics specifically protected under international law, such as religion, political identity, and ethnicity, with respect to imprisonment in political prison camps. Evidence was further presented to show that imprisonment specifically targeted those persons on the basis of their membership with the aforementioned groups.

i. Religious Persecution

313. Multiple witnesses testified to watching prisoners in the political prison camps being tortured and murdered for their religious affiliation. Kim Ha-neul witnessed the murder of Oh Seong-hwa for her religious affiliation.[581] Also, Kim Tae-jin testified to seeing seven people being tortured at Camp 15 for participating in Christian meetings.[582] Further, a former guard at numerous political prison camps stated that "[t]here was an abundance of references to Christian groups for the purposes of annihilation . . . Christians were reactionaries and there were lots of instructions and mottos to wipe out the seed of reactionaries."[583]

314. Witnesses testified to seeing Christians (or those suspected of being Christians) incarcerated in specific zones within the prison camp at which prisoners were subjected to more severe deprivation.[584] Kim Eun-cheol testified that he witnessed five people accused of reading the Bible being sent to the total control zone or executed at Camp

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577 *Prosecutor v. Kvocka,* Case No. IT-98-30/1-A, Judgment, para. 367 (Int'l Crim. Trib. for the Former Yugoslavia 28 Feb. 2005).
578 *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, para. 227 (Int'l Crim. Trib. for the Former Yugoslavia 15 July 1999).
579 *Prosecutor v. Kvocka,* IT-98-30/1-T, Judgment, paras. 374–386, 397 (Int'l Crim. Trib. for the Former Yugoslavia 2 Nov. 2001).
580 *Prosecutor v. Kvocka,* IT-98-30/1-T, Judgment, para. 407 (Int'l Crim. Trib. for the Former Yugoslavia 2 Nov. 2001).
581 Kim Ha-neul Aff. (7 Nov. 2016).
582 Kim Tae-jin Aff. (10 Nov. 2016).
583 *North Korea: A Case to Answer A Call to Act,* Christian Solidarity Worldwide 64 (2007), http://www.csw.org.uk/2007/06/20/report/35/article.htm (citing statement of Ahn Myong-cheol).
584 *See* COI Report, paras. 254–256.

15.[585] Mr. A testified that his sister was imprisoned in Camp 15 in part because she practiced Christianity before being caught and repatriated back to the DPRK. She was never heard from again.[586]

315. These reports are consistent with the testimony of a former high-level official, who described the DPRK policy of sending those who attempted to reach South Korea using Christian channels to political prison camps, while those using other channels might be sent to ordinary prisons.[587]

ii. Political Persecution

316. The entire network of political prisons is designed to silence contrary political views and to persecute those who harbor such views. Kim Ha Neul, in her testimony, recounted witnessing a homicide that was perpetrated as a result of a prisoner's political statement. A young prisoner, presumed to be Kim Myung-soon, shouted "down with North Korean socialism" and "may divine punishment befall the bastard Kim Jong-il" as she suffered from a coughing fit in her detention cell. After hearing Ms. Myung-soon's shouts, National Security Border officers ran to her cell and struck Ms. Myung-soon, fracturing her skull, and stabbed her with a knife, killing her. The officers were the detention camp's lead security officers.[588]

iii. Persecution Based on Ethnicity

317. There is also evidence of forced abortions of prisoners believed to be pregnant with half-Chinese babies, reflecting the DPRK's persecution of ethnically mixed-race children.[589] Female prisoners who were forcibly repatriated from China and impregnated in China were either forced to have an abortion or faced threats that their baby would be killed at birth, as it was assumed the father might be Chinese.[590] Women who were impregnated by Chinese men were "routinely punished and their babies killed, accompanied by racial slurs and refusal to accept children who were part Han Chinese."[591] One witness testified to seeing guards at a SSD detention facility take away the new-born baby of a repatriated woman and refer to the baby as "not human."[592] The guards also stated that the baby did not deserve to live.[593]

b. Severe Deprivation of Fundamental Rights

318. Persons imprisoned in the political prison camps are deprived of all but the most basic of human needs.[594] The distinction between the general prison camp and the "total control zone" described by a number of witnesses only serves to illustrate the severe deprivation suffered by persons in the political prison camp system.[595]

319. As detailed throughout the Hearing, the deprivation often resulted in severe malnutrition, illness, and death.

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585 Kim Eun-cheol Aff. (11 Nov. 2016).
586 COI Report, para. 256.
587 COI Report, para. 410.
588 Kim Ha-neul Aff. (7 Nov. 2016).
589 Although this Inquiry focuses primarily on conduct within the DPRK's political prisons, for purposes of this section, the Inquiry report has included forced abortions that also occur in detention centers due to their connection with the DPRK political prison system.
590 See COI Report, para. 426; see also Brooke, N. Koreans Talk of Baby Killings, *supra* note 539.
591 See Hawk, The Hidden Gulag Exposing North Korea's Prison Camps, *supra* note 323 at 72; Hawk, The Hidden Gulag, Second Edition, *supra* note 6 at 152–154.
592 COI Report, para. 426.
593 COI Report, para. 426.
594 *See, e.g.,* Prosecutor's Br., paras. 87, 92, 98, 118.
595 *See, e.g.,* Prosecutor's Br., paras. 109, 112.

4. Analysis and Findings

320. As detailed below, this evidence establishes all of the elements of the crime of persecution. The facts above establish that people in the political prison camps were: (i) severely deprived of their fundamental rights; (ii) by reason of their identity with a group or collectivity; (iii) based on political, racial, national, ethnic, cultural, or religious grounds; and (iv) was committed in connection with any act referred to in Article 7(1) of the Rome Statute or any crime within the jurisdiction of the applicable court.

321. The first element specific to the crime of persecution is that persons subjected to the alleged persecution be severely deprived of fundamental rights.[596]

322. Fundamental rights have been defined expansively to include "life, liberty and basic humanity enjoyed by members of the wider society."[597] Consequently, the deprivation of liberty presented by Counsel and supported by witness testimony illustrates the deprivation of fundamental rights of liberty and basic humanity that are recognized as fundamental.

323. In contrast, "severe deprivation" has not been explicitly described by tribunals, but is informed by those circumstances where deprivation was found. Such occurrences include seizure, collection, segregation, or forcible transfer of civilians to camps; "murder, imprisonment, and deportation;" and economic deprivation where attacks on property constitute "a destruction of the livelihood of a certain population."[598]

324. There is sufficient evidence to find that persons in the prison camps have been severely deprived of their fundamental rights.

325. The second element specific to the crime of persecution is that the deprivation occurs because of the victim's membership with a particular group.[599] This can be evidenced by acts directed at a specific ethnic group[600] or a group of persons because of their religion or political views.[601]

326. Persons affiliated with Christianity and organizations promoting the Christian faith are selected for imprisonment in the political prison system.[602] Simply reciting verses from the Bible or being exposed to Christianity outside of the country resulted in imprisonment in the political prison system – and more specifically, within the "total control zones" of individual prisons.[603] This persecution was further confirmed by former regime official Thae Yong-ho, whose affidavit explains that the political prison camps were established to target those deemed enemies of the [S]tate, including "religious persons."[604]

327. Similarly, seeking to exercise political views that are critical of the DPRK regime has resulted in severe punishment. As Kim Ha-neul witnessed, when an inmate at a detention center shouted out against the Supreme Leader and the regime, the inmate was swiftly executed.[605]

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596 ICC, *Elements of Crimes*, art. 7(1)(h).
597 *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-T, Judgment, para. 22 (Int'l Crim. Trib. for Rwanda 1 June 2000).
598 *Prosecutor v. Kordic,* Case No. IT-95-14/2-T, Judgment, para. 198 (Int'l Crim. Trib. for the Former Yugoslavia 26 Feb. 2001).
599 *Prosecutor v. Kvocka,* IT-98-30/1-T, Judgment, paras. 195–197 (Int'l Crim. Trib. for the Former Yugoslavia 2 Nov. 2001).
600 *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-T, Judgment, para. 22 (Int'l Crim. Trib. for Rwanda 1 June 2000).
601 *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, para. 438 (Int'l Crim. Trib. for the Former Yugoslavia 15 Mar. 2002).
602 Prosecutor's Br., para. 131(i).
603 *See also, e.g.,* Kim Ha-neul Aff. (7 Nov. 2016); Kim Eun-cheol Aff. (11 Nov. 2016); Kim Tae-jin Aff. (10 Nov. 2016); COI Report, para. 256.
604 Thae Yong-ho Aff. (23 Mar. 2017).
605 *See* Kim Ha-neul Aff. (7 Nov. 2016).

328. The third element specific to the crime of persecution is that the group membership for which the victim was singled out for severe deprivation be expressly enumerated under Article 7 of the Rome Statute. Thus, it is not sufficient that the persons being discriminated against be part of an identifiable group – they must be discriminated against on the basis of characteristics defined and protected under the Rome Statute. In short, they must be discriminated against on the basis of, *inter alia*, their religion or politics.[606]

329. The factual record demonstrates that the reason for the deprivation detailed by witnesses to this proceeding is due to religion or political philosophy. Persons detained for possible imprisonment after being repatriated from China are specifically identified for assignment within the political prisons based, in part, on their affiliation with Christianity.[607] Women repatriated when pregnant are subjected to forced abortions as described above.[608] And, persons are executed for attempting to exercise political speech contrary to official policies.[609]

330. The fourth element specific to the crime of persecution is that the persecution be perpetrated "in connection with any act referred to [in Article 7(1) of the Rome Statute] or any crime within the jurisdiction of the [applicable] court." However, tribunals have found this element to be superfluous, noting that a restrictive interpretation of "persecution" is inconsistent with other provisions in the Rome Statute and contradict the expansive definition of "persecution" enumerated in Article 7(g).[610] Consequently, there is no requirement that the crime of persecution be prosecuted in connection with other crimes enumerated in the Rome Statute.[611] Notwithstanding the fact this element has been dismissed by previous tribunals, the requirement is met in this case as demonstrated by the overwhelming evidence showing that other crimes against humanity have been committed in the North Korean political prison camps, as detailed in Part VII of this opinion.

331. The evidence presented in Part VII(L) below establishes that the common elements of the crime against humanity of persecution have been met.

5. Conclusion

332. Based on the evidence presented to the Inquiry, we find reasonable grounds to believe that the crime against humanity of persecution has been committed in North Korean political prison camps and related facilities.

I. Enforced Disappearances

333. Enforced disappearance is a crime against humanity when knowingly committed by (or with the authorization or support of) the government as part of a widespread or systematic attack directed against a civilian population. As detailed below, evidence has been presented that enforced disappearances are widespread in the DPRK, perpetrated by the State. Based on the evidence presented and consistent with established

606 *Prosecutor v. Kvocka,* Case No. IT-98-30/1-A, Judgment, paras. 343–347 (Int'l Crim. Trib. for the Former Yugoslavia 28 Feb. 2005).
607 *See, e.g.,* Kim Ha-neul Aff. (7 Nov. 2016); Kim Eun-cheol Aff. (11 Nov. 2016); Kim Tae-jin Aff. (10 Nov. 2016); COI Report, para. 256.
608 Prosecutor's Br., para. 128.
609 Testimony of Choi Hyun-jun (8 Dec. 2016).
610 *Prosecutor v. Kupreskic*, Case No. IT-95-16-A, Judgment, paras. 578–581 (Int'l Crim. Trib. for the Former Yugoslavia 14 Jan. 2000). *See also Prosecutor v. Kordic,* Case No. IT-95-14/2-T, Judgment, para. 197 (Int'l Crim. Trib. for the Former Yugoslavia 26 Feb. 2001).
611 *Prosecutor v. Kupreskic*, Case No. IT-95-16-A, Judgment, para. 581 (Int'l Crim. Trib. for the Former Yugoslavia 14 Jan. 2000).

principles of international law, we find reasonable grounds to believe that the crime of enforced disappearance has been committed in the DPRK's political prison camps and related facilities.

