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## BRIEF

### **Inquiry on Crimes Against Humanity in North Korean Political Prisons**

*Organised by:*

**International Bar Association (IBA) War Crimes Committee**

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THE COMMITTEE FOR  
HUMAN RIGHTS IN NORTH KOREA  
북한인권위원회



Yonsei Center for Human Liberty  
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<b>COI</b>	UN Commission of Inquiry
<b>CAT</b>	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
<b>CEDAW</b>	Convention on the Elimination of All forms of Discrimination against Women
<b>CRC</b>	Convention on the Rights of the Child
<b>DPRK</b>	Democratic People's Republic of Korea
<b>ICC</b>	International Criminal Court
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia
<b>JCE</b>	Joint Criminal Enterprise
<b>KWP</b>	Korean Workers' Party
<b>MPS</b>	Ministry of Public Security
<b>MSC</b>	Military Security Command
<b>NGO</b>	Non-governmental organisation
<b>NKDB</b>	Database Centre for North Korean Human Rights
<b>OGD</b>	Organization and Guidance Department
<b>POW</b>	Prisoner of War
<b>PPC</b>	Political prison camp ( <i>kwan li so</i> )
<b>ROK</b>	Republic of Korea
<b>SAC</b>	State Affairs Commission
<b>SPA</b>	Supreme People's Assembly
<b>SSD</b>	State Security Department
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UNGA</b>	United Nations General Assembly



## I. INTRODUCTION

1. The Democratic People's Republic of Korea (DPRK) is one of the most isolated and secretive countries in the world. Ruled by an absolute hereditary monarchy, the Kim family, the country is governed by its only party, the Korean Workers Party (KWP) that is controlled by Kim Jong-un the Head of State known as the 'Supreme Leader.'
2. There is compelling evidence that the eight classes of defendant identified in this Brief have committed 10 of the 11 crimes underlying crimes against humanity. Certain of the defendant classes (especially senior ministers and Kim Jong-un) are liable for all 10 crimes pursuant to: (1) joint criminal enterprise (JCE), or (2) under the principle of command responsibility.

## II. DPRK POLITICAL SYSTEM

3. The Economist Intelligence Unit, listed North Korea in last place in its 2015 'Democracy Index' of 167 countries, assessing it to be a totalitarian regime.<sup>1</sup> Like other totalitarian regimes, the DPRK is characterized by: an official ideology (*juche*); a mass party (the Korean Workers Party); and a secret police force (the State Security Department).<sup>2</sup> Power resides almost exclusively in the 'Supreme Leader'. The Supreme People's Assembly nominally consists of three parties; however, following the purges of the 1950s,<sup>3</sup> the parties other than the Korean Workers Party exist in name only, as the three parties govern in a monopoly coalition, and there is no disagreement with the KPW.<sup>4</sup> The authoritarian nature of this framework is cemented by the propaganda circulated

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<sup>1</sup> The Economist Intelligence Unit, Democracy Index 2015, p. 8.

<sup>2</sup> Gause, *Coercion, Control, Surveillance And Punishment*, The Committee for Human Rights in North Korea, 2012, p. 12.

<sup>3</sup> <https://www.britannica.com/place/North-Korea/Economy#ref1028202>.

<sup>4</sup> <https://www.nknews.org/2014/11/being-a-minor-party-in-the-north/>.



concerning the Kim family,<sup>5</sup> and the severe consequences for speaking even a word against it or inadvertently damaging an image of a member of the Kim dynasty.<sup>6</sup>

4. 'Elections' are held every five years in the DPRK. 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.<sup>7</sup> Voting 'no' or abstaining is viewed as a dangerous act of treason. Booths do not provide any secrecy, and dissenting votes must be openly placed into a different ballot box.<sup>8</sup> As such, these 'elections' are a 'rubber-stamping' exercise to validate the Kim regime. In any case, those deputies 'elected' to the Supreme People's Assembly (SPA) hold little power, since the SPA is convened only a few days a year.<sup>9</sup> The Presidium, composed of a select group of officials trusted by the Supreme Leader, has legislative powers for the rest of the year.<sup>10</sup>
5. The structure of the DPRK state is not designed to limit the power of the Supreme Leader, but rather to increase the ease with which he may consolidate it.<sup>11</sup> Whilst formally institutions are attributed clear functions and powers, reality is quite different.<sup>12</sup> Power is often expressed outside any legal framework by secret means.<sup>13</sup> The four *loci* around which power and influence operate are:
  - i. The Korean Worker's Party Apparatus;
  - ii. The military and security apparatus;
  - iii. A family-based patronage system; and

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<sup>5</sup> See, for example: *Kim Jong il: Brief History*, Foreign Languages Publishing House, Pyongyang, 1998.

<sup>6</sup> Gause, *Coercion, Control, Surveillance and Punishment* (The Committee for Human Rights in North Korea, 2012, p. 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."

<sup>7</sup> <http://www.economist.com/blogs/economist-explains/2014/03/economist-explains-2>.

<sup>8</sup> Gause, *Coercion, Control, Surveillance and Punishment* (The Committee for Human Rights in North Korea, 2012.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> Gause, *North Korean Civil-Military Trends: Military-First Politics to a Point*, US Strategic Studies Institute, September 2006, p. 4.

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

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



iv. Three generations of leaders from the same family dynasty.<sup>14</sup>

### A. Head of State

6. Since 2011, the post of Head of State, or ‘Supreme Leader’ has belonged to Kim Jong-un. His predecessors were his father, Kim Jong-il, and his grandfather, Kim Il-sung. The Supreme Leader also enjoys the titles of Supreme Commander, Chairman of the Korean Worker’s Party, First Chairman of the State Affairs Commission, and Deputy to the Supreme People’s Assembly.<sup>15</sup> As such, he directly controls the Korean Worker’s Party (KWP) (the executive), the military, and the Supreme People’s Assembly (the legislative). As mentioned above, the corollary of this is that power resides almost exclusively in Kim Jong-un. Although the structure of the North Korean 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 State Affairs Commission and the Korean People’s Army, are controlled directly by Kim Jong-un.
7. The only political ideology permitted in DPRK is that of the Supreme Leader known as *Suryong*.<sup>16</sup> The clear hierarchical structure of the State with the top to bottom control over the entire society by the Supreme Leader is demonstrated in its unswerving application of the Monolithic Ideology System proclaimed and instituted throughout DPRK by Kim Il-sung in 1967 and consisting of 10 fundamental principles.<sup>17</sup>
8. Kim Jong-il as his successor explained the 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*

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<sup>14</sup> *Ibid.*

<sup>15</sup> Gause, ‘North Korean Political Dynamics of the Kim Jong-un Era’, *International Journal of Korean Unification Studies* Vol. 25, No. 1, 2016, 33 – 63, p. 34.

<sup>16</sup> Park *Kim Jong-il sidae Bukan-ui jeongchicheje*, 56. Robert Collins, ‘Pyongyang Republic,’ Committee for Human Rights in North Korea 2016.

<sup>17</sup> Robert Collins, ‘Pyongyang Republic,’ Committee for Human Rights in North Korea 2016.



*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 struggle to overcome the heterogeneous ideas and factional elements which conflict with the leader's idea and guidance and disturb unity and cohesion.*<sup>18</sup>

9. The Ten Principles are designed to govern all aspects of life in the DPRK for North Koreans. There is no other permitted philosophy. The Ten Principles are:

1. *Struggle with all your life to paint the entire society with the one color of the Great Leader Kim Il-sung's revolutionary thought.*
2. *Respect and revere highly and with loyalty the Great Leader Kim Il-sung.*
3. *Make absolute the authority of the Great Leader Kim Il-sung.*
4. *Accept the Great Leader Kim Il-sung's revolutionary thought as your belief and take the Great Leader's instructions as your creed.*
5. *Observe absolutely the principle of unconditional execution in carrying out the instructions of the Great Leader Kim Il-sung.*
6. *Rally the unity of ideological intellect and revolutionary solidarity around the Great Leader Kim Il-sung.*
7. *Learn from the Great Leader Kim Il-sung and master communist dignity, the methods of revolutionary projects, and the people's work styles.*
8. *Preserve dearly the political life the Great Leader Kim Il-sung has bestowed upon you, and repay loyally for the Great Leader's boundless political trust and considerations with high political awareness and skill.*
9. *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 Kim Il-sung.*
10. *The great revolutionary accomplishments pioneered by the Great Leader Kim Il-sung must be succeeded and perfected by hereditary*

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<sup>18</sup> Robert Collins, 'Pyongyang Republic,' Committee for Human Rights in North Korea 2016. Kim Jong-il, 'The Workers' Party of Korea is the Party of the Great Leader Comrade Kim Il Sung, in a speech given on 2 October 1995. The full text of the speech is available at <http://korea-dpr.com/lib/109.pdf>.





*successions until the end.*<sup>19</sup>

10. Kim Jong-un, the present Supreme Leader of the Kim dynasty, has expressed his commitment to the same 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...*<sup>20</sup>

## **B. Korean Workers' Party**

11. Over time, the significance and power of the military and KWP have changed. Whilst Kim Jong-Il focused on the policy of *songun* or 'military first', so that the military was seen as directly subordinate to him and hence superior to any other arm of the state,<sup>21</sup> Kim Jong-un has in recent years changed the emphasis so that the KWP is the most important wing of government.<sup>22</sup> Decisions by the Supreme Leader and the KWP are absolute and override laws.<sup>23</sup> Those most senior in the KWP are the members of the Politburo. The KWP, whose membership is limited to the most favoured North Koreans,<sup>24</sup> oversees every aspect of North Korean life.<sup>25</sup> The *songbun* system operates so that the backgrounds of families are assessed to determine their loyalty to the regime and from that assessment benefits are granted. The KWP Administrative Department oversees

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<sup>19</sup> Citizens' Alliance for North Korean Human Rights, 'Ten Principles of the Establishment of the Unitary Ideology System.' There are also 65 sub-principles.

<sup>20</sup> 'Political Bureau of C.C. WPK Adopts Resolution,' *KCNA*, 13 February 2015.

<sup>21</sup> Gause, 'North Korean Political Dynamics of the Kim Jong-un Era', *International Journal of Korean Unification Studies* Vol. 25, No. 1, 2016, 33 – 63, pp. 40-41.

<sup>22</sup> *Ibid.*, pp. 42-43.

<sup>23</sup> Article 11 of the Constitution provides that the DPRK conducts all activities under the leadership of the party; Principle 5 of the Ten Guiding Principles provides: *Observe absolutely the principle of unconditional execution in carrying out the instructions of the Great Leader Kim Il-sung.*

<sup>24</sup> <https://www.britannica.com/topic/Korean-Workers-Party>.

<sup>25</sup> *Ibid.*



the operation of the State Security Department (SSD), which operates the political prison camps of the DPRK.<sup>26</sup> Those who are hostile are sent to camps as political prisoners.

### C. State Security Department

12. The State Security Department (SSD) is responsible for wide-ranging counterintelligence and internal security functions generally associated with the secret police.<sup>27</sup> Its personnel is believed to number approximately 50,000.<sup>28</sup> It monitors political attitudes, operates the surveillance of those who have returned from foreign areas and deals with those persons viewed as being against the State.<sup>29</sup> The SSD reports directly to the State Affairs Commission (ex. National Defence Commission).<sup>30</sup> Information concerning the SSD is generally obscured as much as possible.<sup>31</sup>
13. General Kim Won Hong was appointed Minister of State Security in April 2012.<sup>32</sup> He is a member of the KWP Politburo and the Party Central Military Commission.<sup>33</sup> Beneath him are six vice directors who are responsible for: organisation, propaganda, cadres, inspections, rear services and liaising with the Ministry of People's Security (MPS).<sup>34</sup>
14. The SSD has offices that include: the General Guidance Bureau, Counterespionage Bureau, Counterintelligence Bureau, Border Security Bureau, Investigation Bureau

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<sup>26</sup> Gause, *Coercion, Control, Surveillance And Punishment*, The Committee for Human Rights in North Korea, 2012, p. 25.

<sup>27</sup> Gause, *Coercion, Control, Surveillance And Punishment*, The Committee for Human Rights in North Korea, 2012, p. 17.

<sup>28</sup> *Ibid.*

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

<sup>30</sup> *Ibid.* At the Fourth Session of the 13<sup>th</sup> Supreme People's Assembly, 29 June 2016, the National Defence Commission was replaced by the State Affairs Commission, which takes on the responsibilities of the National Defence Commission with an expanded focus on the non-military national concerns. According to Article 106 of the Constitution of North Korea, the SAC is the "supreme national guidance organ of state sovereignty."

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

<sup>32</sup> <https://nkleadershipwatch.wordpress.com/dprk-security-apparatus/state-security-department/>.

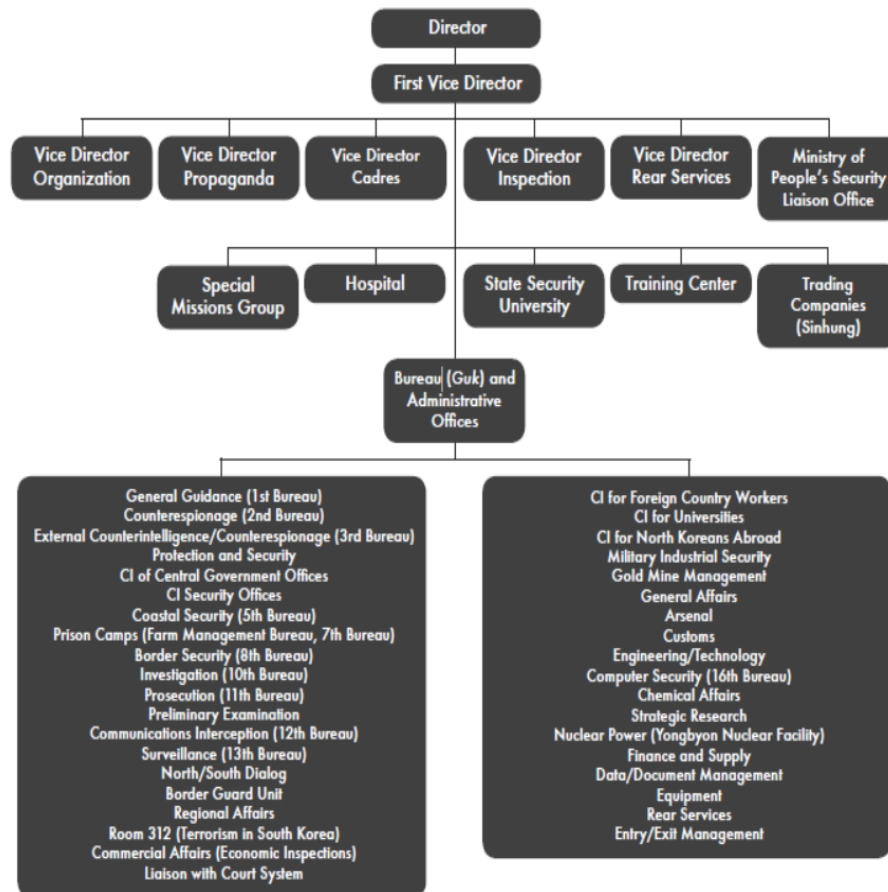
<sup>33</sup> <https://nkleadershipwatch.wordpress.com/leadership-biographies/gen-kim-won-hong/>.

<sup>34</sup> Gause, *Coercion, Control, Surveillance and Punishment*, The Committee for Human Rights in North Korea, 2012, p. 24.



Prosecution Bureau, and Prisons Camps (known as the 7<sup>th</sup> Bureau, it is responsible for the management of political prisoners and prisons).<sup>35</sup>

15. The SSD is organised according to the following model as structured below:<sup>36</sup>



#### D. State Security Department and Political Prisoners: the Investigation Bureau, Prosecution Bureau and the Prison Bureau

16. Articles 122 and 124 of the Criminal Procedure Law provide the SSD with exclusive competence to deal with political crimes.<sup>37</sup> If the Ministry of People's Security, who operate as the ordinary police, arrest anyone suspected of a political crime, they must

<sup>35</sup> *Ibid*, pp. 22-23.

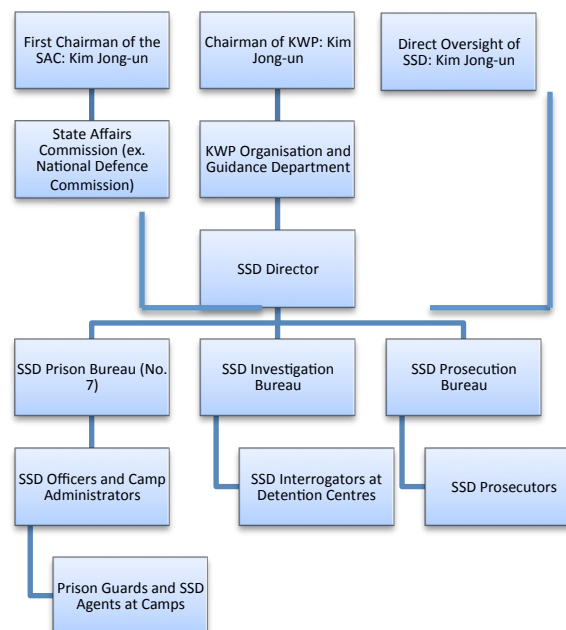
<sup>36</sup> *Ibid*., p. 24.

<sup>37</sup> *Ibid*, p. 69.



transfer the case to the SSD.<sup>38</sup> The SSD's Investigation Bureau controls the investigation, arrest and interrogation of political suspects.<sup>39</sup> The Bureau is particularly feared by the public because it has a reputation for arbitrarily carrying out executions for personal political gain.<sup>40</sup> The Prosecution Bureau determines how to proceed with 'adjudication': evidence suggests that the Bureau acts as both prosecutor and the court of judgment,<sup>41</sup> and that "legal procedures are often violated or simplified to the point that they are meaningless."<sup>42</sup> The Prisons Bureau is in charge of the operation of political prisons where those persons who have been deemed to have committed political crimes are sent.<sup>43</sup>

17. The structure of accountability for the SSD and its superior state apparatus for the operation of political prison camps is as follows:



<sup>38</sup> *Ibid*, p. 70.

<sup>39</sup> *Ibid*, p. 22.

<sup>40</sup> *Ibid*, p. 22.

<sup>41</sup> *Ibid*, p. 70.

<sup>42</sup> *Ibid*.

<sup>43</sup> *Ibid*., p. 23.



## **E. State Security Department: Regional Departments and Political Prison Camps**

18. Each of the DPRK's nine provinces has an SSD office.<sup>44</sup> The provincial offices are run by chiefs and deputy chiefs who oversee section chiefs and guidance members.<sup>45</sup> Each provincial headquarters has approximately 200 to 300 personnel.<sup>46</sup>
19. Political prison camps, 14, 15, 16 are known to be run exclusively by the SSD.<sup>47</sup> In these camps, the 'Chief Administrator' maintains command, followed by a political officer who assists him for operations. Each camp has a political bureau, an SSD bureau, a security and guard bureau, and an administrative bureau (in charge of maintenance, procurement, ammunition, finance, transportation and communication sections). The SSD maintains a system of vertical chain of command, from the SSD officers at the top of the chain, to those prison guards that supervise prisoners at work sites.<sup>48</sup>
20. Whilst the SSD is technically answerable to the National Defence Committee, in practice, the arrest and treatment of the political prisoners is directly controlled by the KPW.<sup>49</sup>
21. Other than the SSD, within the prisons the monitoring of prisoners is undertaken by the prisoners themselves.<sup>50</sup> The prisoners are formed into a strict hierarchy to minimize the need for SSD officials.<sup>51</sup> They are formed into work units, with each unit assigned a single SSD officer.<sup>52</sup>
22. Based on testimony,<sup>53</sup> the structure of camps run by the SSD resembles the following:

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<sup>44</sup> *Ibid.*, p. 25.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> Political Prison Camps in North Korea Today, Database Center for North Korean Human Rights, 2011, pp. 125-126,

<sup>48</sup> Political Prison Camps in North Korea Today, Database Center for North Korean Human Rights, 2011, p. 203, based on the testimony of witness A27.

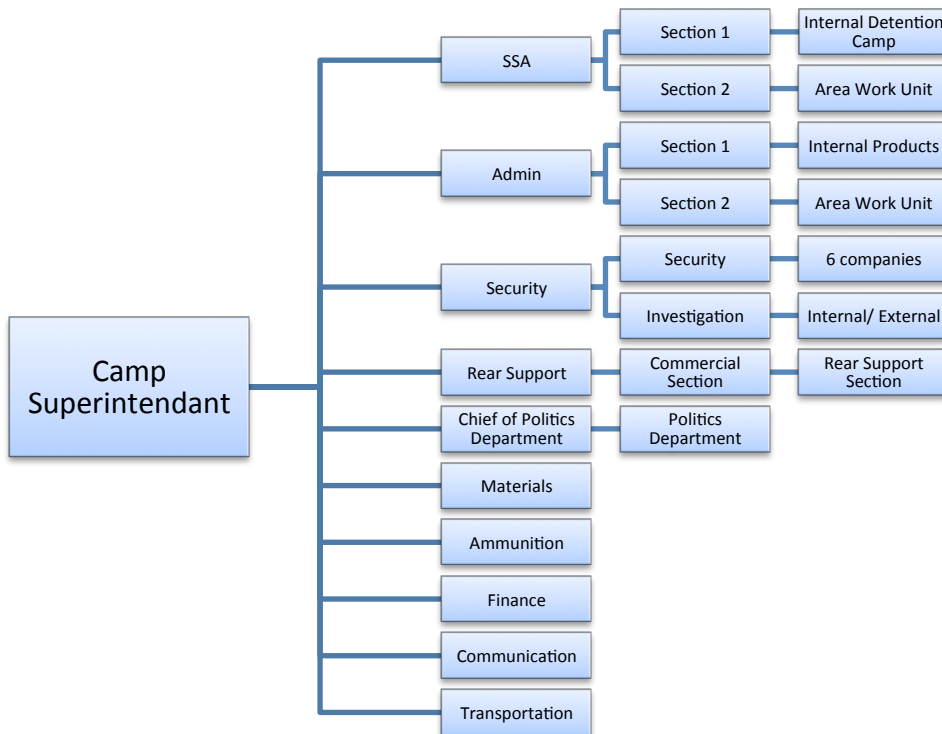
<sup>49</sup> Park Young-ho et al., North Korean Human Rights White Paper 2010, (Seoul: Korea Institute of National Unification, 2010), p. 126.

