

COMMUNICATION

to the Office of the Prosecutor

under Article 15 of the Rome Statute of the International Criminal Court

**Situation in North Korea:
War Crimes and Crimes Against Humanity
against South Korean Prisoners of War**

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Respectfully submitted by

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I. Introduction

1. This June 25 marks the sixty-fifth anniversary of the Korean War, which broke out on June 25, 1950. The Korean War was arguably the bloodiest war in the Cold War, resulting in nearly three million military and civilian casualties¹.
2. However, while an cease-fire agreement between North Korea and South Korea (the “Armistice”) has resulted in tenuous peace during the last six decades, a large number of people still suffer the effects of the Korean War to this day.
3. It is officially estimated that nearly 50,000 South Korean prisoners of war (“POWs”) remain in captivity in North Korea, while some estimates count up to 70,000². North Korean leaders during and following the war purposely denied, concealed or understated the existence and the number of South Korean POWs in North Korea. Moreover, North Korea refused the repatriation of the South Korean POWs in violation of Article 8(2)(a)(vii) of the Rome Statute of the International Criminal Court (the “Rome Statute”) prohibiting unlawful confinement.
4. Furthermore, following the Armistice, while the South Korean POWs were freed from forced conscription into the Korean People’s Army, the military force of North Korea (the “KPA”), they were placed into forced labor in coal mines, where they remained for decades, often right up to the point of death, while being denied contact with family in South Korea. Such treatment is in violation of Articles 8(2)(a)(ii) and 8(2)(a)(iii), which prohibit, respectively, inhuman treatment and wilfully causing great suffering.
5. Meanwhile, North Korea has continued to detain South Korean POWs and refused to provide any information on their whereabouts for over six decades. Even to this day, the fates of the 50,000 South Korean POWs that were unaccounted for at the Armistice are

¹CNN Library, *Korean War Fast Facts*, CNN (June 28, 2013), available at <http://edition.cnn.com/2013/06/28/world/asia/korean-war-fast-facts>.

² United Nations, Office of the High Commissioner for Human Rights, *Report of the detailed findings of the commission of inquiry on human rights in the Democratic People’s Republic of Korea* 861, A/HRC/25/CRP.1 (February 7, 2014), available from http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoIDPRK/Report/A.HRC.25.CRP.1_ENG.doc

mostly unknown. In continuing this confinement of South Korean POWs and refusing to provide any information, the North Korean leaders may be violating Article 7(1)(i) prohibiting enforced disappearance of persons as a crime against humanity.

6. Lastly, the surviving South Korean POWs are forever marked with a label of being “No. 43”, showing his background as a South Korean POW. This label affects not only the POW himself, but also his family, including children, who are prevented from educational and job opportunities and face social stigma for being a “No. 43”. Such practice may be in violation of Article 7(1)(h) prohibiting persecution against any group on political and national grounds.
7. There is ample evidence from various sources supporting the allegations of war crimes of unlawful confinement under Article 8(2)(a)(vii), inhuman treatment under Articles 8(2)(a)(ii) and wilfully causing great suffering under 8(2)(a)(iii) as well as crimes against humanity of enforced disappearance of persons under Article 7(1)(i) and persecution against any group on political and national grounds under Article 7(1)(h) (collectively, “Charged Crimes”), which are crimes not only under the Rome Statute but also in contravention of the Geneva Conventions of 12 August 1949, in particular, the Convention (III) relative to the Treatment of Prisoners of War (“Geneva Conventions III”). These sources include testimonies of North Korean citizens who have escaped North Korea seeking asylum in South Korea and South Korean POWs who have managed to escape and return home. These testimonies were collected by various sources over the years, and also served as the basis for a recent Report of the detailed findings of the Commission of Inquiry by the UN Human Rights Council (“UNHRC”).
8. The individuals whom this Communications alleges to be perpetrators of the Charged Crimes are the leaders of the North Korean state government, the KPA and the Workers’ Party of Korea (the “WPK”, and together with the state government and the KPA, the “North Korean Government”).
9. In particular, this Communication raises allegations against Kim, the Supreme Leader of North Korea and most of its major organs, including the KPA and the WPK (“Kim”). Kim is individually responsible not only for his direct orders for the commission of the Charged Crimes, but his failure to prevent the commission of the Charged Crimes in his capacity as a military and civil leader.

10. The International Criminal Court (the “ICC”) is able to exercise its jurisdiction in relation to the Charged Crimes. Even in the absence of a self-referral or referral from the UN Security Council—neither of which are even remotely likely in this case—the Prosecutor has the *proprio motu* authority to initiate investigation.
11. In particular, the ICC is able to try Kim even though North Korea is not a State Party to the Rome Statute. This is due to the fact that Kim, in spite of his obvious North Korean citizenship, is also, by law and in practice, a national of South Korea.
12. The fact that South Korean nationality applies to North Korean citizens is based on well-established legal principles of international law. More importantly, however, this is the stance of the United Nations High Commissioner on Refugees and the grounds on which it refuses to grant Refugee Status to escaped North Koreans.
13. Based on the established facts, it is the mandate of the Prosecutor by the Rome Statute to commence investigations if there is a reasonable factual and legal basis for the alleged crimes. In that connection, this Communication urges the Prosecutor to begin taking steps to proceed with an investigation of Kim regarding his involvement in the perpetration of the Charged Crimes.
14. Although this is a difficult request to fulfill, this is the purpose of the ICC—to provide justice to those who are without protection.
15. For sixty-five years, 50,000 young men have slaved away in coal mines. No national government has been willing or able to stop this atrocity. Although only a few hundred remain today, free nations must take up the burden to bring justice to the surviving South Korean POWs and give relief to their separated families in South Korea and closure to the survivors of POWs who have passed away. It is time for these 50,000 South Korean POWs—in reality, 50,000 UN POWs—to come home finally.

II. Background Facts

a. Brief Overview of Korean War

16. The Korean War was a bloody conflict between North and South Korea from 1950 to 1953. A multinational force from 16 nations lead by the United States aided the South Koreans. South Korea and its allies fought under the United Nations (“UN”) Command, which had been established by a UN Security Council Resolution days after North Korea invaded the South on June 25, 1950. The Communist North Koreans had been armed and trained by the Soviet Union and China, which continued to provide supplies throughout the war. In November 1950, hundreds of thousands of soldiers from the Chinese Communist People’s Volunteer Army came to North Korea’s aid.
17. Out of a combined population of only 30 million in North and South Korea, at least 2.5 million people (including at least 1.6 million civilians from both sides) were killed³. In spite of all those deaths, the war ended inconclusively in a stalemate and ceasefire along the current Demilitarized Zone between North and South Korea.
18. Official estimates count 92,070 UN soldiers were captured by Communist forces⁴. Nonetheless, this number is likely to be much higher. For example, the KPA leadership announced on the first anniversary of the Korean War that it had taken 108,257 POWs captive--a number that would have only been higher by the end of the war⁵.
19. Despite such estimates, however, only 13,444 POWs, including 8,321 South Koreans and 3,746 Americans, were returned at the end of the fighting⁶. Out of the 79,626 UN POWs who were not repatriated, only 349 were accounted for by the Communists. These were the 347 UN POWs (325 South Koreans, 21 Americans, and one British) who had verified to the neutral nations representatives and the Red Cross their intent to stay with their Communist captors, and the two South Korean POWs who had sought asylum in India.

³*Korean War*, ENCYCLOPAEDIA BRITANNICA (retrieved June 14, 2015), <http://www.britannica.com/EBchecked/topic/322419/Korean-War>; James L. Stokesbury, *A SHORT HISTORY OF THE KOREAN WAR* 21 (1988).

⁴Korean Bar Association Human Rights Foundation, 2014 WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA 355 (2014); Korea Institute for National Unification, WHITE PAPER OF HUMAN RIGHTS IN NORTH KOREA 541 (2013).

⁵ Seong-hun Cho, *KOREAN WAR AND SOUTH KOREAN PRISONERS OF WAR* 27 (2014).

⁶Korean Bar Association, *supra*; Walter G. Hermes, *TRUCE TENT AND FIGHTING FRONT: THE U.S. ARMY IN THE KOREAN WAR* Appendix B (1992).

None of the other unrepatriated UN POWs were heard from for decades after the ceasefire.

b. Fate of the POWs

20. The UN Command suspected that large numbers of South Korean POWs had been coerced into joining the North Korean forces, in “grave violation” of the Geneva Conventions III⁷. Communist negotiators denied they had violated the Geneva Conventions III and claimed the large discrepancy between the number of UN POWs they had captured and the number they repatriated was because they had “released” tens of thousands of South Korean prisoners who had “recognized their crimes” at the front during combat⁸. The Communists also claimed that any former South Korean POW who stayed with them had done so voluntarily after being released⁹.
21. In truth, however, the vast majority of South Korean POWs were enlisted into the KPA in the Construction Brigades, composed almost exclusively of POWs, forced to work in coal mines and other harsh conditions in the most remote part of the country, being subjected to forced labor even after the Armistice¹⁰.
22. On June 25, 1956, almost three years after the Armistice was signed, the North Korean Cabinet issued “Order 143”, which officially demobilized the Construction Brigades. The POWs were also issued North Korean citizenship and allowed to marry and start families. However, their work was largely restricted to the same hard labor occupations in the same mines they had worked in before. Many suffered physical injuries over the decades of hard labor¹¹.

⁷Geneva Convention Relative to the Treatment of Prisoners of War art. 130, Aug. 12, 1949, 75 U.N.T.S. 135.

⁸Man-ho Heo, *North Korea's Continued Detention of South Korean POWs since the Korean and Vietnam Wars*, 14 KOREA J. OF DEFENSE ANALYSIS 141 (2002); Hermes, *supra* at Chapter 7.

⁹Hermes, *supra* at Chapter 7.

¹⁰*See generally*, United Nations, *supra*.

¹¹Kyung Seop Oh *et al*, A COMPREHENSIVE REPORT ON THE ISSUE OF UNREPATRIATED SOUTH KOREAN POWS HELD IN NORTH KOREA 95-102 (2008).

