

May 22, 2006

A Case for the Prosecution of Kim Jong Il for Crimes Against Humanity, Genocide, and War Crimes.

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SUMMARY: This article provides a factual overview of the deplorable human rights situation in the Democratic People's Republic of Korea (DPRK or North Korea). It shows how the International Criminal Court (ICC) could have jurisdiction over these crimes. It provides the legal framework for establishing individual criminal liability for the crimes under the ICC's jurisdiction. It applies this framework and the legal standards for genocide, crimes against humanity, and war crimes to the facts existing in the DPRK, as provided by credible sources. It concludes that published facts indicate a reasonable basis to believe that Kim Jong Il, who controls the DPRK absolutely, is individually liable for crimes against humanity, genocide, and war crimes. It therefore recommends that the UN Secretary-General launch an investigation into the DPRK situation. Pursuant to the findings of the investigation, the UN Security Council should refer the DPRK situation to the ICC or, if necessary to overcome the ICC's temporal jurisdiction requirement, create a special tribunal to open an investigation and prosecution of Kim Jong Il and his cadres.

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I. INTRODUCTION.

As the world focuses on efforts to denuclearize the Democratic People's Republic of Korea (DPRK or North Korea), profound human rights abuses persist under the dictatorship of the DPRK's leader, Kim Jong Il. This article seeks to demonstrate the magnitude of these abuses by showing how they constitute crimes against humanity, genocide, and war crimes and how Kim Jong Il may be criminally liable for them. Although the goal of resolving the nuclear problem diplomatically is at odds at this time with the notion of prosecuting Kim Jong Il, it is an idea that must be explored not only for moral and legal grounds, but also for increasing the arsenal of possible disincentives to use against the DPRK should the six-party talks fail or should the DPRK fail to abide by any agreement produced to end its nuclear weapons efforts.² It is in effect another

² The six parties engaged in negotiations to denuclearize the Korean peninsula are the United States, D.P.R.K., Republic of Korea, People's Republic of China, Russian Federation, and Japan. On Sept. 19, 2005, the six parties produced a joint statement, which set forth agreed commitments to achieve the verifiable denuclearization of the Korean Peninsula in a peaceful manner. However, it left unresolved major issues, including timing, implementation, and the D.P.R.K.'s demand for a light-water nuclear reactor. Within one day after the joint statement, the D.P.R.K. stated that the United States "should not even dream" that it would dismantle its nuclear weapons before it receives a new nuclear plant, while the United States stated that the possibility for such a reactor would occur only after complete and verified dismantlement. Joseph Kahn and David E. Sanger, *U.S.-Korean Deal on Arms Leave Key Points Open*, N.Y. TIMES, Sept. 20, 2005. The six parties met again Nov. [9 –11,] 2005, in Beijing, but no substantive progress was made. Kelly Olsen, *U.S. Calls North Korea 'Criminal Regime'*, ASSOCIATED PRESS, Dec. 7, 2005. On May 18, 2006, the New York Times reported Pres. Bush was very likely to approve beginning negotiations on a peace treaty, even while efforts to dismantle the country's nuclear program are still

form of United Nations (UN) Security Council sanction to be considered as seriously as other sanctions, including economic.

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underway...But he will not do so unless North Korea returns to multinational negotiations over its nuclear program..." David E. Sanger, *U.S. Said to Weigh a New Approach on North Korea*, N.Y. TIMES, May 18, 2006. Reuters reported, "two senior U.S. officials were very pessimistic about persuading North Korea to return to the table and said they did not expect any movement until after Bush leaves office, in 2009, at the earliest." Carol Giacomo and Steve Holland, *U.S. Open to North Korea Treaty Talks*, REUTERS, May 18, 2006.

II. FACTUAL OVERVIEW.

The following provides a factual overview based on credible reports to demonstrate Kim Jong Il's control and likely knowledge of human rights abuses that constitute crimes against humanity, genocide, and war crimes.