<sup>50</sup> *Ibid.* p. 208.

<sup>51</sup> *Ibid.*

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

<sup>53</sup> Political Prison Camps in North Korea Today, Database Center for North Korean Human Rights, 2011, p. 204.



23. Witness testimony is inconclusive concerning the management of a further political prison No. 25. Some witnesses have stated that it is operated by the police rather than by the SSD.<sup>54</sup>
24. It is also believed by the Committee for Human Rights in North Korea a new camp may have been established in 2007 in a region called Choma Bong Restricted area, although no escapees have yet been discovered to confirm what has thus far been established only by the interpretation of satellite imagery.<sup>55</sup>

#### **F. Political Prison Camps 14, 15, 16 and Prison 25**

25. Political prisoners are incarcerated throughout the DPRK prisons, but there are three known designated political prison camps numbered: 14, 15, 16, and a prison for political

<sup>54</sup> *Ibid.*, p. 202.

<sup>55</sup> Report North Korea Choma-Bong Restricted Area March 17 2016



prisoners no. 25. There were more, but others such as nos. 18 and 22 have been decommissioned in recent times.<sup>56</sup> Political prison camps were established in DPRK in the 1950's, and represent a state policy for the treatment of political prisoners.<sup>57</sup> The camps have numbers rather than place names in order to identify them. The prisons are large areas of land enclosed by barbed wire and electrified fences as can be seen in satellite photographs, with settlements of prisoners dotted around the inhospitable terrain.

26. Political prisoners are persons who are found by the SSD to have engaged in political crimes and sent without trial or judicial order to the special political prison camps (*kwanliso*).<sup>58</sup> Political crimes may be any form of behaviour or conduct suspected or believed to be contrary to the interests of the state and most of those detained have been said to have violated the Ten Principles of the Monolithic Ideology System. The prisons also include people who have been subject to outside influences and such risk of competing experience is viewed as subversive and dangerous to the DPRK. Prisoners of war and civilians abducted during the Korean War, ended up in the prison camps as they came from outside the State. Koreans who returned from Japan in the 1950s and 1960s were sent to political prison camps, because it was felt they might spread subversive information about what they had seen abroad. The same fate was suffered by a large number of young citizens of the DPRK who had studied in Eastern Europe and the Soviet Union around 1989 and witnessed the emergence of democracy in those countries after the fall of the Berlin Wall.
27. *Kwanliso* political prison camps are established with 'total control zones' to which people have been sent without any prospect of release. Only 2 people have been known to emerge from such zones. The *kwanliso* have received hundreds of thousands political prisoners since their inception, with up to three generations of families detained together without any judicial process and forced into slave labour in mines, or logging, or

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<sup>56</sup> White Paper on Human Rights in North Korea 2016 Korea Institute for National Unification pp398-399

<sup>57</sup> UN HRC Report of the commission of inquiry into human rights in DPRK 7 February 2014 A/HRC/25/CRP.1 para 733

<sup>58</sup> UN HRC Report of the commission of inquiry into human rights in DPRK 7 February 2014 A/HRC/25/63 para 59.



agriculture. The authorities sent entire families to political prison camps for political crimes committed by a family member simply based upon guilt by association.<sup>59</sup>

28. In February 2014 the United Nations Commission of Inquiry on Human Rights in North Korea (COI) determined that “crimes against humanity have been committed in North Korea, pursuant to policies established at the highest level of the State.” The COI determined that in the DPRK political prison camps, the prisoners had been subjected to deliberate starvation, forced labor, executions, torture, rape and the denial of reproductive rights enforced through punishment, forced abortion and infanticide. The commission estimated that hundreds of thousands of political prisoners died in the camps over the last five decades.

29. The State authorities in the DPRK deny the existence of the camps but they have been proved to exist by the testimonies of former inmates, guards and local witnesses. Satellite imagery also proves their existence and which the DPRK have tried to disguise. It is estimated that between 80,000 and 120,000 political prisoners are currently detained in the three political prison camps.<sup>60</sup>

30. **Political Prison Camp No.14:**

Covering 150 square kilometres of a mountainous area near Kaecheon City in South Pyongan Province.<sup>61</sup> It appears to have been in existence since the 1960s and was transferred to its present location in the early 1980s. All inmates are incarcerated for life. Only one prisoner is known to have successfully escaped the camp, Mr Shin Dong-hyuk who testified publicly before the COI. According to what can be seen on satellite images, the camp appears to have been expanded since his escape in 2005.<sup>62</sup> It is clearly visible in Camp 14: Committee For Human Rights in North Korea: Satellite Imagery Report.

31. **Political Prison Camp No. 15**

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<sup>59</sup> Commission of Inquiry Report, para 59.

<sup>60</sup> Commission of Inquiry Report, para. 61.

<sup>61</sup> The GeoCoordinates of the central area of Camp No. 14 are 39.3415N -126.0319E.

<sup>62</sup> See COI testimony of former Camp No. 14 inmate Mr Shin Dong-hyuk, Seoul Public Hearing, 20 August 2013, afternoon.





Covers an area of 370 square kilometres in Yodok County, South Pyongan Province.<sup>63</sup> Camp No. 15 it has a ‘total control zone’ and a ‘revolutionizing zone’. The total control zone inmates who are considered ideologically irredeemable and incarcerated for life are separated from the revolutionizing zone prisoners who are incarcerated for less serious wrongs and tend to come from privileged families. They have a chance of being released after a some years of incarceration if they convince the camp authorities through hard work, diligent participation in daily indoctrination sessions and often also the payment of bribes, of their ideological rehabilitation.<sup>64</sup> It is visible in Camp 15: Committee For Human Rights in North Korea: Satellite Imagery Report.

### 32. **Political Prison Camp No. 16**

Is 560 square kilometres of rugged terrain in Myonggan, North Hamgyong Province.<sup>65</sup> It is located in close proximity to the P’unggye-ri nuclear test site. First-hand witness testimony indicates that the camp has existed since the 1970s, although it was much smaller at that time. Inmates live in two settlement areas in the northwestern and southeastern areas of the camp. It is visible in Camp 16: Committee For Human Rights in North Korea: Satellite Imagery Report

### 33. **Political Prison No. 25**

Located near Chongjin City, North Hamgyong Province.<sup>66</sup> While Political Camps No. 14, 15 and 16 each have tens of thousands of prisoners, Prison No. 25 has a few thousand prisoners. It has a main block surrounded by a high wall. The political prisoners are incarcerated for life on political grounds.

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<sup>63</sup> The GeoCoordinates of the central area of Camp 15 are 39.4032N-126.5059E.

<sup>64</sup> Seoul Public Hearing: Ms Kim Young-soon; Mr Jeong Kwang-il and Mr Kim Eun-chol, 21 August 2013, morning; Mr Ahn Myong-chol, 21 August 2013, afternoon; and Mr Kang Chol-hwan, 24 August 2013, afternoon. Some observers fear that releases from the revolutionizing zones are no longer carried out. See testimony of Mr David Hawk, Washington Public Hearing, 31 October 2013, afternoon.

<sup>65</sup> The GeoCoordinates for the central area of Camp 16 are 41.1849N 129.2032E.

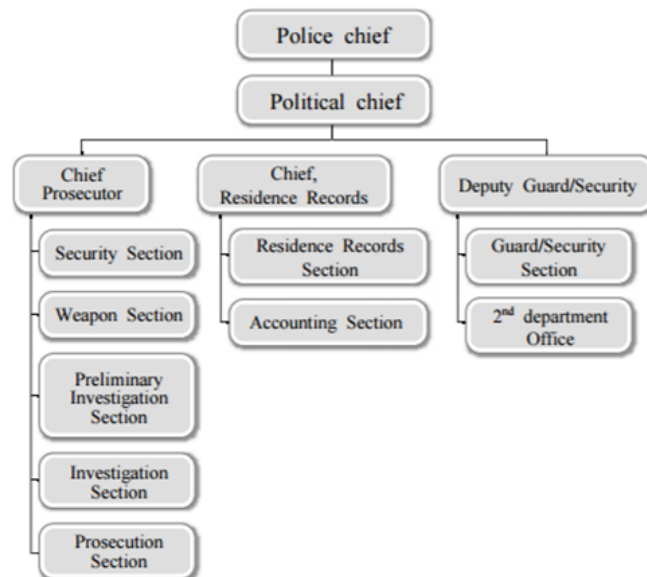
<sup>66</sup> The GeoCoordinates for Camp 25 are 41.5002N 129.4334E.



## G. Ministry of People's Security: Camp No. 18

34. Camp No. 18 was based at Bukchang until it was largely decommissioned at the beginning of 2007.<sup>67</sup> This was a hybrid camp run predominantly by the Ministry of People's Security (MPS), or the ordinary police, with a small SSD presence. It is of particular interest since evidence shows that Camp No. 18 has a residual existence at Dongrim-il, Gaecheon, South Pyeongan Province and continues to be operated by the MPS.<sup>68</sup> Camp No. 18 was a mixed prison,<sup>69</sup> and more is known about the structure of this camp than of any other because of the inmates here were not exclusively political prisoners.
35. This Camp consisted of: (i) an MPS department; (ii) an SSD department; and (iii) a KWP department, as well as an administration department.

- i. The MPS Department has the following structure:



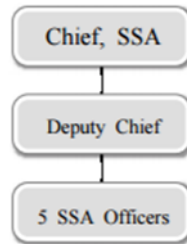
<sup>67</sup> Political Prison Camps in North Korea Today (Database Center for North Korean Human Rights, 2011), pp. 97-98. Witness testimony suggests that around 80 families from the Camp were transferred to another camp, whilst remaining prisoners were released (A09, former prisoner, Pongchang-ni, Camp No. 18, 1975-2000).

<sup>68</sup> 2016 White Paper on Human Rights in North Korea, pp. 399 - 402

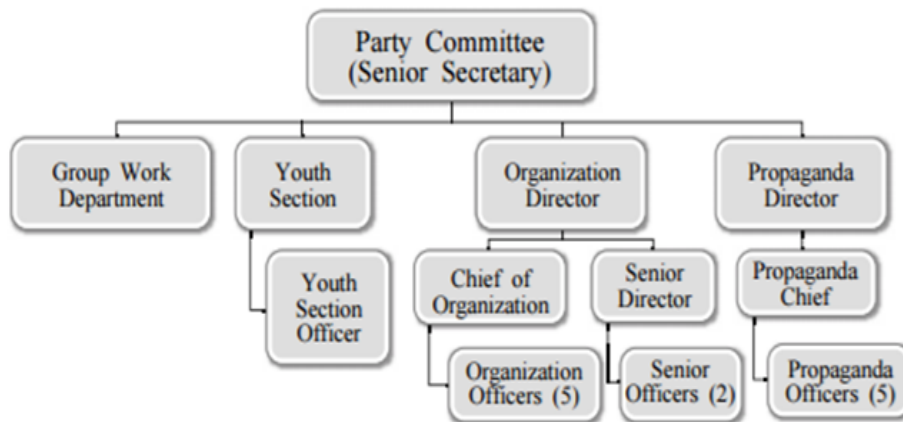
<sup>69</sup> D. Hawk, *North Korea's Hidden Gulag: Interpreting Reports of Changes in the Prison Camps*, The Committee for Human Rights in North Korea, p. 25.



ii. The small SSD presence is arranged as follows:



iii. The KWP presence at the Camp:



36. Although camps run by the MPS are technically run by the National police ministry, they are controlled by the KWP who appoint the top-ranking officials.<sup>70</sup>

### III. DPRK INTERNATIONAL TREATY OBLIGATIONS

37. The DPRK is in clear violation of UN treaties that it has ratified. The DPRK has made serious international commitments under the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Each of these

<sup>70</sup> Political Prison Camps in North Korea Today, Database Center for North Korean Human Rights, 2011, p. 201.



treaties contains obligations relevant to the DPRK's treatment of prisoners in its political prisons, in particular: extermination,<sup>71</sup> murder,<sup>72</sup> enslavement,<sup>73</sup> torture,<sup>74</sup> imprisonment,<sup>75</sup> rape and other grave sexual violence, and persecution<sup>76</sup> on political, religious, and gender grounds.

38. The ICESCR<sup>77</sup> entered into force on 03 January 1976 and the ICCPR<sup>78</sup> entered into force on 23 March 1976, by agreement of the 1966 UN General Assembly (UNGA). The

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<sup>71</sup> 'Extermination' is defined in international law as "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." Human Rights Council, *Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea*, A/HRC/25/CRP.1, para. 1041 (7 February 2014) (citing: ICTY, *Prosecutor v. Lukic*, IT-98-32/1-T [Trial Chamber], Judgment of 20 July 2009, para. 938). Extermination can also be accomplished by means of mass imprisonment, and withholding the means to maintain life and thereby cause death on a mass scale.

<sup>72</sup> 'Murder' is defined under international criminal law as purposefully causing the unlawful death of another, whether by causing the death of that person or being aware of that death will be the inevitable consequence of an impugned act in the "ordinary course of events." Elements of Crimes, Assembly of States Parties to the Rome Statute of the International Criminal Court, 1st Sess., Sept. 3–10, 2002, article 7 (1) (a); ICTY, *Prosecutor v. Mucic et al*, IT-96-21-T [Trial Chamber], Judgment of 16 November 1998, para. 439; ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T [Trial Chamber I], Judgment of 2 September 1998, para. 589.

<sup>73</sup> 'Enslavement' may be found where one exercises any or all powers which ordinarily attach to the right of ownership over a person. This may be evidenced by extracting forced labour if accompanied by aggravating circumstances that deprive the victim of their personhood under domestic law. Relevant aggravating circumstances include, inter alia: detention or captivity; the degree of control exercised over the victim; absence of freedom of choice; conditions and intensity of forced labour; and the subjection of cruel treatment and abuse. *Prosecutor v. Kunarac et al*, IT-96-23/IT-96-23/1, ICTY Trial Chamber, Judgment of 22 February 2001, para. 539, 541.

<sup>74</sup> "Torture", as understood in customary international law, is defined as the intentional infliction of severe physical or mental pain and suffering. And while custody or control of the victim is not necessary, the infliction of pain must "aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person." ICTY, *Prosecutor v. Kunarac et al*, IT-96-23-A, 12 June 2002, Appeals Chamber, para. 117.

<sup>75</sup> "Imprisonment" implicates human rights obligations when it occurs in a manner that violates the fundamental rules of international law, including detention which fails to observe the most basic notions of due process. Such failures do not rise to human rights violations where minor deviations are found, but must be sufficiently grave in duration or be exercised to as to deprive an individual of a basic human right. ICTY, *Prosecutor v. Kordic et al*, IT-95-14/2-T [Trial chamber], Judgment of 26 February 2001, para. 302; ICTY, *Prosecutor v. Krnojelac*, IT-97-25-A, [Trial Chamber], Judgment of 15 March 2002, para. 122.

<sup>76</sup> "Persecution" under internal law is defined as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity . . . [and] must be committed with the specific intent of discriminating against the victim." Human Rights Council, *Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea*, A/HRC/25/CRP.1, para. 1057.

<sup>77</sup> International Covenant on Economic, Social and Cultural Rights, New York, 3 January 1976, *United Nations Treaty Series*, vol. 993, No. 14531, p. 4, available at [treaties.un.org/doc/Publication/UNTS/Volume%20993/volume-993-I-14531-English.pdf](https://treaties.un.org/doc/Publication/UNTS/Volume%20993/volume-993-I-14531-English.pdf).

<sup>78</sup> *International Covenant on Civil and Political Rights*, New York, 23 March 1976, *United Nations Treaty Series*, vol. 999, No. 14668, p. 172, available at [treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf](https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf).



DPRK ratified these treaties in 1981, while holding observer status in the UNGA.<sup>79</sup> The DPRK subsequently ratified the CRC<sup>80</sup> in 1990 and the CEDAW<sup>81</sup> in 2001.

39. These four treaties reflect the consensus of UN Member States of the basic rights to which all individuals should be entitled, and to which Members who have ratified the agreements have obligated themselves to uphold. These treaties, *inter alia*, contribute to the realization of the UN Charter and the Universal Declaration of Human Rights (UDHR) by agreement that ‘everyone is entitled to all rights and freedoms set forth [in the UDHR], without distinction of any kind...’<sup>82</sup>

#### **A. International Covenant on Economic, Social and Cultural Rights**

40. The ICESCR and ICCPR are companion treaties intended to enshrine principles of individual dignity and fundamental rights, originally articulated in the UDHR, into enforceable and monitored human rights treaties. The ICESCR focuses principally on the social and economic benefits recognised under the UDHR, and complements the civil and political rights recognised under the ICCPR.

- a. *Extermination* – Article 11 of the ICESCR enshrines the principle that every individual has the right to an adequate standard of living for themselves and their family, including adequate access to food, clothing, housing and continuously improving living conditions (Article 11(1)). In particular, signatory states have committed to ensure that individuals will be free from hunger, whether through domestic provision of food or through international cooperation (Article 11(2)).

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<sup>79</sup> <http://indicators.ohchr.org/>

<sup>80</sup> *Convention on the Rights of the Child*, New York, 2 September 1990, *United Nations Treaty Series*, vol. 1577, No. 27531, p. 3, available at [treaties.un.org/doc/Publication/UNTS/Volume%201577/v1577.pdf](http://treaties.un.org/doc/Publication/UNTS/Volume%201577/v1577.pdf).

<sup>81</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, New York, 18 December 1979, *United Nations Treaty Series*, vol. 1249, No. 20378, p. 13, available at [treaties.un.org/doc/Publication/UNTS/Volume%201249/v1249.pdf](http://treaties.un.org/doc/Publication/UNTS/Volume%201249/v1249.pdf).

<sup>82</sup> “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.” UDHR, Article 2.



- b. *Enslavement* – The right to work, in a profession of one’s choosing, and the ability to enjoy the fruits of one’s labours are integral features of the ICESCR. For instance, Article 6(1) recognises the right to work and to freely choose one’s living.

Article 7 articulates the benefits to be enjoyed and to which individuals are entitled from just and favorable working conditions, including: remuneration that supports a decent standard of living for individuals and families; safe and healthy working conditions; equal opportunities for employment; and rest and leisure.

Additional provisions relevant to the question of slavery under the ICESCR include: freedom from exploitation (Article 10(3)), access to education and freedom of parents to direct their children’s education (Article 13), and freedom to participate in cultural life (Article 15(1)(a)).

- c. *Imprisonment* – The ICESCR does not include provisions that expressly reference the matter of imprisonment. However, two provisions implicate imprisonment and the consequential loss of freedom that results. Notably, this includes Article 6(1)’s recognition of the right to freely choose one’s profession and Article 15(1)(a)’s recognition of the individual right to take part in cultural life.
- d. *Persecution* – Rights recognised and guaranteed under the ICESCR are to be exercised without discrimination on the basis of gender, politics or religion. Provisions related specifically to gender and political persecution are elaborated below.
  - i. *Political Persecution* – Self-determination and the freedom to determine one’s political status are recognised under Article 1(1) of the ICESCR. Additionally, the right to work and to choose one’s profession freely are provided under Article 6(1),



thereby precluding limitations based on political criteria of individuals.

- ii. Gender Persecution – Article 3 of the ICESCR recognises the equal right of men and women to fully enjoy all economic, social, and cultural rights recognised under the ICCPR.

## **B. International Covenant on Civil and Political Rights**

41. The ICCPR articulates those rights recognised by signatories as fundamental to the enjoyment of civil and political freedom.

- (i) *Extermination* – Extermination is expressly forbidden under Articles 1, 6, 7, and 17 of the ICCPR. For instance, extermination, or the intentional infliction of conditions of life to bring about the destruction of part of the population, contravenes the State's obligation to respect, and not arbitrarily deprive, the individual right to life (Article 6(1)). State efforts to deprive individuals of the most basic means of subsistence or to permit unlawful attacks on honour or reputation are also violations of obligations under the ICCPR (Articles 1(2) and 17(1), respectively).
- (ii) *Enslavement* – Signatories to the ICCPR are obligated to enforce a universal prohibition on slavery under Article 8(1) ('No shall be held in slavery...'). Further, the resulting deprivation of freedom of movement that is a feature of slavery is also prohibited under Article 12(1), which enshrines the liberty of movement and freedom to choose one's residence.
- (iii) *Torture* – Torture is expressly forbidden under Article 7 of the ICCPR.
- (iv) *Imprisonment* – The ICCPR expressly enshrines minimum standards of due process, including protection from arbitrary arrest (Article 9(1)),



and the right to a fair and public hearing before a competent and impartial tribunal (Article 14). Further, a State's penitentiary system must comprise treatment of prisoners for which the essential aim is reformation and social rehabilitation (Article 10(3)). Children and juveniles are to be segregated from the adult prison population (Article 10(3)).