23. For decades, North Korea continued to deny that any South Korean prisoners had been held against their will¹². For years, North Korea denied any contact with the POWs and no one outside of North Korea had any idea of even how many South Korean prisoners survived and continued to be detained in North Korea.
24. However, Soviet-era archives provide documentary evidence that North Korean leaders purposely denied the South Korean POWs repatriation. The documentary evidence shows that North Korean leaders were aware that they were violating the terms of the Armistice.
25. According to the Soviet Union's protocol of a meeting between Stalin, Kim Il Sung, Zhou Enlai and other senior officials, in September 1952 North Korea held 35,000 ROK POWs despite acknowledging officially only about 7,500 POWs.¹³
26. Soviet Ambassador S.P. Suzdalev's memo written in May 1953 expresses concern that North Koreans are detaining POWs that should be repatriated. This memo shows that Communist leaders were aware that the POWs were employed in "various kinds of hard work in North Korea" and that North Koreans were "ignoring their desire to return to their families"¹⁴.
27. Fedorenko's memo dated December 3, 1953 provides even clearer evidence of Communist intentions. Both Kim Il Sung and Mao Zedong recognized they were detaining large numbers of POWs that are "eligible for return" in violation of the Armistice. Kim Il Sung also reports he has taken measures to hide this violation by preventing the POWs from escaping or contacting neutral nations officials¹⁵.

¹²Oh, *supra* at 41.

¹³Gary Goldberg, *Record of a Conversation between Stalin, Kim Il Sung, Pak Heon-yeong, Zhou Enlai, and Peng Dehuai, September 04, 1952*, HIST. & PUB. POL. PROG. DIG. ARCH., available at <http://digitalarchive.wilsoncenter.org/document/114936>.

¹⁴Alena Volokhova, *Armistice Talks in Korea (1951-1953) Based on Documents from the Russian Foreign Policy Archives*, 2 FAR EASTERN AFFAIRS 74, 86 (2000).

¹⁵*Id.*, at 86-90.

28. The memos between Soviet diplomats show that North Korean leaders never intended to allow the POWs to return home. North Korean leaders intentionally kept South Korean POWs from escaping or making contact with international officials monitoring the exchange of prisoners after the war¹⁶.
29. Despite the lack of information, it is nonetheless estimated that there were at least 50,000 South Korean POWs that were not repatriated based on conservative estimates, and even more if North Korea's comments are not brushed off as mere bravado¹⁷.

c. Recent Testimonies and Investigations

30. Since 1994, 80 former South Korean POWs have escaped from North Korea. The testimonies from these men contradict North Korean claims.
31. The UNHRC also discussed in detail the conditions of the POWs in its Report of the detailed findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea¹⁸ ("COI Report"), prepared in large part based on the testimonies of the escaped POWs. The COI was established to investigate the human rights violations by North Korea considered so serious that the Resolution 22/13 establishing the COI marked the first time that the UNHRC had established a COI without a vote¹⁹. In addition to the staggering amount of publicly available testimonies of escaped POWs collected in the COI Report and other official publications, such as the White Papers on Human Rights in North Korea²⁰, the Korean POW Affairs Committee based in the United States has also collected additional testimonies from South Korean POWs who have escaped from North Korea, a sampling of which are attached to this Communication as Appendix.

¹⁶ *Id.*

¹⁷ *See* note 4, *supra*.

¹⁸ United Nations, *supra*.

¹⁹ *Id.*, at 6.

²⁰ *See* note 3, *supra*.

32. According to the escaped POWs, North Koreans forced South Korean POWs to remain in the coal mines even after the dismantling of the Construction Brigade and the grant of North Korean citizenship. They were held incommunicado and prevented from contacting their families in South Korea. The North Koreans never gave the POWs an opportunity to return home, and the POWs were continuously threatened with imprisonment or even death for expressing their desire to return to South Korea²¹—or even complaining about treatment²². The forced labor in coal mines typically continued until the death of that POW²³.
33. The escaped POWs have also testified that they were restricted in their work, residence and travel throughout their lives in North Korea. Furthermore, North Korea's State Security Department and Department of Public Safety kept them under strict surveillance which continues to this day, even though the POWs are now in their 70s and 80s. The discrimination and surveillance also continues against their children, who are marked as "No. 43", a code for POW, and discriminated in university entrance, job selection and many other aspects of daily life, effectively creating a lower caste²⁴. In its report, the COI recognized that "[a]mong those who suffered the most extreme discrimination were South Korean prisoners of war (POWs) retained in the DPRK after the armistice"²⁵.
34. The testimonies from escaped POWs provide evidence regarding whether they had freely choose to join the North Korean forces and to stay in North Korea. All of the escaped POWs have testified they were never given such an opportunity during the fighting and after the cease-fire, or were even shot to death for expressing desire for repatriation²⁶. The fact that the North Korean leadership denied the South Korean POWs opportunities to contact the Red Cross or neutral nations officials shows that the POWs were held against their will.

²¹*Id.*, at 871.

²² *Id.*, at 874.

²³ *Id.*, at 872.

²⁴*Id.*, at 289.

²⁵ *Id.*, at 298.

²⁶ *Id.*, at 870-871.

35. The denial of contacts with families in South Korea also shows that the POWs were held against their will. Beginning in 1972, there have been numerous unofficial and official contacts between North and South Korea including a number of divided families that were allowed to see each other. Although almost all the POWs were kept under close surveillance, and that they were likely to have had family in South Korea, North Korean authorities never allowed any contact between the POWs and their families in South Korea in a meaningful scale. If the POWs had voluntarily stayed in North Korea, there would be no reason to deny such contact. The denial of contacts indicates that North Korea has something to hide about these POWs.
36. Most astonishingly, the testimonies of the escaped POWs show that such harsh treatment and forced labor continues to this date, in spite of the old age of the South Korean POWs still held captive in North Korea. The COI Report quotes a former POW from South Korea worked in a coal mine in North Hamgyong Province for 40 years, while Mr. Yoo Young-bok continued to work in the mines right up until his escape at age 69²⁷.
37. Moreover, it is also highly likely that the state policy of the North Korean Government has changed little over the decades despite passage of time and change of leadership in North Korea. For example, Kim continues to make headlines for nuclear tests for which his father first gained notoriety, while public executions of high ranking officials—including Jang Sung-taek, Kim's uncle who happens to be Kim Il Sung's son-in-law and part of the royal family that are revered as living gods²⁸, and Hyon Yong-chol, the Defence Minister of North Korea and second-ranking military official subordinate only to Kim²⁹—remain commonplace³⁰ as they had been under Kim Il Sung and Kim Jong Il and

²⁷Alastair Gale, *Five Decades as a POW*, WALL ST. J. (June 25, 2013), available at <http://www.wsj.com/articles/SB10001424127887324423904578526040354265304>.

²⁸Jethro Mullen, *North Korea's Kim Jong Un lauds purge of executed uncle Jang Song Thaek*, CNN (January 2, 2014), available at <http://edition.cnn.com/2013/12/31/world/asia/north-korea-kim-jong-un-speech>.

²⁹*North Korea Defence Chief Hyon Yong-chol 'executed'*, BBC (May 13, 2014), available at <http://www.bbc.com/news/world-asia-32716749>.

continue to occur even as recently as in April 2015³¹. After all, the COI Report was prepared because of North Korea's abhorrent human rights conditions; as the COI had found that the North Korean Government has committed and are committing crimes against humanity in the political prison camps, including extermination, murder, enslavement, torture, imprisonment, rape and other grave sexual violence and persecution on political, religious and gender grounds³², it is most likely that the war crimes and crimes against humanity targeting South Korean POWs continue to this day.

d. Status of the POWs Today

38. Based on the testimonies of escaped POWs, the South Korean government estimates that approximately 500 South Korean POWs survive to this day and remain under confinement in North Korea³³.
39. However, it is quite possible that the actual number of South Korean POWs being confined in North Korea is much higher. First of all, this is an astonishingly small number out of the total 50,000 (if not more) South Korean POWs who were unaccounted for, even if age is taken into consideration. Moreover, a large number of the escaped POWs had previously been presumed to have already died³⁴. As such, it is highly likely that many of the POWs currently presumed dead are in fact alive and suffering in North Korea, adding to the estimate of 500.
40. However, despite numerous requests by the South Korean government for repatriation of the South Korean POWs, the North Korean Government has continued to deny their present. In October 2010, when the South Korean government requested confirmation of merely the survival of 116 South Korean POWs, the North Korean Government

³⁰Agence France Presse, *North Korea 'Publicly Executed 80 People,' South Korea Paper Reports*, THE WORLD POST (November 11, 2013), available at http://www.huffingtonpost.com/2013/11/11/north-korea-public-execution_n_4252610.html.

³¹ See note 27, *supra*.

³²United Nations, *supra* at 1033.

³³Korea Institute on National Unifications, *supra* at 541.

³⁴Oh, *supra* at 31.

confirmed only 7.8% survivals and 12.1% deaths—that is, the North Korean Government failed or refused to confirm the survival of more than 80% of the South Korean POWs included in the request³⁵.

III. Specific Crimes under the Rome Statute

a. War Crimes

41. Based on the evidence discussed in Section II of this Communication, it is without doubt that Kim, through his command and control of the North Korean Government, is in direct and serious violations of Article 8 by refusing repatriation of the South Korean POWs who continue to live under constant surveillance with severe restriction of freedom and civil rights, even more so than a typical person living in North Korea.

i. Common Elements

42. Certain elements of crimes under the Elements of Crimes of the ICC are common to the war crimes to be alleged under this Communication. They are:

“Such person or persons were protected under one or more of the Geneva Conventions of 1949.

The perpetrator was aware of the factual circumstances that established that protected status.

The conduct took place in the context of and was associated with an international armed conflict.

The perpetrator was aware of factual circumstances that established the existence of an armed conflict.”

³⁵Korea Bar Association, *supra* at 362.

