

Korea. Fedorenko's memo advises Molotov that for the Soviets "it is not advisable for us to adopt any measures on this question" regarding the prisoners. [VOLOKHOVA 2000, p. 90].

Although the numbers of South Korean POWs mentioned in Soviet documents are much smaller than other estimations of POW survivors (e.g., HEO's [2002, p. 142] estimation of 50,000), it is still clear that Communist leaders intentionally held thousands of South Korean POWs they had incorporated into the North Korean military. They also purposely hid them from the NNRC and prevented their escape. The documents also show that the decision to detain the South Korean POWs was made at the highest levels of North Korean and Chinese leadership, and that Soviet leaders were also fully aware of their allies' decisions.

### ***3.4 New Evidence opens opportunities for legal action***

The testimonies from escaped POWs and documentary evidence from Soviet-era documents opens new opportunities for legal action against North Korea on behalf of South Korean POWs through the international legal system. In particular, the continued detention of POWs past 2002 is a war crime over which the International Criminal Court has jurisdiction. Other venues for appeal for international action include international humanitarian organizations including those of the United Nations. Even if the possibility of convincing the North Korean government to free the POWs is remote, legal action can bring international awareness to the issue and mobilize human rights groups. [CAMMAROTA et al. 2007].

## **4. Bringing a Case in the International Criminal Court**

### ***4.1 General Information regarding the International Criminal Court (ICC)***

The International Criminal Court (ICC) came into force in 2002 under the Rome Statute [ROME 1998, Preamble]. After the tribunals in Rwanda and Yugoslavia in the 1990's, the ICC was established as a permanent venue to hold individuals responsible for gross human rights violations, including war crimes [ROME 1998, Articles 5, 8].

CAMMAROTA et al. (2007, p. 26, 37) note that the treatment of South Korean POWs could qualify as a War Crime under the ICC's jurisdiction but that there could be evidentiary challenges. Given the availability of testimonies from escaped POWs and the documentary evidence from Soviet archives, an appeal to the ICC Prosecutor seems feasible.

## **4.2. Jurisdiction of the ICC covers the continued detention of Korean War POWs**

The case of Korean War POWs who continue to be held in North Korea after 2002 falls under the court's territorial jurisdiction. The "conduct in question" must begin in the territory of a state that has ratified the Rome Statute. [ROME 1998, Article 12(2)(a)]. Here, the War Crime violations begin when South Korean soldiers were taken prisoner within South Korean territory, where South Korea has ratified the Statute. Therefore, the Rome Statute, Article 12(2)(a) grants the ICC jurisdiction over the War Crimes committed against these POWs. [CAMMAROTA et al. 2007, p. 26, 37].

The incorporation of the POWs into North Korean forces is a grave violation of the Geneva Conventions [GENEVA 1949, Art. 130], and a violation of the Rome Statute, Article 8.2(a)(v) which prohibits "compelling a prisoner of war ... to serve in the forces of a hostile Power." The ICC may have difficulty establishing jurisdiction over this specific crime because it occurred 46 years before the temporal jurisdiction of the ICC began. POWs were demobilized from the North Korean military in 1956 whereas the ICC was established in 2002. [ROME 1998, Article 11].

Other War Crimes against South Korean POWs that have continued past 2002 are within the temporal jurisdiction of the ICC. [CAMMAROTA et al. 2007, p. 26, 37]. The prolonged detention of POWs after the ceasefire violates Article 8(2)(a)(vii) which bans "unlawful confinement." Denying the POWs contact with the Red Cross and neutral nations representatives to process their repatriation according to the terms of the Korean Armistice Agreement violates Article 8(2)(a)(vi), "depriving a prisoner of war ... of the rights of fair and regular trial." Both these violations continue to this day. [ROME 1998].

The systematic discrimination of the children of South Korean POWs in North Korea is a Crime Against Humanity defined in Article 7(1)(h) "persecution of identifiable group." Unlike the violations of Article 8 war crimes against the POWs themselves, jurisdiction of the ICC is difficult to establish under Article 12(2)(a) because this crime occurred within North Korean territory and North Korea is not a signatory to the ICC.

However, any realistic relief for the POWs must protect the families of the POWs, whom the defendants, who are powerful individuals within North Korea's leadership, could hold hostage through their political allies. It would be impossible to bring charges in the ICC while allowing the persecution of the POWs' family members to continue. In this case, an appeal to the Prosecutor to include the crimes against the POWs' children in the investigation should be possible under Article 15(1) where the Prosecutor can initiate investigations on his own. [ROME 1998, Art. 15(1)].