- (v) *Rape and Other Forms of Grave Sexual Assault* – The ICCPR's Article 7 prohibition against 'cruel, inhuman or degrading treatment' has been repeatedly recognised by international tribunals to apply to the crime of rape and other forms of grave sexual assault (including forced abortions).<sup>83</sup>
- (vi) *Persecution* – Political, religious and gender persecution are expressly prohibited under Articles 2, 24, and 26 of the ICCPR. Even in instances where public emergencies require a State to derogate from their obligations under the ICCPR, they may not do so in a manner that discriminates (or persecutes) individuals on the basis of their politics, sex, or religion (Article 4(1)). Further, the right to self-determination is enshrined under Article 1, including the right to freely determine political status, and to pursue economic, social and cultural development. Provisions specifically relating to the specific purpose for persecution are elaborated below.
  - i. *Political Persecution* – Political persecution, or persecution based on opinion, or in violation of freedom of expression (including participation in the democratic process) and association, is prohibited under Articles 18 (freedom of thought), 19 (freedom of opinion and expression), and 25 (freedom to engage in democratic process) of the ICCPR.

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<sup>83</sup> See, for example: ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T [Trial Chamber I], Judgement, 2 September 1998, para. 687; Human Rights Committee, General Comment No. 28, CCPR/C/21/Rev.1/Add.10 (2000), para. 11.





- ii. Gender Persecution – The State is obligated to recognise everyone as a person and entitled to equal protection under the law (Articles 16 and 26), and women are entitled to equal rights and responsibilities in the marriage (Article 23).
- iii. Religious Persecution – In addition to freedom of conscience and opinion (Article 18(1)), individuals have the right, free from coercion, to adopt and instil in their children the religion of their choice (Article 18(1)–(3)), and members of religious minorities may not be denied the right to profess and practice their religion (Article 27). Further, states are precluded from advocating religious hatred that constitutes incitement to discrimination (Article 20(2)).

### **C. Convention on the Rights of the Child**

42. The CRC is the only human rights treaty the DPRK ratified immediately following its adoption by the UNGA.<sup>84</sup> The treaty is applicable to all the claims asserted against the DPRK as they relate to the matter of political prisons, and the list below reflects its universal applicability to all seven claims.

- i. *Extermination* – Children have an absolute right to life (Article 6(1)), and are to be accorded the every opportunity to the extent possible the means necessary to achieve the highest attainable standard of health and wellbeing (including moral, mental, physical and social) (Articles 24(1) and 27(1)). Children are not be deprived of these basic protections and rights by virtue of being a member of a minority group (Article 30), nor prevented from enjoying membership in said group, and shall not be

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<sup>84</sup> Convention on the Rights of the Child, *UN Treaty Collection*, available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en) (last accessed 25 October 2016). It is worth noting that all UNGA members have ratified the CRC, except for the US, which is nevertheless a signatory to the CRC. It is the only human rights treaty to date with near universal ratification. *Id.*



exploited or forced to engage in work or labour that are dangerous or hazardous to their health or wellbeing (Article 32).

- ii. *Murder* – The CRC recognises that children have an inherent right to life, and states are obligated to ensure their survival and development to the maximum extent possible (Article 6).
- iii. *Enslavement* – As physical, mental, and emotional development of children is a feature of the CRC, enslavement and ancillary effects of enslavement invariably implicate a number of CRC provisions. For instance, all institutions, whether public or private, are required to ensure that the ‘best interests of the child’ are given primary consideration when taking official acts (Article 3). Children have the right to a standard of living adequate for their physical, mental, moral, and social development (Article 27). And in addition to the right to rest, leisure, recreation, and cultural activities (Article 31), children are to be protected from economic exploitation and from performing any work that is hazardous and may interfere with their development (Articles 32(1) and 36).
- iv. *Torture* – Children are not to be tortured (Article 37) and a legal and administrative framework is to be established to ensure that children are protected from physical and mental violence and abuse (Article 19(1)). Where children have been victims, the State is obligated to establish appropriate measures to ensure the full recovery and reintegration of the child victim (Article 39). Finally, any child accused of committing a crime shall not be compelled to give testimony or to confess guilt (Article 40(2)(b)(iv)).
- v. *Imprisonment* – Article 3 of the CRC stipulates that no actions shall be taken unless in the “best interest of the child,” implicating any action that results in imprisonment of children. Nor may any child be subject



to arbitrary or unlawful interference with their family or with the privacy of their home (Article 16).

States are obligated to ensure that no child is arbitrarily or unlawfully deprived of liberty, and any arrest or detention of a child must be done in strict conformity with the law (Article 37). And where a child is lawfully imprisoned, that child must be treated humanely, with respect and dignity (Article 37(c)), and shall not be subject to exploitation of any kind (Articles 32 and 36).

Finally, any child temporarily or permanently deprived of their family environment and whose best interests are not being provided for, must be accorded special protection and assistance by the State (Article 20).

- vi. *Rape and Other Forms of Grave Sexual Assault* – Under Articles 19 and 34 of the CRC, children are to be protected from sexual exploitation and violence, including through legislative and administrative acts, as well as appropriate bilateral and multilateral measures.
- vii. *Persecution* – The CRC provides that children are to be accorded all the rights, privileges, and protections enumerated in the treaty, regardless of sex, politics, or religion (Article 2(1)). Further, children are to be protected from discrimination by any and all means available to the State, and shall not be punished for membership in any group or community (Article 2(2)). Relevant provisions concerning specific types of persecution are elaborated below.
  - i. *Political Persecution* – In addition to freedom of association (and protection from discrimination or punishment due to association with family or community) (Article 2(2)), states are also obligated to respect and protect the rights of children to freedom of expression and opinion (with due weight given



to age and maturity) (Articles 12 and 13), and freedom of thought and conscience (Article 14).

- ii. Gender Persecution – Article 2(1) provides that children are not to be discriminated against on the basis of their gender, and the rights of children are to be protected regardless of gender.
- iii. Religious Persecution – In addition to the general non-discrimination protection provided by Article 2(1), states are required to respect, recognise, and protect childrens’ freedom of religion, and are not to be discriminated against or punished because of the religious beliefs of their family or community (Article 14).

#### **D. Convention on the Elimination of All Forms of Discrimination against Women**

- 43. CEDAW focuses exclusively on reversing long-standing gender-based discrimination. As a consequence, the treaty is generally applicable to the claim of gender persecution in DPRK’s political prison camps, insofar as gender discrimination contributes to incarceration in political prison camps, and the harm suffered in the camps.
- 44. Non-discrimination is the general principle upon which all provisions in CEDAW are based. Article 2 prohibits discrimination against women “in all its forms” and obligates signatory states to take appropriate action to incorporate non-discrimination into law and policy. Women are to be given freedom of expression and self-determination (Article 3), and to ensure political freedom to women already provided under Article 25 of the ICCPR. Incarceration on the basis that women may not assume their appropriate social



role as suggested by the COI and other reports implicates this prohibition against gender discrimination.<sup>85</sup>

45. Women are also to be accorded rights equal to their male counterparts in access to education, work and the provision of healthcare (Articles 10, 11, and 12, respectively), the latter bearing particular import to the claim that prison camp personnel have systematically targeted female prisoners' capacity to reproduce for both nationalistic and retributive purposes.<sup>86</sup>
46. Discrimination against women is prohibited in all other areas of social and economic life (Article 13), and gender distinctions under the law and within marriage are to be proscribed (Articles 15 and 16). For instance, the right to inherit nationality through the mother is to be recognised (Article 9). According to the COI and numerous authorities on DPRK, the *songbun* system and its applicability in determining whether a person or family should be incarcerated, and the exclusive paternal determination of placement in the hierarchy, implicates the DPRK's obligations under CEDAW.<sup>87</sup>

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<sup>85</sup> See, for example: Ishimaru Jiro, ed., *Rimjin-gang: News from Inside North Korea* (Osaka, Asiapress Publishing, 2010), pp. 438-443; ICNK, *Introduction to North Korea*, p. 19.

<sup>86</sup> Human Rights Council, *Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea*, A/HRC/25/CRP.1, para. 1059. See also Robert Collins, *Marked for Life: Songbun – North Korea's Social Classification System*, 6 June 2012, prepared for the Committee for Human Rights in North Korea, p. 7.

<sup>87</sup> *Ibid.*, at para. 1058.



## IV. CRIMINAL LEGAL FRAMEWORK

### A. Criminal Jurisdiction

47. There are a number of possible mechanisms through which those suspected of perpetrating international crimes in North Korea might face accountability: a ‘special’ or *ad hoc* tribunal could be constituted; the ICC might gain jurisdiction over such crimes committed after 1 July 2002 by way of a UN Security Council referral or the Republic of Korea as a state party may cause jurisdiction to be invoked for crimes against its nationals; or certain leaders of the regime could be susceptible to trial abroad under the principle of universal jurisdiction.

### B. Definition of Crimes Against Humanity

48. The definition of crimes against humanity was first set out by the International Military Tribunals at Nuremberg and Tokyo, and has been further refined by the Statutes and jurisprudence of the modern international criminal tribunals as well as national courts. The articulation contained in the Rome Statute was agreed following extensive discussion between states and subject to the ratification of many and may be considered to encapsulate the modern customary international law position. This formulation requires no nexus to an armed conflict,<sup>88</sup> though it is noted that, in any event, and as observed by the Commission of Inquiry, the Korean War has not been concluded.<sup>89</sup>
49. The following definition may thus be considered to reflect the customary articulation in the modern era:

Any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

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<sup>88</sup> *Eichmann* (1968) 36 ILR 5, 49 (DC), *Barbie* (1990) 78 ILR 124, 136 (Cour de Cassation), ILC Report 1996, UN Doc. A/51/10 (1996), p. 96, ICTY, *Tadic*, IT-94-1-T (T. Ch. II), Judgement, 7 May 1997, para. 627, *Tadic*, IT-94-1-T (A Ch.), Judgement, 15 July 1999, paras 282-288.

<sup>89</sup> Commission of Inquiry Report, para. 162.



- (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 collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law;
- (ix) Enforced disappearance of persons;
- (x) The residual category of other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

### **C. Modes of Criminal Responsibility**

- 50. 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 organisational structure.
- 51. It is now widely accepted by international criminal courts that participants in instances of 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 joint criminal enterprise (JCE). They may also be held criminally liable for criminal conduct not envisaged by the common criminal design, where such may be regarded as a natural and foreseeable consequence of the criminal plan. Differing levels of culpability may be taken into account at the point of sentencing.



52. Additionally, within the regimented structure of the DPRK regime, perpetrators may be liable under the principle of command responsibility.
53. Both modes of criminal liability are considered below.

**i. Joint Criminal Enterprise**

54. JCE is a mode of co-perpetration recognised under customary international law, with three different forms.<sup>90</sup> The leading case is *Tadic*, which is the first instance in which the ICTY formally employed the principle of JCE (though it referred to it as "common purpose"), defining it thus:

[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.<sup>91</sup>

The ICTY's jurisprudence in this area has been accepted by the ICTR,<sup>92</sup> though the ICC adopting the principles of its statute has favoured a theory of joint control.<sup>93</sup>

55. The ICTY Appeals Chamber in *Tadic* held that the *actus reus* elements of JCE are:

- (i) A plurality of persons;<sup>94</sup>
- (ii) The existence of a common plan, design or purpose, which constitutes or involves the commission of an international crime;<sup>95</sup>

<sup>90</sup> STL *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Case No STL 11-01/I, Appeals Chamber (26 February 2011), para. 236

<sup>91</sup> ICTY, *Tadic*, IT-94-1-T (A Ch.), Judgement, 15 July 1999, para. 190.

<sup>92</sup> ICTR, *Ntakirutimana*, ICTR-2001-64-A (A. Ch.), 13 December 2004, para. 468.

<sup>93</sup> ICC, *Lubanga*, PTC, 02 February 2007, paras 322-342.

<sup>94</sup> ICTY, *Tadic*, IT-94-1-T (A Ch.), Judgement, 15 July 1999, para. 227. These persons need not be organised in a military, political or administrative structure (para. 220).





- (iii) Participation of the accused in the common plan involving the perpetration of an international crime;<sup>96</sup>
- (iv) Those liable under JCE must possess intent to participate in the JCE, which, it is held, can be inferred from knowledge.<sup>97</sup>

## **JCE I**

56. 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.<sup>98</sup> A significant contribution may be through omission.<sup>99</sup>

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<sup>95</sup> ICTY, *Tadic*, IT-94-1-T (A Ch.), Judgement, 15 July 1999, para. 227. 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)." (para. 220).

<sup>96</sup> ICTY, *Tadic*, IT-94-1-T (A Ch.), Judgement, 15 July 1999, para. 227. 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."

<sup>97</sup> ICTY, *Kvočka et al*, IT-98-30/1-T (A. Ch.), Judgement, 8 February 2005, para. 367: '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 *Krnojelac* IT-97-25A (A. Ch.), Judgement, 17 September 2003, paras 100, 102: '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 Jelisi 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.'

<sup>98</sup> STL *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Case No STL 11-01/I, Appeals Chamber (26 February 2011), para. 237.

<sup>99</sup> ICTY, *Gotovina*, IT-06-90-T [T. Ch], 15 April 2011, Vol. II, paras 2370, 2581-2582; *Kvočka*, IT-06-90-T [A. Ch.], 28 February 2005, paras 187, 195; *but see Milutinovic* IT-03-70-1[T. Ch.], 25 September 2003, paras 23, 103.



## JCE II

57. 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.<sup>100</sup>

58. 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.<sup>101</sup> Such intent may be proved either directly or as a matter of inference from the nature of the accused’s authority within the camp or organisational hierarchy.<sup>102</sup> Further, knowledge of the criminal system and intent to further its criminal purpose can be determined by the actual role of an individual within, for example, a prison camp.<sup>103</sup>

59. 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

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<sup>100</sup> ICTY, *Tadic*, IT-94-1-T (A Ch.), Judgement, 15 July 1999, para. 220.

<sup>101</sup> ICTY, *Tadic*, IT-94-1-T (A Ch.), Judgement, 15 July 1999, para. 220.

<sup>102</sup> ICTY, *Tadic*, IT-94-1-T (A Ch.), Judgement, 15 July 1999, para. 227. 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.”

<sup>103</sup> ICTY, *Krnjelac*, A. Ch., 17 September 2003, para. 111. “The Appeals Chamber holds that, with regard to Krnjelac’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 Krnjelac 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 Krnjelac to incur criminal liability on the count of persecution on this basis.”



perpetrated in the camp and continued participation which enables the camp's functioning.<sup>104</sup>

Due to the high position Kvočka 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 endeavour, the Trial Chamber finds Kvočka a co-perpetrator of the joint criminal enterprise of Omarska camp.<sup>105</sup>

60. With regard to imposing liability on those persons with authority under JCE II, it was stressed in *Kvočka* 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.<sup>106</sup>

### **JCE III**

61. The doctrine of JCE III exists to cover those circumstances where the direct perpetrator of criminal plan diverges from that plan to commit another crime that was nevertheless foreseeable, such that the other perpetrators had willingly taken a risk that such a crime would occur in executing their criminal plan.
62. As stated above, it was established in *Tadić* that all three forms of JCE share the same *actus reus* element. JCE III is distinguished from the other forms on the basis of its *mens rea* requirement. Akin to JCE I, 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 joint criminal enterprise or in any event to the commission of a crime.”<sup>107</sup> In addition to this, however, 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 accused willingly took the risk that the crime might occur.<sup>108</sup>

<sup>104</sup> ICTY, *Kvočka*, IT-98-30/1-T [T. Ch.], Judgement, 2 November 2001, para. 278.

<sup>105</sup> ICTY, *Kvočka*, IT-98-30/1-T [T. Ch.], Judgement, 2 November 2001, para. 414.

<sup>106</sup> ICTY, *Kvočka*, ICTY-98-30.1-A [A. Ch.], 28 February 2005, para. 309.

<sup>107</sup> ICTY, *Tadić*, IT-94-1-T (A Ch.), Judgement, 15 July 1999, para. 220.

<sup>108</sup> ICTY, *Tadić*, IT-94-1-T (A Ch.), Judgement, 15 July 1999, para. 220.



It is important to note that there is no requirement that the accused actually knows of the commission of the unintended act.<sup>109</sup>

63. Criterion (i) imposes a requirement that, objectively, in the eyes of a reasonable person, the unintended crime might occur. Criterion (ii), on the other hand, 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*.<sup>110</sup> 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.”<sup>111</sup>
64. However, in some cases, it is submitted the unintended act is 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.”<sup>112</sup> Unless superiors impose a system that prevents such acts, they will be held responsible for those acts.

## **ii. Command Responsibility**

65. Command Responsibility is a long-established form of liability that holds superiors responsible for the criminal acts of their subordinates. The principle that superiors be accountable for the actions of their subordinates, which can be traced back to ancient

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<sup>109</sup> See ICTY, *Milosevic*, T. Ch. III, 16 June 2004, para. 150.

<sup>110</sup> See: ICTY, *Tadic*, IT-94-1-T (A. Ch.), Judgement, 15 July 1999, para. 220, *Stakic*, IT-97-24-A [A. Ch.], Judgement, 22 March 2006, paras 99-103.

<sup>111</sup> ICTY, *Kvočka*, ICTY IT-06-90-T [A. Ch.], Judgement, 28 February 2005, para. 86.

<sup>112</sup> ICTR, *Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse*, Case No. ICTR-98-44-T, Judgement, para. 1476.



times,<sup>113</sup> was first codified at a multi-national level in the Hague Conventions of 1899 and 1907.<sup>114</sup> These Conventions also suggested that states may be held liable where military superiors fail to command their troops lawfully.<sup>115</sup> The doctrine of ‘command responsibility’ as outlined in the Hague Conventions was applied by the German Supreme Court in Leipzig in *Trial of Emil Muller*, who was convicted for his failure to prevent the commission of crimes and to punish the perpetrators thereof. This doctrine was famously invoked by several military tribunals (including the International Military Tribunal at Nuremberg) in the wake of World War II,<sup>116</sup> and developed further in domestic jurisprudence thereafter.<sup>117</sup> The principle of command responsibility was codified in Additional Protocol I to the Geneva Conventions,<sup>118</sup> and 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.<sup>119</sup> It is also enshrined in the Rome Statute.<sup>120</sup>

66. Command responsibility imposes liability upon a superior to ensure the proper compliance with international law of those under his/her command by imposing criminal responsibility for failure to prevent or punish violations perpetrated by those under

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<sup>113</sup> Progenitors of the principle of command responsibility can be discerned in, for example, Sun Tzu’s *The Art of War*, and in The Bible (Kings 1: Chapter xxi). For a description of its development through the Middle Ages into modern times, see: Edoardo Greppi, *The evolution of individual criminal responsibility under international law*, 30-09-1999 Article, International Review of the Red Cross, No, 835.

<sup>114</sup> 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, 29 July 1899; 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, 18 October 1907.

<sup>115</sup> Hague Convention 1899, Annex: Regulations concerning the Laws and Customs of War on Land, Article 1; Hague Convention 1907, Annex: Regulations respecting the Laws and Customs of War on Land, Article 1.

<sup>116</sup> US Military Tribunal (Manila) and US Supreme Court, *Case No. 21 (Trial of General Tomoyuki Yamashita)*, 1946; IMT Nuremberg, *Von Leeb et al. (High Command Case)*, 1948; IMT Nuremberg, *Hostage Case*, 1948; UN War Crimes Commission (Canadian Military Court), *Case No. 21 (The Abbaye Ardenne Case: Trial of S.S. Brigadeführer Kurt Meyer)*, 1945.

<sup>117</sup> US Military Tribunal, *Medina*, CM 427162, 1971.

<sup>118</sup> 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, Articles 86 and 87. Further, Article 91 imposes liability for acts committed by members of its armed forces onto the state.

<sup>119</sup> ICTY Statute, Article 7(3); ICTR Statute, Article 6(3).

<sup>120</sup> Rome Statute, Article 28.



his/her effective command. Whether this liability is ‘direct’ or ‘indirect’ differs between tribunals.<sup>121</sup>

67. The doctrine of command responsibility applies in both military and civilian contexts, applying to military commanders, political leaders and other civilian superiors exercising authority.<sup>122</sup>
68. The ICTY has expounded a tripartite test for 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.<sup>123</sup>

*Superior – subordinate relationship*

69. The existence of a superior-subordinate relationship may be established as either *de jure* or *de facto*. *De jure* command may be held by military or civilian state organisations.<sup>124</sup>

<sup>121</sup> ICTY, *Prosecutor v. Halilović*, IT-01-48-T [T. Ch.], Judgement, 16 November 2005, para. 48; SCSL, *Prosecutor v. Brima et al.*, SCL-04-16-T [T. Ch. II], Judgement, 20 June 2007, para. 783; Rome Statute, Article 28; STL Statute, Article 3(2).

<sup>122</sup> ICTY, *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A [A. Ch.], Judgement, 20 February 2001, paras 195–196; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1- A, Appeal Judgment, 24 March 2000, para. 76; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, para. 484, 29 July 2004; ICTR, *Prosecutor v. Baglishema*, Case No. ICTR-95-1A-A, Judgment (Reasons), 3 July 3 2002, para. 51; ICTR, *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, 23 May 2005, para. 85; SCSL, *Prosecutor v. Brima et al.*, SCL-04-16-T [T. Ch. II], Judgement, 20 June 2007, para. 782.