43. In the present case, the POWs, who are the victims of all the alleged crimes in this Communication, are "protected under one or more of the Geneva Conventions of 1949" as they are combatants taken prisoner under Article 4 of the Geneva Conventions III.
44. Kim, who is the chief perpetrator of all the alleged crimes in the Communication, was and is aware of the protected status of the POWs. During the armistice negotiations, North Korean and Chinese negotiators showed a sophisticated awareness of the text and context of Geneva Conventions III. It is not likely that Communists innocently thought South Korean POWs were not protected by Article 4 of the Geneva Conventions III³⁶. Particularly, the fact that 8,321 South Korean POWs were repatriated and 325 South Korean POWs were allowed to verify their wish to stay with their Communist captors to neutral nations representatives shows that Communist forces were aware of the POW status of South Korean soldiers and their rights within the POW repatriation process. Moreover, Soviet Ambassador Suzdalev's memo written in May of 1953 shows that Communist leaders were aware of all South Korean POWs' status³⁷, while Fedorenko, a Soviet Foreign Ministry official, reported that North Korean leaders intended to hide such POWs and prevent their escape³⁸.
45. The present unlawful confinement of the POWs takes place in the context of an international armed conflict as the Korean War involved international forces fighting on both the North and South Korean sides.
46. Lastly, Kim is aware of the existence of an armed conflict as South Korean POWs were managed by both military and the Ministry of Internal Affairs who were aware of the existence of the armed conflict since they were participating in combat and support roles themselves.

ii. 8(2)(a)(vii) Unlawful Confinement

³⁶ Hermes, *supra* at Chapter 7.

³⁷ Volokhova, *supra* at 86.

³⁸ *Id.* at 89-90.

47. Kim is in violation of Article 8(2)(a)(vii) which prohibits unlawful confinement of POWs, who are the “persons or property protected under the provisions of” the Geneva Conventions III.
48. The specific element of crime of unlawful confinement under Article 8(2)(a)(vii) is as follows:
- “1. The perpetrator confined or continued to confine one or more persons to a certain location.”
49. As discussed in Section II of this Communication, the North Koreans continue to detain secretly as many as 50,000 POWs in North Korea, particularly confined to the residential locations assigned by the North Korean Government close to the place of work assigned by the North Korean Government and under constant surveillance by the North Korean Government.
50. Such confinement is unlawful as Article 118 of the Geneva Conventions III requires the belligerent states are required to release and repatriate POWs “without delay after the cessation of active hostilities”. As active hostilities of the Korean War came to a cessation on July 27, 1953 upon signing of a formal armistice agreement, any confinement of POWs following such date is a violation of Article 118 of the Geneva Conventions III and therefore constitutes unlawful confinement.
51. This is highlighted by the fact that the UN Command repatriated 75,823 POWs through the Operation Big Switch in August and September of 1953³⁹. In return, however, North Korea only repatriated 13,444 POWs, including 8,321 South Koreans and 3,746 Americans, of the 92,070 UN soldiers were captured by Communist forces⁴⁰. As examined above, more than 70,000 UN POWs were neither repatriated nor accounted for (seeking asylum elsewhere or electing to remain in North Korea), nearly all of them being South Korean POWs. Moreover, such conduct constitutes a violation of Article 122

³⁹Richard Henson, *QM Support for Big Switch*, QUARTERMASTER R. (January-February 1954), available at http://www.qmmuseum.lee.army.mil/korea/big_switch.htm.

⁴⁰Paul Edwards, *HISTORICAL DICTIONARY OF THE KOREAN WAR* 232 (2010).

of the Geneva Conventions III, which concerns duties of a detaining power to report the POWs they capture.

52. In addition, Articles 69 through 71 of the Geneva Conventions III concern rights of POWs to be able to contact the outside world. POWs are to be allowed contact with their families and the outside world. Kim violated these articles by holding South Korean POWs incommunicado.
53. Although the North Korean Government claims that any POW who stayed with them did so voluntarily after being released at the front, such claims contradict the testimonies of escaped POWs who testify that they were kept under surveillance all their lives and were threatened with physical harm and even death.
54. Although neither the Rome Statute nor the Element of Crimes lends specific definition of the word “confinement”, the verb form of the word, to “confine”, is an active verb, defined by the Merriam-Webster Dictionary as “to keep (someone or something) within limits: to prevent (someone or something) from going beyond a particular limit, area, etc.” or “to keep (a person or animal) in a place (such as a prison)”⁴¹. That is, the word “confinement” is not concerned with the initial act of capture. Applied to the present case, the crime of confinement, then, does not refer to the initial capture of the POWs during the Korean War, but rather the act of keeping the POWs from leaving North Korea—an act that is repetitiously conducted each day, hour, minute and second.
55. Kim constantly commits this violation of Article 8(2)(a)(vii), even at this very moment, by refusing to repatriate the South Korean POWs. Such violation has occurred each day, hour, minute and second that has passed since the Effective Date—a period of twelve years under the jurisdiction of the ICC.

iii. 8(2)(a)(ii) Inhuman Treatment; 8(2)(a)(iii) Wilfully Causing Great Suffering

56. Kim is in violation of Article 8(2)(a)(ii) which prohibits inhuman treatment of POWs.

⁴¹*Confine*, MERRIAM-WEBSTER (retrieved June 14, 2015), available at <http://www.merriam-webster.com/dictionary/confine>.

57. The specific element of crime of inhuman is as follows:
- “1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.”
58. Alternatively, Kim is in violation of Article 8(2)(a)(iii) which prohibits wilfully causing great suffering of POWs.
59. The specific element of crime of inhuman is as follows:
- “1. The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.”
60. It is without doubt that denial of contact with family in South Korea for nearly six decades causes the POWs suffering and pain, which continues to intensify today as the POWs, and the families left behind, grow older, eliminating hope of reconciliation.
61. Furthermore, the evidence discussed in Section II of this Communication, available from testimonies of escaped POWs, show that the POWs continue to be treated as second- or third-class citizens, under constant surveillance and prohibited from even the most limited opportunities available to other North Korean residents.
62. Such treatment causes serious mental pain and suffering to the South Korean POWs, to a point that some have risked not only their lives but, in some cases, lives of their own children remaining in North Korea in order to escape to South Korea. Moreover, such actions continue to be committed to this day.
63. Therefore, the actions of Kim, through his command and control of the North Korean Government, against the South Korean POWs constitute violations of Articles 8 (2)(a)(ii) and (iii).

b. Crimes Against Humanity

64. Assuming *arguendo* that the status of the POWs held in North Korea changed to that of a civilian during some point in their captivity, at that point in time, actions of Kim may constitute crimes against humanity under Article 7 instead of war crimes under Article 8.

i. Common Elements

65. Certain elements of crimes under the Elements of Crimes are common to the crimes against humanity to be alleged under this Communication. They are:

“The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”

66. For the purpose of this section, the South Korean POWs are assumed to be no longer belligerent forces but a civilian population. As evidence discussed in Section II establishes, the policies of the North Korean Government with respect to the South Korean POWs are widespread—applicable to practically all South Korean POWs—and systematic—perpetrated as a part of government policy for six decades.
67. As the North Korean Government was the one committing the acts constituting the below violations, and as the South Korean POWs were specifically identified as South Korean POWs with such identity being the basis for being targeted in such acts, it is without doubt that Kim knew that such conduct intended the conduct to be part of a widespread or systematic attack directed against the now-civilian POWs.

ii. 7(1)(i) Enforced Disappearance of Persons

68. Kim is in violation of Article 7(1)(i) which prohibits enforced disappearance of persons.
69. The specific elements of crime of enforced disappearance of persons under Article 7(1)(i) is as follows:

“1. The perpetrator:

- (a) Arrested, detained or abducted one or more persons; or
 - (b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.
 - 2.
 - (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
 - (b) Such refusal was preceded or accompanied by that deprivation of freedom.
 - 3. The perpetrator was aware that:
 - (a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
 - (b) Such refusal was preceded or accompanied by that deprivation of freedom.
 - 4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.
 - 5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.
 - 6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.”
70. As established above, Kim, through his command and control of the North Korean Government, continues to detain and confine the South Korean POWs. To this day, the North Korean Government denies that POWs are being held captive in North Korea⁴², and has refused to provide information on whether nearly 50,000 South Korean POWs are alive⁴³. Moreover, such refusal to acknowledge the existence of South Korean POWs and the refusal to inform the fate of the South Korean POWs came before, during and

⁴²United Nations, *supra* at 881.

⁴³*Id.*

after the unlawful detention and confinement of the South Korean POWs, and the North Korean Government is aware of such fact as they were the ones who directly order the persistent confinement as well as refusal of information. The implementation of Cabinet Order 143 by North Korea indicates that the North Korean government has purposely controlled the fate of these POWs for decades.

71. Lastly, the refusal to give information regarding the South Korean POWs—including the insistence that many of them, even if they cannot be identified or even confirmed to be alive, elected against repatriation voluntarily—clearly illustrates Kim's intent to remove the South Korean POWs from protection of law, both international and that of South Korea, the home government of the POWs. Such removal from protection of the law has persisted for nearly six decades.
72. Accordingly, as supported by the testimonies of the escaped South Korean POWs as well as historical facts regarding Kim's refusal to provide information, Kim, through his command and control of the North Korean Government, is in violation of Article 7(1)(i).

**iii. 7(1)(h) Persecution Against any Identifiable Group on Political. . .
National. . . Grounds**

73. Kim, through his command and control of the North Korean Government, is in violation of Article 7(1)(h) which prohibits persecution against any identifiable group on political or national grounds.
74. The specific elements of crime of persecution under Article 7(1)(h) is as follows:
 - “1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
 2. 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.
 3. 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 recognized as impermissible under international law.

4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.
 5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
 6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”
-
75. The North Korean Government has marked and continues to mark the South Korean POWs as “No. 43” and have deprived them, and their North Korean families, of some of the most basic fundamental rights.
 76. The South Korean POWs are identified as “No. 43” by the virtue of being South Korean POWs, which constitute both political and national grounds.
 77. The persecution of South Korean POWs is committed in connection with the enforced disappearance of persons prohibited under Article 7(1)(i) as well as unlawful confinement under Article 8(2)(a)(vii), inhuman treatment under Article 8(2)(a)(ii) and wilfully causing great suffering under Article 8(2)(a)(iii).
 78. Such persecution is carried out and has been carried out over the previous six decades, against both the South Korean POWs and their families, as a part of the North Korean Government policy, and is both widespread and systematic as well as purposeful and intentional.
 79. Accordingly, as supported by the testimonies of the escaped South Korean POWs as well as other North Korean asylum seekers, Kim, through his command and control of the North Korean Government, is in violation of Article 7(1)(h).

