

The POWs were held in North Korea after the Armistice where they worked in mining and other hard labor occupations. Although the numbers have never been released by North Korea, as many as 50,000 South Korean POWs may have suffered this fate. As many as 560 POWs are believed to have survive and continue to be held to this day [OH, YOON and HUR p. 11].

III. The Accused Individuals

The parties responsible for the crimes are North Korean military and civilian officials who are responsible for the continued detention of South Korean POWs. Any official involved in the exclusion of South Korean POWs from POW rosters and the POW exchange process at the 1953 Korean War Armistice is also responsible. Other officials involved in the systematic surveillance of POWs and their family members in North Korea which effectively denies any contact with the outside world by the POWs are also responsible.

Although it is not possible to name the accused without further investigation, the perpetrators and material witnesses will include current and former officials within the North Korean government and ruling Korean Worker's Party. Officials working in these departments should have known of or were themselves involved in the policies that lead to the crimes. Some of these departments are the following:

- 1) The Korean People's Army (KPA), or Chosun In-min-gun. The KPA captured and administered the POWs during the war and until 1956.
- 2) The Department of Public Security or Bo-an bu. Former names are the Ministry of Public Security and the Ministry of Internal Affairs. The Ministry of Internal Affairs administered the Construction Brigades composed of POWs until 1956. Its successor was the Ministry of Public Security, which was again reorganized into the Public Security Department which commands North Korea's police forces.
- 3) The State Security Department, or Bo-wi-bu. The State Security Department is North Korea's anti-espionage agency and secret police.
- 4) The Ministry of the People's Armed Forces. The Ministry exercises control of the military.
- 5) The Central Military Commission of the Korean Worker's Party. This commission exercised civilian oversight of the military forces.
- 6) The National Defense Committee (Guk-bang Wi-won-hwe). This committee has ultimate control over the military and state security forces of North Korea. North Korean head of state, Kim Jong Il has been the Chairman of this committee since 1994.

IV. Jurisdiction of the ICC

The ICC has Jurisdiction rationae temporis under Article 11(1).

The crimes listed here are the War Crimes and Crimes Against Humanity committed against the POW victims that continue to this day. The violations of Articles 7(2)(i) and 8(2)(a)(ii),(iii), (vii) and (vi) have continued after 2002 when the Rome Statute came into force.

Jurisdictional precondition regarding nexus of conduct and State Party territory under Article 12(2)(a) is satisfied.

A precondition for the ICC to exercise jurisdiction is defined in Rome Statute Article 12(2)(a) where the “[s]tate on the territory of which the conduct in question occurred” must be a State Party to the ICC.

The accepted interpretation by the ICC is that this precondition is met if the criminal conduct has an “effect that occurs on the territory of a State Party.” This is based on the general rule that, when a crime involves the territory of multiple states, any state with a connection to the criminal conduct can claim jurisdiction. [WAGNER 2003, p. 485].

A State Party to the ICC could assert its jurisdiction over any crime that caused an effect on its territory, regardless of where the conduct begins. If artillery is fired across a border and hits targets within the State Party, resulting in a violation of Rome Statute Articles 6, 7, or 8, the State Party could assert its own jurisdiction over the crime. The ICC’s jurisdiction would follow from the State Party’s exercise of jurisdiction. [WAGNER 2003, p. 485].

The crimes here were committed against POWs. Not only was there combat that had an effect upon territory under South Korean control when the POWs were captured, the particular crimes involve extended detention of POWs held incommunicado. The effect of such conduct are suffered not only by the direct victims themselves, but also family and friends throughout the territory of the POW’s home. [PLATE and DEWHIRST 2009, p. 22].

Therefore, the effects of the conduct occur on the territory of South Korea, which is the POWs home country, in many ways. Since South Korea is a State Party to the ICC, the jurisdictional precondition involving territory in Article 12(2)(a) is satisfied.

Jurisdictional precondition regarding the nationality of the accused under Article 12(2)(b) is also satisfied.

An alternative to the territorial precondition is the Article 12(2)(b) precondition regarding the nationality of the accused. Article 12(2)(b) states that the nationality of the accused must be that of a State Party to the ICC. This precondition is met because a North Korean accused of war crimes has “effective” dual nationality of South Korea (a State Party).