<sup>123</sup> See, for example: ICTY, *Prosecutor v. Delalić et al. (Čelebići case)*, Appeals Judgement, Case No. IT-96-21-A, 20 February 2001; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, para. 484, 29 July 2004; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1- A, Judgment, 24 March 2000.

<sup>124</sup> ICTY, *Prosecutor v. Delalić et al. (Čelebići case)*, Appeals Judgement, Case No. IT-96-21-A, 20 February 2001, paras 195–196; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1- A, Appeal Judgment, 24 March 2000, para. 76; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, para. 484, 29 July 2004; ICTR, *Prosecutor v. Baglishema*, Case No. ICTR-95-1A-A, Judgment (Reasons), 3 July 3 2002, para. 51; ICTR, *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, 23 May 2005, para. 85; SCSL, *Prosecutor v. Brima et al.*, SCL-04-16-T [T. Ch. II], Judgement, 20 June 2007, para. 782.



*De facto* command exists where the superior exercises ‘effective control’ over his subordinate/s.

70. 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.<sup>125</sup> 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.<sup>126</sup>
71. 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.<sup>127</sup>

*Superior’s knowledge of subordinate/s’ crime*

72. The superior must have actual or constructive knowledge of the involvement of the subordinates in a crime. Actual knowledge cannot be presumed, but may be established through circumstantial evidence.<sup>128</sup>
73. In determining whether a superior possessed the requisite knowledge, a tribunal may consider, *inter alia*, the following indicia: 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; the location of the superior at the time (which may affect in turn the evidence required vis-à-vis reporting and monitoring mechanisms).<sup>129</sup>

<sup>125</sup> ICTY, *Popovic*, IT-05-88-A [A. Ch.], IT-05-88-A, 30 January 2015, para. 1039.

<sup>126</sup> ECCC, Case 001, *Kaing Guek Eav alias Duch*, 001/18-07-2007/ECCC/TC, 26 July 2010, para. 542.

<sup>127</sup> ICTY, *Prosecutor v. Delalić et al. (Čelebići case)*, Appeals Judgement, Case No. IT-96-21-A, 20 February 2001, para. 197.

<sup>128</sup> SCSL, *Prosecutor v. Brima et al.*, SCL-04-16-T [T. Ch. II], Judgement, 20 June 2007, para. 788.

<sup>129</sup> ICTY, *Prosecutor v. Delalić et al. (Čelebići case)*, Appeals Judgement, Case No. IT-96-21-A, 20 February 2001, para. 386.





74. Constructive knowledge requires that a superior ‘had reason to know’ of his/her subordinates’ criminal behaviour or intended criminal behaviour. The standard for ‘reason to know’ is whether the superior was on notice, possessing information ‘sufficiently alarming to justify further inquiry.’<sup>130</sup> The superior is not able to negate this element by deliberately evading relevant information.<sup>131</sup>

*Superior’s failure to prevent or punish*

75. 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 behaviour or imminent criminal behaviour. The duty to punish arises once the crime has been committed. 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.<sup>132</sup>
76. The superior must take the necessary and reasonable measures within his/her material ability to fulfil these duties. A lack of formal legal competence to take necessary measures does not preclude the superior’s criminal responsibility.<sup>133</sup>

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<sup>130</sup> ICTY, *Prosecutor v. Delalić et al. (Čelebići case)*, Appeals Judgement, Case No. IT-96-21-A, 20 February 2001, paras 226, 238, 241, 393. 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 (SCSL, *Brima*, SCSL-2004-16-A [A. Ch.], Judgment, 22 February 2008, para. 199).

<sup>131</sup> ECCC, Case 001, *Kaing Guek Eav alias Duch*, 001/18-07-2007/ECCC/TC, 26 July 2010, para. 542.

<sup>132</sup> ICTY, *Prosecutor v. Halilović*, IT-01-48-T [T. Ch.], Judgement, 16 November 2005, para. 72. See also: ICTY, *Blaškić*, IT-95-14-A [A. Ch.], Judgment, 29 July 2004 para. 83; SCSL, *Sesay*, Case No. SCSL-04-15-T [T. Ch. I], Judgement, 2 March 2009, paras 178-179.

<sup>133</sup> ICTY, *Prosecutor v. Delalić et al. (Čelebići case)*, Appeals Judgement, Case No. IT-96-21-A, 20 February 2001, para. 395.





## V. CRIMES AGAINST HUMANITY

77. Ten of the eleven constituent crimes that underlie crimes against humanity are applicable to the DPRK case (that of apartheid is the only one not applicable):

Any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (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 collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised 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) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.



78. The ICC Elements of Crimes provides the following clarification:

- (i) The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organisation. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.
- (ii) ‘Attack directed against a civilian population’ in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack. The acts need not constitute a military attack. It is understood that ‘policy to commit such attack’ requires that the State or organisation actively promote or encourage such an attack against a civilian population.

## **A. Chapeau Elements**

### **i. Widespread or systematic attack**

79. The attack must be either widespread or systematic: the test is disjunctive.<sup>134</sup> In order for the attack to be widespread, the attack must be large scale by nature and in terms of the

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<sup>134</sup> ICTR, *Akayesu*, ICTR-96-4-T (T. Ch.), Judgment, 2 September 1998, para. 579.



number of victims.<sup>135</sup> While this standard is generally satisfied cumulatively by numerous inhumane acts, it could also be satisfied by one act of great magnitude.<sup>136</sup>

80. In order for the attack to be systematic, the established test is that the evidence must show ‘the organised nature of the acts of violence and the improbability of their random occurrence.’<sup>137</sup> The key hallmark of ‘systematic’, in line with the ordinary meaning of the word, is that the attack is highly organised.<sup>138</sup> Although the threshold established in *Blaskic* has been lowered, the factors identified are relevant in establishing a high level of organisation.<sup>139</sup> These are: (1) a plan or objective (2) a large scale or continuous commission of linked crimes (3) significant resources (4) The implication of high-level authorities. Another relevant evidentiary standard is whether the violence follows a pattern.<sup>140</sup>
81. In addition, there must also be an ‘attack.’ This can encompass the mistreatment of civilians, and does not need to involve any use of armed force.<sup>141</sup> The ICC definition of attack requires (i) multiple commission of acts; (ii) a state or organisational policy. The introduction of a policy element is controversial; in *Kunarac*, the ICTY Appeals Chamber denied categorically that such a requirement existed as a matter of customary international law.<sup>142</sup>

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<sup>135</sup> ICTY *Tadic*, T. Ch. II, 7 May 1997, para 206; ICTY *Kunarac et al.*, I T. Ch. II. Judgment, 22 February 2001, para. 428; ICTR *Nahimana*, A. Ch., Judgment 28 November 2007, para. 920, *Situation in Darfur* (Al Bashir Arrest Warrant Case), ICC PTC I, 4 March 2009, para. 81.

<sup>136</sup> ICTY *Kordic and Cerkez*, T.Ch., 26 February 2001, para. 176.

<sup>137</sup> ICTR *Nahimana*, A. Ch., 28 November 2007, para. 920, ICC, *Al Bashir* Arrest Warrant case, ICC PTC I, 4 April 2009, para. 81, SCSL *Taylor*, T. Ch. II, 18 May 2012, para. 511.

<sup>138</sup> The ‘improbability of random occurrence’ is also inherent in the word ‘attack’; otherwise, random but widespread crimes would amount to a crime against humanity. Further, the satisfaction of the improbability of a random occurrence is consequent on evidence showing a high level of organisation.

<sup>139</sup> ICTY *Blaskic*, T. Ch. 3, Judgment, 3 March 2000, para. 203. The move in more recent cases towards the definition supplied suggests that these are evidentiary criteria, each of which may evidence the highly organised nature of the violence. They are not necessary conditions, however.

<sup>140</sup> ICTR, *Akayesu*, ICTR-96-4-T [T. Ch.], I, Judgment, 2 September 1998, para. 580, ICTY, *Tadic*, T. Ch. II, Judgment, 7 May 1997, para. 648.

<sup>141</sup> ICC Elements of Crimes, Crimes Against Humanity Introduction, para. 3, ICTY, *Kunarac et al.*, A. Ch., Judgment, 12 June 2002, para. 86.

<sup>142</sup> ICTY, *Kunarac et al.*, A. Ch., 12 June 2002, para. 98.



## ii. Attack directed against any civilian population

82. Article 7(2)(a) of the Rome Statute states:

‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in [Article 7(1)] against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.

83. The attack must be ‘directed against any civilian population.’ This entails that the attack must be against a group predominantly constituted of civilians (rather than military targets) and that a ‘larger body of victims is visualised.’<sup>143</sup>

84. The perpetrator must know that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. This requirement is supported by the ICTY: the accused must have been aware “of the broader context in which his actions occur.”<sup>144</sup> Tribunal jurisprudence establishes that this will be satisfied by awareness, wilful blindness, or knowingly taking the risk that one’s act may be part of an attack.<sup>145</sup> The ICC elements of crimes also support a broad approach to this mental element: it is not required that “the perpetrator had knowledge of all the characteristics of the attack or the precise details of the plan or policy of the State or organisation.”<sup>146</sup>

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<sup>143</sup> UN War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London, 1948), 193.

<sup>144</sup> ICTY, *Tadic*, A. Ch., Judgement, 15 July 1999, para. 248.

<sup>145</sup> ICTY, *Tadic*, T Ch. II, Judgement, 7 May 1997, para. 657; ICTY, *Kunarac et al.* A. Ch., Judgement 12 June 2002, para 102, ICTY, *Blaskic*, T.Ch. I, Judgement, 3 March 2000, para. 251; ICTY, *Krnjelac*, T. Ch. II, Judgement, 15 March 2002, para.59.

<sup>146</sup> ICC Elements of Crimes, Crimes Against Humanity Introduction, para. 2.



## B. Constituent Crimes

### i. Murder

85. The ICC Elements of Crimes states that murder is the unlawful and intentional causation of the death of a human being.<sup>147</sup> This is in conformity with tribunal jurisprudence.<sup>148</sup>
86. Tribunal jurisprudence establishes the mental element 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.<sup>149</sup>
87. There is evidence of summary execution taking place in political prison camps as a result of (i) being raped and/or becoming pregnant,<sup>150</sup> (ii) infanticide,<sup>151</sup> (iii) summary execution for stealing food,<sup>152</sup> (iv) attempting escape,<sup>153</sup> (v) in order to set an example,<sup>154</sup> (vi) death from torture or other severe ill treatment,<sup>155</sup> (vii) through human experimentation.<sup>156</sup> In each of these cases, there was an intention to kill or cause grievous bodily harm with recklessness as to the result, and the killing was not lawful.

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<sup>147</sup> ICC Elements of Crimes, Article 7(1)(a).

<sup>148</sup> ICTR, *Akayesu* T. Ch. I, 2 September 1998, para. 589, ICTY, *Jelisić* T. Ch. I, 14 December 1999, para. 35, *Kupresic*, ICTY T. Ch. II, 14 January 2000, paras. 560-561.

<sup>149</sup> ICTY, *Prosecutor v. Delalić et al. (Čelebići case)*, T. Ch. II, 16 November 1998, para. 439; ICTR, *Akayesu*, ICTR T. Ch. I, 2 September 1998, para. 589, *Kordić and Cerkez*, ICTY T. Ch., 26 February 2001, para. 236.

<sup>150</sup> TJH041 ('Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea' (hereafter 'Commission of Inquiry Report'), Human Rights Council, A/HRC/25/CRP.1, 14/02.2014, p. 239). Kim Ha Neul, Affidavit, 2016. 11. 07 (MON) 10:00 - 12:00.

<sup>151</sup> Ahn Myong-chol (Commission of Inquiry Report, p. 238), TSH019 (Commission of Inquiry Report, p. 238). Kim Ha Neul (Affidavit, 11. 07.2016, 10:00 - 12:00).

<sup>152</sup> Kim Eun-cheol (Commission of Inquiry Report', p. 242), Kim Hye-Sook (Commission of Inquiry Report, p. 267).

<sup>153</sup> Ahn-Myong-chol, Jeong Kwang-il (Commission of Inquiry Report, p. 234), Kim Ha Neul, (Affidavit, 11. 07.2016, 10:00 - 12:00), Kim Eun-cheol (Affidavit 6, 11.11.2016, 16:00 - 19:00).

<sup>154</sup> Ahn Myong-chol (Commission of Inquiry Report', p. 267).

<sup>155</sup> Kim Ha Neul, (Affidavit, 11. 07.2016, 10:00 - 12:00), Kim Eun-cheol (Affidavit 6, 11.11.2016, 16:00 - 19:00).

<sup>156</sup> Ahn Myong-chol, <http://www.dailynk.com/english/read.php?cataId=nk02600&num=506>, Lee Soon-ok, testimony before the US Senate, 06.21.2002,



i. ***Executions for being pregnant or being raped have been reported in various prison camps***

Kim Ha-neul reported that four pregnant women were executed for protesting forcible abortions.<sup>157</sup>

A former guard in Camp No. 11 testified that the camp was regularly visited by a senior official who sexually abused inmates. After the inmates were raped, the victims were killed.<sup>158</sup>

At Camp No.15, Lee Baek-lyong witnessed a woman being raped, and then, after the sexual act, the assaulter stuck a wooden stick inside her vagina and beat her lower body. The victim died within a week.<sup>159</sup>

ii. ***Infanticide***

Kim Ha-neul stated that where forced abortions failed and the baby was born alive, the guards would release dogs to kill the infants.<sup>160</sup>

Another witness reported that she was beaten to trigger premature labour. Her baby was born alive, but by the time she awoke from losing consciousness, it was dead.<sup>161</sup>

Ahn Myong-chol saw a baby, which he believed had been conceived through a high-ranking official's sexual abuse of an inmate, fed to dogs.<sup>162</sup>

Former detainee no. 21 reported the killing of two babies at the Ondong police station in 1999.<sup>163</sup>

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<sup>157</sup> Kim Ha Neul, Affidavit, 11. 07.2016, 10:00 - 12:00.

<sup>158</sup> Confidential testimony of TJH041 (Commission of Inquiry Report, p. 239).

<sup>159</sup> Lee Baek-lyong, testimony available at <http://eng.nkhumanrights.or.kr/>

<sup>160</sup> Kim Ha Neul, Affidavit, 11. 07.2016, 10:00 - 12:00.

<sup>161</sup> TSH019 (Commission of Inquiry Report, p. 238).

<sup>162</sup> Ahn Myong-chol (Commission of Inquiry Report, p. 238).

<sup>163</sup> Hawk, *The Hidden Gulag I* (Centre for North Korean human Rights, 2003), p. 72.



Former detainee no. 24 helped deliver seven babies who were killed at Backto-ri police detention centre in January 2000.<sup>164</sup>

Former detainee no. 25 saw four babies killed in Chongjin police detention centre in 1999.<sup>165</sup>

Former detainee no. 26 saw seven babies killed at Nongpo detention centre in May 2000.<sup>166</sup>

Choi Yong-hwa assisting in delivering three babies who were then killed immediately afterward in Sinuiji provincial detention centre in mid-2000.<sup>167</sup>

iii. ***Executions for taking food***

Before the COI, Kim Su-jong testified that Camp No. 18 prisoners who went up the mountain to dig up edible plants were shot to death.<sup>168</sup>

Kim Eun-cheol witnessed a fellow inmate being executed in front of the other inmates for stealing potatoes.<sup>169</sup>

Kim Hye-sook saw numerous executions in Camp No. 18 for scavenging for leftover food in the guards' quarters.<sup>170</sup>

Another witness saw two men executed for leaving the living areas to search for food in the mountains.<sup>171</sup>

In another case, a witness saw a fellow prisoner beaten to death after hiding stolen corn in his mouth.<sup>172</sup>

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<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*

<sup>168</sup> Kim Su-jong (Affidavit 9, 11.14.2016, 16:00-19:00). The events he describes happened in 1971.

<sup>169</sup> Kim Eun-cheol (Commission of Inquiry Report, p. 242)

<sup>170</sup> Kim Hye-sook (Commission of Inquiry Report, p. 267).

<sup>171</sup> TLC008 (Commission of Inquiry Report, p. 267).

<sup>172</sup> TSH029 (Commission of Inquiry Report, p. 242).



iv. ***Murder for attempting to escape***

Kim Ha Neul records that 12 people were killed with machine gun fire while attempting to escape Camp No. 25.<sup>173</sup>

Kim Eun-cheol saw two prisoners executed at Camp No. 15.<sup>174</sup>

Kim Tae Jin reported that the standard practice for escaping was ‘an instant shot to death.’<sup>175</sup>

Jeon Kwang-il witnessed two executions where inmates had stolen food then ran away for fear of punishment.<sup>176</sup>

v. ***In order to set an example***

Ahn Myong-chol reported that it was common practice to ‘execute... one inmate to set an example to others.’<sup>177</sup> Whilst there were fluctuations in the number of such executions, Mr Ahn reported that in some years there were as many as 20.<sup>178</sup>

vi. ***As a result of inhumane treatment or torture***

Kim Ha Neul records two murderous attacks occurring at Camp No. 25 in 2006.<sup>179</sup> In the first case, SSD agents beat the victim severely, whipped her with a belt whilst her head was against a concrete wall until her skull was fractured to reveal her brain, and then stabbed her to death.<sup>180</sup> In the second case, the victim, Oh Seong-hwa’ was hung upside down and beaten such that she died on the spot.

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<sup>173</sup> Kim Ha Neul (Affidavit, 11. 07.2016 10:00 - 12:00).

<sup>174</sup> Kim Eun-cheol (Affadavit 6, 11.11.2016, 16:00 - 19:00).

<sup>175</sup> Kim Tae Jin (Affidavit 8, 11.10. 2016, 12:00 - 15:00).

<sup>176</sup> Jeong Kwang-il (Commission of Inquiry Report, p. 234), Seoul Public Hearing, 21 August 2013, morning.

<sup>177</sup> Seoul Public Hearing, 21 August 2013, afternoon (00:26:30).

<sup>178</sup> Commission of Inquiry Report, p. 267, Seoul Public Hearing, 21 August 2013, afternoon (00:26:30).

<sup>179</sup> Kim Ha Neul (Affadavit, 11. 07.2016, 10:00 - 12:00).

<sup>180</sup> Kim Ha Neul (Affadavit, 11.07.2016, 10:00 - 12:00).





Kim Eun-cheol recalled a prisoner dying immediately after torture, and another prisoner dying after being tortured for having sexual relations with the Head of Administration, Jeong Gil-hyun.<sup>181</sup>

A great many deaths occurred as a result of treatment received in interrogation. In November 2006, Ji Seong-ho's father died through injuries sustained in interrogation at the hand of SSD agents.<sup>182</sup>

In August 2011, one witness's 17 year old son was so badly tortured that he died from a brain haemorrhage shortly after interrogation.<sup>183</sup> In 2001, the witness saw one of her inmates die from injuries as a result of a beating that had been meted out to all her cellmates. The witness was forced to dig shallow graves, and inferred from this that many other inmates were dying in interrogation.

In 2004, another witness (who bribed her way out of interrogation into hospital since she was in need of emergency treatment) saw many other detainees dying from starvation and water-borne diseases.<sup>184</sup>

An elderly woman was tortured in detention at Onsong in 2006. Although she was in a critical condition, she was denied medical care in an attempt to force her brother to return from China and turn himself in. She died after 15 days at the interrogation centre.<sup>185</sup>

vii. ***Due to Human experimentation***

Witness testimony suggests the conduct of human experimentation at Camp No. 22.

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<sup>181</sup> Kim Eun-cheol (Affadavit 6, 11.11.2016, 16:00 - 19:00). Jeong Gil-hyun was originally imprisoned at Camp No.15 but given the title of Head of Administration due to his status before imprisonment.

<sup>182</sup> Ji Seong-ho (Commission of Inquiry Report, p. 215), Seoul Public Hearing, 22 August 2013, morning.

<sup>183</sup> TJH028 (Commission of Inquiry Report, p. 215).

<sup>184</sup> TBG018 (Commission of Inquiry Report, pp. 215-216)

<sup>185</sup> TJH024 (Commission of Inquiry Report, pp. 215-216).



Ahn Myong-chol reports that he encountered inmates who were forced to have surgery without any anaesthetic.<sup>186</sup>

Soon Ok Lee testified before the US Senate that 50 female prisoners were forced to eat poisoned cabbage which led to them vomiting, bleeding from their mouths and dying in less than 20 minutes.<sup>187</sup> On another occasion, she was asked to check 30 gas masks out of the administration warehouse for the prison staff. Then 150 weakened female prisoners were selected from the unit and separated from the other prisoners. Those prisoners never returned.<sup>188</sup>

A former security official at Camp No. 22 testified to watching a ‘a whole family being tested on suffocating gas and dying in the gas chamber.’<sup>189</sup> This witness was also able to draw the gas chamber in detail.<sup>190</sup>

Such evidence is corroborated by a North Korean document, smuggled out of the country, that records: ‘the above person is transferred from... camp number 22 for the purpose of human experimentation of liquid gas for chemical weapons.’<sup>191</sup> Kim Sang-hun, a North Korean human rights worker, has verified this document.<sup>192</sup>

#### 88. *No legal basis for executions and secret executions*

Kim Ha Neul states that the ‘trial’ for in-camp executions in reality followed the format of reading the alleged crimes, then sentencing the accused to execution.<sup>193</sup> According to Ahn Myong-chol, the SSD agent on site has entire control of whether “you are saved or

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<sup>186</sup> <http://www.dailynk.com/english/read.php?cataId=nk02600&num=506>.