IV. Perpetrators

a. Individual Criminal Responsibility

80. The evidence discussed in Section II of this Communication, including those investigated by the UNHRC, strongly supports the view that there is a wide-spread and systematic pattern of perpetration in North Korea.
81. North Korea is among the most notorious states in the world today, with practically the entirety of the global community acknowledging the brutal single-party dictatorship, particularly one in which the state, the ruling party and its military are essentially one and the same⁴⁴. Accordingly, the crimes enumerated in this Communication (the “Charged Crimes”) could not be perpetrated without close cooperation and coordination among the leaders of the North Korean Government, the KPA and the WPK.
82. In particular, this Communication recommends an investigation into the role of Kim, the Supreme Leader of North Korea since December 17, 2011, First Secretary of the WPK since April 11, 2012, Chairman of the National Defence Commission since April 13, 2012, Supreme Commander of the KPA since December 20, 2011, Chairman of the Central Military Commission since April 11, 2012 and Vice Chairman of the Central Military Commission from September 28, 2010 to April 11, 2012.
83. As the totalitarian dictator of North Korea and the leader and chief of most important government bodies, including the KPA and the WPK, it cannot be denied that Kim, through his command and control of the North Korean Government, has been involved in the perpetration of the Charged Crimes, either directly or complicitly.
84. Article 25(3) provides that a person shall be criminally responsible for a crime if that person “aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission”, without providing a knowledge qualifier. As the Supreme Leader of North Korea in full control of every decision made by the North Korean Government, it cannot be denied that Kim aided and abetted the commission of the Charged Crimes, particularly by providing the means for their commission, particularly with respect to the crime of unlawful confinement, as the North Korean Government has explicitly denied the existence of POWs and refused their repatriation. Such denial and refusal, made at a government level and to another

⁴⁴SOCIALIST CONSTITUTION OF THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA, Arts. 11, 100, 106 and 109.

government (that of South Korea), could not occur without direct order or at least an implicit approval of Kim.

85. Furthermore, Article 28(a) provides that a military commander shall be criminally responsible if crimes are committed by forces under his effective command and control if the military commander know, or should have known, that the forces were committing such crimes and still failed to take necessary measures to prevent such crimes. In the present case, there is no doubt that Kim does in fact have such effective control and command over his forces. Because of such control over military and state policies, there is no doubt that Kim should have known that the Charged Crimes were being committed. Nonetheless, he has taken no action to prevent their continued commission.
86. In addition, Kim is also the civilian leader of North Korea as the Supreme Leader of North Korea and the First Secretary of the Workers' Party of Korea, and is therefore responsible for the Charged Crimes under Article 28(b), which provides that a superior, even in a non-military position, shall be criminally responsible for crimes committed by subordinates under his control if the superior knew of or consciously disregarded information about the crime, which is under his effective responsibility and control, and nonetheless failed to take necessary measures to prevent their commission. Kim has effective control of his subordinates in the civilian government and party organization, and must have received reports regarding the commission of the Charged Crimes. Nonetheless, Kim, despite his knowledge of the commission of the Charged Crimes, at least failed to stop their commission, and likely ordered the commission of the Charged Crimes through direct orders or establishing policies.
87. It is without a doubt that Kim cannot have committed these atrocities solely with his own two hands. It is clear that there are dozens of responsible officials in the North Korean Government. However, due to the isolationist nature of North Korea, information regarding its government hierarchy and command structure is scant at best. Nonetheless, it is this very lack of information that must be a major driving force in launching an investigation by the ICC. Through such investigation, with a mandate from an internationally recognized body such as the ICC, more information and evidence will be discovered, allowing justice to be carried out and the long-suffering South Korean POWs to return home.

V. Jurisdiction and Admissibility

88. The ICC has jurisdiction regarding the Charged Crimes only if it has (i) the temporal jurisdiction, (ii) the territorial or personal jurisdiction and (iii) the material jurisdiction with respect to the Charged Crimes and the alleged perpetrators. As material jurisdiction of the ICC—that is, whether the alleged crimes are covered by the Rome Statute—is discussed extensively in Section III of this Communication, this Section V will examine the temporal jurisdiction and the territorial or personal jurisdiction of the ICC.

a. Exercise of Jurisdiction

89. Article 13 provides three grounds on which the ICC may exercise its jurisdiction. The first is a referral of the case to the Prosecutor by a States Party to the Rome Statute⁴⁵. The second is a referral of the case to the Prosecutor by the Security Council⁴⁶. Although there have been efforts to persuade both South Korea and the Security Council to refer the matter of the South Korean POWs to the ICC, such efforts have been unfruitful, and appear nearly impossible, as South Korea cannot risk inflaming its military threat and because it is a foregone conclusion that China will block any Security Council action. As such, these grounds for exercise of jurisdiction are not applicable in the present case. However, Article 13(c) also provides that the ICC may exercise its jurisdiction if the Prosecutor has initiated an investigation in respect of a crime *prioprio motu*, in accordance with Article 15. Accordingly, it is clear from a plain reading of the Rome Statute that the ICC may exercise jurisdiction over the present case upon the Prosecutor's *proprio motu* decision to initiate investigation, which will be discussed further in Section VI.

b. Preconditions to the Exercise of Jurisdiction

90. Although the ICC is explicitly authorized to exercise jurisdiction as examined in the previous paragraph, it is also necessary to examine the preconditions of jurisdiction contained in Article 12.

⁴⁵Article 13(a).

⁴⁶Article 13(b).

91. Article 12(2)(b) provides that in connection with a case for which the Prosecutor has initiated investigation *prioprio motu*, the precondition to the exercise of the jurisdiction may be met if a State Party that is the State of which the person accused of the crime is a national.
92. In the present case, this precondition is satisfied as the person accused of the Charged Crimes, i.e., Kim, is a national of South Korea in addition to being a national of North Korea.
93. North Korea and South Korea both claim to be the sole legitimate government of Korea. They claim jurisdiction over each other's territory and population. Such claims are clearly made in their constitutions⁴⁷. In practice, as well, both sides treat any individual who willingly comes from the other side as their own citizens. For example, South Korea grants citizenship on arrival to the thousands of refugees who escape from North Korea every year⁴⁸, while, as discussed in Section II, North Korea had granted citizenship to the South Korean POWs. Given that the question of whether an individual is a national of a particular state is primarily within the "reserved domain of domestic jurisdiction"⁴⁹, it is without doubt that Kim should be considered to be a South Korean national.
94. Moreover, the United Nations High Commissioner on Refugees("UNHCR")has recognized the dual nationality of North Koreans under international law.
95. Since the 1990s, the number of North Koreans fleeing into China to escape famine and oppression has reached tens of thousands, resulting in a humanitarian crisis. The UNHCR determined that the escaped North Koreans were "persons of concern" but did not grant full Refugee Status under the 1951 Refugee Convention. This determination has immense

⁴⁷SOCIALIST CONSTITUTION OF THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA, Article 1; Hyo Sang Chang, *Nationality in Divided Countries: A Korean Perspective* 257, NATIONALITY AND INTERNATIONAL LAW IN ASIAN PERSPECTIVE 255 (Kwan Sik Ko, ed., 1990).

⁴⁸Courtland Robinson, *North Korea: Migration Patterns and Prospects*, working paper presented at "The Korea Project: Planning for the Long Term," sponsored by the Korean Studies Institute, University of Southern California, Los Angeles, CA (August 20-21, 2010), available at http://www.nkeconwatch.com/nk-uploads/North_Korea_Migration_Patterns-2010.pdf.

⁴⁹European Convention on Nationality art. 3, Nov. 6, 1997, E.T.S. 166.

judicial weight. If the North Koreans were granted full Refugee status, they would have the right to much stronger international protection.

96. The UNHCR's decision was based upon the North Koreans' "dual nationality" by which "they can avail themselves of protection in South Korea"⁵⁰. The UNHCR *Handbook* paragraph 106 interprets the 1951 Refugee Convention as excluding from Refugee Status "all persons with dual or multiple nationalities who can avail themselves of the protection of at least one of the countries of which they are nationals." Paragraph 107 clarifies that this exclusion can only occur when the nationality is "effective"⁵¹. This shows that the UNHCR concluded that North Koreans had an effective dual South Korean nationality and that a genuine connection existed between South Korea and the North Korean asylum seekers. The ICC, which is also an international body with fundamental connections to the UN, should also recognize this ruling of effective dual nationality of North Koreans, including Kim.
97. In addition to the UN, Australia, the United Kingdom and other national governments also treat North Koreans as dual nationals of South Korea based on the Constitution, the Nationality Act and the North Korean Refugee Protection and Settlement Support Act of South Korea⁵².
98. For example, even though Australia had considered North Korean asylum seekers to qualify for refugee status under Australian law prior to 2010, North Koreans no longer qualify for refugee status because of the dual nationality with South Korea which Australia has recognized since at least 2010⁵³. Meanwhile, a court judgment in the

⁵⁰Brookings-Bern Project on Internal Displacement, *Legal Grounds for Protection of North Korean Refugees*, 12 September 2010, available at: <http://www.refworld.org/docid/4ca58cad0.html> [accessed 14 June 2015]; Joshua Kurlantzick & Jana Mason, *North Korean Refugees: The Chinese Dimension*, in *The NORTH KOREAN REFUGEE CRISIS: HUMAN RIGHTS AND INTERNATIONAL RESPONSE* (Stephan Haggard & Marcus Nolan, eds., 2006).

⁵¹UNHCR, *Handbook and Guidelines for Procedures and Criteria for Determining Refugee Status* art. 107, HCR/1P/4/ENG/REV. 3 (2011), available from <http://www.unhcr.org/3d58e13b4.html>.

⁵²In-ho Song, LECTURES ON UNIFICATION LAW 343 (2015).

⁵³ Andrew Wolman, *North Korean Asylum Seekers and Dual Nationality*, 24 INT'L J. OF REFUGEE L. 802 (2013).

United Kingdom holds North Korean asylum seekers to be South Korean nationals and the Home Office has followed such stance⁵⁴.