A. Kim Jong Il controls the DPRK and knows of crimes carried out by DPRK authorities.

The DPRK is probably the most controlled, authoritarian regime in the world. The obedience required of DPRK citizens to the "Dear Leader" Kim Jong Il and his deceased father, "Great Leader" Kim Il Sung, is so extreme that it resembles a religion.³ It is based on "juche ideology" and reflects a unique regime structure.⁴ "Juche," which means self-reliance, was used by Kim Il Sung as the rationale for purging his political foes.⁵ Juche ideology elevated Kim Jong Il and Kim Il Sung to such a level that North Koreans have drawn parallels from the "Dear Leader" and his father to Jesus Christ and

³ Mike Chinoy, *Rare Look Inside North Korea*, CABLE NEWS NETWORK, Nov. 20, 2005, <http://search.cnn.com/pages/search.jsp?query+north%20korea>.

⁴ E-mail Interview with Hwang Jang Yop, highest ranking North Korean government defector previously holding senior posts, e.g. Chairman of the Supreme People's Congress (Dec. 20, 2005) (on file with author).

⁵ KOREA INSTITUTE NATIONAL UNIFICATION (KINU), WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA 7 (2004).

God.⁶ According to the Seoul-based, government-funded Korea Institute for National Unification (KINU), the “worship” of Kim Il Sung and Kim Jong Il is stipulated in the Ten Great Principles of Unique Ideology.⁷ Here we see another analogy to Christianity, the Ten Commandments. The “Ten Commandments of North Korea” are:

1. Struggle with all your life to paint the entire society with the one color of the Great Leader Kim Il Sung’s revolutionary thought.
2. Respect and revere highly and with loyalty the Great Leader Kim Il Sung.
3. Make absolute the authority of the Great Leader Kim Il Sung.
4. Accept the Great Leader Kim Il Sung’s revolutionary thought as your belief and take the Great Leader’s instructions as your creed.
5. Observe absolutely the principle of unconditional execution in carrying out the instructions of the Great leader Kim Il Sung.
6. Rally the unity of ideological intellect and revolutionary solidarity around the Great Leader Kim Il Sung.

⁶ Anthony Faiola, *An Act of Subversion, Carried by Balloons*, WASH. POST, August 10, 2005, at A11; Barbara Demick, *A Vigil Against Faith in North Korea*, L.A. TIMES, Nov. 15, 2005 (“Choi recalled the daily recitations of ‘Thank you, Father Kim Il Sung’ required of children. But after studying with missionaries, she realized the extent to which ‘Kim Il Sung just replaced God’s name with his own,’ she said.”). Seoul-based NGO Citizens’ Alliance for North Korean Human Rights reported that official religious organizations in North Korea mainly exist to secure foreign assistance from religious aid organizations. Philo Kim, *New Religious Policy and the Reality of Religious Freedom in North Korea*, LIFE & HUMAN RIGHTS IN NORTH KOREA, CITIZENS’ ALLIANCE FOR NORTH KOREAN HUMAN RIGHTS, vol. 31 (2004), <http://www.nkhumanrights.or.kr>.

⁷ KOREA INSTITUTE NATIONAL UNIFICATION (KINU), WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA 167 (2005).

7. Learn from the Great Leader Kim Il Sung and master communist dignity, the methods of revolutionary projects, and the people's work styles.
8. Preserve dearly the political life the Great Leader Kim Il Sung has bestowed upon you, and repay loyally for the Great Leader's boundless political trust and considerations with high political awareness and skill.
9. Establish a strong organizational discipline so that the entire Party, the entire people, and the entire military will operate uniformly under the sole leadership of the Great Leader Kim Il Sung.
10. The great revolutionary accomplishments pioneered by the Great Leader Kim Il Sung must be succeeded and perfected by hereditary successions until the end.

