

4.5.2. Documentary Evidence against defendants from Soviet-era Archives

The 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.

Soviet Ambassador S.P. Suzdalev's memo written in May of 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." [VOLOKHOVA 2000, p. 85].

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 takes measures to hide this violation by preventing the POWs from escaping and contacting the NNRC. [VOLOKHOVA 2000, p. 89].

The testimonies and the documentary evidence show a pattern of War Crimes, followed by cover up that extends for over a generation. The POWs were exploited for their labor unlawfully during the war. They continued to be detained and exploited to hide the unlawful exploitation. The exploitation and cover up has continued to include their children.

4.6 Relief to be sought against Defendants

In addition to criminal sentencing of the leaders of North Korea's military and State Security Department, South Korean POWs and their families in North Korea should be granted relief according to Article 75 of the Rome Statute. Article 75 specifies "reparation to victims" including "restitution, compensation and rehabilitation." [ROME 1998].

The rehabilitation relief should include allowing the POWs and family members to contact relatives outside of North Korea and to leave North Korea if they wish. Many POWs have family in South Korea that they have not seen for over 50 years and many South Koreans could have relatives that were thought to have died in the Korean War who have been held in North Korea. North Korean authorities should promptly allow contact with POWs and their family members outside North Korea and allow any POW or family member to be reunited with relatives outside of North Korea if they wish.

Restitution relief that forces the North Korean military and government to disgorge their gains from exploitation of the POWs over their detention should also be sought, as well as compensation where POWs were paid unfairly for their labor.

5. Alien Tort Claims Act and Other Litigation in the United States

The Alien Tort Claims Act and the Torture Victims Protection Act are statutes in the United States that may possibly be used against North Korea in the future. The ATCA requires obtaining jurisdiction over a defendant North Korean official or other individual in the United States which is not feasible at the time. The TVPA requires the plaintiff to be a U.S. citizen and none of the escaped POWs or their family members have obtained U. S. citizenship.

5.1 Alien Tort Claims Act (ATCA)

The Alien Tort Claims Act (ATCA) in the United States allows foreign citizens to sue individuals or corporations in U.S. Courts for a “tort only, committed in violation of the law of nations or a treaty of the United States.” [CAMMORATA 2007 p. 91]. It is a statute unique to the United States.

The statute has been used against war criminals in the Yugoslavian Civil War where Croat and Muslim citizens of Bosnia-Herzegovina sued Radovan Karadzic, leader of Bosnian-Serb rebel forces. The Plaintiffs successfully alleged violations of international norms against genocide, war crimes and torture and a US jury awarded damages of \$4.5 billion. [CAMMORATA 2007 p. 91].

The difficulty in charging North Korean defendants with the ATCA is establishing jurisdiction within courts of the United States. There are no former members of the North Korean regime living in the US or with enough contact with the United States to establish jurisdiction. [CAMMORATA 2007 p. 100].

Corporations have been sued for aiding and abetting violations of international law under the ATCA. The oil company Unocal was sued for aiding the Burmese government’s practice of forced labor. Currently there are few companies that do any business in North Korea but Chinese corporations are seeking mining rights in North Korea, and the use of ports in the Northeastern coast. If the mines involve forced labor there may be an argument to establish jurisdiction over such a company if it also does business in the United States. As Chinese corporate interests increase in North Korea, opportunities for such a suit may arise in the future.

5.2 Torture Victims Protection Act

Another United States Federal statute that can bring a suit on behalf of South Korean POWs would be the Torture Victims Protection Act of 1991. The statute allows U.S. citizens to sue foreign individuals for torture and extra-judicial killing. The families of the USS Pueblo, a US Navy intelligence ship that was seized by the North Korean navy

in international waters off of North Korea in 1968, have successfully obtained a default judgment against the North Korean state in a US Federal Court. [*Massie v. Government of the Democratic People's Republic of Korea* (2008)].

The detention of South Korean POWs and forced labor could qualify as torture under the definition of the statute. The difficulty of bringing suit under this statute lies in identifying a plaintiff with standing to sue in the United States courts. Currently, there are no identified U.S. citizens who are relatives of South Korean POWs. If there are any POWs or their children who become US citizens in the future, they may have standing to bring a suit against the North Korean state.