99. The *Harvard Draft Convention on Jurisdiction With Respect to Crime* supports the right on any state of which the accused has nationality to prosecute a crime. “If international law permits the state to regard the accused as its national, its competence is not impaired or limited by the fact that he is also a national of another state”⁵⁵. This reflects the “equality principle” that holds all states of which a person is a national to be equals. Both states have the same rights via the link of nationality irrespective of its strength⁵⁶. If this rule is applied to a person who had both North and South Korean nationality, then South Korea would have an equal right to prosecute any crimes committed by that person regardless of which was the dominant nationality.
100. If the equality principle is applied to ICC crimes committed by a perpetrator with dual nationality, the precondition in Article 12(2)(b) would be satisfied if one of the nationalities, since the non-State Party nationality would not impair the State Party nationality as a basis for jurisdiction. Therefore, the precondition in Article 12(2)(b) would be met when a North Korean is accused of an ICC violation, because he has dual nationality of South Korea, which is a State Party.
101. Allowing the ICC to exercise jurisdiction it has over a Kim also seems justified from a practical perspective. The effective South Korean dual nationality of a North Korean asylum seeker hiding in China bars him from attaining full Refugee Status, and denies him the international protection such status would afford. It would be patently unjust and contradictory if the same dual nationality were not recognized as a precondition for jurisdiction in the case of a North Korean perpetrator. It would be especially absurd if it

⁵⁴ Mark Leftly, *UK may ship all North Korean asylum-seekers to South Korea*, THE INDEPENDENT (Nov. 28, 2014), available at <http://www.independent.co.uk/news/uk/politics/uk-may-ship-all-north-korean-asylumseekers-to-south-korea-9891612.html>.

⁵⁵ *The Harvard Draft Convention on Jurisdiction With Respect to Crime*, 29 AM. J. OF INT’L L. 439, 511 (1935).

⁵⁶ Zsuzsanna Deen-Racsmany, *The Nationality of the Offender and the Jurisdiction of the International Criminal Court*, 95 AM. J. OF INT’L L. 606, 610 (2001).

had been the very conduct of the North Korean perpetrator that had forced the North Korean asylum seeker to flee.

102. Article 21(1) provides that the ICC, in addition to the documents of the ICC, shall apply principles and rules of international law and the laws of legal systems of the world. In light of the foregoing discussion, as well as the laws and practices of both South Korea and other countries around the world, it is indisputable that Kim is a South Korean national in addition to being a North Korean national and therefore subject to the jurisdiction of the ICC under Article 12(2).
103. Article 12(2) states that the ICC may exercise its jurisdiction if “one or more” precondition was satisfied. As the precondition under Article 12(2)(b) is satisfied, it is not necessary to separately discuss whether “the State on the territory of which the conduct in question occurred” has accepted jurisdiction of the ICC.

c. Jurisdiction *ratione temporis*

104. Article 11 also provides certain temporal jurisdictional requirements. Article 11(1) provides that the ICC has “has jurisdiction only with respect to crimes committed after the entry into force” of the Rome Statute on July 1, 2002. Furthermore, Article 11(2) provides that “[i]f a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State”. Accordingly, the ICC has jurisdiction over only the crimes committed after February 1, 2003.
105. At first glance, it may appear that the South Korean POW issue is a stale one, resulting from a war that took place sixty years prior, well before the temporal jurisdiction of the ICC.
106. However, as discussed in detail in Section III of this Communication, each Charged Crime has continued to take place following February 1, 2003, and continues to take place to this date.
107. The Charged Crimes alleged in this Communication do not involve isolated events that occur at a given point in time. Rather, crimes such as unlawful confinement, enforced

disappearance of persons and persecution are crimes that describe a certain state of being. For example, in case of unlawful confinement, the relevant element of crime is not the act of capturing a the captive, but the confinement itself—the refusal to set free. Accordingly, the crime of unlawful confinement is committed at every moment that the captive remains in confinement, which, in the present case, includes the period of time during which the ICC has temporal jurisdiction.

108. Accordingly, the Charged Crimes continue to be perpetrated at each moment following February 1, 2003. Furthermore, the Charged Crimes continue to be perpetrated at each moment following December 11, 2011, when Kim assumed the office of the Supreme Leader of North Korea, or an even earlier date when Kim came to hold certain central military and government offices with connections to the Charged Crimes⁵⁷. Thus, the ICC has temporal jurisdiction with respect to the Charged Crimes.

d. Admissibility

109. In addition to jurisdiction, the case must be admissible pursuant to Article 17 for the ICC to take action with respect to a case. Issues of admissibility include (i) complementarity, that is, whether the State having jurisdiction over the case is already pursuing, or has duly declined to pursue, investigation or prosecution in connection with the case and (ii) gravity, whether the seriousness of the facts of the case justify action by the ICC.
110. With respect to complementarity, neither North Korea nor South Korea has considered any proceedings regarding the perpetration of the Charged Crimes by Kim. In addition, Article 17(1)(a) admissibility requirement contains an exception for cases where “the State is unwilling or unable genuinely to carry out the investigation or prosecution”. In this regard, Article 17(3) sheds further light on such inability, stating that “[i]n order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings”. It is sufficiently clear that North Korea, a totalitarian dictatorship built around the cult of personality of Kim, is clearly cannot carry out any proceedings

⁵⁷ For example, Kim became the Vice Chairman of the Central Military Commission on September 28, 2010, to be groomed as the successor of Kim Jong Il.

against him. Moreover, due to political concerns, South Korea will not and cannot bring to justice a leader—however brutal—of an enemy State with which it technically remains at war. Accordingly, the present case is not inadmissible under Article 17(1)(a).

111. Regarding gravity, it is beyond question that the nature and scale of the Charged Crimes, affecting, theoretically, over 50,000 South Korean POWs still unaccounted for, is sufficiently grave and disproportionate to pass the gravity threshold and thus is admissible.

VI. Request

112. A request is made hereby to the Prosecutor to formally begin proceedings to pursue an investigation of the Charged Crimes and the involvement of Kim in perpetration of the Charged Crimes. As it cannot be expected that any State Party or the UN Security Council will refer this case to the Prosecutor under Articles 13(a) and 13(b), it is necessary that the Prosecutor initiate an investigation *proprio motu* pursuant to Articles 13(c) and 15(a) in order to bring justice and freedom to the South Korean POWs who merely wish to return home to live out the remaining few years of their hard-fought lives.
113. Article 15 provides that the prosecutor “*shall* submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected”(emphasis added) if there is a “reasonable basis to proceed with an investigation”. That is, as long as there is a reasonable basis to proceed with an investigation, the Rome Statute mandates the Prosecutor to at least take the first steps in commencing an investigation.
114. Likewise, Article 53(1) provides that “[t]he Prosecutor *shall*. . . initiate an investigation unless he or she determines that there is no reasonable basis to proceed” (emphasis added). Although the Prosecutor shall also consider whether “information available to the Prosecutor provides a reasonable basis to believe that a *crime within the jurisdiction* of the Court has been or is being committed” (emphasis added), Article 53 does not compel the Prosecutor to consider jurisdiction *ratione temporis*, *ratione teritorii* or *ratione personae*.

115. Article 53(2) provides a more clear understanding of what constitutes “reasonable basis”. Article 53(2) provides that reasons for concluding that there is not a sufficient basis for prosecution are “(a) [t]here is not a sufficient legal or factual basis to seek a warrant or summons under article 58; (b) the case is inadmissible under article 17; or (c) a prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime”. In other words, as long as there is legal and factual basis for a warrant, the case is not inadmissible under Article 17 and prosecution of the crimes does not contravene interests of justice, it must be viewed that there is a reasonable basis to proceed with an investigation, thereby requiring the Prosecutor to submit a request for authorization of an investigation pursuant to Article 15. It is only necessary that the Prosecutor consider whether there is jurisdiction *ratione materiae*, and not necessary to consider jurisdiction *ratione temporis*, *ratione teritorii* or *ratione personae*.
116. Furthermore, Article 54 provides further duties of the Prosecutor, mandating the Prosecutor to “extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute”, without consideration of jurisdiction *ratione temporis*, *ratione teritorii* or *ratione personae*, and only mentions jurisdiction *ratione materiae* by requiring that the Prosecutor “Take appropriate measures to ensure the effective investigation and prosecution of *crimes* within the jurisdiction of” the ICC (emphasis added).
117. This is further highlighted by Article 15(4), which explicitly states that the Pre-Trial Chamber, upon examination of the request for investigation by the Prosecutor, shall consider whether there is a reasonable basis to proceed with an investigation and whether the case falls within the jurisdiction of the Court. That is, determination of a reasonable basis is separate from determination of jurisdiction. Furthermore, the fact that the Pre-Trial Chamber is explicitly authorized by Article 15(4) to consider jurisdiction lends support to the argument that the Prosecutor should not consider jurisdiction.
118. Rather, if there is any question regarding jurisdiction *ratione temporis*, *ratione teritorii* or *ratione personae*, Article 19(3) provides that the “Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility” rather than consider and reach a conclusion on her own. Furthermore, in such proceedings, victims would be able to

submit observations to the ICC, which would be a monumental moment in the interest of justice.

119. In light of the foregoing, we respectfully request the Prosecutor to consider the Communication in accordance with the obligations of the Prosecutor under Article 15 and take steps towards initiating investigation pursuant to Article 53.
120. In presenting the findings of the COI Report, Michael Kirby, chair of the COI, recommended that the Security Council refer the North Korea situation to the ICC, and stated that “[t]he recommendations are challenging, but unavoidable”⁵⁸.
121. Likewise, the recommendation and request in this Communication will also be difficult. However, it is necessary. Due China’s seat on the Security Council, the UN and the Security Council are effectively prevented from take any meaningful action against North Korea and Kim.
122. However, it would be in great disservice of the human kind and the very notion of human rights if the ICC would be unable to let these grave human rights violations and international crimes to go unaccounted for merely because of politics and power play. In fact, to paraphrase Kirby, if the ICC is not the place where crimes against humanity and war crimes are to be addressed, where can we seek justice?⁵⁹
123. Lastly, we implore the Prosecutor to understand that the issue with South Korean POWs is not only a South Korean issue. It is a UN issue—after all, the South Korean POWs fought not only as members of the South Korean army, but also as part of the UN Command and under UN flag. These are 50,000 UN POWs whose life or death have not been confirmed. 50,000 UN POWs who have yet to come home. We humbly request the Prosecutor to take the very first steps in bringing these soldiers home, at long last.

⁵⁸*Statement by Mr Michael Kirby Chair of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea to the 25th session of the Human Rights Council, Geneva (March 17, 2014), available at* <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14385&LangID=E>.

⁵⁹*Id.*

Sources Cited

Alena Volokhova, *Armistice Talks in Korea (1951-1953) Based on Documents from the Russian Foreign Policy Archives*, 2 FAR EASTERN AFFAIRS 74, 86 (2000).

Andrew Wolman, *North Korean Asylum Seekers and Dual Nationality*, 24 INT'L J. OF REFUGEE L. 802 (2013).