1. Elements of the Crime of Enforced Disappearances

334. The offense of enforced disappearance is a crime against humanity under both Article 7(1)(i) of the Rome Statute and under customary international law[612] when "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[613]

335. Under Article 7(1)(i) of the Rome Statute, the offense consists of the following elements:

(i) the arrest, detention, or abduction of persons (or "deprivation of liberty");

(ii) the perpetrator was aware that:

(a) such deprivation of liberty would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or

(b) such refusal was preceded or accompanied by that deprivation of liberty.

(iii) by or with the authorization, support, or acquiescence of a state or a political organization (or "state involvement");

(iv) followed by a refusal to acknowledge that deprivation of freedom has occurred or to provide information on the fate or whereabouts of the person that has been arrested, detailed, or abducted (or "state denial or concealment");

(v) with the intention (or "*mens rea*") of removing the person from the protection of the law for a prolonged period of time;

(vi) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

(vii) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[614]

336. The Declaration for the Protection of All Persons from Enforced Disappearance provides that "[a]ny act of enforced disappearance is an offence to human dignity . . . and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the [UDHR] and reaffirmed and developed in international instruments in this field."[615]

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612 *Rule 98. Enforced Disappearance: Rule 98. Enforced Disappearance is prohibited*, Int'l Comm. of the Red Cross (2017), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_ rule98.

613 Rome Statute, art. 7(1)(i).

614 ICC, *Elements of Crimes*, art. 7(1)(i). The Declaration on the Protection of All Persons from Enforced Disappearance and the International Convention for the Protection of All Persons from Enforced Disappearance do not position this element as a *mens rea* requirement but instead requires that the state acts "place(s) such a person(s) outside the protection of the law." For this reason, the customary international law standard for this element of the crime of enforced disappearance is not necessarily represented by the Rome Statute, but instead a lower standard that does not require intent. Despite this uncertainty of the standard under international law, we proceed with our analysis under the Rome Statute standard.

615 Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, art. 1(1) (12 Feb. 1993), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/47/133.

"No circumstances whatsoever . . . may be invoked to justify enforced disappearances."[616]

337. The International Convention for the Protection of All Persons from Enforced Disappearance is an international human rights instrument of the United Nations, modeled after the UN Convention Against Torture that details the unlawfulness of enforced disappearance.[617] This Convention supports and expands upon the protections against enforced disappearance as specified in the Rome Statute and under customary international law.

2. Prior Cases

338. Numerous international human rights cases have reviewed allegations of enforced disappearances and applied international human rights law. The ICTY in the case of *Prosecutor v. Kupreskic* et al.[618] defined enforced disappearance as an inhumane act and a crime against humanity. The tribunal took into account that enforced disappearance consisted of the violation of several human rights and was prohibited under the UN Declaration for the Protection of All Persons from Enforced Disappearances. The ICTY in *Prosecutor v. Kvocka* et al.[619] later cited the *Kupreskic* tribunal's decision, with approval.[620]

339. The *Rasevic* and *Todovic* Bosnian War Crimes panels convicted those perpetrators of enforced disappearance under the liability theory of co-perpetration through systematic JCE.[621] Giving false information about a victim's whereabouts or fate was viewed to constitute the third element of the offense, refusal or failure to give information.[622]

340. The Inter-American Commission and Court of Human Rights have found that enforced disappearances violate the right to liberty and security of person, the right to a fair trial and the right to life.[623] Additionally, the ECCC has found that enforced disappearances are inhumane acts.[624]

3. The Evidence Presented

341. As described below, Counsel has provided extensive evidence, including witness testimony, to demonstrate that DPRK officials carried out numerous acts of enforced disappearances. These disappearances often are carried out secretly, with close family members, friends, coworkers and neighbors never hearing from the disappeared individual ever again.[625] In fact, because the regime does not acknowledge that political prisons even exist,[626] in many cases relatives of political prisoners are never told where

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616 Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, art. 7 (12 Feb. 1993), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/47/133.

617 The UNGA on 20 December 2006 adopted the International Convention for the Protection of All Persons from Enforced Disappearance, which entered into force on 23 December 2010. *See* G.A. Res. 61/177 (20 Dec. 2006), https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&chapter=4&clang=_en.

618 *Prosecutor v. Kupreskic* et al., Case No. IT-95-16-T, Judgment, para. 566 (Int'l Crim. Trib. for the Former Yugoslavia 14 Jan. 2000).

619 *Prosecutor v. Kvocka*, Case No. I-98-30/1-T, Judgment, para. 208 (Int'l Crim. Trib. for the Former Yugoslavia 2 Nov. 2001).

620 *Prosecutor v. Kvocka*, Case No. I-98-30/1-T, Judgment, paras. 206–211 (Int'l Crim. Trib. for the Former Yugoslavia 2 Nov. 2001).

621 *See Prosecutor v. Rašević & Todović,* Case No. X-KR-06/275, First Instance Verdict, 160-161 (Ct. of Bosnia and Herzegovina 28 Feb. 2008); see also Brian Finucane, *Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War,* 35 Yale J. of Int'l Law 171, 188–189 (2010), https://campuspress.yale.edu/yjil/files/2016/09/35-1-finucane-enforced-disappearance-1tcwq1f.pdf.

622 *Prosecutor v. Rašević & Todović*, Case No. X-KR-06/275, First Instance Verdict, 98 (Ct. of Bosnia and Herzegovina 28 Feb. 2008).

623 *See Rule 98. Enforced Disappearance: Rule 98. Enforced Disappearance is prohibited, supra* note 612.

624 *See Prosecutors v. Nuon & Khieu*, Case. No. 002-19-09-2007/ECC/TC, Judgment, paras. 642–643 (ECCC 7 Aug. 2014).

625 COI Report, para. 698.

626 COI Report, para. 731.

their relatives are detained. In certain cases, families can learn the whereabouts of their disappeared relative by bribing a public official or by relying on family connections.[627]

342. Affiant Kim Hye-sook testified that her father went missing after being arrested by SSD officers on 7 December 1974.[628] She was later incarcerated under the "guilt-by-association system" and every member of her family was imprisoned. She testified that, upon her release, she learned that records reflected her family had been "registered as the family of the '[e]xecuted.'"[629] She was never able to ascertain the grounds for her father's disappearance or the circumstances surrounding his apparent execution.[630]

343. Young Sun-kim testified that her husband was taken away to an unknown location on 4 July 1970 and to date remains missing. According to sources contacted by Young-Sun Kim, her husband was released from Camp 15 (Yodok) in 1999 and sent to another prison camp for an indefinite period of time because of whistleblowing by an OGD officer, Kwang Su-jeong, working in Pyongyang. Young Sun-kim testified that these acts occurred in Units 3 and 6 of Camp 15.[631]

344. Former prisoner A14 stated that, pursuant to SSD policy, SSD officers regularly arrested suspects at night, but neighbors nevertheless could hear screams emanating from the nearby house as a result of the arrest.[632]

345. Former prisoner A12 states that his/her uncle's grandmother, mother, and two children were all sent to a political prison camp; however, nobody in the family was told to which prison camp they were sent.[633]

346. According to former prisoner A05, his/her father left for work one morning never to return. Prisoner A05 was only told that his/her father had been arrested.[634]

4. Analysis and Findings

347. We hereby find that all of the elements of enforced disappearance have been established. The facts above establish that enforced disappearances were committed in political prison camps through: (i) deprivation of liberty, including arrests, detentions, and abductions; (ii) certain minimum awareness of the perpetrator; (iii) state involvement, support, or acquiescence; (iv) state denial or concealment; and (v) sufficient *mens rea*. These enforced disappearances have been committed as part of a widespread or systematic attack directed against the DPRK's civilian population. We find that the State's mass deprivation of liberty, coupled with the total and widespread denial and concealment of these arrests, detentions, and abductions, amounts to a deliberate tactic to perpetuate a culture of fear, obedience, and silence to further the State's political goals. These state acts of enforced disappearance amount to a crime against humanity in violation of international law.

348. Through accounts provided in connection with this Inquiry, it is clear that the deprivation of liberty of large numbers of people has occurred. This deprivation occurs through arrest, detention, and/or abduction of numerous persons. Persons are arrested without explanation or justification, taken away in the night and transferred to prison camps.

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627 COI Report, para. 698.
628 Kim Hye-sook Aff. (4 Nov. 2016).
629 Kim Hye-sook Aff. (4 Nov. 2016).
630 Kim Hye-sook Aff. (4 Nov. 2016).
631 Young Sun-kim Aff. (4 Nov. 2016).
632 *Survey Report on Political Prisoner's Camps in North Korea, supra* note 304 at 172, 234.
633 *Survey Report on Political Prisoner's Camps in North Korea, supra* note 304 at 173–174.
634 *Political Prison Camps in North Korea Today, supra* note 103 at 138.

These arrests sometimes are done using bindings, blindfolds, and other constraints and often without any prior notice. Accordingly, the first element of this crime has been met.

349. The second element of the crime of enforced disappearance requires that the perpetrators were aware that the prisoner-victims' deprivation of liberty would be (i) followed by a refusal to acknowledge the deprivation or to give information on :the fate or whereabouts of such person or persons; or (ii) that such refusal was preceded or accompanied by that deprivation of liberty. The evidence demonstrates that prisoner-victims were regularly and frequently taken by government agents and brought to prisons without any notification or acknowledgement given to those prisoner-victims' families. Multiple witnesses have given evidence that there was no communication between prisoner-victims and their family members regarding their whereabouts, the reasons for their deprivation of liberty, or their ultimate fate – often death. The perpetrators committed these enforced disappearances with the intention of removing the abducted persons from the protection of the law for a prolonged period of time. The perpetrators committed these crimes with awareness that those deprivations of liberty were done with a refusal to acknowledge those deprivations or to give information about those persons that were "disappeared" by the State. Accordingly, the second element of this crime has been met.

350. With regard to the third element, this deprivation of liberty was committed by the government and with its support, authorization and acquiescence. The state of the DPRK is a totalitarian state that controls all elements of society. In particular, the SSD wields enormous power and autonomy. The State has broad power to arrest and detain individuals and it broadly uses this power to secretly abduct, detain and imprison large numbers of people. Based on information regarding the State's involvement in these actions and first-hand accounts presented in this case, we find that the deprivation of liberty is being perpetrated by state actors, including the SSD. Indeed, as indicated in the affidavit of Thae Yong-ho, each political prison maintains its own party committee within the political prison structure and these prisons and their structures are sanctioned by the KWP OGD.[635] Accordingly, the third element of state involvement has been met.

351. Fourth, the evidence presented clearly proves state denial or concealment - to wit, the refusal by the government to acknowledge that deprivation of freedom has occurred (denial) or to provide information on the fate or whereabouts of the person that has been arrested, detailed, or abducted (concealment).

352. As detailed above, very few detainees receive any justification for their arrest through an explanation, presentation of a written warrant, or otherwise. Similarly, family members of detainees rarely receive any rationale or justification for their family member's arrest, nor do they receive information on their whereabouts or their fates. No third party entities, including human rights organizations, are permitted to observe or investigate the prison camps. The State does not allow any person to learn about the whereabouts of imprisoned persons, including the imprisoned person, their families and third party organizations.