The tenth principle provides the linkage of absolute authority to Kim Jong Il. According to KINU, the Ten Great Principles are an expansive norm that controls every expression of DPRK citizens. Those who disobey are political or ideological criminals. The Principles' vagueness allows for arbitrary interpretation that makes them convenient "legal" tools for punishing people on political grounds. For example, a nine-year-old child's family was punished and disappeared on the basis of the Ten Great Principles because the child had scribbled over the faces of Kim Jong Il and Kim Il Sung in his textbook.⁸

The worship of the Great Leader and Dear Leader is so extreme that people have died to protect their portraits. Their portraits are ubiquitous; every home has at least one set. The North Korean Central Broadcast Agency on June 4, 1997, reported that before a fishing boat went down because of a typhoon, the sailors on board tied their portraits of

⁸ KINU (2005), *supra* note 7, at 168.

Kim Il Sung and Kim Jong Il to life-preservers, allowing the portraits to be saved while the sailors perished. They were posthumously titled heroes of the Republic.⁹

International media has also reported on this type of behavior. Time magazine reported that a North Korean caught in a fire is expected to save the portraits before his own children.¹⁰

In addition to this cult-like mentality, a culture of surveillance pervades the society. The government runs a covert surveillance network. The People's Security Agency, State Security Protection Agency, and Korean Workers' Party (KWP) each plant informants in all places of work and units of organization. They are recruited locally. Workers do not know who the informants are. They may number from one out of five to ten workers, so the workers must assume that everyone is an informant and behave accordingly.¹¹

The KWP is one of the two main organs for control over the people. The other is the People's Army. Kim Jong Il controls both. He is the general-secretary of the Korean Workers' Party (KWP), which controls the government and the army, and is chairman of the People's Army.¹² He inherited his position as KWP general-secretary from his father Kim Il Sung, as the previous KWP leader. Hereditary succession, as stipulated in the tenth of the Ten Great Principles, is not embraced by other communist states. The pervasiveness of Kim Jong Il's control is manifest in the many positions he holds in the

⁹ *Id.* at 193-194.

¹⁰ Donald Macintyre, *Still in the Picture*, TIME ASIA, Nov. 22, 2004, <http://www.time.com/time/asia/magazine>.

¹¹ KINU (2004), *supra* note 5, at 5-6.

¹² *Id.*

government organizational structure. He chairs the Politburo, which is the KWP's council of policy advisors. In addition, he is the premier for the Cabinet National Defense Judiciary Commission, which is responsible for oversight of national policy implementation. The Supreme People's Assembly merely approves without question Kim Jong Il's annual budget. Kim Jong Il is able to keep the elites in his machinery satisfied with lavish gifts and privileges. At the same time, millions suffer from chronic food insecurity perpetuated by his government.¹³

That the DPRK is probably the most controlled, authoritarian regime in the world works to the advantage of the prosecution of Kim Jong Il, as it lessens the difficulty to prove that he knowingly committed, ordered, solicited, induced, aided, abetted, assisted, or contributed to the commission of crimes against humanity, genocide, and war crimes and therefore would be individually liable for them. As the superior authority over the DPRK, he would also be individually liable for failing to repress or submit to judicial authorities the commission of these crimes. Of course, others at the top of his regime¹⁴

¹³ STEPHAN HAGGARD & MARCUS NOLAND, U.S. COMMITTEE FOR HUMAN RIGHTS IN NORTH KOREA, HUNGER AND HUMAN RIGHTS: THE POLITICS OF FAMINE IN NORTH KOREA 9 (2005).

¹⁴ Interview with Hwang Jang Yop, *supra* note 4. Hwang believes other officials responsible for crimes include the Party Secretaries for Propaganda (Chung Ha Chul), Police (Kae Un Tae), Personnel (Kim Kuk Tae), Military Industry (Chun Byung Hol), Worker Mobilization (Kim Choong Lin), Economy (Han Sung Ryong), Science Technology (Cho Tae Bok), Revolution Record (Kim Ki Nam). Other responsible persons are the principal chiefs of departments or offices: Inspection, Kim Jong Il's Office Mgmt., Party Org., Propaganda and Promotion, Int'l Relations, Military, Unification Front-Line, External Relations, 35th Room Intelligence Collection, War Strategy, Military Industry, Economic Policy Inspection, Light Industry, Agricultural Inspection, Science and Education, Workers' Group, Finance, 38th Room Office

are also criminally culpable and must be included in any UN investigation of the DPRK situation. But this article focuses on Kim Jong Il as the one most responsible for the abuses of his regime.