Brookings-Bern Project on Internal Displacement, *Legal Grounds for Protection of North Korean Refugees*, 12 September 2010, available at:
<http://www.refworld.org/docid/4ca58cad0.html> [accessed 14 June 2015]

Courtland Robinson, *North Korea: Migration Patterns and Prospects*, working paper presented at "The Korea Project: Planning for the Long Term," sponsored by the Korean Studies Institute, University of Southern California, Los Angeles, CA (August 20-21, 2010), available at http://www.nkeconwatch.com/nk-uploads/North_Korea_Migration_Patterns-2010.pdf.

European Convention on Nationality, Nov. 6, 1997, E.T.S. 166

Gary Goldberg, *Record of a Conversation between Stalin, Kim Il Sung, Pak Heon-yeong, Zhou Enlai, and Peng Dehuai, September 04, 1952*, History and Public Policy Program Digital Archive, available at <http://digitalarchive.wilsoncenter.org/document/114936>

Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135.

Hyo Sang Chang, *Nationality in Divided Countries: A Korean Perspective* 257, NATIONALITY AND INTERNATIONAL LAW IN ASIAN PERSPECTIVE 255 (Kwan Sik Ko, ed., 1990)

In-ho Song, LECTURES ON UNIFICATION LAW (2015).

James L. Stokesbury, A SHORT HISTORY OF THE KOREAN WAR 21 (1988).

Joshua Kurlantzick & Jana Mason, *North Korean Refugees: The Chinese Dimension*, in *THE NORTH KOREAN REFUGEE CRISIS: HUMAN RIGHTS AND INTERNATIONAL RESPONSE* (Stephan Haggard & Marcus Nolan, eds., 2006).

Korean Bar Association Human Rights Foundation, 2014 WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA 355 (2014).

Korean War, ENCYCLOPAEDIA BRITANNICA (retrieved June 14, 2015), <http://www.britannica.com/EBchecked/topic/322419/Korean-War>.

Kyung Seop Oh *et al*, *A COMPREHENSIVE REPORT ON THE ISSUE OF UNREPATRIATED SOUTH KOREAN POWs HELD IN NORTH KOREA* (2008), available at <http://www.scribd.com/doc/16682782/Comprehensive-Report-on-the-Issue-of-Unrepatriated-South-Korean-POWs-Held-in-North-Korea>.

Man-ho Heo, *North Korea's Continued Detention of South Korean POWs since the Korean and Vietnam Wars*, 14 KOREA J. OF DEFENSE ANALYSIS 141 (2002)

Statement by Mr Michael Kirby Chair of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea to the 25th session of the Human Rights Council, Geneva (March 17, 2014), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14385&LangID=E>.

The Harvard Draft Convention on Jurisdiction With Respect to Crime, 29 AM. J. OF INT'L L. 439 (1935).

UNHCR, *Handbook and Guidelines for Procedures and Criteria for Determining Refugee Status*, HCR/1P/4/ENG/REV. 3 (2011), available at <http://www.unhcr.org/3d58e13b4.html>.

United Nations, Office of the High Commissioner for Human Rights, *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 (February 7, 2014), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoIDPRK/Report/A.HRC.25.CRP.1_ENG.doc.

Walter G. Hermes, TRUCE TENT AND FIGHTING FRONT: THE UNITED STATES ARMY IN THE KOREAN WAR Appendix B (1992)., available at <http://www.history.army.mil/books/korea/truce/fm.htm#cont>.

Zsuzsanna Deen-Racsmany, *The Nationality of the Offender and the Jurisdiction of the International Criminal Court*, 95 AM. J. OF INT'L L. 606 (2001).

Appendix: Excerpts from Testimonies by POWs

These excerpts are a portion of the testimonies by escaped South Korean POWs that are available to the Korean POW Affairs Committee. POW's names are listed family name, followed by given names when disclosed. Some of the names are withheld to protect the victim and their family members who remain in North Korea. More detailed information, including audio recordings of testimonies will be available to an investigation.

Victim 1. Kim, Won Jae

Kim was born in 1931 and joined the Republic of Korea Army (ROKA; South Korean) in 1952. He was wounded, and subsequently captured by People Volunteer Army (PVA; Chinese) forces. After being treated in a PVA hospital, he was sent to the *Onsung* prisoner camp in 1953. He passed away in North Korea, but his daughter, who defected to South Korea, gave testimony about the persecution her father suffered as a POW.

From 1954 until his death, Kim was forced to work in the *Onsung* coal mine, located in North *Hamkyung* Province. Every winter he had to endure blistering cold weather without any warm clothing. He witnessed South Korean POWs get shot when they asked to be returned home, so Kim did not mention his wish to be repatriated. He eventually married a woman in *Onsung* and had 5 children. However, his family suffered from constant poverty and hunger. Since 1994, they barely received any rations from the government and Kim passed away due to malnutrition.

Victim 2. Kim

Kim joined the Republic of Korea Army (ROKA; South Korean) in the winter of 1950. In July, 1953, Kim was listed as killed in action. However, a South Korean POW who was repatriated during the prisoner exchange in September, 1953, testified that Kim was alive in North Korea. Also, another POW who escaped from North Korea in 1998 testified that Kim was still alive in North Korea and had been forced to work in the *Ah-oh-ji* coal mine.

For over 8 years, Kim's daughter has been trying to get in contact with her father. In 2002, a broker gave her a 57 word letter from Kim. He wrote that he was very happy to hear from her. He also wrote that he was in poor health from years of malnutrition and hard labor, but he promised her that someday he would return to his homeland. Later, a broker told Kim's daughter that Kim was under special surveillance in North Korea. It is unclear whether Kim is still alive.

Victim 3. Kim

On July 14th, 1953, Kim was taken prisoner near *Kumhwa*, *Kangwon* Province by People's Volunteer Army(PVA; Chinese) forces. Kim was moved to the *Sepo* POW Camp in *Kangwon* Province, and then moved to the *Kangdong* POW Camp in South *Pyongan* Province. Later, he was forced to work in the *Hakpo* coal mine.

Victim 4. Kang

Kang was taken prisoner around Nov of 1950 by People's Volunteer Army (PVA; Chinese) forces. He currently lives in South Korea after escaping from North Korea.

Kang was incorporated into the Korean People's Army(KPA; North Korean) 16th Regiment where he worked in rear services. After the Armistice, he was assigned to the Ministry of Internal Affairs 103rd Construction Brigade, 1st Battalion and performed various post-war reconstruction duties. He was discharged in November of 1957 and then sent to work in the *Kocham* coal mine in *Myoungcheon-kun* of North *Hamkyung* Province.

Kang worked in the mine for 50 years. He testified that he was classified as "number 49" and kept under close surveillance. "Number 49's" were considered to be enemy spies and treated as a lower caste than even other South Korean POWs.

Victim 5. Nam, So Yeol

Nam was taken prisoner in *Kumhwa*, *Kangwon* Province, on July 14th, 1953 by People's Volunteer Army (PVA; Chinese) forces.

He was sent to the *Cheonma* mineral mine and the *Hakpo* coal mine. Nam said that when he was working, he barely have enough time to sleep. His commute to and from the mines typically took 3 to 4 hours, and then he had to work for 8 hours. After work, he was given a 2 hour political lecture before commuting home.

At one point, Nam contracted tuberculosis and had to be hospitalized. At another point, he also injured his back. He had a small fracture but did not have the money to get proper treatment and fully recover. He went to the hospital after work and was treated by both western medical doctors and oriental medical doctors. The doctors never cleared him to go back to work in the mines but he could not afford to stop working. He kept working in the coal mines as a electrical switch repairman for 3 years with an injured back.

Victim 6. Park, Jun Kil

Park was born in South *Chungcheong* Province and joined the Republic of Korea Army (ROKA; South Korean) in 1949. Park was a member of the ROKA 2d Division, 16th Regiment. He was taken prisoner by People's Volunteer Army (PVA; Chinese) forces on Dec 12, 1950 during the battle of *Hoengsung*, in *Kangwon* Province. Park was captured with the commander of the ROKA 2d Division, General Song Won Sung.

He was detained in North Korea for about 50 years. He escaped in 2000 and was reunited with his wife in South Korea whom he had married when he was 17 years old, before the Korean War. However he has another family (including a wife and children) who remain in North Korea.

Park testified that he had never been asked whether he wished to go back to South Korea. Park faced discrimination in North Korea since South Korean POWs were the lowest caste in North Korean society. His wife in North Korea was also from a low caste and they could not afford a wedding when they married. They lived in a small room.

He was restricted in his employment and residence, and his family lived in poverty. After the Korean War, he worked in a cement plant in *Pyongyang*, but he was expelled to a rural area when authorities realized he was a South Korea POW. After being forced to move to North *Hamkyung* Province, he did repair work on remote mountain roads. He tried to apply for college many times, but was denied. Park testified that South Korean POWs were treated as "useful work animals." State Security agents spied on him routinely and he suffered physical abuse as well. He says he still has nightmares about the torture he suffered from State Security agents.

Victim 7. Song, Young Cheol

After being detained and sent to the *Sepo* and *Kangdong* POW camps, he assigned to the Ministry of Internal Affairs Construction Brigade 1706. He was sent to the *Cheonma* mine and was later the *Hamyon* coal mine. In both mines, he was forced to work hard under poor conditions and little food or medical help.

Song also testified about the discrimination suffered by his children. His children were denied opportunities for education, restricted from serving in the military or joining the Communist Party, and therefore they were denied all practical ways they could improve their lot in North Korean society. Song testified his son, who was denied admission into higher education, was extremely bitter about the discrimination he suffered.

Victim 8. Shin, Dong Kil

Shin was taken prisoner on July 18, 1953, during the battle of *Kumhwa*, in *Kangwon* Province.

He was assigned to work in the *Holdong* mine, in *Hwanghae* Province, and then sent to the *Kangdong* Prisoner Camp. Later he was assigned to Ministry of Internal Affairs Construction Brigade 1709 and then sent to work in coal mines. He worked in the *Shinchang* mine in South *Hamkyung* Province, the *Hoeryung* and *Kokeonwon* mines in North *Hamkyung* Province. There were other South Korean POWs in the mines as well. Several times gas explosions killed miners, including many South Korean POWs.

He suffered serious injuries when a coal mine caved in during construction around 1960. He was forced to work in three shifts almost immediately after he was discharged from the hospital.