353. Indeed, despite clear evidence of the existence of prison camps and the State's practice of abducting individuals in the manner described herein, the DPRK has never acknowledged these disappearances. Even beyond these disappearances, the State actively hides the existence of these prison camps and continues to deny their very existence. The State takes demonstrable methods to conceal the locations of the prisons to ensure that the State can continue to obscure proof of their existence. For example, one victim notes that their eyes were blindfolded when taken to a prison camp so that

[635] Thae Yong-ho Aff. (23 Mar. 2017).

they would not be able to determine the prison's location.[636] This evidence demonstrates that the State and its actors are taking active, demonstrable steps to conceal the existence of prison camps and the State's methods of populating those prisons. The State's efforts allow for the State to continue to refuse to acknowledge that it is depriving individuals of their freedom and allowing the State to justify their policy of not providing information on those individuals.

354. Through this evidence, it is clear that the State refuses to acknowledge that it is depriving people of their freedom. The State also refuses to provide information on the fate or whereabouts of the persons that have had their freedom taken by the State without legal justification. Therefore, the fourth element of state denial or concealment has been met.

355. With regard to the fifth element, based on the evidence presented, we find that the perpetrators conducted such disappearances with the intent to remove the persons from the protection of the law for a prolonged period of time. As detailed in the testimony, the State refuses to acknowledge the actions that deprived persons of their liberty, including the deprivation that occurs when individuals are put into political prisons. Family members rarely are able to ascertain the location of these disappeared individuals, or to know if they remain alive at all. Even so, mass disappearances are undoubtedly occurring, based on the evidence presented in this case. The circumstances of arrests alone – unannounced arrests, often at night and without explanation – strongly indicate that the perpetrators acted with the requisite intent to conduct such arrests without legal or procedural protections to the arrestee. Those arrests leading to disappearances involve a removal of legal protection for a prolonged period of time, because the individuals are placed in prison camps with no ability to apply for a hearing or to appeal their detention. Accordingly, the requisite *mens rea* has been met.

356. The evidence presented in Part VII(L) below establishes that the common elements of the crime against humanity of enforced disappearance have been met.

5. Conclusion

357. Based on the evidence presented to the Inquiry, we find reasonable grounds to believe that the crime against humanity of enforced disappearance has been committed in the DPRK in connection with its political prison camps and related facilities.

J. Apartheid

358. Apartheid, as defined under the Rome Statute, consists of inhumane acts similar to the other ten crimes against humanity that are committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intent of maintaining that regime.

1. Elements of Apartheid

359. Under the Rome Statute, the offense of "apartheid" consists of the following elements:

(i) the perpetrator committed an inhumane act against one or more persons;

(ii) such act was an act referred to in Article 7(1) of the Statute, or was an act of a character similar to any of those acts;

(iii) the perpetrator was aware of the factual circumstances that established the character of the act;

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[636] Hawk, *The Hidden Gulag, Second Edition, supra* note 6 at 50.

(iv) the conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups;

(v) the perpetrator intended to maintain such regime by that conduct;

(vi) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

(vii) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[637]

2. The Evidence Presented

360. Counsel states in its brief that of the eleven constituent crimes against humanity, apartheid is the only one not applicable with respect to the DPRK,[638] and Counsel does not present any evidence with respect to the crime of apartheid.

3. Conclusion

361. Due to the lack of argument or evidence put forth by Counsel on this point, we are unable to consider the DPRK's potential liability for the crime against humanity of apartheid. Accordingly, we take no position with respect to this point and note that this finding should in no way be read to prejudice the deliberations of any other panel or tribunal, should evidence and argument regarding this crime against humanity be presented to such a body in the future.

K. Other Inhumane Acts

362. As a party to the ICESCR, the CRC, and the ICCPR, the DPRK is obligated to treat all persons within its jurisdiction, particularly those who have been deprived of their liberty, with humanity and respect. Based on the evidence presented and consistent with established principles of international law, we find reasonable grounds to believe that the crime of other inhumane acts has been committed in the DPRK's political prison camps and related facilities.

1. Elements of Other Inhumane Acts

363. Under the Rome Statute, the offense of "other inhumane acts" consists of the following elements:

(i) the perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act;

(ii) such act was of a character[639] similar to any other act referred to in Article 7(1) of the Rome Statute;[640]

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637 ICC, *Elements of Crimes*, art. 7(1)(j).

638 Prosecutor's Br., para. 77.

639 The "character" of an act refers to the nature and gravity of such act.

640 Article 7, paragraph 1 of the Rome Statute designates the following crimes as "crimes against humanity" when knowingly committed as part of a widespread or systematic attack directed against any civilian population: murder, extermination, enslavement, deportation, or forcible transfer, imprisonment, torture, sexual violence, persecution, enforced disappearance, apartheid, and "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." Rome Statute, art. 7(1).

(iii) the perpetrator was aware of the factual circumstances that established the character of the act;

(iv) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

(v) the perpetrator knew that the conduct was part of or intended that the conduct be part of a widespread or systematic attach directed against a civilian population.[641]

364. The crime against humanity of "other inhumane acts" acts as a limited version of a catch-all provision within the Rome Statute, providing a means by which to ascribe liability where actions or omissions violate tenets of human dignity but do not fall neatly within one of the other crimes set forth in paragraph 1 of the Statute.[642] The "other inhumane acts" category of offenses ensures that the capacity to prosecute wrongdoers is not limited by the inability of drafters to envisage and enumerate all treatment so inhumane as to be comparable in gravity to acts that are specifically prohibited under statutory and case law.[643]

2. Prior Cases

365. International courts and tribunals have acknowledged that there does not need to be a direct relation between an assailant and a victim in order to establish that "other inhumane acts" have been committed. It has been established that family members[644] and third parties[645] can also suffer serious mental harm by witnessing egregious acts committed against others and that such exposure may constitute an "other inhumane act." In the *Niyitegeka* case in the ICTR, the defendant decapitated, castrated and used a spike to pierce the skull of a prominent Tutsi named Kabanda.[646] The defendant later had two men carry away the skull on the spike and hanged Kabanda's genitals on another spike for the public to see.[647] In a separate act, the defendant ordered one of his subordinates to undress the body of a Tutsi woman who had been shot dead, fetch a piece of wood, sharpen it and insert it into her vagina.[648] The court found that the acts committed by the defendant would cause mental suffering to civilians and constituted a

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641 ICC, *Elements of Crimes*, art. 7(1)(k).

642 *See Prosecutor v. Kupreškić* et al., Case No. IT-95-16-T, Judgment, paras. 562–566 (Int'l Crim. Trib. for the Former Yugoslavia 14 Jan. 2000) (in which the Trial Chamber stated that "[t]he phrase 'other inhumane acts' was deliberately designed as a residual category, as it was felt to be undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition.").

643 *See Prosecutor v. Kupreškić* et al., Case No. IT-95-16-T, Judgment, paras. 562–566 (Int'l Crim. Trib. for the Former Yugoslavia 14 Jan. 2000); *Report of the Comm'n to the Gen. Assembly on the Work of Its Forty-Eighth Session*, 1996 2 Y.B. of the Int'l L. Comm'n 50, U.N. Doc. A/CN.4/SER.A/ 1996/Add.1 (Part 2) [hereinafter "*Report of the I.L.C*"]. When tasked with drafting a statute defining criminal offenses under international law, the International Law Commission included the category of "other inhumane acts" in its draft Code of Crimes Against the Peace and Security of Mankind, which draft was referred by the U.N. General Assembly to the Committee on the Establishment of an International Criminal Court for consideration. *See Report of the I.L.C.* at 47–50; *Int'l L. Comm'n Rep. on the Work of Its Forty-Eighth Session*, G.A.Res. 51/160, paras. 1–3 (16 Dec. 1996). In commenting on its decision to include "other inhumane acts" in the draft Code, the International Law Commission noted that it "recognized that it was impossible to establish an exhaustive list of the inhumane acts which might constitute crimes against humanity. It should be noted that the notion of other inhumane acts is circumscribed by two requirements. First, this category of acts is intended to include only additional acts that are similar in gravity to those listed in the preceding subparagraphs. Secondly, the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity. . . . The Charter of the Nürnberg Tribunal (art. 6, subpara. (*c*)), Control Council Law No. 10 (art. II, subpara. (*c*)), the statute of the International Tribunal for the Former Yugoslavia (art. 5) and the statute of the International Tribunal for Rwanda (art. 3) as well as the Nurnberg Principles (Principle VI) also included 'other inhumane acts.'" *Report of the I.L.C.* at 50.

644 *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment, paras. 819–820 (Int'l Crim. Trib. for the Former Yugoslavia 14 Jan. 2000).

645 *Prosecutor v. Kayishema*, Case No, ICTR-95-1-T, Judgment, para. 153 (Int'l Crim. Trib. for Rwanda May 21, 1999).

646 *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgment, paras. 462–467 (Int'l Crim. Trib. for Rwanda 16 May 2003).

647 *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgment, para. 462 (Int'l Crim. Trib. for Rwanda 16 May 2003).

648 *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgment, para. 463 (Int'l Crim. Trib. for Rwanda 16 May 2003).

serious attack on human dignity.[649] Based on the above, the defendant was found guilty of committing "other inhumane acts."[650]

366. In the Trial Chamber of *Prosecutor v. Kupreskic* et al., the family of Musafer Pušcul was forced to witness Pušcul's murder inside of their family home.[651] The court found this clearly constituted other inhumane acts, as it could be inferred the perpetrators knew that "witnessing the death of a loved one and the loss of a family home would cause serious mental suffering," and further, that it was obvious to the perpetrator at the time of the commission of the crime.[652] Further, the Appeals Chamber held that the defendants could be charged with both murder and other inhumane acts with respect to Pušcul's murder.[653]

3. The Evidence Presented

367. Public executions in prison camps are commonplace, with prisoners forced to witness the executions of fellow prisoners.[654] Forcing the prison population, including very young children, to witness the murder of fellow prisoners by hanging, gunfire, beatings, etc., is calculated to subdue the prison population.[655] As prison guard Ahn Myong-chol testified: "There were annual public executions . . . [Prison officials] would try to analyze the trends of the political prisoners and when the trends were unstable, there was always public executions. This was a way to control the political prisoners and as a method of execution, most were by AK rifle and there were hangings at times."[656] Further, forcing individuals to observe public executions and other forms of violence or torture is known to cause mental trauma and lasting psychological damage among North Korean defectors.[657]

368. Affiant Kim Hye-sook testified that approximately 20 to 30 people were publicly executed at Camp 18 every year.[658] Similarly, Affiant Kim Eun-cheol witnessed two incidents where prisoners were publicly executed for attempting to escape the prison camp.[659]

369. Affiant Kim Hye-sook described one incident where a security guard forced her to kneel with her hands tied behind her back and lift her chin. The guard then spit in her mouth and commanded her to swallow it without frowning or gagging, or she would be beaten. When she in fact frowned or gagged, she was beaten.[660]

370. Affiant Kim Ha-neul reported that the bodies of prisoners who died as a result of forced labor or torture were not buried. Rather, "their corpses were thrown into the cells of prisoners in solitary confinement" and later "strung on barbed-wire fences of the prison