<sup>187</sup> Soon Ok lee before US Senate, 06.21.2002, at <http://www.judiciary.senate.gov/meetings/examining-the-plight-of-refugees-the-case-of-north-korea>

<sup>188</sup> *Ibid.*

<sup>189</sup> Operating under the pseudonym Kwon Hyuk, <http://www.telegraph.co.uk/news/worldnews/asia/northkorea/10376676/North-Korea-testing-chemical-weapons-on-political-prisoners.html>.

<sup>190</sup> [http://www.bbc.co.uk/pressoffice/pressreleases/stories/2004/02\\_february/01/korea.shtml](http://www.bbc.co.uk/pressoffice/pressreleases/stories/2004/02_february/01/korea.shtml).

<sup>191</sup> <https://www.theguardian.com/world/2004/feb/01/northkorea>.

<sup>192</sup> He states: ‘It carries a North Korean format, the quality of paper is North Korean and it has an official stamp of agencies involved with this human experimentation. A stamp they cannot deny. And it carries names of the victim and where and why and how these people were experimented [on],’ at <https://www.theguardian.com/world/2004/feb/01/northkorea>.

<sup>193</sup> Kim Ha Neul (Affadavit, 11. 07.2016, 10:00 - 12:00).



executed.<sup>194</sup> Those attempting escape or who leave the main camp are shot immediately without any calculation of whether such force is proportionate.<sup>195</sup> On this basis, the fair trial rights of the relevant individuals are so far denigrated as to render it impossible for this to provide a legal basis for the killing. Executions are recorded to have taken place in secret:

A former guard has testified that at Camp No.13 prisoners were transported to a secret location in the mountains, forced to dig their own graves and then killed and buried.<sup>196</sup>

Mr. Lee (full name withheld), who was a security official at Camp No. 16 from the 1980s until the mid-1990s, witnessed precisely the same conduct.<sup>197</sup>

Ahn Myong-cheol indicated that a secret mountain near the camp was used for secret executions and sometimes shots could be heard at night.<sup>198</sup>

## **ii. Extermination**

89. The ICC Elements of Crimes, in line with tribunal jurisprudence,<sup>199</sup> establishes 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.<sup>200</sup>

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<sup>194</sup> Seoul Public Hearing, 21 August 2013, afternoon (00:58:40).

<sup>195</sup> Commission of Inquiry Report, p. 234.

<sup>196</sup> TJH041 (Commission of Inquiry Report, p. 268).

<sup>197</sup> Amnesty International, North Korea, New Satellite Images Show Continued Investment In The Infrastructure of Repression ASA 24/010/2013, p. 6.

<sup>198</sup> Ahn Myong-cheol (Confidential Interview, Commission of Inquiry Report, pp. 268-269).

<sup>199</sup> ICTR, *Kayishema and Ruzindana*, T. Ch. II, 21 May 1999, para. 147.

<sup>200</sup> ICC Elements of Crimes, Article 7(1)(b).



90. Extermination requires a surrounding circumstance of mass killing. The perpetrator must know of this mass killing. The definition also expressly includes indirect means of causing death: there is no need for any direct connection with the act of murder.<sup>201</sup>
91. It is not required that the perpetrator is responsible for a substantial number of killings. The ICTY Appeal Chamber has made it clear that a single killing suffices if it were knowingly perpetrated in the context of a mass killing.<sup>202</sup> This approach is consistent with that of the ICC.<sup>203</sup>
92. It is submitted that extermination was committed in political prison camps in three distinct manners: (i) mass killings; (ii) small-scale killings 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.

(i) ***Mass killings***

In 1990, whilst Yong Kim was a prisoner in Camp No.14, he testifies that there was a prison riot. As a result of this uprising, 1,500 people were shot and their bodies discarded in a closed mine.<sup>204</sup>

(ii) ***Small scale killings committed with knowledge of the context of mass killing***

Given the definition of extermination set out, any of the commissions of murder laid out above will also qualify as extermination, provided that they are committed with knowledge of the context of mass killing. 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 camp. One witness stated that approximately 200 people died in the mine in which he or

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<sup>201</sup> UN War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London, 1948), p. 194.

<sup>202</sup> ICTY, *Stakic*, A Ch., Judgement, 22 March 2006, paras. 260-261.

<sup>203</sup> ICC Elements of Crimes, Article 7(1)(b) Element 1.

<sup>204</sup> Yong Kim, in testimony to the Citizen's Alliance of North Korean Human Rights, [http://eng.nkhumanrights.or.kr/eng/datacenter/related\\_write.php](http://eng.nkhumanrights.or.kr/eng/datacenter/related_write.php).



she worked each year.<sup>205</sup> The Commission of Inquiry Report states that each year, ‘large numbers of prisoners die from or nutritional deficiency diseases like pellagra, [...] breakdown of the mental and digestive system and mental deterioration.’<sup>206</sup> Executions, both public and secret, are a regular feature of the political prison system.<sup>207</sup> Witness testimony points to 20 to 30 prisoners being publicly executed each year.<sup>208</sup>

Other witnesses testify that where a prisoner was sent to the punishment block, there was an extremely high chance of death.<sup>209</sup>

(iii) ***Extermination through the infliction of conditions of life calculated to bring about the death of the population***

In *Kayeshima and Ruzindana*, the ICTR stated that planning conditions of life that lead to mass killing constitutes extermination.<sup>210</sup> Examples of such conditions were held to include ‘imprisoning a large number of people and withholding the necessities of life.’<sup>211</sup> It is submitted that the facts of the instant case fit that description exactly. In forcing prisoners to work extremely long hours in labour intensive areas whilst feeding them less than subsistence rations, prison camps are designed to result in mass killing. Ahn Myong-chol states that ‘the inmates are supposed to die in the camp from hard labour.’<sup>212</sup>

That political prison camps were intended to result in the death of substantial numbers of inmates may be inferred from the fact that when Kim Il-sung spoke to SSD members in 1958, he informed them that the purpose of the

<sup>205</sup> TAP012 (Commission of Inquiry Report, p. 244).

<sup>206</sup> Commission of Inquiry Report, pp. 239-240.

<sup>207</sup> Survey Report on Political Prisoner’s Camps in North Korea (The National Commission of Human Rights of North Korea), pp. 152-157.

<sup>208</sup> A10, Survey Report on Political Prisoner’s Camps in North Korea (The National Commission of Human Rights of North Korea), pp. 154-155.

<sup>209</sup> TLC008 (Commission of Inquiry Report, p. 235), Kang Chol-hwan (Commission of Inquiry Report, p. 235).

<sup>210</sup> *Prosecutor v Kayeshima and Ruzindana*, Judgement, 21 May 1999, paras 141 -147.

<sup>211</sup> *Ibid.*

<sup>212</sup> Seoul Public Hearing, 21 August 2013, afternoon (00:16:40).



camps was to eliminate the ‘seed’ of three generations of class enemies.<sup>213</sup> This message was perpetuated over generations by billboards in the camps reminding the guards of Kim-il Sung’s instruction.<sup>214</sup> Lee Baek-lyong corroborates this statement, recalling that in Camp No.15 in 1996, there were message boards all around the camp with incendiary slogans such as ‘There is no reconciliation or negotiation with class enemies!’<sup>215</sup> Given the combination of this evidence of intention with the factual evidence of the conditions imposed, it is submitted that the definition of extermination is satisfied.

Rations provided to inmates were grossly insufficient. Kim Tae Jin subsisted on 300g of corn whilst working 12 hours a day.<sup>216</sup> Kim Su-jong, who was born in Camp No.18, saw his two older brothers and one younger brother die of starvation.<sup>217</sup> Even in the 1980s, when North Korea was not experiencing a food shortage, the rations amounted to ‘a handful of corn powder and the outer leaves of cabbage.’<sup>218</sup> Lee Baek-lyong stated that prisoners at Camp No.15 were given just 40g of corn gruel three times a day.<sup>219</sup> According to her testimony, Kim Hye-sook’s family of seven received only 4.5 kilograms of dried corn *per* month in Camp No.18, also before the famine of the 1990s.<sup>220</sup> Jeong Kwang-il and Kim Eun-cheol, detained in Camp No. 15 from 2003, stated that prisoners were given 120g of corn porridge three times a day.<sup>221</sup>

Death from starvation is common. The Commission of Inquiry found:

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<sup>213</sup> Ahn Myong-chol in confidential interviews (Commission of Inquiry Report, p. 229).

<sup>214</sup> *Ibid.*

<sup>215</sup> Lee baek-lyong, testimony recorded by the Citizen’s Alliance for North Korean Human Rights, [http://eng.nkhumanrights.or.kr/eng/datacenter/related\\_write.php](http://eng.nkhumanrights.or.kr/eng/datacenter/related_write.php).

<sup>216</sup> Kim Tae Jin (Affidavit 8, 11.10. 2016, 12:00 - 15:00).

<sup>217</sup> Kim Su-jong (Affidavit 9, 11.14.2016, 16:00-19:00).

<sup>218</sup> Kim Su-jong (Affidavit 9, 11.14.2016, 16:00-19:00).

<sup>219</sup> Lee Baek-lyong on 2016-01-19, available at:

[http://eng.nkhumanrights.or.kr/eng/datacenter/related\\_write.php?mode=view&bbs\\_idx=4323&search\\_mode=&search\\_word=political&pg=7](http://eng.nkhumanrights.or.kr/eng/datacenter/related_write.php?mode=view&bbs_idx=4323&search_mode=&search_word=political&pg=7)

<sup>220</sup> Kim Hye-sook, confidential interview (Commission of Inquiry Report, p. 241).

<sup>221</sup> Commission of Inquiry Report, p. 241, Seoul Public Hearing, 21 August 2013, morning.



Inmates are provided with rations so insufficient in quantity, quality and diversity that any prisoner who solely relies on rations would quickly starve to death... each 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.<sup>222</sup>

Given the pervasiveness of deaths resulting from torture, starvation and labour, it is submitted that each guard or SSD official in each camp must have been aware, or must be presumed to have been aware, of the circumstances of mass killing surrounding his or her murderous act. On this basis, any murders committed within political prison camps also fall within the underlying crime of extermination.

Generally, inmates work 12 hours a day, even if they are sick.<sup>223</sup> A quota system meant some prisoners were forced to work far longer than that. Lee Baek-lyong states that prisoners were forced to undergo 15 -16 hours of hard labour a day whilst he was at the revolutionizing zone of Camp No.15.<sup>224</sup> Kim Hye-sook was forced to work 16-18 hours a day in a coal mine from the age of 15 in Camp No.18.<sup>225</sup> Lee Young Kuk worked for 14 hours a day almost every day from 1995 until 1999 in the Revolutionising Zone of Camp 15.<sup>226</sup> Another witness stated that in the mine in which he or she worked, some

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<sup>222</sup> Commission of Inquiry Report, p. 239-40. See also testimony of Kang Chol-hwan, stating that 300 prisoners a year died of starvation (Seoul Public Hearing, 24 August 2013, afternoon (03:31:30)), and Kim Tae-jin, stating that at least one person died a week from starvation, at [http://eng.nkhumanrights.or.kr/eng/datacenter/related\\_write.php](http://eng.nkhumanrights.or.kr/eng/datacenter/related_write.php),

<sup>223</sup> Commission of Inquiry Report, p. 243.

<sup>224</sup> Lee Baek-lyong on 2016-01-19, available at:

[http://eng.nkhumanrights.or.kr/eng/datacenter/related\\_write.php?mode=view&bbs\\_idx=4323&search\\_mode=&search\\_word=political&pg=7](http://eng.nkhumanrights.or.kr/eng/datacenter/related_write.php?mode=view&bbs_idx=4323&search_mode=&search_word=political&pg=7)

<sup>225</sup> Kim Hye-sook, confidential interview (Commission of Inquiry Report, p. 244).

<sup>226</sup> Lee Young Kuk, Hidden Gulag Report I (David Hawk, U.S. Committee for Human Rights in north Korea, 2003), p. 33.



people had to work for 20 hours a day to fulfil the quota: that witness estimated that 200 people died each year in that mine alone.<sup>227</sup>

### iii. Enslavement

93. Under the Rome Statute, enslavement is committed where ‘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.’<sup>228</sup> This definition has its roots in the Slavery Convention 1926,<sup>229</sup> and is consistent with tribunal jurisprudence.<sup>230</sup>
94. Enslavement may be committed by: engaging in the slave trade (treating people as property),<sup>231</sup> the trafficking of persons,<sup>232</sup> ‘reducing a person to a servile status’,<sup>233</sup> forced labour,<sup>234</sup> and through ‘other activities.’
95. The ICTY Appeals Chamber in *Kunarac* established that relevant factors in establishing whether a form of treatment amounts to enslavement include ‘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 labour.’<sup>235</sup>
96. In order to determine whether labour is forced, regard may be had to Geneva Convention III,<sup>236</sup> the ICCPR, and the Forced or Compulsory Labour Convention 1930. In *Krnjelac*, the Appeals Chamber stated that labour may be presumed forced where there is evidence

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<sup>227</sup> TAP012 (Commission of Inquiry Report, p.244).

<sup>228</sup> ICC Elements of Crime, Article 7(1)(c), Element 1.

<sup>229</sup> Convention to Suppress the Slave Trade and Slavery, 25 September 1926, Article 1.

<sup>230</sup> ICTY *Kunarac*, Trial Chamber II, 22 February 2001, para. 539.

<sup>231</sup> Rome Statute, Article 7(2)(c).

<sup>232</sup> *Ibid.*

<sup>233</sup> ICC Elements of Crimes, footnote 11. This expression originates in 1956 Supplementary Slavery Convention, and includes the practices of debt bondage, serfdom, forced marriage and child exploitation.

<sup>234</sup> ICC Elements of Crime, footnote 11.

<sup>235</sup> ICTY, *Kunarac et al.*, A Ch., 12 June 2002, para. 119.

<sup>236</sup> Geneva Convention III relative to the Treatment of Prisoners of War, 12 August 1949, Articles 49-57.





of overcrowded conditions, deplorable sanitation, insufficient food, locked doors, frequent beatings, psychological abuse, and brutal living conditions.<sup>237</sup>

97. It is submitted that, following the criteria laid out in *Krnojelac*, the circumstances under which prisoners work in the DPRK's prison camps are so deficient that labour cannot be considered anything other than forced.
98. As detailed above, the level of food provided to inmates is grossly insufficient and the working conditions extremely poor. There is evidence illustrating the existence of overcrowded conditions: four to five families are forced to live in one flat together.<sup>238</sup> The prisoners are subject to constant psychological abuse, being surrounded by billboards reminding them of their status as enemies of the state,<sup>239</sup> and forced to attend daily self-criticism meetings.<sup>240</sup> The inmates are subjected to 'frequent beatings' as well as torture.<sup>241</sup> They are reminded daily that failing to meet their work quota would mean that they were severely beaten, have their food rations cut and be forced to work extended hours.<sup>242</sup> Prisoners are forced to work even if they are sick,<sup>243</sup> and they work in dangerous industries with minimal protection, so that numerous work related deaths occur each year.<sup>244</sup> On the basis of this evidence, it is submitted that the labour performed by political prisoners must be considered forced. As such, the requirements for the underlying crime of enslavement are satisfied.

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<sup>237</sup> ICTY, *Krnojelac*, T. Ch, II, 15 March 2002, paras. 193-195.

<sup>238</sup> Survey Report on Political Prisoner's Camps in North Korea (The National Commission of Human Rights of Korea), p. 110.

<sup>239</sup> Lee Baek-lyong, testimony at <http://eng.nkhumanrights.or.kr/>.

<sup>240</sup> See testimony of Mr. Lee, Amnesty International, North Korea, New Satellite Images Show Continued Investment In The Infrastructure of Repression ASA 24/010/2013, p. 20.

<sup>241</sup> Kim Ha Neul (Affidavit, 11. 07.2016, 10:00 - 12:00), Kang Chol-hwan, *The Aquariums of Pyongyang*, pp. 95-96. The contents of the book were authenticated by Mr Kang in the Seoul Public Hearing, 24 August 2013, afternoon. TLC008 (Commission of Inquiry Report, p. 235). Kim Tae Jin (Affidavit 8, 11.10. 2016, 12:00 - 15:00), Ahn Myon-chol (Commission of Inquiry Report, p. 235) Seoul Public Hearing, 21 August 2013, afternoon.

<sup>242</sup> Commission of Inquiry Report, p. 243.

<sup>243</sup> Commission of Inquiry Report, p. 243.

<sup>244</sup> One witness considered that 200 people a year died in his or her mine alone - TAP012 (Commission of Inquiry Report, p. 244).



#### iv. Forced Transfer

99. The ICC Elements of Crime states that forced transfer is committed where:

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

100. Deportation refers to displacement across a border, whilst forcible transfer denotes internal displacement.<sup>245</sup>

101. The deportation or transfer must be forced, but this can be achieved by means other than physical force: the threat of force or coercion, psychological oppression or other means of rendering displacement involuntary suffice.<sup>246</sup> For example, if a group flees in order to escape targeted oppression or violence, that displacement would be forced.<sup>247</sup>

102. The SSD are responsible for the transport of suspects and suspects' families to political prison camps.<sup>248</sup> Often, the suspect is transferred to PPC without knowledge of his fate.<sup>249</sup> In many cases, prisoners were not aware of any wrongdoing they had committed: O Myong-O states that 'of course, there was no trial for me since I was innocent anyway... there was no trial or judicial proceeding of any kind.'<sup>250</sup> On this basis, it is submitted that there could be no ground permitted under international law for their transfer. *A fortiori*,

<sup>245</sup> ILC Draft Code, 1996, p. 100; ICTY *Stakic*, A. Ch., Judgement, 22 March 2006, para. 300 (no deportation without crossing a *de jure* border).

<sup>246</sup> ICC Elements of Crimes, Article 7(1)(d).

<sup>247</sup> ICTY *Stakic*, T. Ch. I, Judgement, 2 August 2001, para. 530.

<sup>248</sup> Survey Report on Political Prisoner's Camps in North Korea (The National Commission of Human Rights of North Korea, 2010), p. 54.

<sup>249</sup> Survey Report on Political Prisoner's Camps in North Korea (The National Commission of Human Rights of North Korea, 2010), p. 54.

<sup>250</sup> O Myong-o (alias), PPC No.18, Survey Report on Political Prisoner's Camps in North Korea (The National Commission of Human Rights of North Korea, 2010), p. 56.



where families were transferred from their home after a family member was arrested, there can be no basis in international law. Standard practice in this case was for an SSD truck to arrive at the house in the middle of the night, and secret the families away in the night.<sup>251</sup>

103. The perpetrators must have been aware of the factual circumstances that established the lawfulness of the individual's presence in their own homes – the simple fact that they had a legal right to remain in their homes, especially where no adequate legal procedure was in place to determine their guilt. It is therefore submitted that the definition for the crime of underlying crime of forced transfer is satisfied by the actions of SSD agents in transporting suspects and their families from their house in which they are lawfully resident to political prison camps.

#### **v. Imprisonment**

104. Under customary international law, the requirements for the underlying inhumane act of imprisonment are:
- (i) The perpetrator imprisoned or severely deprived one or more persons of their physical liberty;
  - (ii) The imprisonment must be arbitrary;
  - (iii) This arbitrariness must be of significant gravity;
  - (iv) The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
105. With regard to the first element, there is consensus amongst international criminal courts as to the requirements imposed.<sup>252</sup> 'Severe' deprivation of liberty occurs when the

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<sup>251</sup> Kang Chul-hwan, A11, A06 Survey Report on Political Prisoner's Camps in North Korea (The National Commission of Human Rights of North Korea, 2010), p. 54; A14, A15, A12 (Survey Report, pp. 172-174).

<sup>252</sup> ICTY, *Kordic and Cerkez*, T. Ch. III, Judgement, 26 February 2001, ICTY, *Krnjelac*, T. Ch. II, Judgement, 15 March 2002, para. 114, ICC Elements of Crimes Article 7(1)(e)(1), ICTR, *Ntagerura, et al*, ICTR-99-46-A [T. Ch.], Judgment, 25 February 2004.



deprivation of liberty is of an equal or greater severity to imprisonment. This result is entailed by the fact that imprisonment is *in se* sufficient to satisfy the first element. Equivalence can be ascertained on two grounds: first, the deprivation of physical liberty must as restrictive as that entailed by imprisonment; second, the time period of the deprivation must be similar to that of imprisonment. Since imprisonment is measured at least in weeks, a deprivation of liberty of a similar longevity will meet the requirement of severity.<sup>253</sup> This reasoning is supported by the ICTY Trial Chamber in *Kordic and Cerkez*, which approved the conclusion of the International Law Commission that arbitrary imprisonment covers ‘the practice of concentration camps or detention camps or “other forms of long-term detention.”’<sup>254</sup>

106. The UN Working Group on Arbitrary Detention considers that, under customary international law, imprisonment is sufficiently arbitrary where:

- (i) There is an absence of any legal basis for the deprivation of liberty;
- (ii) The total or partial non-observance of the international human right to a fair trial is so severe as to give the imprisonment an arbitrary character;
- (iii) The deprivation of liberty is imposed solely as the result of the exercise of a right or freedom recognised as a fundamental principle of international law.<sup>255</sup>

107. The ICTY similarly considers deprivation of liberty sufficiently arbitrary where ‘no legal basis can be called upon to justify the initial deprivation of liberty,’ continuing, ‘if national law is relied upon as justification, the relevant provisions must not violate international law.’<sup>256</sup> The emphasised that ‘the national law itself must not be arbitrary and the enforcement of this law in a given case must not take place arbitrarily.’<sup>257</sup> This supports the notion that (i) where there is no legal basis for detention, it is sufficiently arbitrary. Since the right to a fair trial is a rule of customary international law, this also

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<sup>253</sup> Kai Ambos, *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (Oxford University Press, 2014), p. 89.