Victim 9. Shin, Ho Sik

Shin was taken prisoner during the Battle of *Kumhwa*. Currently he resides in South Korea after successfully escaping from North Korea in 2004.

After the armistice of 1953, he was assigned to hard labor in mines, such as the *Holdong* and *Kumduck*. Shin testified that children of POWs were also suffered discrimination in terms of education and career opportunities. He had serious conflicts with his children when his children complained to him about the inequality they suffered. Shin testified that he tried to commit suicide because he felt so guilty to his children.

Victim 10. Oh, Jin Sang

Oh was taken prisoner on June 13, 1953 during battle in *Kumhwa*, *Kangwon* Province by PVA(People's Volunteer Army; Chinese) forces.

He was assigned to work in the *Holdong* mine, the *Kangdong* POW camp, and the *Hwapyong* POW camp near *Kangkye*, *Jagang* Province. He was assigned to Ministry of Internal Affairs Construction Brigade 1707 and worked at a monazite mine in *Cheolsan*, North *Pyongan* Province. Later he worked in the *Yongyang* mines in North *Hamkyung* Province. He was forced to work in mines his entire life.

Victim 11. Yang, Soon Yong (梁珣容)

Yang was born in *Hamyang*, South *Kyongsang* Province. He was taken prisoner in 1953 during the battle of *Kumsung*, in *Kangwon* Province. He escaped from North Korea in Dec 1997 at the age of 72. He was the second POW to successfully do so, after Cho, Chang

Ho(see Victim 22). Yang declined the \$2000 award that the South Korean government offered him, and news of his actions lead to comprehensive legislative reform in South Korea regarding its POWs. Yang revealed the names of 100 POWs held in North Korea. Among them, 60 were believed to be still alive. Yang who had worked in the infamous *Ah-Oh-Ji* coal mine for most his life, tried to locate the South Korean families of his fellow POWs who also worked in the mine. Yang passed away in 2001 in a fatal car accident.

Yang testified that the *Ah-Oh-Ji* coal mine where he had worked was known to North Koreans as “hell on earth.” The whole time he was forced to do hard labor, and he suffered from inadequate food, and abuse, torture, and constant surveillance at the hands of North Korean security personnel.

Victim 12. Yang

Yang was taken prisoner on June 30, 1950 by Korean People’s Army (KPA; North Korean) forces. While he was held at the *Hoeryung* POW camp, he became severely ill. When the North Koreans were moving the POWs from the camp, they abandoned Yang who was barely alive, with other corpses. However, he was rescued by North Korean civilians and received treatment at the *Kungsim* coal mine hospital. After recovering from his illness, he was forced to work in the coal mine.

Yang’s account is notable in that he was captured early in the war. Most of the South Korean POWs who were detained in North Korea after the Armistice were captured later in the war. He revealed that some of the early POWs who were ill or injured were sent to POW camps in the rear areas and then assigned to work in coal mines and not repatriated.

After the Armistice, Yang was assigned to a Ministry of Internal Affairs Construction Brigade and worked in the *Yusung* coal mine. He testified the *Yusung* mine was particularly dangerous because of large amounts of gas that formed in the mine. Many people, including POWs, died because of gas explosions. Every time a gas explosion occurred, at least 20 to 30 people died, he said. Because of these horrible working conditions, most workers worked in constant fear for their lives.

Although the mine regulations specified 8 hour shifts, most workers spent over 12 hours working and commuting. The work was so exhausting that once he got home, all he could do was sleep. Also, Yang testified that children of POWs could not apply to college or serve in the military. This denied his children any practical opportunity to attain wealth or a good career in North Korea. Even when children of POWs were allowed to serve in the North

Korean military, they would be assigned to work as laborers. After their 10 years of conscription, they would be sent back home to work in labor or construction.

Victim 13. Yoo, Jong Ho

On July 14, 1953, Yoo was taken prisoner by People's Volunteer Army(PVA; Chinese) forces. Currently he lives in South Korea after escaping from North Korea in 2005.

Yoo was held at the *Sepo* and *Kangdong* POW camps, and then assigned to Ministry of Internal Affairs Construction Brigade 1708. He was forced to work in the *Cheolsan* monazite mines, and the mines at *Kumduck*, and *Musan* in North *Hamkyung* Province.

Victim 14. Yoo, Young Bok

Yoo was born in *Icheon*, *Kyunggi* Province. He escaped from North Korea in 2000 after the first North-South Korean Summit Meeting was held in *Pyongyang*. He decided to escape from North Korea on his own because there was no mention of South Korean POWs as himself at the Summit. He concluded the South Korean government had given up rescuing the POWs and was angry that the South Korean President was participating in a Summit with North Korean leaders without getting the POWs out first. Recently he published a memoir of life as a POW in North Korea.

Yoo was sent to work in the *Ah-Oh-Ji* coal mine. He testified that summary executions of POWs who were working in the mine were common. "There were countless injustices that we POWs suffered. North Koreans worked the POWs in the *Ah-Oh-Ji* mine until we died. I lost track of the number of times I saw with my own eyes my comrades being shot to death."

Victim 15. Lee, Tae Joon (pseudonym)

Lee was born in 1931, in *Kuryong*, South *Kyongsang* Province and joined the Republic of Korea Army (ROKA; South Korean) in 1949. When the Korean War broke out, he was only 18 years old and a member of the 2d Division, 16th Regiment. Lee was serving as a regiment courier when he was taken prisoner in *Kumhwa*, *Kangwon* Province. Lee passed away in North Korea, but his son, who escaped to South Korea testified about his father. Currently 7 of Lee's children survive in North Korea.

Lee was held in the *Hwamyon* POW camp located in *Saebyeul* County, North *Hamkyung* Province. He was then sent to the *Onsung* coal mine. For about 40 years, he was forced to work in the coal mine like a slave. After the Armistice, Lee heard rumors that South Korean

POWs who said they wanted to go back to South Korea were all shot to death at the Tumen River. So Lee kept silent about his wishes to be repatriated. Lee married a woman, whose father had defected to South Korea. Because he was a POW married to the daughter of a “traitor,” Lee’s family was in the lowest caste in North Korea. The children of victim 15 struggled against discrimination and social inequality, especially in their education.

Victim 16. Lee

Lee was taken prisoner by People’s Volunteer Army(PVA; Chinese) forces during the Battle of *Kumhwa* battle, in *Kangwon* Province, on July 14, 1953.

After being detained in the *Kangdong* POW camp, he was forced to work in the *Ah-Oh-Ji* coal mine in North *Hamkyung* Province. He was forced to work in hard labor until he was 60 years old. He was told by authorities that at 60 he could stop working and receive an old age pension. However, his situation worsened because the pension was too small to support Lee and his wife. They lived in poverty and there was no way for Lee to find work he could do at that age to supplement his income. He and his wife suffered from malnutrition. Lee testified that many other POWs who turned 60 also suffered as he did including from malnutrition.

“Many POWs lived in extreme poverty once they stopped working at 60. We suffered from malnutrition and I was in critical condition when I escaped. Stopping us POWs from working at the age of 60 did not mean freedom for us. They were actually abandoning us. We were too old to find other work and because of the malnutrition, many of us became crippled.”

Victim 17. Jang, Hyun Soo

Jang was kidnapped by the North Korean Army in *Kanghwa* island near Seoul on Oct 3, 1950. Jang e was 18 years old. He is currently categorized in South Korea as a civilian abductee and not a POW. However, he lived close to 4 families of POWs in North Korea and forced to spy upon them by North Korean State Security agents. Jang passed away in North Korea, but his daughter, who escaped to South Korea, testified about her father.

Jang lived in *Musan*, North *Hamkyoung* Province and worked as a railroad laborer. The North Korean government forced Jang to spy on four neighbors who were POWs. When there was any political disobedience, Jang and his sons often were tortured and beaten.

The State Security agents visited Jang’s home almost every other day, even when he lay ill from bronchitis and demanded that he write 3 page reports of what had happened. Jang died

in 2009 shortly after hearing news that his daughter had escaped to South Korea and visited Jang's birthplace.

Victim 18. Jang, Jin Hwan

Jang was captured by the People's Volunteer Army(PVA; Chinese) forces on February 25, 1951 near *Hoengsung*, *Kangwon* Province. He was incorporated into an artillery unit of the Korean People's Army(KPA; North Korean), 2d Corps, 2d Division. Three days after he was assigned to his KPA unit, Jang and 30 other South Korean POWs, including the company and platoon commanders attempted to escape. The attempt failed and all were captured.

Five of the escapees died from torture during the investigation, and 25 were executed by firing squad. Jang, who was the youngest amongst the 31 escapees was spared. He received a 20-year sentence in a political prison. He served 17 years of his sentence at the *Shinuiju* prison before he was granted and early release in the 1970's. He worked at the *Ah-Oh-Ji* mine in North *Hamkyoung* Province.

Victim 19. Jang

Jang was taken prisoner on July 23, 1953, during the Battle of *Kumhwa*, in *Kangwon* Province by People's Volunteer Army(PVA; Chinese) forces.

He was held in POW camps in *Koksan*, *Hwanghae* Province and *Kangdong*, *Pyongan* Province and then assigned to Ministry of Internal Affairs Construction Brigade 1701. He worked at the *Ohbong* coal mine.

Victim 20. Jeon, Yong Il

Jeon was born in *Youngchun* County, South *Kyongsang* Province, and he joined the Republic of Korea Army(ROKA; South Korean) in 1951. His military serial number was 0347876 and he served with the 6th Division, 19th Regiment, 3d Battalion, 2d Company, 2d Platoon. In July 1953, he was taken prisoner by the Korean People's Army(KPA; North Korean) in the Battle of Mt. *Jeamsan* in *Kangwon* Province. In June 2003, he and his son escaped from North Korea and hid in China. In November, 2003, they were captured by Chinese police and were detained in a camp for North Koreans in the Tumen River area. On Dec 24, 2003, Jeon was able to go to South Korea thanks to the efforts of the South Korean government, but his son was forcibly deported to North Korea in August of 2008.

During the war, Jeon was held in the *Kangdong* POW Camp and *Sungcheon* mining camp where he received political indoctrination. In June 1956, he was released from prisoner camp and was assigned to hard labor in a mine in *Musan*, North *Hamkyoung* Province, where he worked for over 35 years, until July of 1992.