That Kim Jong Il had the requisite knowledge of these crimes is almost without question because of the very nature of the society that he and his father have constructed – one based on surveillance and absolute control. Kim Jong Il’s direct involvement in the prison camp system, where most of these crimes occur, is traceable to 1973, when he took over the Party’s security apparatus and reorganized it.¹⁵ The prison camp system was under his direct control and the number of inmates grew substantially, including the addition of four more camps in 1980.¹⁶ His direct control has been evident in the years since. After Kim Il Sung’s death in 1994, executions in the camps were suspended for about a month. But they reconvened when word spread that Kim Jong Il wanted to “hear

Mgmt., 39th Room Office Mgmt., Party History Research Room, Central Attorney General, Central Court, National Defense Committee (People’s Army General Political Bureau Chief, Vice Chair, and five Committee Members), Military Supply, Mobilization Bureau, People’s Army Defense Commander, Body Guards, National Security, and the People’s Security.

Hwang provided the names of persons holding these positions and, as a former member of the inner circle of Kim Il Sung and Kim Jong Il, understands how the D.P.R.K. power structure operates. Although Hwang defected in 1997, he apparently has sources he believes provide him with current information on the internal workings of the DPRK regime. He emphasizes that Kim Jong Il is the most responsible, as the other officials have little choice but to follow his decisions.

¹⁵ JASPER BECKER, *ROGUE REGIME, KIM JONG IL AND THE LOOMING THREAT OF NORTH KOREA* 86 (Oxford University Press 2005).

¹⁶ *Id.*

the sound of gunshots again.”¹⁷ Executions became daily in 1995 allegedly pursuant to Kim’s orders. KINU also reported that in 1998, Kim Jong Il instructed that firing squads in public executions aim at victims’ heads, as “their brains were bad.”¹⁸ Human rights investigator David Hawk reported that a former body guard of Kim Jong Il believed Kim Jong Il personally intervened to release him from a political prison camp after nearly four years of quarrying stones for 14 hours a day.¹⁹ Hawk also stated that such camps are administered by the National Security Agency, which reports directly to Kim Jong Il.²⁰ Kim Jong Il has a strong interest in fully controlling the activities of the National Security Agency, as it is the key agency for information collection.²¹ Informants for the agency include former camp inmates. Kim must know of the activities in the camps.

Indeed, Kim has reportedly closed down camps out of fear that the international community, particularly Americans, would discover their existence.²² Journalist Jasper Becker writes that Kim closed five camps, including several near Pyongyang, and moved the inmates to other camps apparently because he became alarmed that the outside world might learn about them. Considering Kim’s involvement in the camps’ development and

¹⁷ *Id.* at 98.

¹⁸ KINU (2005), *supra* note 7, at 47.

¹⁹ DAVID HAWK, U.S. COMMITTEE FOR HUMAN RIGHTS IN NORTH KOREA, THE HIDDEN GULAG, EXPOSING NORTH KOREA’S PRISON CAMPS 33 (2003).

²⁰ *Id.* at 26.

²¹ Han Young Jin, *Two Pillars of the North Korean Regime, Information Politics and the Reign of Terror, Kim Jong Il Directly Controls the NK National Security Agency*, DAILY NK, <http://www.dailynk.com> (last visited Oct. 20, 2005).

²² BECKER, *supra*. note 15, at 99.

his efforts to hide them, Becker concludes Kim Jong Il must “be conscious of how the camps violate every international norm, but not be concerned enough to change them—only to prevent the outside world from learning about them.”²³

In addition, Kim Jong Il controls confinement facilities outside of the prison camps. For example, pursuant to Kim Jong Il’s instructions in “Regarding Military’s Self-education for Minor Violators,” forced-labor units are organized and operating in each city and county.²⁴ Persons held in such facilities also suffer human rights abuses.