6. The UN Human Rights Council

The UN agency that would seem most relevant to the issue of prolonged detention of POWs is the UN Human Rights Council (UNHRC). The Council has already taken an interest in North Korea's human rights. North Korea is under Universal Periodic Review as of 18 June 2007 under the Human Rights Council Resolution 5/1. For a period of six years, until June of 2010, Professor Vitit Muntarbhorn of Thailand was appointed Special Rapporteur for the Human Rights situation in North Korea. Professor Muntarbhorn's final report, dated 17 Feb 2010 recommends that North Korea should immediately begin to "cooperate effectively" to address "consequences of the Korean War." [MUNTABHORN 2010, paragraph 88 (a)(iv)]. Muntarbhorn (2010) includes both the issue of separated families [paragraph 39] and prisoners of war [paragraphs 69, 74] as consequences.

The procedure for submitting a complaint to the UNHRC is the 1503 procedure. The procedure is open ended but requires the following:

- 1) Factual description of the violation.
- 2) Be submitted by the actual victims or individuals or NGOs with reliable direct knowledge of the victims.
- 3) It is not based on reports already disseminated by mass media.
- 4) It is not about a pattern of violations already being dealt with by another UN organization.

[UNHRC 2010].

Evidence to be used in the ICC report should also satisfy the standards for the 1503 procedure. In the case of the South Korean POWs, the testimonies and documentary evidence from Soviet archives show that the North Korean state has violated a number of rights guaranteed by the Universal Declaration of Human Rights. [UDHR 1948]:

- Article 13. Freedom of Movement.
- Article 9. Freedom from arbitrary detention.
- Article 7. Right to equal protection
- Article 4. Freedom from Slavery.

The POW's freedom of movement (UDHR, Article 13) and freedom from arbitrary detention (UDHR, Article 9) has been violated through their prolonged detention in North Korea and because the POWs were not allowed to leave North Korea and restrictions were placed on their residence. The classification of POWs and their children into the Number 43 caste, and the increased surveillance and restrictions on Number 43's compared to other North Korean citizens is a systematic discrimination based upon their status alone that violates UDHR Article 7's right to equal protection. The forced labor in labor brigades and decades of hard labor amounts to a systematic form of slavery that violates UDHR Article 4. The testimonies from POWs also document human rights violations that the POWs witnessed, including summary execution and punishment without due process of other POWs.

Although Special Rapporteur Muntarhorn has urged resolution of the prisoner of war issue and other "consequences of the Korean War," there is no UN agency currently monitoring progress specifically on behalf of South Korean POWs and their children after the Special Rapporteur mission was concluded in June of 2010. Therefore, the case of the POWs is not being dealt with by any UN agency at this time. Therefore, the testimonies and documentary evidence should be a valid 1503 complaint to the UN HRC.

7. UN Security Council and International Court of Justice

The UN Security Council and International Court of Justice (ICJ) require a state actor to initiate action. NGOs can not by themselves bring cases to the Security Council's agenda or file suit in the ICJ.

The UN Security Council would seem to be an obvious and appropriate forum for demanding the release of South Korean POWs. The South Korean POWs were in fact under the command of the UN Command when they were taken prisoner. The UN Command was directly authorized by a UN Security Council Resolution so the Security Council would seem to have a close interest in the welfare of the South Korean POWs.

Furthermore, China, whose soldiers fought against the UN Command and captured many of the South Korean POWs is now a permanent member of the Security Council itself. The prolonged detention of POWs for decades by North Korea should be an embarrassment to China and in its best interest to resolve the issue as quickly as possible.

Ironically, finding a state actor to speak out on behalf of the South Korean POWs has been difficult. The United States and South Korea have been careful to avoid bringing up this issue in the Security Council, perhaps because of concerns of complicating other talks with North Korea, especially regarding the nuclear weapons issue.

China has also disapproved of discussing this issue in general and has been sensitive to any "hardline" approaches to North Korea, favoring a "quiet diplomacy" approach. Therefore, it is not likely that the UN Security Council will be discussing the fate of these POWs who were captured while fighting under the UN flag.