Victim 21 Jeong

Jeong was captured by the People's Volunteer Army(PVA; Chinese) on Dec 12, 1950. After screening by Korean People's Army(KPA; North Korean) officers at the *Kangdong* POW camp, he was incorporated into KPA Unit 9670(later renamed to Unit 990) where he worked as a laborer, loading supplies for transport in the rear areas.

After combat had ended in 1953 with the Armistice, he was assigned to Construction Brigade 2 which worked on reconstruction projects in *Pyongyang*. He worked in *Pyongyang* as a railroad worker for a while, but in 1972, he was expelled from *Pyongyang*, where lower caste individuals such as POWs were not allowed to live. Jeong was sent to *Namyang*, North *Hamkyung* Province. Jeong testified that POWs suffered discrimination at work and were kept under strict surveillance. He was also denied education opportunities because of his POW status.

“The surveillance upon POWs was severe. The State Security Agency, Worker's Party and Public Safety (Police) all took part in watching over POWs. If we made one slip of the tongue they would imprison us, so I kept my mouth shut in North Korea. I was a ‘mute who could speak.’ The psychological torture was worse than hunger.

When I was younger, I wanted to get an education. I was working in a large cement factory where they had night classes. When I told my manager my wish to attend the classes, I was promptly fired.”

Victim 22. Cho, Chang Ho

Cho was a freshman in *Yonsei* University when the Korean War broke out in June, 1950. He volunteered for Artillery Officer School and was assigned to the Republic of Korea Army (ROKA; South Korean) 9th Division, 101 Battery.

On May 19, 1951 Cho was taken prisoner by the People's Volunteer Army(PVA; Chinese) at the battle of Mt. *Hansuksan*, *Kangwon* Province. After 43 years of captivity, he escaped from North Korea in 1994. On April 27, 2006, he testified about his life a POW before the U.S. Congress. He testified he was not notified that the war ended and POWs had been exchanged. He found out long after the ceasefire.

After capture, Cho was incorporated into the Korean People's Army(KPA; North Korean) 8th Corps. On Feb, 1952, he was caught trying to escape back to UN lines and was sentenced to 13 years in prison by the court-martial. In 1953, he was held in Special Prison Camp Number 1 in *Ah-Oh-Ji*, North *Hamkyung* Province. Throughout his 13 year sentence, he was moved between six different prison camps in *Wonsan*, *Hamheung*, *Dukchon*, *Manpo*, *Ah-Oh-Ji* and *Kangkye*.

The condition in the camps was unsanitary, so most prisoners, many of whom were also South Korean POWs, suffered from malnutrition and disease. Cho testified that POWs' names were replaced with numbers, and possession of private property was prohibited. POWs only had thin clothes to wear even in the cold of winter. There was no bed, blanket, or pillows. An oil drum was used as a toilet. Conversations between inmates were prohibited. If POWs talked to one another, they were detained by State Security agents.

After he was detained in such political prison camps for over 12 and a half years, he was released from the *Ah-Oh-Ji* mine in 1964. He was assigned to hard labor for over 13 years in the *Hwapoong* mine from 1964 to 1977. After 1977, he lived under surveillance by State Security agents in North Korea until he escaped from North Korea in 1994.

Victim 23. Choi

On Dec 30, 1951, Choi was taken prisoner by the People's Volunteer Army (PVA; Chinese) in the *Yangku* region of *Kangwon* Province. He was handed over to the Korean People's Army (KPA; North Korean) and sent to the *Woosi* POW camp, in *Jakang* Province.

There were approximately 400 South Korean POWs in the *Woosi* camp who had been captured when UN forces advanced deep into North Korea in the Autumn of 1950. All such POWs were repatriated to South Korea following the 1953 Armistice. However, 27 POWs including Choi, who were captured after the combatants had exchanged initial POW rosters were not repatriated. They were sent to the *Chilpyung* POW camp, and then assigned to Ministry of Internal Affairs Construction Brigade 1709. Choi as forced to work in the *Shinchang* coal mine in South *Pyongan* Province and the *Kokonwon* coal mine in North *Hamkyung* Province.

Victim 24. Han, Jae Bok

On July 12, 1953, Han was captured by the People's Volunteer Army(PVA; Chinese) in *Kumhwa*, *KangWon* Province. He was held in the *Sepo*, *Kangdong*, and *Baekhak* POW camps, and then assigned to a Ministry of Internal Affairs Construction Brigade where he worked at the *Chunma* mineral mine. Later he was sent to the *Hamyon* coal mine.

He was always under surveillance by the State Security agency, so there was no time to meet friends freely, he said. Since he had to work hard and had to attend political lectures all the time, Han could not have any private time for himself or for his family. State Security agency spied on his family even when they had conversations on holidays.

Their neighbors would also spy on them. If more than two POWs gathered for a conversation, they could be arrested by the Stated Security Agency.

Han testified many POWs were killed while they worked in the coal mine. POWs were blamed for accidents and were either shot to death or taken away to an unknown location whenever accidents occurred. Han also testified that one would care if any of the POWs were killed. At one time, all the POWs who had held a rank higher than Staff Sergeant were blamed for hurting North Korean civilians during the war and taken away and never heard from again.

Han testified that the POWs always struggled with hunger and poverty. They would not be given enough to eat so they had to find wild roots which they boiled with their corn. From 1998, the government stopped providing food rations altogether. The POW families tried to survive by boiling corn husks. They would not have time to soak out toxins from the wild roots and if they ate such roots they would suffer from swelling.

Victim 25 Huh, Jae Seok

Huh was born in 1932, in *Jinyang* County, South *Kyongsang* Province. He was drafted into the Republic of Korea Army (ROKA; South Korean) in 1952 when he was 20 years old. During the Battle of *Kumsung*, in *Kangwon* Province, he was wounded and taken prisoner by the Korean People's Army (KPA; North Korean). He now lives in South Korea after escaping from North Korea. On Nov 18, 2008, he published his memoir about life in North Korea as a POW.

Huh was assigned to work at *Ah-Oh-Ji* mine until 1956. Huh testified that he was assigned to Ministry of Internal Affairs Construction Brigade 1701 and he believes that North Korean authorities organized these so-called "construction brigades" under the Ministry of Internal Affairs (rather than military) to hide the fact they were actually POW labor camps. Huh believes that North Korea's claim that there were no POWs held against their will at the end of the war is based on the nominal civilian control of the POWs through the Ministry of Internal Affairs.

He testified that POWs were not allowed to have lunch time while other workers were given lunch boxes. POWs were allowed to eat only after finishing their 8 hour shifts. Huh said that the food (usually rice mixed with millet grains and seaweed or radish leaf soup) was not enough for the POW who were performing hard labor so all suffered from hunger and malnutrition.

Also, whenever accidents happened, POWs would be unfairly blamed and punished for sabotage. POWs were always punished more severely than other workers.

On June, 1956, he was given North Korean citizenship following Cabinet Order 143 along with 450 other South Korean POWs. He was formally discharged from his camp and construction brigade. Although he was nominally a full citizen, he still faced discrimination in his employment and residence and treated as the lowest caste in North Korean society. The POWs would frequently be called up for forced labor even after they were discharged and were always under strict surveillance.

POWs were also discriminated in housing allotments. North Korean laborers were supposed to be given a house with 2 rooms if they had more than 5 people in the family. However, Huh, his wife and their seven children all lived in a one room house their whole life.

Victim 26 Huh

Huh was captured by People's Volunteer Army(PVA; Chinese) forces on July 17, 1953 in *Kumhwa*, in *Kangwon* Province. He was held in the Sepo and Kangdong POW camps. Later he was sent to the *Chunma* mineral mine and *Hamyon* coal mines. Huh forced to work for 40 years as a miner. If he could not reach his daily quota (usually 100 tons), he had to work overtime. He usually worked 12 to 13 hours daily. Sometimes he would have to work 8 hour shifts, back to back.

The authorities thought that giving the POWs even a minute of free time would lead to subversive thoughts. So in addition to the hard labor, he would have to attend political lectures.

Huh felt lucky that the coal he mined was bituminous coal. The bituminous coal generated less coal dust. He believes that he avoided severe damage to his lungs because of this.

Victim 27. Roh

Roh was captured by the Korean People's Army(KPA; North Korean) on June 29 1950. He was sent to a re-education camp in Yanji, China where he received military training for one year. He was then incorporated into to the KPA 8th Corps. He attempted to escape but was captured and consequently sentenced to 13 years of re-education. He was moved between re-education camps in *Pyongyang*, *Wonsan*, *Hamheung* and the Susung Re-education camp in *Chongjin*. Roh has testified about conditions and prisoners held in the North Korean re-education camps during the 1950's and 1960's.

Victim 28. Roh

Roh was captured by the People's Volunteer Army(PVA; Chinese) in late November of 1950 near *Sinuiju* in North *Pyongan* Province. Roh was incorporated into a Labor Brigade in *Pyongyang* that supported logistics operation for the Communist forces. Although he was not forced to engage in direct combat duties against UN forces, he and other POWs built and repaired air fields and railroads that were used by the Communist military forces.

Victim 29. Park

Park was captured on October 20, 1952 by the People's Volunteer Army(PVA; Chinese) near *Yangku* in *Kangwon* Province. He was wounded and then treated in the 57th Hospital of the Korean People's Army (KPA; North Korean) in *Heechun*, *Jakang* Province. After he recovered, he was assigned to work at a textile factory in *Hoeryung*.

Victim 30. Jang

After Jang was captured, he was incorporated into the Korean People's Army (KPA; North Korean). He subsequently tried to escape but was recaptured and sentenced to a re-education camp.

Victim 31. Kim

Kim served in the Republic of Korea Army(ROKA; South Korean) 2d Division, 17th Regiment. He was taken prisoner and held in North Korea without being exchanged. He passed away due to tuberculosis. His daughter escaped from North Korea in 2004 and reached South Korea in 2008. She filed an administrative suit in South Korea to verify her

father's status as a Korean War POW. She also has testified about the persecution her father and her family suffered in North Korea.

According to Kim's daughter, her father tried to hide the fact that he was a former South Korean POW from others. Her mother would forbid her to speak about their father. POWs and their families were treated with disdain and were part of the lowest caste in North Korean society.

She also testified that Kim was imprisoned at one time and served a 15 year sentence. Kim worked many years in a coal mine before he passed away.