The opacity of the DPRK to foreigners is well-known. The secrecy extends to the inner circles of the Kim regime. Hwang Jang Yop, the highest-ranking defector from the DPRK and a key architect of the *juche* ideology, has noted, “Whenever there is a gathering, Kim Jong-il always emphasizes two things. One is keeping the party’s secrets, and the other is refraining from pinning one’s hopes on any individual official.”²⁵ Journalist Bradley K. Martin writes that Kim’s secretiveness may have been motivated by fear of the consequences of having his secrets revealed. Hwang said Kim “has cruelly killed countless people. His worst fear is having these crimes exposed.” Thus “keeping secrets is the essence of life in the party.”²⁶

²³ *Id.* at 100.

²⁴ KINU (2004), *supra* note 5, at 121.

²⁵ BRADLEY K. MARTIN, UNDER THE LOVING CARE OF THE FATHERLY LEADER, NORTH KOREA AND THE KIM DYNASTY 285 (St. Martin’s Press 2004).

²⁶ *Id.* at 287. As an example, Hwang said one of Kim Jong Il’s secretaries made the mistake of telling his wife of Kim’s life of debauchery (which includes corps of women for “sexual services” and entertainment, extravagant parties, and the most expensive foods of the world – even while millions were starving.). She wrote a letter to Kim Il Sung asking that he reprimand his son. In response, Kim Jong Il threw a drinking

Kim Jong Il is also likely aware of international criticism of the DPRK's human rights abuses. The government-controlled press has responded directly to such criticism. An example is its response to US President George W. Bush's meeting with North Korean defector Kim Chol Hwan, who wrote about his horrendous life in a DPRK prison camp in The Aquariums of Pyongyang. The state-run Korean Central News Agency specifically attacked the meeting by dismissing "defectors" as "just a handful of hooligans and criminals..."²⁷ In addition, the DPRK has participated in UN Commission on Human Rights sessions in Geneva to deny charges of human rights violations against it.²⁸ Many reputable organizations, such as KINU, the US State Department, Human Rights Watch, Amnesty International, and the UN Special Rapporteur on the situation of human rights in the DPRK, produce human rights reports on the DPRK that are easily accessible, such as on the internet, which Kim Jong Il is said to surf.²⁹ There is no indication that he is mentally incapacitated or under the control of others who block information from him. Thus, it is highly improbable that he would be unaware of the

party and in front of the guests he declared her a counterrevolutionary and ordered her execution, which was voluntarily carried out by her husband. "His intention was to issue a warning to those present that leaking whatever went on at drinking parties would be punishable by death."

²⁷ *KCNA Urges U.S. to Clearly Understand Purport and Agenda of Six-Party Talks*, KOREAN CENTRAL NEWS AGENCY, <http://www.kcna.co.jp/item/2005/200506/news06/24.htm> (last visited June 23, 2005).

²⁸ In March 2005, I directly told a D.P.R.K. delegate to the Commission about the human rights abuses that are widely known to be occurring in the D.P.R.K. Jubilee Campaign, directed by Ann Buwalda, provided my accreditation to the Commission. See *supra* note 1.

²⁹ *Profile: Kim Jong Il*, BRITISH BROADCASTING CORP. July 31, 2003, <http://news.bbc.co.uk/1/hi/world/asia-pacific/1907197.stm> (last visited Aug. 22, 2005).

existence of the abuses. Indeed, it is more probable that he, as the supreme leader, instigated them.