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649 *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgment, para. 465 (Int'l Crim. Trib. for Rwanda 16 May 2003).
650 *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgment, para. 467 (Int'l Crim. Trib. for Rwanda 16 May 2003).
651 *Prosecutor v. Kupreškić* et al., Case No. IT-95-16-T, Judgment, para. 820 (Int'l Crim. Trib. for the Former Yugoslavia 14 Jan. 2000).
652 *Prosecutor v. Kupreškić* et al., Case No. IT-95-16-T, Judgment, paras. 820–822 (Int'l Crim. Trib. for the Former Yugoslavia 14 Jan. 2000).
653 *Prosecutor v. Kupreškić*, Case No. IT-95-16-A, para. 393 (Int'l Crim. Trib. for the Former Yugoslavia 23 Oct. 2001). The Appeals Chamber noted: "[t]he acts underlying the Article 5(a) (murder) charge involved killing or aiding and abetting the killing of Musafer Pušcul (count 16), whereas the acts underlying the Article 5(i) (other inhumane acts) charge involved forcibly removing a family from its home and holding family members nearby while Musafer Pušcul was being killed and burning the family home (count 18)." *Prosecutor v. Kupreškić*, Case No. IT-95-16-A, para. 393. (Int'l Crim. Trib. for the Former Yugoslavia 23 Oct. 2001).
654 COI Report, para. 834.
655 COI Report, para. 759.
656 Ahn Myong-chol's video testimony conducted at the NKSC headquarters in Seoul, on November 9, 2016 (KST).
657 Benjamin Eric Taylor, Eugene Chekaluk, and Joanne Bennett, *Post-Traumatic Stress Disorder, Depression and Anxiety among North Korean Refugees: A Meta-Analysis*, 14 Psychiatry Investigation 550–561(Sept. 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5639122/.
658 Kim Hye-sook Aff. (4 Nov. 2016).
659 Kim Eun-cheol Aff. (11 Nov. 2016).
660 Kim Hye-sook Aff. (4 Nov. 2016).

where crows would eat the eyes and flesh;" in part, this was done to instill a "deep sense of fear" in the prisoners.[661]

371. Affiant Kim Ha-neul provided a detailed description of the three torture chambers at the Soo-sung Detention Camp, where "[l]arge amounts of blood and ripped flesh were left on the walls of the chambers and there were corpses of people who died of torture were left to instill fear in the next prisoner [to be tortured]."[662]

372. It has been reported that pregnant prisoners were induced to give birth, only to have the newborn baby killed in front of the mother. A defector, Choi Yongh-hwa, witnessed an incident where a pregnant prisoner in a detention center was given a labor-inducing injection, resulting in the birth of her child. Once born, the baby was suffocated to death with a wet towel in front of the mother.[663]

4. Conclusion

373. Based on the evidence presented in connection with this Inquiry, we find reasonable grounds to believe that the crime against humanity of "other inhumane acts" has been committed in the DPRK's political prison camps and related facilities. The nature of daily assaults on the dignity of North Korean political prisoners are so pervasive and wide ranging that such assaults cannot be said to fall neatly within the first ten crimes against humanity enumerated in the Rome Statute. The ability of political prison officials to keep the prison population subdued rests, in part, on its ability to terrorize the population through theatrical violence and ghoulish practices of the sort described above (*e.g.,* gross mistreatment of dead and live bodies, public executions and the killing of babies in front of family members). Just as the ICTR found certain perverse acts of violence to constitute "other inhumane acts" in the *Niyitegeka* and *Ruzindana* cases, we too conclude that acts that shock the conscience of the sort described above also justify a finding that there are reasonable grounds to believe that the crime of "other inhumane acts" has been committed. Finally, while we also considered the impact of North Korea's political prisons on North Korea's general population (as opposed to political prisoners incarcerated therein), and whether said impact might also be deemed an "other inhumane act," we make no legal or factual findings on this issue.[664]

L. Common Elements

374. To be considered a crime against humanity: (i) the conduct must have been committed as part of a widespread or systematic attack directed against a civilian population (whether it be in war or peace);[665] and (ii) the perpetrator must have known that the conduct was part of, or intended the conduct to be part of, a widespread or systematic attack against a civilian population.[666] Such crimes can be committed by a government against its own citizens within the country's internal borders.[667]

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661 Kim Ha-neul Aff. (7 Nov. 2016).
662 Kim Ha-neul Aff. (7 Nov. 2016).
663 Hawk, The Hidden Gulag, Second Edition, *supra* note 6 at 124.
664 We also considered whether additional crimes against humanity – including the crime of "persecution" – might be implicated by the political prisons' impact on the general population, but we make no legal or factual findings on this issue.
665 Prof. Antonio Cassese et al., *International Criminal Law*, *supra* note 197.
666 *See* ICC, *Elements of Crimes,* art. 7(1).
667 *See Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, para. 312 (ECCC 26 July 2010) (noting that crimes against humanity are committed against "any civilian population" and "may therefore include a [s]tate's attack on its own population," when discussing the ECCC Law) (internal quotation marks omitted).

1. The Conduct Was Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population

375. The first common element of all crimes against humanity is that the conduct (*i.e.*, murder) be committed as part of a widespread or systematic attack directed against a civilian population.

376. "Widespread" refers to the number of victims involved and the large-scale nature of the attack.[668] "Systematic" refers to the organized nature of the attack and the improbability of its random occurrence.[669] An attack is systematic if it involves the "non-accidental repetition of similar criminal conduct on a regular basis."[670] An attack is considered systematic if there is: (i) the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology to destroy or weaken a community; (ii) perpetration of a criminal act on a large scale against a group of civilians or repeated and continuous commission of inhumane acts linked to one another; (iii) use of significant public/private resources; (iv) implication of high level political and/or military authorities in defining and establishing of the methodical plan.[671]

377. A plan or policy behind the attack is evidence that it was widespread or systematic, but proof of a plan or policy is not required.[672] A limited number of attacks are sufficient to be systematic if the attacks are not isolated or random.[673]

378. An attack is directed against a civilian population if the course of conduct involves the commission of multiple acts against a civilian population "pursuant to or in furtherance of a state or organizational policy to commit such attack."[674] Such a policy must "actively promote or encourage such an attack against a civilian population."[675]

379. Based upon the evidence submitted, the political prison system of the DPRK is part of a widespread and systematic attack directed against a civilian population. The systematic nature of the attack against the civilian population can be established through the stated purpose of the DPRK political prison system. For example, Kim Il-sung indicated that the purpose of the prisons was to eliminate the "seed" of three generations of class enemies, indicating the purpose of the prisons was to imprison, enslave and exterminate political opponents.[676]

a. Murder

380. With regard to the crime against humanity of murder, the widespread nature of the murder of North Koreans is established by the sheer number of deaths in various prisons over a decades-long period. As established above, DPRK officials carried out a vast number of executions and other killings in different North Korean political prison camps and related facilities and such killings constitute a widespread attack as per the Rome Statute.

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668 *Prosecutor v. Popovic,* Case No. IT-05-88-T, Judgment, para. 756 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010).
669 *Prosecutor v. Popovic,* Case No. IT-05-88-T, Judgment, para. 756 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010).
670 *Prosecutor v. Popovic,* Case No. IT-05-88-T, Judgment, para. 756 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010).
671 *Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Judgment, para. 179 (Int'l Crim. Trib. for the Former Yugoslavia 26 Feb. 2001).
672 *Prosecutor v. Popovic,* Case No. IT-05-88-T, Judgment, para. 756 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010).
673 *Prosecutor v. Popovic,* Case No. IT-05-88-T, Judgment, para. 756 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010).
674 ICC, *Elements of Crimes*, art. 7, Introduction, para. 3.
675 ICC, *Elements of Crimes*, art. 7, Introduction, para. 3.
676 COI Report, para. 747 (citing confidential interview testimony of Ahn Myong-chol).

381. The systematic nature of the crimes is also established by the evidence. Affiant Kim Tae-jin reported that murder is the standard practice for dealing with a prisoner attempting to escape from Camp 15.[677] Ahn Myong-chol reported that it was common practice at Camp 22 to "execute . . . one inmate to set an example for the rest of the inmates."[678] Ahn Myong-chol also indicated that an undisclosed area near Camp 22 was established for secret executions. This evidence indicates that the executions and other killings were not isolated or accidental, but rather appear to be part of a systematic approach and conduct in the political prison system.

382. Lastly, there is a clear state policy to allow and facilitate murder in the North Korean political prison system. These institutions are under the effective control of the political leadership, with the scale of the detentions and number of prisons such that it could only be operated through a state policy. As discussed above, affiants reported a standard practice of murder for attempted escape, a common practice of executing prisoners to make an example of them and designated areas in the prisons for the carrying out of executions. Affiant Kim Tae-jin testified that prison "trials" followed the same basic format: a recitation of the alleged crime(s) committed, followed by a sentence of death and subsequent execution.[679]

383. Statements by senior North Korean officials provide additional evidence that murders in political prisons were systemic and encouraged by a state policy to eliminate perceived class enemies. When Kim Il-sung spoke to SSD officials in 1958, he informed them that the purpose of the prisons was to eliminate the "seed" of three generations of class enemies.[680] This message was perpetuated over generations by billboards in the prisons reminding the guards of Kim Il-sung's instruction.[681]

384. Lee Baek-lyong corroborates this statement, recalling that in Camp 15 in 1996, there were message boards all around the prison with slogans such as: "There is no reconciliation or negotiation with enemy of the class!"[682]

385. Further, Prison Guard Ahn Myong-chol testified that "[the inmates] are supposed to die in the camp from hard labour."[683]

b. Extermination

386. With regard to the crime against humanity of extermination, evidence has been presented that the SSD operated political prison camps and related facilities in which mass killings of members of the civilian population were carried out through the infliction of conditions of life calculated to bring about the destruction of part of the population. Civilians suspected of political offenses were and are, subjected to conditions including forced labor, starvation and deprivation of medical care. As discussed above, these conditions were calculated to constitute a systematic and organized means of weeding out the "seed" of three generations of class enemies from the general population.[684] This intentional, highly organized orchestration of the deaths of large numbers of people viewed as political opponents of the North Korean regime constitutes a widespread and systematic attack.

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677 Kim Tae-jin Aff. (10 Nov. 2016).
678 COI Report, para. 834 (quoting testimony of Ahn Myong-chol, Seoul Public Hearing, 21 August 2013, afternoon (00:26:30)).
679 Kim Ha-neul Aff. (7 Nov. 2016).
680 COI Report, para. 747 (citing confidential interview testimony of Ahn Myong-chol).
681 COI Report, para. 747 (citing confidential interview testimony of Ahn Myong-chol).
682 *Testimony of Lee Baek-lyong, supra* note 143.
683 COI Report, para. 767 (quoting confidential testimony of Ahn Myong-chol).
684 COI Report, para. 747 (citing confidential interview testimony of Ahn Myong-chol).

c. Enslavement

387. With regard to the crime against humanity of enslavement, the widespread nature of the practice of enslavement in the North Korean political prison system is well established by the evidence presented in this Inquiry. Witness testimonies provide evidence of forced labor in grueling work conditions and poor living conditions in all of the political prison camps.