The report by the UN's Special Rapporteur for the Human Rights Situation in North Korea, published in 2010 states that many human rights violations within North Korea could be serious enough to warrant an independent examination by the ICC Prosecutor under Article 15. The virtual enslavement of tens of thousands of POWs and the systematic discrimination against their children would certainly seem to be such an

example. Given the severity, scale, and relatedness of the violations that have continued to this day for almost 60 years, and the fact that the violations were committed against the same group of victims and their descendants, the ICC would seem justified in investigating the entire series of crimes under Article 15 rather than only those offenses that meet the jurisdictional requirements of Article 11 and 12. [MUNTARBHORN 2010, para. 59-60].

### **4.3. Defendants**

The ICC prosecutes individuals who are responsible for War Crimes and Crimes Against Humanity. It will be important to find the individuals in North Korea who had direct responsibility for the detention of South Korean POWs past 2002. Such people include military leaders who had ordered that the South Koreans be kept off the POW rosters and incorporated into the North Korean People's Army, and the military, State Security and civilian leaders who continued the detention of the POWs.

The officers in command of the Korean People's Army (Chosun In-min-gun), which administered the South Korean POWs during the war and until 1956 either had knowledge or should have had knowledge that their POWs were detained against the conventions of war. POWs from other UN forces and a small group of other South Korean POWs had been either repatriated or turned over to the NNRC according to the protocols agreed upon in the ceasefire. It should have been evident to any officer who was involved in administering the South Korean POWs and their chain of command that any South Korean POWs who had not been directly repatriated, even by choice must be allowed to meet with the NNRC. Any North Korean officer should have known that keeping any South Korean POW without a meeting with the NNRC was a violation of the Armistice and Geneva Conventions. Therefore, Korean People's Army officers involved in administering POWs and senior officers of the General Staff of the Korean People's Army who knowingly continued to detain of South Korean POWs are all defendants for the Article 8 War Crimes.

The military forces of North Korea are under the leadership of the Supreme Commander of the Korean People's Armed Forces, and the Chairman of the National Defense Committee (Guk-bang Wi-won-jang). This post has been held by Kim Jong Il since 1994. Members of the National Defense Committee and Kim Jong Il should have known about the continued detention of South Korean POWs and its illegality. Therefore, they are also culpable.

Another set of defendants are officials who were in the Ministry of the People's Armed Forces. The Ministry exercises control of the military and its leaders should have known about the detention of South Korean POWs.

Leaders of the Central Military Commission of the Korean Worker's Party exercised civilian oversight of the military forces and also should have known about the detention of South Korean POWs. These individuals should also be defendants.

After the POWs were granted citizenship in 1956, they were under strict surveillance by the State Security Department (Bo-wi-bu), North Korea's anti-espionage agency. The leaders of the State Security Department had knowledge that the South Korean POWs they kept under their surveillance had been detained against their will so should also be defendants. Any North Korean official in State Security and other areas of North Korea's government and ruling Worker's Party who was involved in planning and executing the policies of strict surveillance against the POWs potentially share culpability in continuing the detention of POWs.

North Korean officials involved in planning and executing the discriminatory policies against the POWs and their children potentially are all potentially culpable for Article 7 Crimes Against Humanity. This would include all North Korean officials involved in executing the restrictions on work and residence of "number 43s."

#### **4.4. The ICC Violations**

The crimes committed by the defendants are War Crimes against the South Korean POWs themselves, and Crimes Against Humanity committed against the POW's children.

##### **4.4.1. War Crimes against the South Korean POWs**

The incorporation of POWs into North Korean People's Army units and Interior Ministry labor brigades, the denial of contact with Red Cross and NNRC officials administering the prisoner exchanges, and the prolonged detention of South Korean POWs and violates three of the Geneva Conventions provisions specified in the Rome Statute, Article 8:

###### Article 8

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

...

- (v) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (vi) willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) unlawful deportation or transfer or unlawful confinement;

##### **4.4.1.1 Compelling prisoners to serve in the forces of a hostile Power**

Compelling prisoners to serve in military forces is a "grave breach" of Geneva Convention III Article 130. The Geneva Convention commentaries list this crime as an "offence sui generis" (ie. a category by itself). [GENEVA 1949, Art. 130 Commentaries].