B. The DPRK has a policy of committing crimes against humanity, genocide, and war crimes.

The DPRK is permeated with human rights violations in every aspect of its society. The entire population is divided into three classes based on family background and loyalty: core, wavering, and hostile.³⁰ Although this practice has been allegedly abolished by law, it persists, as indicated by defectors.³¹ Those in the lower classes particularly face scrutiny and often arbitrary punishment for alleged misbehavior on political grounds. New York-based Human Rights Watch reported, “those at the bottom of this class system suffer permanent discrimination and the most intense persecution, a fate that is passed from generation to generation.”³²

Citizens must demonstrate absolute loyalty to Kim Jong Il; otherwise, they may be forcibly sent to political labor colonies, camps, or prison facilities without adequate due process. These constitute a distinct system of incarceration in the DPRK, according

³⁰ KINU (2004), *supra* note 5.

³¹ Address by Vitit Muntarbhorn, U.N. Special Rapporteur on the situation of human rights in the D.P.R.K., the U.N. Commission on Human Rights, 61st session (Mar. 29, 2005).

³² *Advancing Human Rights in North Korea, Testimony by Tom Malinowski before the U.S. Senate Committee on Foreign Relations*, HUMAN RIGHTS WATCH (Mar. 2, 2004), http://hrw.org/english/docs/2004/03/02/usint7793_txt.htm.

to David Hawk's *The Hidden Gulag, Exposing North Korea's Prison Camps*.³³ A second system consists of smaller, shorter-term detention facilities along the DPRK-People's Republic of China (PRC or China) border. They are used to punish North Koreans who flee to China, but are forcibly repatriated to the DPRK by Chinese authorities.³⁴

The facilities of both systems have a high rate of death for reasons such as hard labor and lack of food. Becker estimates about one million have died.³⁵ Those who have been repatriated face torture and if pregnant, forced abortion or infanticide motivated by the nationality (or potentially the ethnicity) of the child. Those who are Christians have also faced heightened abuse because of their religious faith. Rapes have also been reported in addition to beatings, torture, testing of chemical and biological weapons³⁶ and other gross mistreatment. Gilt -by-association is also the norm, with relatives of purged political prisoners sentenced with them to a lifetime of brutal forced labor without legal due process.³⁷ Types of labor include mining of gold, coal, iron, and magnesite under unsafe conditions and production of textile goods, logging, and farming, all under grueling, slave-like conditions.³⁸ Living conditions are horrifically unsanitary and, with

³³ HAWK, *supra* note 19, at 10. This report includes satellite photography to corroborate victims' testimonies.

³⁴ *Id.* See also Kim Sang-Chul, *On the Status of N.K. Defectors in China*, THE COMMISSION TO HELP NORTH KOREAN REFUGEES (CNKR), Oct. 8, 1999, <http://www.cnkr.org>.

³⁵ BECKER, *supra* note 15, at 87.

³⁶ KINU (2005), *supra* note 7, at 309.

³⁷ BECKER, *supra* note 15, at 95; HAWK, *supra* note 19.

³⁸ *Id.* U.S. State Dep't, *Democratic People's Republic of Korea, Country Report on Human Rights Practices*, (2005), <http://www.state.gov>, section 1(c) [hereinafter U.S. State Dep't Human Rights Report].

starvation-level rations, produce illness and death.³⁹ Crimes by the regime are by no means limited to these incarceration systems. Other facilities throughout the DPRK also are sites for abuses.⁴⁰ But for the purposes of this article, they provide a particularly strong factual foundation for building a criminal case against Kim Jong Il and his cadres.

Non-DPRK citizens are also victims of crimes. More than 500 Republic of Korea (ROK) prisoners-of-war, who may suffer abuses, are still reportedly incarcerated in the DPRK in violation of the Korean Armistice Agreement and Geneva Conventions.⁴¹ In addition, hundreds of kidnapping victims, who are still alive out of the thousands who have been kidnapped by the DPRK from the ROK, Japan, other parts of Asia, Europe, and the Middle East, suffer abuses as well.⁴²

These crimes reflect a culture of criminality that characterizes the Kim Jong Il regime. In addition to these violations, the government engages in trade of illegal items, such as drugs, and produces counterfeit money. DPRK embassies and diplomats abroad are known to channel funds from illegal activities to Kim Jong Il's personal slush fund. Kim Jong Il is in reality running a criminal enterprise.⁴³ Indeed, the economic benefits of the forced labor camps, borne through the criminal loss of many lives, could conceivably contribute significantly to the DPRK's gross national product. Forced labor itself may

³⁹ *Human Rights in North Korea*, CHRISTIAN SOLIDARITY WORLDWIDE, Dec. 10, 2002, <http://www.cnkr.org>.