388. The evidence also demonstrates that the incidents of enslavement are not random occurrences, but rather, the result of a systematic state policy. The vast prison camp infrastructure described by witnesses and the sheer number of people reportedly conscripted to support various North Korean industries can only be the result of a highly organized policy of enslavement by the DPRK.

d. Forcible Transfer

389. With regard to the crime against humanity of forcible transfer, the removal of suspects and their families from their homes and their transport to political prison camps are not accidental occurrences. SSD agents are ordered to carry out the forcible transfers as part of the process of admitting new prisoners to the prison camps.[685] These attacks are coordinated and often occur at night[686] when the targeted individuals are sleeping, alone, or vulnerable. Based on the evidence presented, we find that the forcible removal of suspects and their families is both widespread and systematic, fulfilling the fourth element of the crime against humanity.

e. Imprisonment

390. With regard to the crime against humanity of imprisonment, currently, an estimated 80,000 to 130,000 individuals are imprisoned in *kwan-li-so*[687], including at Camps 14, 15, 16 and 25. An entire department of the SSD, the Prisons Bureau, is responsible for management of political prisoners and the prisons, while other organizations of the SSD have jurisdiction over political crimes, including SSD's Prosecution and Investigation Bureaus. The high number of individuals incarcerated, seemingly without any legitimate basis, is evidence that there is an on-going attack against the civilian population of the DPRK that is both systemic and widespread.

f. Torture

391. With regard to the crime against humanity of torture, the evidence shows there is a structured system of torture directed against the DPRK civilian population. A large proportion of the DPRK civilian population is incarcerated or subject to incarceration, and once within the North Korean political prison camp system, the use of torture is widespread.[688] Water torture, fire torture, and frequent beatings are among the common means of torturing prisoners.[689]

g. Sexual Violence

392. With regard to the crime against humanity of sexual violence, the evidence establishes that rape and other forms of sexual violence perpetrated against civilian prisoners are pervasive within the North Korean political prison camp system. Acts of sexual violence

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685 *Survey Report on Political Prisoner's Camps in North Korea, supra* note 304 at 45–46.
686 *Survey Report on Political Prisoner's Camps in North Korea*, *supra* note 304 at 52–53 (citing testimony of Kang Cheol-hwan, A11, A06), 172–174 (citing testimony of A14, A15, A12).
687 COI Report, para. 741.
688 Testimony of Choi Hyun-jun (8 Dec. 2016).
689 *See, e.g.,* Kim Ha-neul Aff. (7 Nov. 2016); Testimony of Choi Hyun-jun (8 Dec. 2016).

are committed and facilitated by the officials in charge of political prison camps and related facilities. Rape within the political prison camps occurred with such frequency and on such a scale that individual instances of the rape of prisoners cannot be viewed as isolated attacks, but rather part of a systemic program instituted by prison officials to punish and terrorize inmates.

h. Persecution

393. With regard to the crime against humanity of persecution, evidence has been presented that the SSD and related parties in the DPRK regime persecute individuals on the basis of their religious, political, or ethnic identity, among other bases. This persecution was the result of an official policy of the regime to eliminate the "seed" of three generations of class enemies, including by completely depriving them of liberty through incarceration in the North Korean political prison system and by depriving them of their right to life through a system of enslavement and extermination. Prisoners were explicitly targeted because of their political beliefs, religion, and/or gender and female prisoners who were believed to have been impregnated by Chinese men were regularly forced to abort their babies.

i. Enforced Disappearances

394. With regard to the crime against humanity of enforced disappearances, we find that the State's mass deprivation of liberty, coupled with the total and widespread denial and concealment of these arrests, detentions and abductions, amounts to a deliberate tactic to perpetuate a culture of fear, obedience, and silence to further the State's political goals.

j. Other Inhumane Acts

395. With regard to the crime against humanity of other inhumane acts, there are certain systematic and widespread acts committed within the political prison camps and related facilities that result in serious injury to the prisoners' mental and physical health. Such acts include the frequent and grave mistreatment of corpses within the clear view of prisoners, and forcing prisoners of all ages to observe the violent execution of fellow prisoners by prison officials. Such acts are calculated to instill a deep sense of fear within these prisoners, and in fact achieve their intended; moreover, the effects of these acts are far reaching, resulting in profound, lifelong trauma to this population.

396. The widespread and systematic nature of the murder, extermination, enslavement, forcible transfers, imprisonment, torture, sexual violence, persecution, enforced disappearances and other inhumane acts perpetrated against North Korean civilians by the North Korean government is established by the evidence presented to the Inquiry.

2. The Perpetrator Knew That the Conduct Was Part of, or Intended the Conduct to be Part of, a Widespread or Systematic Attack Against a Civilian Population

397. The second common element of all crimes against humanity is that the accused must know or intend the conduct to be part of a widespread or systematic attack directed against a civilian population.[690] The accused "need not have knowledge of the details of the attack," and the motivations of the accused are irrelevant.[691] The accused may be

[690] Testimony of Choi Hyun-jun (8 Dec. 2016).
[690] ICC, *Elements of Crimes*, art. 7, Introduction, para. 3.
[691] *Prosecutor v. Popovic,* Case No. IT-05-88-T, Judgment, para. 758 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010).

found liable even where he commits the crime for purely personal reasons and "need not share the purpose or the goal behind the attack."[692]

398. As noted in *Kunarac*, under the Rome Statute, an individual has knowledge when he is aware that "a circumstance exists or a consequence will occur in the ordinary course of events," and an individual has intent when: "(a) [i]n relation to conduct, that person means to engage in the conduct; or (b) [i]n relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events."[693]

399. The requisite mental element is that the perpetrator knowingly took the risk of participating in a widespread or systematic attack.[694] The perpetrator need only be aware of the risk of the existence of an attack and risk of the existence of some circumstances of the attack against a civilian population, regardless of knowledge of specific details.[695]

400. The knowledge element of a widespread or systematic attack is established by the facts in this case. As Head of State and Supreme Leader, Kim Jong-un directly controls the KWP and both Kim Jong-un and the KWP have the power to make final decisions and override laws. Testimony presented indicates that the actions and tasks of every leadership position within the political prison camp structure are sanctioned by the KWP, which in turn directly reports to the Supreme Leader, Kim Jong-un. Thus the continued imprisonment of political prisoners cannot occur without, at a bare minimum, the acquiescence and knowledge of the highest levels of the DPRK government, which has the power to oversee the rest of the government of the DPRK.

401. The SSD, the DPRK government agency in charge of maintaining internal security reports to the SAC, while daily reporting and management of the Minister of State Security is conducted through the KWP Administration Department. Kim Jong-un is First Secretary of the KWP and is also the Chairman of the SAC.[696]

402. The SSD is responsible for arresting prisoners accused of political crimes. Within the SSD, the Prisons Bureau is responsible for the management of political prisons. The SSD administers the prisons and runs the Prosecution Bureau of the SSD, which is tasked with adjudication of cases involving political crimes and therefore plays a central role in sending individuals to be incarcerated. The SSD, which employs a vertical chain of command throughout the agency, also oversees the Chief Administrators responsible for the operation of individual political prison camps.

403. For the foregoing reasons, we conclude that the leadership of the DPRK has actual and constructive knowledge of the conditions within the political prison system, the gravity of the conduct involved, and the ongoing attack against its civilian population.

a. Murder

404. With regard to the crime against humanity of murder, the evidence establishes that DPRK officials carrying out executions and other killings knew and intended that the murders be

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692 *Prosecutor v. Popovic,* Case No. IT-05-88-T, Judgment, para. 758 (Int'l Crim. Trib. for the Former Yugoslavia 10 June 2010).

693 *Prosecutor v. Kunarac*, Case No. IT-96-23-T; IT-96-23/1-T, Judgment, n.1333 (Int'l Crim. Trib. for the Former Yugoslavia 22 Feb. 2001); Rome Statute, art. 30.

694 *See Prosecutor v. Cardoso*, Case No. 04-2001, Judgment, para. 306 (UN-ETTA Dist. Ct. Dili 5 Apr. 2003), http://www.worldcourts.com/un_etta/eng/decisions/2003.04.05_Prosecutor_v_Cardoso1.pdf (citing *Prosecutor v Marques*, Case No. 09/2001, Judgment, paras. 634–642 (UN-ETTA Dist. Ct. Dili 11 Dec. 2001)).

695 *See Prosecutor v. Kunarac*, Case No. IT-96-23-T; IT-96-23/1-A, Judgment, paras. 102–103 (Int'l Crim. Trib. for the Former Yugoslavia 12 June 2002).

696 COI Report, para. 152; Grisafi, North Korea creates new lead government body headed by Kim, *supra* note 63.

part of a widespread and systematic attack against the civilian population. As set forth above, the murders were encouraged as part of DPRK state policy to eliminate perceived enemies of the State, with even a single act of disloyalty potentially consigning an accused (and their families) to live and die in a political prison. Witnesses reported that it was standard practice to murder prisoners for attempted escape, to execute prisoners as an example for others, and to use designated areas within the prisons (or nearby) to carry out executions. As such, the DPRK officials implicated in this Inquiry knew that their criminal acts were part of a widespread and systematic attack.

b. Extermination

405. With regard to the crime against humanity of extermination, DPRK officials carried out executions and other killings calculated to bring about the destruction of political dissidents and knew and intended that the killings be part of a widespread and systematic attack against such population. As set forth above, the killings were conducted in many ways - through mass killings, small scale killings committed with knowledge of the context of mass killings, and widespread infliction of conditions of life calculated to bring about death, such as starvation and hard labor. These methods were encouraged as part of DPRK state policy to eliminate perceived enemies of the State. As such, the DPRK officials implicated in this Inquiry knew that their criminal acts were part of a widespread and systematic attack.

c. Enslavement

406. With regard to the crime against humanity of enslavement, the DPRK officials implicated in this Inquiry were and are keenly aware of the widespread and systematic practice of enslavement in North Korean political prison camps. Under the hierarchical leadership structure of the North Korean prison system, SSD agents and officials in the Prisons Bureau regularly visited the prisons and received reports on the conditions in the prisons and the activities and economic output of the detainees. As former SSD official Choi Hyun-jun testified at the Hearing, DPRK leaders are fully aware of the living conditions and everyday life in the prison camps and related facilities, not only through official reports, but also because there is a general understanding in the DPRK that such detainees are not considered to be or treated as human beings. Officials throughout the North Korean prison system not only know about the system of enslavement in the prisons but also work actively to promote and maintain this system.

d. Forcible Transfer

407. With regard to the crime against humanity of forcible transfer, SSD agents are aware that their forcible removal of suspects and their families from their homes are not isolated incidents. Many agents are likely to have participated in numerous forced removals. Neither the SSD agents nor any other actor who is a participant or a passive superior in these circumstances must share the regime's stated motivation of punishing or "re-educating" suspects and their families. The perpetrators' knowledge of the repeated nature of the forcible removals is sufficient to satisfy the final element of the crime of forcible transfer.

e. Imprisonment

408. With regard to the crime against humanity of imprisonment, the SSD, with its responsibility for management of political prisons, prisoners, and its jurisdiction over political crimes, necessarily has knowledge that the crime against humanity of imprisonment is being committed against the civilian population of the DPRK, and also participates in the commission of such crimes. Other political actors within the DPRK

have such knowledge on a widespread and systematic basis, through political oversight, or by sending individuals to be incarcerated.[697]

f. Torture

409. With regard to the crime against humanity of torture, guards and officials in the prison camps and related facilities are fully aware of widespread acts of torture and also perform acts of torture themselves. Other political actors of the DPRK also must have been aware of such widespread torture because, as the witnesses demonstrate through their testimony, the use of torture as a method of control is an essential component of the operation of the prison camp system and of the SSD. As Choi Hyun-jun testified, acts of torture are perpetrated on a daily basis by the SSD.[698]

g. Sexual Violence

410. With regard to the crime against humanity of sexual violence, the pervasive nature of the sexual violence and the extent to which it was committed by upper-ranking officials against their civilian captives leads us to conclude that the prison guards and SSD officials in each prison were aware of the circumstances of sexual violence occurring within their purview and that sexual violence in political prisons was known at the highest levels of the political establishment.

h. Persecution

411. With regard to the crime against humanity of persecution, guards and SSD officials are both aware of the widespread and systematic persecution carried out by the State, and directly participate in its execution in connection with arrests of persecuted individuals and subsequent persecution within the political prison camps. The evidence establishes that persecution is a deliberate feature of the political prison system, with some prisoners incarcerated expressly for their religious or political beliefs, and further harms are committed against individuals because of their religious or political beliefs or their ethnicity.

i. Enforced Disappearance

412. With regard to the crime against humanity of enforced disappearance, the State and its agents have forcibly removed countless individuals from their homes and from their families in a widespread, systematic manner. We conclude that the State's denial and concealment of this mass deprivation of liberty amounts to knowledge of a widespread and systematic attack against the civilian population.

j. Other Inhumane Acts

413. With regard to the crime against humanity of other inhumane acts, prison officials engaged in a variety of acts, such as publicly executing prisoners and mistreating and defiling corpses in front of prisoners for the purpose of subduing and instilling fear in the prison population. Such acts were knowingly committed by the perpetrators as part of a widespread and systematic attack on the prison population.