<sup>254</sup> ICTY, *Kordic and Cerkez*, T. Ch. III, Judgement, 26 February 2001, para. 299.

<sup>255</sup> Report of the Working Group on Arbitrary Detention, A/HRC/22/44, 24 December 2012, para. 38.

<sup>256</sup> ICTY, *Krnojelac*, T. Ch. II, Judgement, 15 March 2002, para. 114.

<sup>257</sup> *Ibid.*, footnote 346 to para. 114.



supports the proposition that (ii) a severe non-observance of the right to a fair trial will render the imprisonment sufficiently arbitrary. Where deprivation of liberty is due solely to the exercise of an international human right, the imprisonment would be arbitrary.

108. There is substantial testimony that demonstrates that imprisonment within political prison camps has happened:

- (i) In the absence of any trial;
- (ii) On the basis of ‘guilt by association’;
- (iii) On the basis of being born in the prison camp;
- (iv) On the basis of the exercise of human rights that form a part of customary international law.

109. All deprivation of liberty in political prison camps meets the requirements of being (i) as restrictive as imprisonment and (ii) of a similar longevity to imprisonment. Sentences are a minimum of 3 years at the Revolutionising Zone at Camp No. 15, and those detained in total control zones have no possibility of release.<sup>258</sup> Satellite evidence of the prison camps, coupled with analyses from satellite imagery experts and testimony of former guards shows that each camp is protected by numerous guard towers.<sup>259</sup> The Commission of Inquiry states that camps are: ‘surrounded by high perimeter fences that are electrified at a deadly voltage and further security barbed wire. Pit traps and minefields are also placed around the perimeter fence. Each camp is surrounded by numerous guard posts and checkpoints, manned by guards armed with automatic rifles. Inmates are subject to strict movement restrictions within the camp.’<sup>260</sup> The conditions under which political prisoners exist are thus as restrictive as imprisonment.

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<sup>258</sup> Hawk, *The Hidden Gulag* (US Committee for Human Rights in North Korea, 2004), p. 25.

<sup>259</sup> Amnesty International, ‘North Korea: New Satellite Images show continued Investment in the Infrastructure of Repression’, 2013. Available from <http://www.amnesty.org/en/library/info/ASA24/010/2013/en>.

<sup>260</sup> Commission of Inquiry Report, pp. 233-234.



110. Witnesses report being interned without any trial, passing straight from interrogation to the prison camps.<sup>261</sup> This suggests a widespread SSD practice of subjecting those accused of political crimes to months of torture and inhumane treatment in order to force a confession.<sup>262</sup> The fact that confessions are elicited in contravention of the *ius cogens* prohibition on torture, and are not followed by any examination of the evidence in a court of law renders imprisonment in such cases arbitrary.
111. Where a ‘trial’ occurs, the decision of whether to incarcerate individuals accused of political crimes lies entirely in the discretion of SSD.<sup>263</sup> This flows from Article 124 of the DPRK Code of Criminal Procedure,<sup>264</sup> which gives the SSD complete control over political crimes. Defector agents from the SSD have stated that sentences are handed down by the Prosecution bureau of the SSD. The prosecutor decides with other SSD officials what the sentence will be.<sup>265</sup> There are no formal procedures, and the Prosecution performs the court’s role.<sup>266</sup> The prosecution submits that this total rejection of the principles of due process, impartiality, and independence results in such a severe non-observance of the right to a fair trial that imprisonment is rendered arbitrary.
112. Witnesses attest to being interned on the basis of ‘guilt by association’ (*yeon-jwa-je*), meaning that they are imprisoned merely for being related to a political prisoner.<sup>267</sup>

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<sup>261</sup> Mr Jeong Kwang-il, Mr Kim Gwang-il (Commission of Inquiry Report) Lee Baek-lyong ([http://eng.nkhumanrights.or.kr/eng/datacenter/related\\_write.php](http://eng.nkhumanrights.or.kr/eng/datacenter/related_write.php)), Yong Kim ([http://eng.nkhumanrights.or.kr/eng/datacenter/related\\_write.php](http://eng.nkhumanrights.or.kr/eng/datacenter/related_write.php)), An Hyuk, Lee Young Kuk (Hawk, Hidden Gulag I (US Committee for Human Rights in North Korea, 2004) Kim Eun-cheol (Affidavit 6, 11.11.2016, 16:00 - 19:00 ), Kim Tae Jin (Affidavit 8, 11.10. 2016, 12:00 - 15:00).

<sup>262</sup> Mr Jeong Kwang-il, Mr Kim Gwang-il (Commission of Inquiry Report) Lee Baek-lyong ([http://eng.nkhumanrights.or.kr/eng/datacenter/related\\_write.php](http://eng.nkhumanrights.or.kr/eng/datacenter/related_write.php)), Yong Kim ([http://eng.nkhumanrights.or.kr/eng/datacenter/related\\_write.php](http://eng.nkhumanrights.or.kr/eng/datacenter/related_write.php)), An Hyuk, Lee Young Kuk (Hawk, Hidden Gulag I (US Committee for Human Rights in North Korea, 2004) Kim Eun-cheol (Affidavit 6, 11.11.2016, 16:00 - 19:00 ), Kim Tae Jin (Affidavit 8, 11.10. 2016, 12:00 - 15:00).

<sup>263</sup> Confidential testimony of a defector during an interview in Seoul on 19 April 2005; Testimony of another defector during an interview in Seoul on 10 October 2005, from the 2008 White Paper on Human Rights (KBA Human Rights Foundation, 2008).

<sup>264</sup> Commission of Inquiry Report p. 209.

<sup>265</sup> 2008 White Paper on Human Rights (KBA Human Rights Foundation, 2008) p. 149.

<sup>266</sup> 2008 White Paper on Human Rights (KBA Human Rights Foundation, 2008) p. 150.

<sup>267</sup> Kim Hye-Sook, Kang Chol-Hwan (Commission of Inquiry Report, p. 231), A14, A15, A12 (Survey Report on Political Prisoner’s Camps in North Korea (The National Commission on Human Rights of Korea, 2010) pp. 171-174). “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 (The National Commission on Human Rights of Korea, 2010), p. 47.



Culpability is a general principle of international criminal law, and is implicitly recognised by all international courts in the notion of *mens rea*.<sup>268</sup> Where a person is imprisoned without committing any wrong, or intending or being aware of any wrong, there can be no legal basis for that imprisonment. As such, where individuals are interned on the basis of a family association, that imprisonment is arbitrary. Although some testimony suggests that the practice of imprisonment on the basis of family association is no longer as widely practiced,<sup>269</sup> evidence demonstrates it is still used in high-profile cases.<sup>270</sup> Further, since the majority of those imprisoned are held in ‘total control zones’ from which there is no prospect of release, tens of thousands continue to be imprisoned due to family association. A 2009 survey conducted by Database Centre for North Korean Human Rights (NKDB) on North Korean defectors with experience of prison camps found that 35.9% had been imprisoned on the basis of family association.<sup>271</sup> Evidence indicates, therefore, that individuals continue to be incarcerated on the basis of guilt by association, and that all such imprisonment is arbitrary.

113. The Commission of Inquiry report states that marriages are sometimes arranged between prisoners. It states of these marriages that “[m]arried” couples are not allowed to live together, but are brought together for several nights per year for the purpose of intimate contact. In some cases, this results in the birth of children. Children born from such relations themselves become prisoners.<sup>272</sup> Those born into the camp are not subject to any sort of trial or legal process: indeed, it seems their imprisonment is not predicated on any sort of guilt, except perhaps ‘guilt by association.’ Kim Su-jong (alias) was born in

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<sup>268</sup> See, for example, Rome Statute, Article 30.

<sup>269</sup> 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. See Andrei Lankov, *The Real North Korea*, p. 47.

<sup>270</sup> TJH019 attests that his parents were arrested for his escape and sent to Camp No. 15 in 2007 (p. 233, CR), TLC004 reports that a group of smugglers were forced to confess to sabotage: an estimated 90 people, including family members, were sent to political prisons: See: Arrested Terrorist Interviewed, *KCNA*, 19 July 2012, accessible at <http://www.kcna.co.jp/item/2012/201207/news19/20120719-08ee.html>. Footage of Mr Jon’s alleged confession, produced by KCNA, is accessible at <http://www.youtube.com/watch?v=PI2g-h2zMyM>. See also: Jang’s Family Hit with Prison Camp Transfer, *Daily NK*, 20 December 2013, accessible at <http://www.dailynk.com/english/read.php?num=11296&catald=nk01500>.

<sup>271</sup> Hung-sun Park and et al., *Survey Report of Political Prisoners’ Camps in North Korea*, (Seoul: National Human Rights Commission, 2009), p. 157.

<sup>272</sup> Commission Report, p. 237.



Camp No.18 and lived there for the first 20 years of his life until 1988.<sup>273</sup> His testimony points to a large number of other children born into the camps as children of South Korean POWs.<sup>274</sup> Such detainment is sufficiently arbitrary to satisfy the definition of imprisonment under customary international law.

114. There is evidence that individuals have been sent to political prison camps on the basis of: speaking of the Supreme Leader in a negative way or way that does not correspond to the state-sanctioned account of his life,<sup>275</sup> having knowledge or experience of a State other than North Korea,<sup>276</sup> expressing or speaking about Christian religion,<sup>277</sup> and leaving North Korea,<sup>278</sup> In these cases, imprisonment is imposed solely as a punishment for the legal exercise of human rights including freedom of opinion and speech,<sup>279</sup> freedom of religion<sup>280</sup> and the right to leave any country, including ones own.<sup>281</sup> The practice in such cases is to force individuals to confess to a political crime such as espionage or sabotage;<sup>282</sup> however, given the corroboration between witnesses on the forced nature of these ‘confessions,’ often obtained through torture, the basis for these ‘political crimes’ is specious.

## **vi. Torture**

115. The ICC Elements of Crime states that torture takes place where:

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

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<sup>273</sup> Kim Su-jong (Affidavit 9, 11.14.2016, 16:00-19:00).

<sup>274</sup> Kim Su-jong (Affidavit 9, 11.14.2016, 16:00-19:00).

<sup>275</sup> TJH019, Kim Young-soon (Commission of Inquiry Report, p. 230).

<sup>276</sup> Ahn Myong-chol (Commission of Inquiry Report, p. 231), the grandfather of Mr Kang Chol-hwan (Commission of Inquiry Report, p. 231).

<sup>277</sup> TJH018 (Commission of Inquiry Report, p. 232)

<sup>278</sup> Mr A (Commission of Inquiry Report.), Lee Baek-lyong, Kim Seung-chol, Kim Cheoryun, Kim Eun-cheol ([http://eng.nkhumanrights.or.kr/eng/datacenter/related\\_write.php](http://eng.nkhumanrights.or.kr/eng/datacenter/related_write.php)) Kim Ha Neul (Affidavit, 11. 07.2016, 10:00 - 12:00), Kim Tae Jin (Affidavit 8, 11.10. 2016, 12:00 - 15:00).

<sup>279</sup> UDHR, Article 19; ICCPR, Article 19.

<sup>280</sup> ICCPR, Article 18.

<sup>281</sup> UDHR, Article 13(2).

<sup>282</sup> Jeong Kwang-il, Kwon Young-hee, Kim Eun-cheol, Ms X (Commission of Inquiry Report, pp. 213-215).





- (ii) Such person or persons were in the custody or under the control of the perpetrator; and
- (iii) Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.<sup>283</sup>

116. Although early tribunal jurisprudence, in line with the Convention Against Torture (CAT),<sup>284</sup> included a requirement that the perpetrator be acting in an official capacity,<sup>285</sup> it is submitted that this does not form a part of the definition of torture in international criminal law. Whilst CAT outlines a human rights standard, intended to regulate the treatment of human beings by the state, international criminal law is concerned with holding individuals accountable for crimes, and should therefore apply equally to anyone, regardless of their affiliation with the state. This approach was followed in *Kunarac*, and, notably, the Rome Statute does not require a connection between the perpetrator and the state.<sup>286</sup>

117. The essential distinguishing feature between torture and other forms of cruel and inhumane treatment is that torture must be committed with a purpose or motive element. Although the ICC statute neglects to include this requirement,<sup>287</sup> it is worth recalling that the ICC Elements of Crimes *does* include a purpose element for the war crime of torture, raising the possibility that its exclusion under the crimes against humanity definition is anomalous,<sup>288</sup> and does not reflect customary international law. Certainly, it cuts against the grain of established human rights systems and international criminal case law. Both the CAT and the Inter-American Torture Convention require a purpose element.<sup>289</sup> With respect to international criminal cases, tribunal jurisprudence has consistently maintained that a purpose element must be satisfied in order for the crime of torture to be

<sup>283</sup> ICC Elements of Crimes, Article 7(1)(f).

<sup>284</sup> Convention Against Torture, 26 June 1987, Article 1.

<sup>285</sup> ICTR, *Akayesu* T. Ch. I, 2 September 1998, para. 594.

<sup>286</sup> Art. 7(2)(e) of the Rome Statute, *Kunarac*, ICTY T. Ch. II, 22 February 2001, paras 387-91.

<sup>287</sup> ICC Elements of Crimes, Footnote 14.

<sup>288</sup> ICC Elements of Crimes, 8(2)(a)(ii)-1

<sup>289</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, Article 1, Organization of American States (OAS), *Inter-American Convention to Prevent and Punish Torture*, 9 December 1985, OAS Treaty Series, No. 67, Article 2.



committed.<sup>290</sup> CAT provides a non-exhaustive list of possible purposes for torture, such as ‘obtaining from him [the victim] 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. The ICTY Trial Chamber has added ‘humiliation’ to this list of purposes.’<sup>291</sup>

118. Torture is practised extensively in: (i) SSD detention centres; (ii) MPS detention centres; and (iii) the ‘punishment blocks’ in the prison camps themselves.

(i) *In SSD interrogation centres*

In interrogation, Kwon Young-hee was beaten on the head with a club to the extent that a tumor formed on her head in consequence.<sup>292</sup>

‘Ms X’ was beaten to the extent that she described her state as “near death.”<sup>293</sup> When she alerted the guards to the fact that her fellow inmate had been lying still for some time, they stomped on her and beat her until she began haemorrhaging blood from her head. She and her cellmates were deprived of food for three days as a result.<sup>294</sup>

Kim Eun-cheol was forced to sit on a hot stove and retains visible burn scars to this day.<sup>295</sup> His head was cracked against a wall until it bled.<sup>296</sup>

Kim Dong Nam was tied to a hot water pipe for 32 hours and not allowed to go to the bathroom in order to elicit a confession.<sup>297</sup>

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<sup>290</sup> ICTR, *Akayesu* T. Ch. I, Judgment, 2 September 1998, paras. 593-4, ICTY; *Celebici* T. Ch. II, Judgment, 16 November 1998, para. 459; ICTY, *Furundzija*, T. Ch. II, Judgment, 10 December 1998, para. 161; ICTY, *Krnjelac*, T. Ch. II, Judgment, 15 March 2002, para. 180.

<sup>291</sup> *Furundzija*, T. Ch. II, Judgment, 10 December 1998, para. 162, but see ICTY, *Krnjelac*, T. Ch. II, Judgment, 15 March 2002, para. 186, doubting the customary import of this extension.

<sup>292</sup> Kwon Young-hee (Commission of Inquiry Report, p. 214), Seoul Public Hearing, 24 August 2013, morning.

<sup>293</sup> Ms X (Commission of Inquiry Report, p. 215, Washington Public Hearing, 30 October 2013).

<sup>294</sup> Ms X (Commission of Inquiry Report, p. 215, Washington Public Hearing, 30 October 2013).

<sup>295</sup> Kim Eun-cheol (Affidavit 6, 11.11.2016, 16:00 - 19:00).

<sup>296</sup> *Ibid.*

<sup>297</sup> Kim Dong Nam (Affidavit 7, 11.9.2016, 10:00 – 12:00).



A great many deaths occurred as a result of the treatment received in interrogation. In November 2006, Ji Seong-ho's father died through injuries sustained in interrogation at the hand of SSD agents.<sup>298</sup>

In August 2011, one witness's 17 year old son was so badly tortured that he died from a brain haemorrhage shortly after interrogation.<sup>299</sup>

In 2001, a witness saw one of her inmates die from injuries as a result of beatings that had been meted out to all of her cellmates. The witness was forced to dig shallow graves, and inferred from this that many other inmates were dying in interrogation.<sup>300</sup>

In 2004, another witness who bribed her way out of interrogation into hospital (since she was in need of emergency treatment), saw many other detainees dying from starvation and water-borne diseases.<sup>301</sup> An elderly woman was tortured in detention at Onsong in 2006. Although she was in a critical condition, she was denied medical care in an attempt to force her brother to return from China and turn himself in. She died after 15 days at the interrogation centre.<sup>302</sup>

(ii) *In MPS interrogation*

Mr A was interrogated by the MPS. During that time, he was beaten with a thick wooden club until he passed out.<sup>303</sup>

Kim Gwang-il was tortured through use of the 'pigeon torture' method: his hands were tied behind his back so that his chest protruded: he was then

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<sup>298</sup> Ji Seong-ho (Commission of Inquiry Report, p. 215), Seoul Public Hearing, 22 August 2013, morning.

<sup>299</sup> TJH028 (Commission of Inquiry Report, p. 215).

<sup>300</sup> TBG018 (Commission of Inquiry Report, p. 215).

<sup>301</sup> TBG018 (Commission of Inquiry Report, pp. 215-216).

<sup>302</sup> TJH024 (Commission of Inquiry Report, pp. 214-215).

<sup>303</sup> Mr. A (Commission of Inquiry Report, p. 215).



beaten in the chest until he vomited blood.<sup>304</sup> He was also subject to ‘motorcycle torture’ and ‘plane torture.’<sup>305</sup>

Mrs P was beaten so badly in interrogations in Onsong, North Hamyong Province, that both her legs were broken and her spine was fractured.<sup>306</sup>

In the interrogation centre in Musan, Kim Song-ju saw a cellmate beaten with a metal rod across his hand about 30 times. This caused the hand to swell to twice its original size.<sup>307</sup>

Kim Hyuk was also subject to pigeon torture in Onsong. Another witness attests to being beaten with wheel barrow handles, gun barrels and wooden planks. Inmates were forced to sit completely still in detention: if they moved they would be beaten.<sup>308</sup>

(iii) *In the prison camps*

Each camp operates a ‘special punishment block,’ which is used concurrently for physical punishment and to interrogate prisoners under torture.<sup>309</sup> Both of these purposes fall within the accepted purposes spelt out under CAT.

Kim Ha Neul (2006) reports that at Camp No. 25, there were three ‘torture chambers’, with ripped flesh on the walls and the corpses of previous detainees on the ground. There was apparatus for water tank torture and for fire torture. There were seven ‘expert torturers.’ Mr. Kim was tortured with both water and fire, by being hung upside down and beaten, and by having an extremely hot (spicy) mixture poured into his nose and mouth.<sup>310</sup> He states

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<sup>304</sup> Kim Gwang-il (Commission of Inquiry Report p. 215).

<sup>305</sup> Ms P (Commission of Inquiry Report, p. 215).

<sup>306</sup> Kim Song-ju (Commission of Inquiry Report, p. 216).

<sup>307</sup> Kim Hyuk (Commission of Inquiry Report, p. 216).

<sup>308</sup> TSH014 (Commission of Inquiry Report, pp. 215-216).

<sup>309</sup> Commission of Inquiry Report, p. 235.

<sup>310</sup> Kim Ha Neul (Affadavit, 11. 07.2016, 10:00 - 12:00).



that the purpose of this treatment was to elicit information concerning the veracity of the confession he had provided whilst in SSD detention.<sup>311</sup>

Kang Chol-hwan recalls the existence of a ‘sweatbox’ that was used to punish prisoners, which was so small 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.<sup>312</sup> He states that the sweatbox was utilised as a mode of physical punishment.<sup>313</sup>

A witness from the Revolutionizing Zone of Camp 18 states that anyone critical of the camp authorities was taken to the punishment block. Of those taken, many did not return to the camp. An inmate who did return was in such ill health that he could not fulfil his work quota: as a punishment for this he was beaten to death.<sup>314</sup>

Outside the punishment blocks, severe punishment is inflicted upon prisoners on an *ad hoc* basis.

Kim Tae Jin stated that the standard practice when a prisoner appeared tired or produced work deemed unsatisfactory was to beat the prisoners with wooden chunks until they ‘lost [their] mind’ or to be forced to strip naked and stand handcuffed in the centre of a yard.<sup>315</sup> He himself was beaten with a burning wooden implement and had his legs ‘roasted’, leaving scars. He was forced to sit in calcium oxide in the rain causing a chemical reaction that severely burnt his hip.<sup>316</sup> Since the object of such inhumane treatment was to punish those who failed to work as extensively as was required, the purposive element of the crime is satisfied.