Effective dual nationality of North Koreans recognized by the UNHCR. Nationality is defined as a “legal tie between an individual and a State, by which the individual is under the personal jurisdiction of that State.” [3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 501,502 (1997)]. The question of whether an individual is a national of a particular state is primarily within the “reserved domain of domestic jurisdiction.” [NATIONALITY DECREES IN TUNIS AND MOROCCO (FRANCE V. GREAT BRITAIN) (1923); confirmed in the EUROPEAN CONVENTION ON NATIONALITY (1997), Art. 3].

However, even if a state asserts that an individual is its national according to its domestic laws, international third parties (e.g., other states or an international tribunal) are not bound to recognize the claim of the state, unless there is a “genuine connection” between the state and the individual, and the nationality is “real and effective”. [NOTTENBOHM CASE (1955) pp. 22-23].

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 statutes [see Article 1 of CONSTITUTION OF NORTH KOREA.; CHANG (1990) p. 257]. In practice as well, both sides treat any individual who willingly comes from the other side as their own citizens. ROBINSON [2010] explains how South Korea grants citizenship on arrival to the thousands of refugees who escape from North Korea every year. [see also REFUGEE REVIEW TRIBUNAL 2005]

The question is whether the claims and assertions of nationality and personal jurisdiction in practice by South Korea can create a dual South Korean nationality for the people of North Korea that the ICC (as an international third party) should recognize. A precedent the ICC should follow is that of the United Nations High Commissioner on Refugees (UNHCR), which has recognized the dual nationality of North Koreans under international law.

Since the 1990’s 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 the escaped North Koreans were “persons of concern” but did not grant full Refugee Status under the 1951 Refugee Convention. This determination has immense judicial weight. If the North Koreans were granted full Refugee status, they would have the right to much stronger international protection. [UN REFUGEE CONVENTION 1951]The UNHCR’s decision was based upon the North Koreans’ “dual nationality” by

which “they can avail themselves of protection in South Korea.” [BROOKINGS-BERN 2010; KURLANZICK and MASON 2006, p. 45].

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” [UNHCR HANDBOOK]. 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 escapee. The ICC, which is also an international body, should also recognize this ruling of effective dual nationality of North Koreans.

Dual Nationality, Customary International Criminal Law, and its application to Article 12(2)(b). 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.” [HARVARD (1935), p. 511].

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 strength. [DEEN-RACSMANY(2001), p. 610]. 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.

If the equality principle is applied to ICC crimes committed by a perpetrator with dual nationality, the Art. 12(2)(b) precondition 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 Art. 12(b)(2) precondition 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.

Allowing the ICC to exercise jurisdiction it has over a North Korean official involved in an ICC crime also seems justified from a practical perspective. The effective South Korean dual nationality of a North Korean escapee 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 had been the very conduct of the North Korean perpetrator that had forced the North Korean escapee to flee.

V. Factual Background

A Brief History of the Korean War.

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, which continued to provide supplies throughout the war. [O'NEILL 2000]. In November of 1950, hundreds of thousands of soldiers from the Chinese Communist People's Volunteer Army came to North Korea's aid. [KOREAN WAR 2010].

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 killed. [KOREAN WAR 2010; STOKESBURY 1988, p. 21]. In spite of all those deaths, the war ended inconclusively in a stalemate and ceasefire along the current Demilitarized Zone (DMZ) between North and South Korea. [KOREAN WAR 2010].

The Communist forces never truthfully disclosed the number of South Korean POWs they had captured.

The Korean War Veterans Memorial in Washington DC states that 92,070 UN soldiers were captured by Communist forces. [KOREAN WAR VETERANS MEMORIAL 1995]. However, only 13,444 POWs, including 8,321 South Koreans and 3,746 Americans, were returned at the end of the fighting. [HERMES 1992, Appendix B]. 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 1 British) who had verified to the neutral nations representatives and the Red Cross their intent to stay with their Communist captors, and the 2 South Korean POWs who had sought asylum in India. None of the other unrepatriated UN POWs were heard from for decades after the ceasefire. Almost all the over 79,000 unaccounted POWs were South Koreans.

The UN Command suspected that large numbers of South Korean POWs had been coerced into joining the North Korean forces. Incorporation of POWs into a captor's military is a "grave violation" of the Geneva Conventions. [GENEVA 1949, Art. 130]. Communist negotiators denied they had violated the Geneva Conventions 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 combat [HEO 2002, p. 145; HERMES 1992, Ch. 7]. The Communists also claimed that any former South Korean POW who stayed with them had done so voluntarily after being released. [HERMES 1992, Ch. 7].