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[697] Thae Yong-ho Aff. (23 Mar. 2017); *see also* COI Report, paras. 1064–1065 (noting that "[t]he Commission has received information directly indicating that the camp system is controlled from the highest level of the state. In some cases, the Commission was able to trace orders to cause the disappearance of individuals to the camps to the level of the Supreme Leader. Moreover, the [SSD], which decides whether to send individuals to the camp, is subject to the directions and close oversight of the Supreme Leader." The report further notes that the political prison system run by the SSD operates in conditions such that "[i]t is impossible to believe that such a large-scale and complex institutional system could be operated without being based on a [s]tate policy approved at the highest level given the strongly centralized nature of the state in the DPRK.").

[698] Testimony of Choi Hyun-jun (8 Dec. 2016).

414. At varying levels of leadership within the DPRK, as described in Part VIII below, the fact that perpetrators of murder, extermination, enslavement, forcible transfers, imprisonment, torture, sexual violence, persecution, enforced disappearances and other inhumane acts against North Korean civilians knew that the conduct was part of, or intended the conduct to be part of, a widespread or systematic attack against a civilian population is established by the evidence presented to the Inquiry.

VIII. CATEGORIES OF RESPONSIBILITY AND LIABILITY

415. Based upon the presentation by Counsel and the evidence set forth above, we have been asked to consider whether sufficient evidence exists to conclude that ten of eleven crimes against humanity have been committed, and who bears responsibility for those crimes. The Inquiry focused its consideration on the following state entities and actors:

(i) Kim Jong-un, as Supreme Leader;

(ii) Korean Workers' Party officials;

(iii) State Affairs Commission officials;

(iv) SSD Prisons Bureau and Main Command officials;

(v) SSD Investigations Bureau officials;

(vi) SSD Prosecution Bureau officials;

(vii) SSD officers; and

(viii) SSD agents and prison guards.[699]

416. As discussed above, we have found sufficient evidence that the crimes against humanity of murder, extermination, enslavement, forcible transfer, imprisonment, torture, sexual violence, persecution, enforced disappearance and other inhumane acts have been committed in the DPRK political prisons. We set forth below our findings regarding those who bear responsibility with respect to these ten crimes. In order to establish responsibility and liability on a particular class of defendants, we must conclude there is sufficient evidence as to the culpability of that particular class of defendants.

417. As discussed in further detail in Part VI(B) above,[700] perpetrators may have individual criminal responsibility through their own actions or through the actions of others who acted with a common purpose, or who were under their command or control. Criminal responsibility for crimes committed within and through a state institutional framework extends from the direct physical perpetrators on the ground to the highest levels of the organization, as long as responsible individuals have knowledge of the broader widespread attack on the civilian population.[701] Participants in collective criminality may be held individually criminally responsible for the perpetration of the criminal act, even where they did not directly participate in the material commission of the criminal act, under the principles of either: (i) JCE; or (ii) command responsibility. International criminal tribunals have recognized three forms of JCE (identified as "I," "II" and "III");

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699 By limiting our consideration to these eight (8) classes, we do not suggest that individuals affiliated with other North Korean institutions who are excluded from this list are not also potentially liable for crimes against humanity in connection with the operation and oversight of the DPRK's political prisons.

700 See *supra* paras. 77–101.

701 *See Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, para. 656 (Int'l Crim. Trib. for the Former Yugoslavia 7 May 1997); *see also Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, para. 248 (Int'l Crim. Trib. for the Former Yugoslavia 15 July 1999).

these three forms of JCE share a common *actus reus*, but differ in their requisite *mens rea*.

A. Kim Jong-Un

418. As the Head of State or "Supreme Leader," Chairman of the KWP and the person at the apex of the North Korean political system, Kim Jong-un exercises control over all of the organs of state, whether legislative, political, or military. In the highly centralized DPRK political structure, all paths of power are ultimately controlled directly by Kim Jong-un. In fact, as was made clear in the affidavit submitted by high level defector Thae Yong-ho, "all North Korean elites are very well aware" that the grave human rights abuses and "systemic violence" perpetrated on the North Korean people have been "planned, orchestrated and ordered by Kim Jong-[u]n."[702]

419. In his role as chairman of the SAC and the KWP and the head of the KPA, Kim Jong-un possesses knowledge and awareness of the political prison camps and is in a position to exercise control over, investigate and punish the immediate perpetrators of these crimes and to prevent their commission in the first instance. As described above, the political prison system was established and maintained to bolster the KWP's control over all aspects of life in the DPRK, provide revenue to the State, and suppress dissent. As such, they form an integral part of the political system.

420. On the basis of the level of control Kim Jong-un exercises over all aspects of the DPRK, as well as his formal and institutional role as titular and functional head of the organs of state, including the SSD, he may be found liable under the theories of command responsibility and JCE I. Inferior officials within the KWP, SAC, and SSD act under the auspices and authority of Kim Jong-un, who is undoubtedly their superior given the political structure of the DPRK. Similarly, Kim Jong-un, by exercising knowing control and participating in the organization of the political prison camps at the highest level and knowingly failing to prevent the commission of crimes against humanity in connection with those prisons, intentionally participates in the common plan of their operation and the crimes committed therein.[703]

421. Accordingly, we find that sufficient evidence exists to conclude that Kim Jong-un is responsible for the crimes against of humanity of murder, extermination, enslavement, forcible transfer, imprisonment, torture, sexual violence, persecution, enforced disappearance and other inhumane acts - that is, ten of the eleven crimes against humanity under consideration by this Inquiry.[704]

B. Korean Workers' Party

422. At both the local and central level, units of the KWP, such as the OGD, regularly participate directly in human rights violations. As previously noted, the OGD is arguably the most influential and powerful organization in the DPRK.[705] Many groups, including

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[702] Thae Yong-ho Aff. (23 Mar. 2017). In his affidavit, Thae Yong-ho also identified by name several individuals whom he personally knew who were sent to political prison camps in or about December 2013 in connection with Kim Jong-un's purge and execution of his uncle, Jang Song-thaek, who at the time was the Vice Chairman of the National Defense Commission. *See* Thae Yong-ho Aff. (23 Mar. 2017).

[703] COI Report, para. 1198 (stating that on 20 January 2014, the Commission sent a letter to Kim Jong-un which provided the findings of the report and his responsibilities to prevent the crimes against humanity).

[704] Kim Jong-un should only be held accountable for the crimes against humanity committed after assuming power on 28 December 2011. It should be noted that the political system created by his forefathers has not been reformed in any meaningful way since he assumed power. A central component of this system is the DPRK's network of political prisons, which the regime uses to repress its population.

[705] Collins, *Pyongyang Republic*, *supra* note 8 at 112.

the Central Committee, all work under the OGD's control.[706] The OGD oversees the internal security agencies and if an agency is not performing satisfactorily, that party is punished at the recommendation of the OGD.[707] All policies in the DPRK, including political, military, economic, cultural, and social, must be approved by the OGD.[708] Further, the intrusive system of Neighborhood Watches (*in-min-ban*) is administered by local People's Committees, which are under the control of the KWP.[709] Members of the *in-min-ban* have the authority to visit any homes at any time and all guests therein must be reported to the *in-min-ban*.[710] Additionally, specialized central-level intelligence departments of the KWP have been implicated in covert abduction operations through which nationals of Japan, the Republic of Korea and other states were forcibly disappeared.[711]

423. The KWP does not act autonomously, but depends upon orders originating at the highest levels of the central government. The most influential political figures in the DPRK hold several positions in the KWP apparatus, military and security apparatus, and other formal state institutions, making it difficult to identify a single institution responsible for any one decision.[712] The origin of orders and the workings of the chain of command are deliberately obfuscated. It is clear, however, that while the KWP exercises control over every aspect of society and bears responsibility for gross violations of human rights, it is centrally controlled by the Supreme Leader.[713]

424. The KWP, in particular the members of the Politburo, are subordinate in the DPRK political structure only to Kim Jong-un. Since Kim Jong-un's assumption of control in 2011, the KWP has gradually eclipsed the primacy of the military.[714] As the overseer of internal security agencies like the SSD, the KWP OGD exercises *de facto* control over the SSD,[715] while *de jure* control rests in the hands of the SAC.[716]

425. On the basis of the OGD's *de facto* control and oversight over the SSD and its exercise of control through the formal mechanisms of the State, as well as the substantial overlap in membership between the Politburo and the SAC, which exercises *de jure* control over the SSD, members of the OGD may be found liable under the theories of command responsibility and JCE I. Whether through formal chains of command or informal mechanisms of control, the SSD and prison camp officials ultimately report to the Politburo and OGD. The exercise of oversight of the SSD by the OGD and Politburo establishes knowledge of the conditions within the political prison camps. Similarly, the role of the OGD and Politburo in establishing SSD policy in the operation of the political prison camps, as well as failure to punish or prevent the crimes committed therein, demonstrates the intentional nature of the KWP's participation in the crimes committed in the prison camps.

426. Accordingly, we find that sufficient evidence exists to conclude that members of the KWP, OGD and Politburo are responsible for the crimes against humanity of murder, extermination, enslavement, forcible transfer, imprisonment, torture, sexual violence, persecution, enforced disappearance and other inhumane acts - that is, ten of the eleven crimes under consideration by this Inquiry.

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[706] Collins, *Pyongyang Republic*, *supra* note 8 at 113.
[707] Collins, *Pyongyang Republic*, *supra* note 8 at 113.
[708] Collins, *Pyongyang Republic*, *supra* note 8 at 113–114.
[709] Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 42–44.
[710] Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 45.
[711] COI Report, paras. 1177–1178.
[712] COI Report, para. 1180.
[713] *See, e.g.,* COI Report, paras. 1179–1188.
[714] Gause, *North Korean Political Dynamics of the Kim Jong-un Era, supra* note 63 at 42–43.
[715] *See* Collins, *Pyongyang Republic*, *supra* note 8 at 112-113.
[716] *North Korea Leadership Watch: State Security Department, supra* note 97.

C. State Affairs Commission

427. The SSD formally reports to the SAC, and the head of the SSD is a member of the SAC.[717] This significant overlap in authority between the SAC and Politburo, as well as the presence of the head of the SSD in both bodies, indicates that the SAC similarly may exercise control over the SSD and that the SAC possesses knowledge of SSD activities, including the operation of political prison camps.