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<sup>311</sup> Kim Ha Neul (Affidavit, 11. 07.2016, 10:00 - 12:00).

<sup>312</sup> Kang Chol-hwan, *The Aquariums of Pyongyang*, pp. 95-96. The contents of the book were authenticated by Mr Kang in the Seoul Public Hearing, 24 August 2013, afternoon.

<sup>313</sup> Kang Chol-hwan, *The Aquariums of Pyongyang*, pp. 95-96. The contents of the book were authenticated by Mr Kang in the Seoul Public Hearing, 24 August 2013, afternoon.

<sup>314</sup> TLC008 (Commission of Inquiry Report, p. 235).

<sup>315</sup> Kim Tae Jin (Affidavit 8, 11.10. 2016, 12:00 - 15:00).

<sup>316</sup> Kim Tae Jin (Affidavit 8, 11.10. 2016, 12:00 - 15:00).



Ahn Myong-chol saw his superior officer bludgeon a prisoner to death with a blowtorch: the officer was rewarded for this act by being sent to University in Pyongyang.<sup>317</sup>

## **vii. Sexual Violence**

119. The Rome Statute recognises that the threshold of sexual violence is met by ‘rape, sexual slavery, forced pregnancy, enforced sterilization, or any other form of sexual violence of a comparable gravity.’<sup>318</sup>

120. The ICC Elements of Crime defines rape as having two constituent elements:

- (i) The Perpetrator invaded the body by conduct resulting in penetration, however slight, of any part of the body of the victim or the perpetrator with a sexual organ, or of the anal or genital opening 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 advantage of a coercive environment, or the invasion was committed against a person incapable of giving consent.<sup>319</sup>

121. The ICC Elements of crime defines other sexual violence of a comparable gravity as comprising the following elements:

- (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;
- (ii) By force or threat of force or coercion;

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<sup>317</sup> Ahn Myon-chol (Commission of Inquiry Report, p. 235) Seoul Public Hearing, 21 August 2013, afternoon.

<sup>318</sup> Rome Statute, Article 7(1)(g).

<sup>319</sup> Rome Statute, Article 7(1)(g)-1, Elements 1 and 2.



(iii) And the gravity of the conduct was comparable to the other offences in Article 7(1)(g).

122. Kim Su Jong testifies that his mother was raped by Officer Paik, and was so ashamed she took her own life.<sup>320</sup> He also testifies that the rape of female students, and their subsequent decision to commit suicide out of shame, was so rife that guards were deployed to watch the Daedonggang River into which they had been jumping.<sup>321</sup> Another witness attests that, in February 2011 in MPS detention, guards took advantage of the coercive setting to rape female inmates, who were taken to a nearby field for ‘questioning.’<sup>322</sup>
123. A22 reports that ‘rape was very common in prison camps. All of the pretty women were... offered for sexual pleasure of SSD officers... if a woman refuses to accept her demands of SSD officers, the officers make an excuse and easily kill her.’<sup>323</sup> A20 reports 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.’<sup>324</sup> According to ‘Political Prison Camps in North Korea Today’, ‘it 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.’<sup>325</sup> A09, a former prisoner at Camp 18, reports that he or she had been informed that, in the punishment chamber, policemen would bring the prisoners out of the jail in order to rape them.
124. Although rape is not condoned, and SSD agents and guards are under strict orders not to have any sexual engagement with the prisoners, the punishments are very light where

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<sup>320</sup> Kim Su-jong (Affidavit 9, 11.14.2016, 16:00-19:00).

<sup>321</sup> Kim Su-jong (Affidavit 9, 11.14.2016, 16:00-19:00).

<sup>322</sup> TSH014 (Commission of Inquiry Report, pp. 215-216).

<sup>323</sup> A22 (former SSD officer, Camp No.22, 1987-90), ‘Political Prison Camps in North Korea Today’ (Database for North Korean Human Rights, 2011), p. 489.

<sup>324</sup> A20 (former camp officer, Pongchang-ni, Camp No. 18, 1989-2006), ‘Political Prison Camps in North Korea Today’ (Database for North Korean Human Rights, 2011), p. 492.

<sup>325</sup> ‘Political Prison Camps in North Korea Today’ (Database for North Korean Human Rights, 2011), p. 491.



SSD personnel are caught.<sup>326</sup> Ahn Myong-chol stated that whilst ordinary guards could face punishment for sexual fraternization with inmates, higher-ranking SSD agents could sexually abuse inmates with impunity as long as the woman did not become pregnant.<sup>327</sup>

Where pregnancy occurred, the official would be dismissed, whilst the mother would either be secretly executed or consigned to harsh mining work. In one case, the camp commander raped and impregnated a prisoner: the woman and child were taken to the punishment block, where the baby was fed to the dogs. Mr Ahn records another girl being raped by a guard and subsequently sent to the punishment block.<sup>328</sup>

125. Forced abortion bears a striking resemblance to the crime of forced sterilization, which is already included as an underlying crime in the Rome Statute.<sup>329</sup> Both aim to criminalise the unwarranted interference with an individual's reproductive rights. Forced sterilisation is criminalised both where it is achieved through a physical invasive procedure and where it is achieved chemically.<sup>330</sup> Given that abortion may be administered by parallel methods, its criminalisation in every case where it is forced, irrespective of methods chosen, is justified by the inclusion of forced sterilisation under the same circumstances.

126. The term 'forced abortion' is here used to refer to conduct that fits the following definition:

- (i) The perpetrator caused termination of pregnancy by force, threat of force, or coercion, such as that caused by fear of violence, detention, duress, psychological oppression, or abuse of power, against the pregnant person or other persons; or
- (ii) The perpetrator conducted an abortion on the victim where the abortion was not undertaken in the interests of the victim's health and the victim did not consent to the treatment, or conditions were such that the coercive environment prevented the victim from giving genuine consent.

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<sup>326</sup> Commission of Inquiry Report, p. 238.

<sup>327</sup> Commission of Inquiry Report, p. 238.

<sup>328</sup> Commission of Inquiry Report, p. 238.

<sup>329</sup> ICC Elements of Crimes, Article 7(1)(g)-6, Elements 1 and 2.

<sup>330</sup> ICC Elements of Crimes, footnote 55.





127. Those victims of rape who became pregnant were rarely allowed to give birth: in the main, they were forced to have an abortion. Kim Ha Neul testifies to witnessing 20 abortions being induced by three men standing on planks on top of the women's stomachs.<sup>331</sup> A23 reports that, in prison camp no. 23, a female student was raped by her teacher and subsequently forced to have an abortion.<sup>332</sup> Others would deliberately try to induce an abortion for fear that they would be killed if their pregnancy were discovered.<sup>333</sup> Such methods of abortion include eating dirt and poisoning oneself by eating boiled peony flower roots.<sup>334</sup> Another method is by insertion of a 'rubber tube curettage' into the vagina – the rubber tube is inserted and it feels as if 'something is piercing deep inside the [pregnant] woman's belly.'<sup>335</sup> Although these abortions are purportedly voluntary, it is submitted that since the women acted on the basis that if they did not abort the foetus they would be killed or face other severe punishment, any voluntariness is vitiated by the presence of a coercive environment and the threat of force. As such, these abortions also fall within the category of forced abortions.
128. There is extensive evidence that women who were forcibly repatriated from China who had become pregnant in China were either forced to have an abortion or threatened that their child would be killed at birth.<sup>336</sup> Former detainee no. 8 witnessed six forced abortions at Chongjin provincial detention centre in 2000.<sup>337</sup> Former detainee no. 9 saw ten forced abortions in Onsong labour training camp in 2000.<sup>338</sup> You Chun-sik reported that four women were subject to forced abortions in a police station in Siniju.<sup>339</sup> Former detainee no.25 saw six women subject to forced abortions in a police detention centre in Chongjin.<sup>340</sup> Former detainee no.26 saw three forced abortions in the Nongpo detention centre in 2000.<sup>341</sup> Lee Chun-shin saw multiple abortions induced by way of injecting the

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<sup>331</sup> Kim Ha Neul, Affidavit, 2016. 11. 07 (MON) 10:00 - 12:00.

<sup>332</sup> Political Prison Camps in North Korea Today, p. 492.

<sup>333</sup> Political Prison Camps in North Korea Today, p. 492.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid., p. 493.

<sup>336</sup> See: Hawk, The Hidden Gulag I (Centre for north Korean Human Rights, 2003), p. 72, Hawk, the Hidden Gulag II (2012), pp.152-4.

<sup>337</sup> Hawk, The Hidden Gulag I (Centre for north Korean Human Rights, 2003), p. 72.

<sup>338</sup> Ibid.

<sup>339</sup> Ibid.

<sup>340</sup> Ibid.

<sup>341</sup> Ibid.



drug ravenol into the womb of a pregnant woman: this caused babies to be born alive prematurely, who were then buried, presumably still alive.<sup>342</sup>

### **viii. Persecution**

129. The ICC Elements of Crimes identifies persecution as occurring where:

- (i) The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
- (ii) The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
- (iii) Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognised as impermissible under international law.
- (iv) The conduct was committed in connection with any act referred to in article 7, paragraph 1 [any of the other underlying acts necessary to commit a crime against humanity], of the Statute or any crime within the jurisdiction of the Court.<sup>343</sup>

130. The threshold of a severe deprivation of fundamental rights contrary to international law is founded in tribunal jurisprudence.<sup>344</sup> The severity must be such that the persecution is comparable to that of other forms of crime against humanity.<sup>345</sup> However, there is no exhaustive list of acts that may form the base of a charge of persecution.<sup>346</sup> Those other underlying inhumane acts listed in the Rome Statute could also be persecutory acts.<sup>347</sup> Acts that severely deprive social, political or civil rights, such as forced seclusion in

<sup>342</sup> Hawk, *The Hidden Gulag II* (US Committee for Human Rights in North Korea, 2012), p.153.

<sup>343</sup> ICC Elements of Crimes, Article 7(1)(h).

<sup>344</sup> ICTY *Kupresic et al.*, Trial Chamber II, 14 January 2000, para. 621.

<sup>345</sup> ICTY *Kupresic et al.*, Trial Chamber II, 14 January 2000, paras 619 and 621; ICTR, *Ruggio*, Trial Chamber, 1 June 2000, para. 21.

<sup>346</sup> ICTY, *Kordic and Cerkez*, Trial Chamber, 26 February 2001, para. 694.

<sup>347</sup> *Tadic*, ICTY T. Ch. II, 7 May 1997, paras 704-710.



ghettos or the exclusion of members of a group from aspects of social, economic or political life, would suffice.<sup>348</sup>

131. The Rome Statute includes a requirement that there be a connection to any crime in the jurisdiction of the court or any other crime that is a constituent part of a crime against humanity. The ICTY concluded that this requirement was “not consonant with customary international law.”<sup>349</sup> Nevertheless, it is not a significant requirement, and poses no issue in the instant case, since it can be satisfied by a linkage to just one other recognised act.

(i) *Evidence of persecution for affiliation with Christianity.* Kim Ha Neul witnesses Oh Seong-hwa murdered for her religious affiliation.<sup>350</sup> Kim Eun-cheol testifies that five people were either sent to the total control zone at Camp No.15 or executed on the basis reading a verse from the bible.<sup>351</sup> Kim Tae Jin, who participated in Christian meetings at Camp No.15, reports that 7 others were tortured severely and taken to another prison camp, presumably a ‘total control zone.’<sup>352</sup> Mr. A testifies that his sister had been imprisoned in the revolutionising zone at Yodok: the fact that she had practiced Christianity aggravated the severity of her ‘crime’ of leaving North Korea.<sup>353</sup> This chimes with the testimony of a former high-level official, who stated that policy was to send those who attempted to reach South Korea using Christian channels would be sent to political prison camps, whilst those using other channels would be sent to ordinary prison.<sup>354</sup>

(ii) *Evidence of persecution for political affiliation.* Kim Ha Neul saw a prisoner murdered for shouting, ‘Down with North Korean Socialism.’<sup>355</sup> It is submitted that the entire system of political prisons, whose basis is

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<sup>348</sup> ICTY *Kupresic et al.*, Trial Chamber II, 14 January 2000, paras 608-615.

<sup>349</sup> ICTY *Kupresic et al.*, Trial Chamber II, 14 January 2000, para. 580.

<sup>350</sup> Kim Ha Neul, Affidavit, 11.07.2016, 10:00 - 12:00.

<sup>351</sup> Kim Eun-cheol (Affidavit 6, 11.11.2016, 16:00 - 19:00).

<sup>352</sup> Kim Tae Jin (Affidavit 8, 11.10. 2016, 12:00 - 15:00).

<sup>353</sup> Mr. A (Commission of Inquiry Report, pp. 231-232).

<sup>354</sup> TJH004 (Commission of Inquiry Report p. 115).

<sup>355</sup> Kim Ha Neul (Affidavit, 11.07.2016, 10:00 - 12:00).



interminable imprisonment for the holding of a political view, evidences persecution for political affiliation.

- (iii) *Evidence of persecution on the basis of gender: forced abortions.* Former detainee no.8 witnessed six forced abortions at Chongjin provincial detention centre in 2000.<sup>356</sup> Former detainee no.9 saw ten forced abortions in Onsong labour training camp in 2000.<sup>357</sup> You Chun Sik reported that four women were subject to forced abortions in a police station in Siniju.<sup>358</sup> Former detainee no.25 saw six women subject to forced abortions in a police detention centre in Chongjin.<sup>359</sup> Former detainee no. 26 saw three forced abortions in the Nongpo detention centre in 2000.<sup>360</sup> Kim Ha Neul attests to witnessing 20 abortions being induced by three men standing on planks on top of the women's stomachs.<sup>361</sup>

#### **ix. Enforced disappearance**

132. Article 7(2)(i) of the Rome Statute states:

‘Enforced disappearance of persons’ means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

133. Accordingly, the crime may be committed by either:

- (i) The arrest, detainment or abduction of a person, with knowledge that a refusal to acknowledge the arrest would follow in the ordinary course of events; or

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<sup>356</sup> Hawk, *The Hidden Gulag I* (Centre for North Korean Human Rights, 2003), p. 72.

<sup>357</sup> *Ibid.*

<sup>358</sup> *Ibid.*

<sup>359</sup> *Ibid.*

<sup>360</sup> *Ibid.*

<sup>361</sup> Kim Ha Neul, (Affidavit 1, 07 November 2016, 10:00 - 12:00).



- (ii) By refusing to acknowledge the deprivation of liberty or to provide information on the fate or whereabouts, with knowledge that such a deprivation has occurred.<sup>362</sup>

134. According to former prisoner A05, his or her father left for work one morning never to return. All A05 was told was that his or her father had been arrested.<sup>363</sup>
135. Former prisoner A17 was prevented from telling his relatives about their transfer to a political prison camp.<sup>364</sup>
136. A14 states that SSD policy was to carry a suspect away in the night, unbeknownst to their family.<sup>365</sup>
137. Former prisoner A12 states that his or her uncle's grandmother, mother and two children were sent to a PPC: nobody knew which PPC they had been sent to.<sup>366</sup>
138. Another witness states that her uncle was arrested, badly beaten and sent to a PPC: nobody was aware of what had happened to him.<sup>367</sup>
139. Indeed, given that the official 'truth' is that political prisons do not exist,<sup>368</sup> it could hardly be state policy to inform family members of their relatives' detention therein. This implies that where families do find the whereabouts of their relative, it is the exception rather than the rule, and it is achieved through the bribing of a public official or on the basis of family connections. According to a survey of North Koreans who had fled North Korea, only 49.4% were able to discover the fate of their relative.<sup>369</sup>

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<sup>362</sup> Witschel and Ruckert, 'Crimes against Humanity and Enforced Disappearance of Persons' in Lee, *Elements and Rules*, pp. 98-103.

<sup>363</sup> *Political Prison Camps in North Korea Today*, p. 138.

<sup>364</sup> *Ibid.*

<sup>365</sup> *Survey Report on Political Prisoner's Camps in North Korea* (The National Commission of Human Rights of Korea, 2010), p. 175

<sup>366</sup> *Ibid.*, p. 177.

<sup>367</sup> *Ibid.*, p. 177.

<sup>368</sup> *Commission of Inquiry Report*, p. 324.

<sup>369</sup> *2012 White Paper on Human Rights in North Korea* (KBA Human Rights Foundation, 2012), p. 202.



## **x. Other Inhumane Acts**

140. The residual underlying crime of ‘other inhumane acts’ ensures that the capacity to prosecute wrongdoers is not limited by the inability of drafters to conceive of all treatment so egregiously inhumane as to be comparable to those already established in statute and in case law.<sup>370</sup>
141. The Rome Statute establishes that in order to qualify as an ‘other inhumane act,’ conduct must: (i) be of a similar character to other prohibited acts; and (ii) cause great suffering or serious injury to body or to mental and physical health.<sup>371</sup>

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<sup>370</sup> Similar *Blaskic*, ICTY T. Ch., 13 March 2000, para. 237.

<sup>371</sup> ICC Elements of Crimes, Article 7(1)(k).



## VI. CRIMINAL LIABILITY FOR CRIMES AGAINST HUMANITY

142. The state security apparatus consolidated by Kim Jong-il in 1997 remains in place under Kim Jong-un. The five core ‘pillars’ of this system are:<sup>372</sup>

- (i) The State Security Department, which serves as the primary political police. It is legally mandated to investigate ‘crimes against the state or the nation’ and is tasked with identifying and suppressing threats to the Supreme Leader and his political system.
- (ii) The Ministry of People’s Security also assumes political policing functions.
- (iii) The Military Security Command serves as the Korean People’s Army political police force.
- (iv) The Office of the Prosecutor acts as a legal and political monitor.
- (v) Special bodies within the Central Committee of the Korea Workers’ Party monitor senior officials and the security agencies.

It is understood, further, that the three main security agencies (the SSD, the MPS, and Military Security Command) compete to demonstrate their ‘efficiency’ at identifying ideological opponents.<sup>373</sup>

143. The DPRK prison system may therefore be considered to be a hierarchical, orderly, and repressive regime in which the command structure is well-defined. The requirement for *actual* or, at the very least, *constructive* knowledge of criminal acts is satisfied at all levels of the command structure. Even senior officers (including Kim Jong-un) who may not have direct contact with the prison system, may be deemed to hold constructive knowledge given their access to outside reports on the conditions of DPRK prison system. The DPRK government’s reaction to such outside reports, and their internal

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<sup>372</sup> Commission of Inquiry Report, p. 36, para. 134.

<sup>373</sup> Commission of Inquiry Report, p. 37, para. 135.



reports regarding same, likely would be sufficient to establish this element for the senior officers. It is noted, further, that the Commission of Inquiry found that:

[T]he inner workings of the state and relevant chains of command are deliberately and systematically obfuscated, especially in those areas where the state engages in the most egregious human rights violations. Orders to commit human rights violations are often only transmitted orally. Where they are put in writing, relevant documents are only available to selected officials and protected by special safeguards to preclude their divulgence to outsiders. These institutionalised precautionary measures further indicate knowledge and approval of human rights violations at the central level.<sup>374</sup>

144. As the Supreme Leader, Kim Jong-un runs the DPRK political prison system through the OGD, MSS (SSD), and the MPS. While the MSS (SSD) and MPS run the prison camps, the OGD seeks to maintain absolute loyalty by ensuring that all individuals adhere to the fundamental bedrock of the Kim regime, the Ten Principles of Monolithic Ideology. The Supreme Leader thus has three direct channels reporting to him on the internal security of the regime.
145. The political prison system was designed to eliminate ‘class enemies’ and political dissidents, including those supposedly tainted as third-generation descendants.<sup>375</sup> There exists a propaganda campaign, taught to Koreans since birth,<sup>376</sup> and specific training given to guards,<sup>377</sup> both of which indoctrinate Koreans to believe that the ‘class enemies’ interned are sub-humans, thereby ‘eradicat[ing] human inhibitions that might otherwise

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<sup>374</sup> Commission of Inquiry Report, p. 355, para. 1180, stating, at footnote 1647: Former DPRK officials told the Commission that documents considered sensitive were handled by special documents safekeeping departments and officials could only gain access to numbered copies that they had to hand back. Other officials indicated that written information revealing human rights violations and other sensitive conduct was systematically destroyed.

<sup>375</sup> Ahn Myong-chol (a former prison guard): inmates ‘are supposed to die in the camp from hard labour,’ Seoul Public Hearing, 21 August 2013, afternoon (00:16:40); Kim Il-sung had instructed that three generations of inmates should be annihilated, so ‘the camp is there in order to make sure that there are no future generations of the political prisoners,’ (00:31:45). Video at: <http://webtv.un.org/search/commission-of-inquiry-on-human-rights-in-the-dprk-seoul-public-hearing-day-2-pm-21-august/2668611255001?term=dprk%20seoul&sort=date>

<sup>376</sup> The KPW Propaganda and Agitation Department has an extensive indoctrination programme through which “the Party seeks to deny its citizen’s freedom of thought and freedom of information” (Commission of Inquiry report, p. 357).