428. On the basis of the SAC's *de jure* control and oversight of the SSD, as well as the substantial overlap between the SAC and the Politburo, members of the SAC may be found liable under the theories of command responsibility and JCE I. The SSD agents, who are the immediate perpetrators of crimes, while separated from the SAC by several layers of intermediaries, are nonetheless in a subordinate relationship to the SAC, to which they ultimately report. The SAC establishes SSD policy in the operation of the prison camps and has the authority to prevent or punish the crimes committed therein. The failure to do so, in light of the SAC's knowledge of the conditions of the prisons, demonstrates the SAC's intentional participation in the commission of these crimes.

429. Accordingly, we find that sufficient evidence exists to conclude that members of the SAC are responsible for the crimes against humanity of murder, extermination, enslavement, forcible transfer, imprisonment, torture, sexual violence, persecution, enforced disappearance, and other inhumane acts, that is, ten of the eleven crimes under consideration by this Inquiry.

D. SSD Prisons Bureau and Main Command

430. The Prisons Bureau, which is SSD Bureau No. 7,[718] is the department within the SSD that oversees the operation of the political prison camps.[719] The Bureau, which is subordinate to the SSD Director (and accordingly, the SAC), operates a vertical chain of command system that maintains control over SSD Officers, SSD Agents and prison guards at the individual political prison camps.[720]

431. On the basis of Prisons Bureau's formal and actual oversight of the operation of political prison camps, the establishment of policies common to the various prisons and the knowledge of crimes occurring therein, members of the Prisons Bureau may be found liable under the theories of command responsibility and JCE I and II. In addition to overseeing the prisons, the Prisons Bureau retains the authority and ability to prevent the occurrence of crimes against humanity within the prisons and to investigate and punish individual perpetrators. Failure to do so demonstrates the Bureau's intentional participation in the commission of these crimes.

432. Accordingly, we find that sufficient evidence exists to conclude that members of the Prisons Bureau are responsible for the crimes against humanity of murder, extermination, enslavement, forcible transfer, imprisonment, torture, sexual violence, persecution, enforced disappearance, and other inhumane acts, that is, ten of the eleven of the crimes under consideration by this Inquiry.

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[717] *See* Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 19, 19 n.11.
[718] *See* Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 17, 22, 82; *see also White Paper on Human Rights in North Korea 2014, supra* note 103 at 136–137.
[719] *See* Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 22, 82.
[720] *See* Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 19, 24; *Political Prison Camps in North Korea Today, supra* note 103 at 203.

E. SSD Investigations Bureau

433. The SSD Investigations Bureau controls the investigation and subsequent arrest of political suspects,[721] and has a public reputation for carrying out arbitrary executions for personal professional gain.[722]

434. On the basis of the Investigations Bureau's role in the arrest, detention, interrogation, and transfer of prisoners to political prison camps, its oversight of interrogators and its control over which individuals are transferred from its custody to the political prison camps, members of the Investigations Bureau may be found liable under theories of command responsibility and JCE I and II. The Investigations Bureau retains authority to prevent or punish the occurrence of crimes against humanity by SSD interrogators under its control, as well as the authority to determine which individuals are transferred to the political prison camps. Failure to prevent, investigate, or punish crimes committed by the SSD demonstrates the Investigation Bureau's intentional participation in the commission of these crimes.

435. Accordingly, we find that sufficient evidence exists to conclude that members of the SSD Investigations Bureau are responsible for the crimes against humanity of murder, forcible transfer, imprisonment, torture, persecution, enforced disappearance, and other inhumane acts. To the extent such crimes occur while prisoners are in the custody of the Investigations Bureau, its members may be responsible for sexual violence as well. With respect to the crimes of enslavement and extermination, we find that evidence has been presented that may support a finding that members of the Investigation Bureau are responsible for these crimes. However, as the Bureau's involvement with prisoners takes place prior to their transfer to the political prison camps where these crimes occur, further evidence with respect to enslavement and extermination is needed before a full conclusion can be drawn.

F. SSD Prosecution Bureau

436. The SSD Prosecution Bureau is responsible for determining how to proceed with "adjudication" of prisoners.[723] In practice, the Prosecution Bureau serves as both prosecutor and court of judgment.[724] Adjudication procedures, to the extent they exist, are often violated and simplified to a perfunctory level.[725] The Prosecution Bureau's adjudications can determine which prisoners are transferred to political prison camps.[726]

437. On the basis of its role in carrying out adjudication procedures that result in the transferal of prisoners to the political prison camps, members of the Prosecution Bureau may be found liable under theories of JCE I and II. To the extent that SSD Prosecutors are liable for the commission of crimes against humanity, members of the Prosecution Bureau may be found liable under the theory of command responsibility, due to the Prosecution Bureau's control over prosecutors.

438. Accordingly, we find that sufficient evidence exists to conclude that members of the SSD Prosecution Bureau are responsible for the crimes against humanity of murder, extermination, enslavement, forcible transfer, imprisonment, torture, sexual violence,

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721 *See* Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 22.
722 *See* Gause, *Coercion, Control, Surveillance, and Punishment*, *supra* note 15 at 22; *see also* COI Report, para. 834 (citing testimony of Ahn Myong-chol).
723 Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 22.
724 Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 70–71.
725 Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 70.
726 Gause, *Coercion, Control, Surveillance, and Punishment, supra* note 15 at 22–23.

persecution, enforced disappearance, and other inhumane acts, that is, ten of the eleven crimes under consideration by this inquiry.

G. SSD Officers

439. Individual SSD Officers, through the vertical chain of command, exercise control over SSD Agents at the prisons, as well as the prison guards responsible for perpetration of crimes.[727] SSD Officers may also participate in the detention and transfer of prisoners, as well as the commission of crimes themselves in the political prison camps.

440. On the basis of their role in carrying out policies established by the SSD Prisons Bureau, as well as their role in supervising and controlling subordinate SSD Agents and prison guards, SSD Officers may be found liable under theories of command responsibility and JCE I and II. SSD Officers retain authority to prevent, investigate and punish the commission of crimes against humanity committed within the political prison camps and their failure to do so demonstrates their intentional participation in the commission of these crimes.

441. Accordingly, we find that sufficient evidence exists to conclude that SSD Officers are responsible for the crimes against humanity of murder, extermination, enslavement, forcible transfer, imprisonment, torture, sexual violence, persecution, enforced disappearance, and other inhumane acts, that is, ten of the eleven crimes under consideration by this Inquiry.

H. SSD Agents and Prison Guards

442. Individual SSD agents and prison guards are the immediate perpetrators of most of the crimes against humanity occurring in the political prison camps. However, while SSD agents may play a role in criminal acts committed prior to the arrival of prisoners at the prison camps, prison guards do not necessarily take part in the removal and relocation of prisoners into the prisons. While SSD agents and prison guards may in some circumstances face punishment from their superiors for the commission of criminal acts, prisoners have no recourse for acts committed against them. SSD agents and prison guards, by virtue of their subordinate role in the DPRK's institutional and political structures, do not ordinarily exercise superior authority over other perpetrators of crimes against humanity.

443. On the basis of their generally subordinate and immediate role in the commission of crimes against humanity, sufficient evidence has not been presented to conclude that SSD agents and prison guards may be held liable under the theory of command responsibility. On the basis of willingly and knowingly acting pursuant to a concerted plan within the institutional framework of the prisons and their participation in crimes that, if not part of the JCE were nonetheless a foreseeable consequence of the JCE, SSD agents and prison guards may be found liable under theories of JCE I, II, and III. Direct participation in criminal acts, as well as failure to prevent or withdraw from participation in such acts, demonstrates intentional participation in the commission of these crimes.

444. Accordingly, we find that sufficient evidence exists to conclude that SSD agents and prison guards are responsible for the crimes against humanity of murder, extermination, enslavement, imprisonment, torture, sexual violence, persecution, and other inhumane acts. With respect to the crimes of forcible transfer and enforced disappearance, we find that sufficient evidence exists to conclude that SSD agents, but generally not prison guards, are responsible, as prison guards are typically not participants in the transfer of

[727] *Political Prison Camps in North Korea Today, supra* note 103 at 203.

prisoners to the prisons. To the extent prison guards did participate in acts of forcible transfer or enforced disappearance, they may be held liable.

IX. CALL FOR ACTION

445. After consideration of the evidence presented, the factual findings made above and the legal conclusions set forth above, we make the following recommendations.

A. Cessation of Crimes Against Humanity

446. First and foremost, we call upon the DPRK to cease – and the world community to put a stop to – crimes against humanity described in this Inquiry report: acts of murder, extermination (including through starvation), enslavement (including the use of child slave labor), forcible transfer, imprisonment, torture, sexual violence, persecution (such as the repression and persecution of religious citizens, most notably Christians), enforced disappearances, and other inhumane acts. This call to action requires the DPRK to take several critical steps. Most immediately, all political prisons must be dismantled and their prisoners freed, with appropriate notice and allowance to international humanitarian organizations to provide medical and other relief for the released prisoners.

447. This recommendation also requires addressing the conditions and circumstances that allowed the political prisons to exist in the first place. As detailed above, political prisons in the DPRK are the result of intentional acts by individuals ranging from Kim Jong-un to low-level prison guards. As the evidence demonstrates, these acts serve to perpetuate a totalitarian, corrupt government that enforces compliance with its wishes and harshly punishes dissent and results in the commission of crimes against humanity on a massive scale.

B. Compliance With UN Human Rights Treaties to Which the DPRK is a Party

448. The Security Council should adopt a resolution demanding that the DPRK comply with all UN human rights treaties and bodies to which it is a party. The DPRK has ratified the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), the Convention on the Elimination of all Forms of Discrimination Against Women ("CEDAW"), the Optional Protocol to the Convention on the Rights of the Child ("CRC") on the sale of children, child prostitution, and child pornography, and the Convention on the Rights of Persons with Disabilities ("CRPD"), all of which are international human rights treaties requiring humane treatment of individuals. The DPRK should be held to the standards contained in these various treaties.

C. Dismantling of the Illegitimate Political Prison System

449. The Inquiry calls for the dismantlement of the political prison system in the DPRK.

450. As a corollary to this – and to ensure that the system is not resurrected in some other form whereby political dissent is criminalized and punished under some other guise – the DPRK must commit to a system of fair and transparent justice, so that punishments are conducted only after due process is afforded in accordance with international standards.

451. And finally, the international community must continually monitor the DPRK to ensure that the political prison system, under whatever name, is not reconstituted. Much in the same way that international monitoring regimes are established in other contexts, the DPRK

must be placed under international monitors to ensure that this system remains dismantled.

D. Acknowledgement and Accounting

452. A fundamental tenet of any prosecution is accountability.[728] As detailed in Part VIII, culpable individuals – public officials and otherwise – must be investigated, tried and appropriately punished for their roles in the commission of crimes described in this Inquiry report.

453. Moreover, accountability also requires the acknowledgment of the victims, living and dead, and the atrocities that they suffered.[729] Families who have lost loved ones, or have been unaware of the fates of their family members and friends are entitled to know whether they survived, how they perished, where their bodies are buried, etc. Where records of such victims have been kept by the prisons or by the government, they should be shared with victims' families. If at all possible, remains should be returned to those families for their proper burial or appropriate disposition.

454. And finally, the accounting should be public. If family members permit, the identities of those who died in the political prisons should be published and memorialized so that these events are never forgotten.

E. Personal Accountability and Prosecution of Individuals

455. Some of the commonly cited goals of international criminal justice include deterrence, creating a historical record, and giving a voice to victims. These goals are best advanced by holding individuals accountable for the crimes against humanity set forth above – crimes that have been, and continue to be, committed as part of the DPRK's overall political system.

456. While political systems that commit gross human rights violations can (and in this case, should) be condemned and challenged, it is not possible to incarcerate a regime for committing those violations. Individuals, not regimes, make decisions, and it is individuals who carry out these decisions. The appropriate trial and punishment of individuals who commit crimes against humanity reflects prevailing (post-Nuremberg) international norms that favor individual criminal responsibility, even if that individual is apprehended decades after he or she committed the crimes in question. Allowing individual perpetrators to go unpunished undermines critical goals of the international criminal justice framework, not the least of which is deterrence.

457. By explicitly identifying Kim Jong-un and an additional seven classes of individuals who help maintain and administer North Korea's political prison camps, this Inquiry makes clear that individual accountability is critical no matter how high or how low these individuals are in the chain of command.

F. Referral to, or Creation of, a Tribunal of Binding Authority

458. Although this Inquiry is composed of international human rights experts who each have served on multiple state-funded international tribunals (*e.g.,* ICC, ICTY, ICTR, ICJ,

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[728] *See* G.A. Res. 60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,* paras. 22(e), 22(h), (21 Mar. 2006).

[729] *See* G.A. Res. 60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,* paras. 22(e), 22(h), (21 Mar. 2006).

ECCC), it must be acknowledged that this civil-society driven Inquiry was conducted without a state sanction and without a commitment from any government or the International Community to heed its recommendations.

459. To that end, this Inquiry respectfully requests that the UN provide the ICC or a special tribunal with jurisdiction to appropriately investigate, punish and remedy the crimes against humanity chronicled by this Inquiry report. The Inquiry further calls on the international community to advocate for the UN to take such action. Finally, even if a particular individual cannot be tried and sentenced in the immediate term, their indictment is an expression of international condemnation, and affirms the continuing relevance and legitimacy of international law.

G. Exercise of Universal Jurisdiction

460. Third-party states who may find within their borders regime officials holding leadership positions who are known or suspected to have committed crimes against humanity in connection with North Korea's political prisons should consider exercising universal jurisdiction over said individuals, and investigate and prosecute these crimes where warranted, thereby depriving them of any safe haven and continued impunity for said crimes. Third-party states who exercise such universal jurisdiction must do so in compliance with international human rights law.

H. Prohibition Against the Importation of Products of Forced Labor

461. This Inquiry takes note of testimony describing the use of children as slave laborers in political prisons. This Inquiry takes further note of the report by Kim Kwang-Jin, himself a refugee from Pyongyang, DPRK, entitled, "Gulag Inc.," published by the Committee for Human Rights in North Korea. This Inquiry concludes that the DPRK government exports products made with materials and labor from the DPRK's prison system, including coal, iron ore, copper, and other commodities, to raise hard currency for the use of the government.[730]

462. This Inquiry calls upon UN member states to implement reasonable safeguards against importing products produced in the DPRK's penal system until such time as the International Committee for the Red Cross is able to verify that conditions in this system meet basic humanitarian standards. This Inquiry also calls on the members of the UN Security Council to approve a resolution prohibiting imports of products made with materials or labor from the DPRK's penal system.

I. Targeted Sanctions of Persons Responsible

463. This Inquiry takes notice of the recommendation of the 2014 United Nations Commission of Inquiry that "[t]he Security Council should . . . adopt targeted sanctions against those who appear to be most responsible for crimes against humanity," without targeting the DPRK's population or economy as a whole.[731] Regrettably, the Security Council has not acted to implement this recommendation and appears unlikely to do so in the foreseeable future. Consequently, we recommend that issuers of convertible currencies adopt carefully targeted, coordinated, and multilateral sanctions against persons they jointly agree to be responsible for crimes against humanity in the DPRK. The objective of these sanctions should be to freeze the assets of the officials, government agencies and KWP agencies deemed responsible for perpetuating crimes against humanity in the DPRK,

[730] *See* Media Release, Kim Kwang-jin, *HRNK Launches Gulag, Inc.: The Use of Forced Labor in North Korea's Export Industries*, The Comm. for Human Rights in North Korea (26 May 2016), https://www.hrnk.org/uploads/files/GULAG-INC-PRESS-RELEASE-FINALFINALFINAL(1).pdf.

[731] Summary of Findings, para. 94(a).

thereby diminishing their capacity to continue carrying out these crimes to the greatest extent possible.

464. This Inquiry takes note of the U.S. government's decision to freeze the assets of Kim Jong-Un, the head of the MPS, the head of the SSD, the head of the PAD and other DPRK and Workers' Party officials for human rights abuses and censorship. Such action represents an example of targeted bilateral sanctions that would be most effective if coordinated with the sanctions regimes imposed by the European Union, the United Kingdom, Japan, Canada, Australia, and other governments.

We, the judges presiding over the December 2016 Hearing and this Inquiry on Crimes Against Humanity in North Korean Political Prisons more generally, unanimously endorse the findings in this report.

Navanethem Pillay
Chair

Thomas Buergenthal
Judge

Mark B. Harmon
Judge

APPENDIX 1
JUDICIAL BIOGRAPHIES

Navanethem "Navi" Pillay (Chair)

Ms. Pillay formerly served as a judge of the High Court of Natal, South Africa, judge and president of the U.N. International Criminal Tribunal for Rwanda, judge on the Appeals Division of the International Criminal Court, and as U.N. High Commissioner for Human Rights (2008-2014). She practiced as a lawyer in South Africa from 1965 until 1995. Currently, Ms. Pillay serves as President of the International Commission against the Death Penalty. Ms. Pillay graduated from the University of Natal with a BA and an LLB. She later attended Harvard Law School, obtaining an LL.M. and a Doctor of Juridical Science degree.

Thomas Buergenthal

Thomas Buergenthal served as judge on the International Court of Justice from 2000 until 2010. From 1979 to 1991, he served as judge, vice president and president of the Inter-American Court of Human Rights. In the 1990s, he was a member of the U.N. Human Rights Committee, the U.N. Truth Commission for El Salvador, and vice chairman of the Claims Resolution Tribunal for Dormant Accounts in Switzerland. He has also served on the Ethics Commission of the International Olympic Committee, as chairman of the Committee of Conscience of the U.S. Holocaust Memorial Museum and as President of the Costa Rica - based Inter-American Institute of Human Rights.

Buergenthal is the Lobingier Professor Emeritus Professor of Comparative Law and Jurisprudence at the George Washington University Law School in Washington, D.C., where he taught international law and international human rights law between 1989 to 2000 and 2010 to 2015. He served as Dean of the Washington College of Law of the American University from 1980 to 1985 and held endowed professorships at the University of Texas Law School (Austin) and the Emory University Law School.

Buergenthal graduated from Bethany College, West Virginia. He received his J.D. degree from the New York University Law School, and his LL.M. and S.J.D. degrees from the Harvard Law School. He has received honorary degrees from various American, European and Latin American universities. Among his many awards are the 2008 Justice Prize of the Peter Gruber Foundation, the ASIL's Golar Butcher Prize for Human Rights, and the 2015 Elie Wiesel Award of the U.S Holocaust Memorial Museum. Buergenthal is the author of more than a dozen books and numerous articles on international law and human rights subjects. His memoir, *A Lucky Child*, describes his experiences as a child in various Nazi camps, including Auschwitz.

Mark Brian Harmon

Judge Harmon served as the International Co-Investigating Judge at the Extraordinary Chambers in the Courts of Cambodia (ECCC) from October 2012 to August 2015. Before joining the ECCC, Mr. Harmon worked as a senior trial attorney at the International Criminal Tribunal for the former Yugoslavia (ICTY) for 17 years. He was the lead prosecutor in the Krajišnik, Krstić, Blaškić and Perisić trials and in the guilty plea cases of Plavšić, Deronjić, Bralo, Erdemović and Češić. Mr. Harmon received his J.D. degree in 1971 from the University of California Hastings College of the Law and has been a member of the California Bar Association since 1972. Prior to working at the ICTY, he served for 10 years as a federal prosecutor in the United States Department of Justice in Washington, D.C. in both the Criminal Section of the Civil Rights Division and in the Environmental Crimes Section and was a deputy public defender in Santa Clara County, California for 12 years. Mr. Harmon has instructed law students at the U.N. Interregional Crime and Justice Research Institute and at other institutions as well as authored publications on environmental criminal prosecutions and aspects of ICTY procedure and rules of evidence.

APPENDIX 2
HEARING AGENDA

A G E N D A
Inquiry on Crimes Against Humanity in North Korean Political Prisons
IBA War Crimes Committee Legal Team for the Inquiry
Steven Kay QC of 9 Bedford Row Chambers, London, UK
Greg Kehoe of Greenberg Traurig, Tampa, Florida, USA
Federica D'Alessandra of Harvard University, USA
Kirsty Sutherland of 9 Bedford Row Chambers, London, UK

8:30-9:00am **Breakfast and Registration**

9:00-9:10am **Opening Remarks**

- Ruth Wedgwood, Edward B. Burling Professor of International Law and Diplomacy, Johns Hopkins – SAIS

9:10-9:20am **Opening Statement by Judges**

- Navanethem "Navi" Pillay (Chair)
- Thomas Buergenthal
- Mark B. Harmon

9:20-9:50 AM **Opening Remarks by Counsel:**

- Nature of the Case and Summary of Law and Evidence (Steven Kay QC)

9:50-10:50am **Testimony by North Korean Defector**

- Kang Cheol-hwan, President, North Korea Strategy Center
(Steven Kay QC)

10:50-11:10am ***COFFEE BREAK***

11:10-12:10pm **Testimony by North Korean Defector 2**

- Anonymous
(Greg Kehoe)

12:10-1:10pm **Testimony by North Korean Defector 3**

- Choi Hyun-jun
(Greg Kehoe)

1:10-2:10pm ***LUNCH***

2:10-3:10pm **Expert Testimony:**

- Kenneth Gause, Director, International Affairs Group, CNA Analysis & Solutions
(Steven Kay QC)

3:10-4:10pm **Expert Testimony:**

- David Hawk, Consultant, Committee for Human Rights in North Korea
(Greg Kehoe)

4:10-4:30pm ***COFFEE BREAK***

4:30-4:40pm **Video Evidence**

- Kirsty Sutherland

4:40-5:10pm **Final Presentation of Evidence by Counsel**

- Summary of Reports, Affidavits and other Documentary Exhibits Introduced into Evidence (Steven Kay QC, Kirsty Sutherland)

5:10-5:20pm **Final Submissions of Legal Case**

- Greg Kehoe

5:20-5:30pm **Closing Remarks**

5:30-7:00pm ***RECEPTION***

The International Bar Association (IBA)

The International Bar Association, established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world.

It has a membership of more than 80,000 individual lawyers and more than 190 bar associations and law societies spanning over 160 countries. It has considerable expertise in providing assistance to the global legal community.

The IBA's War Crimes Committee

The IBA's War Crimes Committee is the only IBA committee of its kind focused specifically on atrocity crimes, and international criminal law and practice. Over the past fifteen years there has been tremendous growth and development in this field of law. This new committee provides a forum for the very diverse group of practitioners and scholars involved in this area of law.

The committee endeavours to provide IBA members with comprehensive and reliable information and resources on international criminal law. It also provides lawyers, international agencies and tribunals with an unparalleled and easily accessible network of contacts and, in turn, is directly involved with the IBA's ongoing programme in support of international, ad hoc and domestic war crimes tribunals.

The committee works alongside the IBA Human Rights Institute and the IBA Human Rights Law Committee to promote justice around the world, and uphold the principle of accountability.

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