<sup>377</sup> Ahn Myong-chol: “We had very intensive ideology training for six months, and that training is to... I guess invoke hostility against the inmates and to imprint in our minds that the inmates are enemies” (Seoul Public Hearing, 21 August 2013, afternoon (01:09:47)).





prevent guards from subjecting prisoners to such inhumane acts.<sup>378</sup> This is reinforced by the notion of *songbun* which permeates all aspects of North Korean life: from the age of 16, all students are taught to discriminate against those with low *songbun*, and this would include any person incarcerated at a political prison camp.<sup>379</sup> Indeed, SSD officials and guards are told that prisoners are meant to die in prison camps.<sup>380</sup> One of the most troubling aspects of the orders given to prison guards is that, should war break out, they are told to ‘shoot everybody that is under their supervision’ and are drilled extensively in how to do this efficiently.<sup>381</sup> This cocktail of discriminatory messages directed towards prison guards correlates with the programme of inciting hatred fundamental to a pernicious elimination campaign.

146. No system exists properly to prevent abuses. Political prison camps exist in a vacuum, ‘isolated from the outside world’ and ‘immune from any critical eyes or inspections from both inside and outside the camp.’<sup>382</sup> Although there is a system of mild punishment for the low-ranking prison guards who engage in sexual activities with prisoners, SSD officers are immune from this system.<sup>383</sup> According to testimony, ‘all of the pretty women were, in one way or another, offered for the sexual pleasure of SSD officers.’<sup>384</sup> The only circumstance in which officers could be punished was if the prisoner became pregnant.<sup>385</sup> In the absence of proper and effective mechanisms to prevent such abuses, members of higher echelons will also be liable for such unintended yet willingly risked consequences of their criminal plan.

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<sup>378</sup> The message that prisoners are ‘sub-human enemies’ is reinforced by ‘the activities of the Propaganda Department of the Worker’s Party of Korea and other state institutions, which create hostility towards so-called “enemies of the people.” The combination of indoctrination by specific training and general propaganda creates a psychological environment that eradicates human inhibitions that might otherwise prevent guards from subjecting prisoners to such inhumane acts.’ (Commission Report, p.329).

<sup>379</sup> Robert Collins, ‘Marked for Life: Songbun – North Korea’s Social Classification System’, p. 72, at [https://www.hrnk.org/uploads/pdfs/HRNK\\_Songbun\\_Web.pdf](https://www.hrnk.org/uploads/pdfs/HRNK_Songbun_Web.pdf).

<sup>380</sup> Ahn Myong-chol, Seoul Public Hearing, 21 August 2013, afternoon (00:16:40). Video at: <http://webtv.un.org/search/commission-of-inquiry-on-human-rights-in-the-dprk-seoul-public-hearing-day-2-pm-21-august/2668611255001?term=dprk%20seoul&sort=date>.

<sup>381</sup> Ahn Myong-chol, Seoul Public Hearing, 21 August 2013, afternoon (00:19:20).

<sup>382</sup> Political Prison Camps in North Korea Today ((Database for North Korean Human Rights, 2011), p. 488.

<sup>383</sup> Ahn Myong-chol (Commission of Inquiry Report, p.238).

<sup>384</sup> Political Prison Camps in North Korea Today (Database for North Korean Human Rights, 2011), p.489.

<sup>385</sup> Ahn Myong-chol (Commission of Inquiry Report, p.238).



## Kim Jong-un

147. As Chairman of the SAC and of the KWP, Kim Jong-un directly oversees the activities of both organizations formally tasked with management of the SSD. Evidence also suggests that Kim Jong-un acts as *de facto* chief of the SSD, since the SSD reports directly to the Supreme Leader.<sup>386</sup> In any case, it would be impossible for him to be unaware of a system of oppression as all encompassing as the political prison camp system: those interned at prison camps are estimated to number at least 80,000.<sup>387</sup> Kim Jong-un is personally acquainted with the highest command of the SSD and became acquainted with SSD Headquarters as early as 2010.<sup>388</sup> Indeed, those most senior in the SSD are members of the SAC and senior members of the Korean People's Army.<sup>389</sup> Given his position of ultimate authority over these bodies, it can be inferred that he has personal knowledge of the system of ill-treatment that is perpetuated through the political prison camp system.
148. Kim Jong-un's failure to prevent the system of oppression that pervades the state of which he is 'Supreme Leader' is sufficient to amount to a significant contribution to the criminal plan that the political prison camps embody. His failure to prevent this system of abuse suggests that he in fact possesses the intent to further this common concerted system of ill-treatment.
149. In *Kvocka*, the ICTY Appeals Chamber emphasised that a silent authority figure could play a significant role in a JCE II.<sup>390</sup> This was especially the case where the authority figure was present at the scene of the crime. Considering this criterion for a moment accentuates the extent of the criminal system in place in North Korea. The Kim family

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<sup>386</sup> TAP024, TJH015, TLC041, ECC002 (Commission of Inquiry Report, p. 353).

<sup>387</sup> Commission of Inquiry Report, pp. 226-227: Korea Institute for National Unification (KINU) estimates that between 80,000 and 120,000 people are detained in the political prison camps today. This figure, which KINU bases on analysis of recent satellite imagery analysis and first hand-testimony, takes into account the release of prisoners from Political Prison Camp No. 18 and the uncertainty about the fate of the prisoners of Political Prison Camp No. 22. Similarly, the non-governmental Committee on Human Rights in North Korea (HRNK) submitted that a figure of 80,000 to 130,000 prisoners is an accurate rendering of the prison camp population. These figures are also in line with a 2011 estimate of the Database Centre for North Korean Human Rights (NKDB), which placed the size of the camp population at a minimum of 130,500 people, but did not yet account for the closure of Camp No. 22 and the related uncertainty about the fate of the prisoners of Camp No. 22.

<sup>388</sup> <https://nkleadershipwatch.wordpress.com/2010/10/26/jong-un-attends-guidance-of-ssd-mss-unit/>.

<sup>389</sup> <https://nkleadershipwatch.wordpress.com/2010/10/26/jong-un-attends-guidance-of-ssd-mss-unit/>.

<sup>390</sup> ICTY, *Kvocka*, IT-98-30/1-A [A. Ch.], 28 February 2005, para. 309.



has continued to administer this system since the 1950s, overseeing the dissemination of propaganda, training and orders which render ruthless and brutal camp criminality utterly commonplace.

150. Kim Jong-un may thus be considered criminally responsible for crimes against humanity under both the doctrines of JCE and command responsibility.

### **Korean Workers' Party**

151. Although *de jure* direct control over the SSD is maintained by the SAC, to attribute complete control to this organ would be to misunderstand the fundamental role the KWP plays in every aspect of North Korean life. Party control of the SSD is maintained by the KWP Organization and Guidance Department (OGD).<sup>391</sup> Indicative of the incestuous nature of power politics in North Korea, the membership of the KWP Politburo (its highest command) largely overlaps with that of the SAC. Of the 12 members of the SAC, 11 are full members of the Politburo, a group consisting of just 19 individuals. The remaining SAC member, Foreign Minister Ri Yong-ho, is an alternate member of the Politburo.<sup>392</sup> General Kim Won-hong, head of the SSD, is both a full member of the Politburo and a member of the SAC.<sup>393</sup>
152. Alternate member of the Politburo Jo Yon-jun is the First Vice Director of the OGD. A source in China with high-level ties to North Korea states that Jo Yon-jun “is the brains behind the operation of the Kim Jong un regime. Jo Yon-jun oversees and directs all internal matters within the party... under Kim Jong un’s regime, power is centralised under the Organisation and Guidance Department and the State Security Department.”<sup>394</sup> First Vice Director, Jo Yon-jun controls the SSD; as a member of the Politburo, he receives orders and direction from KWP leadership on administration of the SSD. Given

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<sup>391</sup> Gause, ‘Coercion, Control, Surveillance and Punishment’, (Committee for Human Rights in North Korea, 2012), p. 82. Although the Administration Department used to play a significant role in overseeing the SSD, evidence suggests that following the death of Jang Song Thaek, the Administration Department plays a ceremonial role, ceding power to the Organisation and Guidance Department – see:

<http://www.dailynk.com/english/read.php?num=13492&catald=nk01500>

<sup>392</sup> <https://www.hrnk.org/about/north-korea-leaders.php?category=list&page=2>.

<sup>393</sup> <https://www.hrnk.org/about/north-korea-leaders.php?category=list&page=2>.

<sup>394</sup> <http://www.dailynk.com/english/read.php?num=13492&catald=nk01500>



his status as the ‘brains behind the organisation’ and the OGD’s status as an organ of centralised power, it may be inferred that the OGD plays a substantial role in the oversight of the SSD. Given that the KWP Politburo comprises Jo Yon-jun, General Kim Won-hong and Ri Pyong-chol, a senior deputy director of the OGC, this organ too may be considered to play a substantial role in the operating the SSD and political prison camps.

153. Members of the KWP OGD and Politburo may be considered to be criminally responsible for those criminal acts perpetrated in prison camps that follow established policy (namely: murder, extermination, enslavement, forcible transfer, imprisonment, torture, the sexual crime of forced abortions, enforced disappearance, and other inhumane acts) under the principles of JCE I and command responsibility. Relevant personnel may also be found to be criminally responsible for rapes, sexual assaults, and other *ad hoc* inhumane acts committed in the political prison camps and in the arrest and detainment procedures that precede imprisonment under JCE II.

#### **State Affairs Commission (ex National Defence Commission) (SAC)**

154. The SSD formally reports to the State Affairs Commission (formerly the National Defence Commission). At the Fourth Session of the 13th Supreme People’s Assembly, 29 June 2016, the National Defence Commission was replaced by the State Affairs Commission, which takes on the responsibilities of the National Defence Commission with an expanded focus on the non-military national concerns. At the Fourth Session, Kim Jong-un was elected Chairman of the SAC.<sup>395</sup> According to Article 106 of the Constitution of North Korea, the SAC is the ‘supreme national guidance organ of state sovereignty.’
155. The extent of the connection between the SAC and the SSD is demonstrated by the fact that the Minister of State Security and Head of the SSD, General Kim Won-hong, is one of the 12 members of the SAC.<sup>396</sup> That the SSD Chief is included in the tiny number of

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<sup>395</sup> <https://nkleadershipwatch.wordpress.com/dprk-security-apparatus/national-defense-commission/>.

<sup>396</sup> <http://38north.org/2016/07/mmadden070616/>.



members of this ‘supreme organ’ further demonstrates the significance of the SSD in the DPRK. The SAC, as the most immediate vessel of Kim Jong-un’s power, must, therefore, hold full knowledge of the political prison camp system, intend that system to be perpetuated, and intend of fail to prevent the conduct constituting underlying crimes be committed.

156. Senior SAC personnel may, therefore, be found criminally responsible for the crimes against humanity under the principles of JCE and command responsibility.
157. SSD Central Command is headquartered in Pyongyang.<sup>397</sup> The Prosecution, Prison and Investigation Bureaux are administered from here, and evidence suggests that they are directly overseen by the Head of the SSD.<sup>398</sup> Their actions, may, therefore, be considered the implementation of the orders of SSD Senior Command. As such, SSD command personnel, under the direction of General Kim Wong Hong as Minister of State Security, may be held responsible for those crimes committed according to policy under JCE I and those crimes which occur outside of the policy but due to the operation of the ‘system of ill-treatment’ that the prison camps embody under JCE II, as well as pursuant to the doctrine of command responsibility

### **Personnel involved in the operation of the political prison camps**

#### **SSD Prison Bureau No.7 and Main Command in Pyongyang**

158. The SSD is the designated agency with the power to deal with serious political crimes,<sup>399</sup> and Bureau No.7 is the department within the SSD with the competence to handle prison camps. Where there is a common policy identifiable across political prison camps, it may reasonably be inferred that orders emanate from, or are communicated through the central Bureau No. 7 in Pyongyang. There is evidence of such a common policy with respect to:

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<sup>397</sup> Gause, ‘Coercion, Control, Surveillance and Punishment’, (Committee for Human Rights in North Korea, 2012), p. 17.

<sup>398</sup> Gause, ‘Coercion, Control, Surveillance and Punishment’, (Committee for Human Rights in North Korea, 2012), p. 24.

<sup>399</sup> Articles 122 and 124 of the DPRK Code of Criminal Procedure.



summary executions for attempting to escape,<sup>400</sup> executions for stealing food,<sup>401</sup> as a result of becoming pregnant or being raped,<sup>402</sup> secret executions,<sup>403</sup> extermination brought about by a combination of less-than-subsistence rations, and extreme labour conditions,<sup>404</sup> the imposition of conditions of labour so egregious that labour cannot be anything other than forced,<sup>405</sup> forced abortions,<sup>406</sup> and torture and other inhumane treatment in established punishment blocks. The prevalence of similar modes of punishment and general conditions in all prison camps, it can be concluded that these are instituted by order in furtherance of a specific policy and pursuant to orders, rather than meted out on an *ad hoc* basis.

159. Undoubtedly, all members of the Bureau, the entire purpose of which is to perpetuate and administer the political prison system, possess the requisite intent to further the system of ill-treatment. Further, those in the centralised command at Pyongyang must know of the surrounding system of ill treatment and be committed to its maintenance. Knowledge of the system may be inferred from their position of authority.<sup>407</sup>

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<sup>400</sup> Kim Ha Neul, Affidavit, 11. 07.2016 10:00 - 12:00, Kim Eun-cheol (Affidavit 6, 11.11.2016, 16:00 - 19:00), Kim Tae Jin (Affidavit 8, 11.10. 2016, 12:00 - 15:00), Jeong Kwang-il (Commission of Inquiry Report, p. 234), Seoul Public Hearing, 21 August 2013, morning.

<sup>401</sup> Kim Su-jong (Affidavit 9, 11.14.2016, 16:00-19:00), Kim Eun-cheol (Commission of Inquiry Report, p. 242), Kim Hye-sook (Commission of Inquiry Report, p. 267), TLC008 (Commission of Inquiry Report, p. 267).

<sup>402</sup> Kim Ha Neul, Affidavit, 11. 07.2016, 10:00 - 12:00, Confidential testimony of TJH041 (Commission of Inquiry Report, p. 239); Lee Baek-lyong, testimony available at <http://eng.nkhumanrights.or.kr/>.

<sup>403</sup> TJH041 (Commission of Inquiry Report, p. 268), Amnesty International, North Korea, New Satellite Images Show Continued Investment in the Infrastructure of Repression ASA 24/010/2013, p. 6, Ahn Myong-cheol (Confidential Interview, Commission of Inquiry Report, pp. 268-269).

<sup>404</sup> Ahn Myong chol Seoul Public Hearing, 21 August 2013, afternoon (00:16:40), Lee baek-lyong, testimony recorded by the Citizen's Alliance for North Korean Human Rights, [http://eng.nkhumanrights.or.kr/eng/datacenter/related\\_write.php](http://eng.nkhumanrights.or.kr/eng/datacenter/related_write.php), Kim Tae Jin (Affidavit 8, 11.10. 2016, 12:00 - 15:00). Kim Su-jong (Affidavit 9, 11.14.2016, 16:00-19:00), Kim Hye-sook, confidential interview (Commission of Inquiry Report, p. 241), Lee Young Kuk, Hidden Gulag Report I (David Hawk, U.S. Committee for Human Rights in north Korea, 2003), p. 33, TAP012 (Commission of Inquiry Report, p. 244).

<sup>405</sup> Lee Baek-lyong, testimony at <http://eng.nkhumanrights.or.kr/>.

<sup>405</sup> See testimony of Mr. Lee, Amnesty International, North Korea, New Satellite Images Show Continued Investment In The Infrastructure of Repression ASA 24/010/2013, p. 20.

<sup>405</sup> Kim Ha Neul (Affidavit 9, 11. 07.2016, 10:00 - 12:00), Kang Chol-hwan, *The Aquariums of Pyongyang*, pp. 95-96. The contents of the book were verified by Mr Kang in the Seoul Public Hearing, 24 August 2013, afternoon, TLC008 (Commission of Inquiry Report, p. 235). Kim Tae Jin (Affidavit 8, 11.10. 2016, 12:00 - 15:00), Ahn Myon-chol (Commission of Inquiry Report, p. 235) Seoul Public Hearing, 21 August 2013, afternoon. Commission of Inquiry Report, p. 243.

<sup>406</sup> Extensive witness testimony to be found in Hawk, *The Hidden Gulag I* (Centre for north Korean Human Rights, 2003), p. 72, Hawk, *The Hidden Gulag II* (2012), pp. 152-154.

<sup>407</sup> As per *Tadic*, ICTY Appeals Chamber 15 July 1999, para. 220.



160. Those members of SSD Bureau 7 may, therefore, be held responsible for crimes committed in the camps under JCE I, JCE II, and command responsibility.

### **SSD Investigation Bureau**

161. The SSD Investigation Bureau is responsible for the operation of SSD detention centres, euphemistically known as ‘guest houses,’ which exist at the county, provincial and national levels.<sup>408</sup> Furthermore, the Investigation Bureau oversees the arrest of those accused of political crimes and their transport to political prison camps.<sup>409</sup> The underlying crimes that occur in SSD detention centres have been outlined above: murder; torture, and other inhumane treatment; the arrest of individuals without due process; imprisonment; forced disappearance; and forced transfer.

162. All of the above crimes occur as part of the approved system and policy of the SSD. Torture, torture equipment, and trained torturers are reported in SSD detention centres across the country.<sup>410</sup> Infanticide was reported as standard policy for returnees from China in multiple border detention facilities,<sup>411</sup> as was forced abortion.<sup>412</sup> Over 80% of detainees are not presented with an arrest warrant, whilst the majority of families have been unable to discover the location of arrested relatives.<sup>413</sup> It appears common for SSD agents to arrive in the night, and secret family members or suspects away to political prison camps without judicial proceedings of any kind.<sup>414</sup> It thus appears that such

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<sup>408</sup> Commission of Inquiry Report, p. 211.

<sup>409</sup> Gause, ‘Coercion, Control, Surveillance and Punishment’, (Committee for Human Rights in North Korea, 2012), p. 22.

<sup>410</sup> E.g. Kim Song-ju was kept in a torture ‘cave’ in Musan (Commission of Inquiry Report, p. 211), Jeong Kwang-il was kept in a similar facility in Hoeryong, TJH015 (an SSD official) described a special torture chamber in the province in which he worked, An Hyul was tortured at Yongsong, Pyongyang (Hidden Gulag I).

<sup>411</sup> Reported in Sinuju, North Pyongyang Province, Chongjin, Hyesan, Pyongyang Province, Onsong, North Hamyong Province, Musan, North Hamyong Province: see ‘Hawk, The Hidden Gulag II’ (Centre for North Korean Human Rights, 2012), pp. 152-154.

<sup>412</sup> *Ibid.*

<sup>413</sup> 2012 Survey found only 18.1% of respondents had been presented with an arrest warrant or document justifying their arrest (2012 *White Paper on Human Rights in North Korea* (KBA Human Rights Foundation, 2012), p. 202.) Only 49.4% were able to find out the fate of their relative, and that was usually on the basis of bribing an official or through family connections, rather than through official channels (2012 *White Paper on Human Rights in North Korea* (KBA Human Rights Foundation, 2012), p. 202).

<sup>414</sup> Survey Report on Political Prisoner’s Camps in North Korea (The National Commission of Human Rights of North Korea, 2010), p. 54. Based on testimony from: O Myong-o (alias) (p. 56), Kang Chul-hwan, A11, A06 (p. 54), A14, A15, A12 (pp. 172-174).





criminal practices are committed pursuant to the established policy handed down from the central command of the SSD Investigation in Pyongyang. In establishing such a protocol, senior command must intend that these crimes be committed. Therefore, central command of the SSD Investigation Bureau may be held liable for crimes against humanity under JCE I and under the principle of command responsibility for such crimes committed by its agents.

### **Prosecution Bureau**

163. Where a provincial SSD Interrogation Unit suspects that a detainee has committed a political crime, he reports it directly to the Prosecution Bureau in Pyongyang. The Bureau then acts as ‘judge, jury, and executioner,’ handing down a sentence in the name of the court. The Bureau has complete discretion in deciding the sentence that should be imposed.<sup>415</sup> Given the blanket disregard for due process or the fair trial rights of the accused, all imprisonments ordered by the Prosecution Bureau must be considered arbitrary. Those in command of the bureau are thus responsible for the policy employed, and indeed must intend the underlying crime of imprisonment be committed. Members of the Prosecution Bureau may, therefore, be considered potentially criminally responsible under JCE and command responsibility.

### **SSD Officers**

164. SSD officers who manage camps may also be direct perpetrators of many of the underlying crimes constituting crimes against humanity perpetrated in political prison camps. In particular, evidence cited above suggests that SSD officers perpetrate sexual crimes in prison camps with impunity, whilst those agents lower down the command chain may be punished for these acts. That these officers have the capacity to order or prevent criminal conduct renders them potentially liable for the criminal acts of their subordinate under command responsibility as well as JCE.

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<sup>415</sup> Gause, ‘Coercion, Control, Surveillance and Punishment’, (Committee for Human Rights in North Korea, 2012), p. 71.





## **SSD Agents and Prison Guards**

165. SSD agents and prison guards are often the direct perpetrators of the underlying crimes constituting crimes against humanity. They may thus be found to be liable under JCE II and III.

## **VII. CONCLUSION**

166. There are reasonable grounds to believe that crimes against humanity have been committed against those condemned as political prisoners to the prisons and political prison camps of DPRK.

167. The perpetrators of these crimes are:

- (i) those who have worked in, supervised, organised and administered the prisons;
- (ii) those who have had control over the prisons;
- (iii) those causing prisoners to be sent to the prisons;
- (iv) those controlling the political structure that uses the prisons to incarcerate civilians.

168. All the perpetrators of the crimes are liable be tried in international courts and tribunals.