⁴⁰ KINU (2004), *supra* note 5.

⁴¹ H. R. CON. RES. 168, which passed the U.S. House of Representatives July 11, 2005.

⁴² *Id.*

⁴³ MARCUS NOLAND, AVOIDING THE APOCALYPSE THE FUTURE OF THE TWO KOREAS 119 (Institute for International Economics 2000).

extend beyond the DPRK's boundaries with DPRK-government-owned farms and factories using North Korean workers located in the Czech Republic, Russia, Libya, Bulgaria, and Saudi Arabia, and Angola.⁴⁴ Trafficking of women and girls also extends beyond borders.

In addition, the threat of weapons of mass destruction extends beyond the nuclear weapons now contemplated by the six-party talks. The DPRK may have the world's largest arsenal of chemical weapons.⁴⁵ It also likely has a biological weapons capability.⁴⁶ It is a known proliferator of missiles and the fear is that this could extend to weapons-of-mass destruction materials to terrorists.⁴⁷ While these other matters are

⁴⁴ Tom Coburn, *North Korea: Illicit Activity Funding the Regime*, Chairman's Statement before the Subcomm. on Federal Financial Management, Government Information, and International Security of the U.S. Senate Comm. on Homeland Security and Government Affairs, 109th Cong. (April 25, 2006). Barbara Demick, *Koreans Toil Abroad Under Grim Conditions*, L.A. TIMES, Dec. 27, 2005.

⁴⁵ *Chemical Overview*, CENTER FOR NONPROLIFERATION STUDIES, MONTEREY INSTITUTE OF INTERNATIONAL STUDIES (2003) at http://www.nti.org/e_research/profiles/NK/Chemical; *Facts on North Korea One of the World's Most Secretive Nations*, CABLE NEWS NETWORK, Feb. 10, 2005, <http://www.cnn.com/2004/WORLD/asiapcf/04/22/nkorea.facts/index.html> ("North Korea is said to have an extensive chemical weapons program. A report by the Federation of American Scientists says that North Korea has chemical stockpiles of at least 180-250 tons of reserve-weaponized agents.").

⁴⁶ *Biological Weapons Overview*, CENTER FOR NONPROLIFERATION STUDIES, MONTEREY INSTITUTE OF INTERNATIONAL STUDIES (2003) at http://www.nti.org/e_research/profiles/NK/Biological; CABLE NEWS NETWORK, *supra* note 45.

⁴⁷ Interview with Hwang Jang Yop, *supra* note 4. Hwang believes the D.P.R.K.'s illegal activities are increasing, despite the international community's heightened surveillance, and with weapons transactions account for most of the D.P.R.K.'s foreign exchange earnings.

outside the scope of the ICC's jurisdiction, they further illustrate the impunity of the Kim Jong Il regime.⁴⁸

III. UN SECURITY COUNCIL ACTION FOR ICC JURISDICTION.

The DPRK is not a party to the treaty creating and governing the ICC, known as the Rome or ICC Statute.⁴⁹ Nonetheless, the ICC may have jurisdiction over crimes committed by DPRK citizens if the UN Security Council refers a case to it, acting under Chapter VII of the UN Charter, pursuant to Article 13(b)⁵⁰ of the ICC Statute.⁵¹ The

⁴⁸ The U.S. Treasury Dept. imposed penalties on Banco Delta Asia in the Chinese territory of Macao on Sept. 15, 2005, for allegedly laundering money for the D.P.R.K. Joseph Kahn, *North Korea and U.S. Spar, Causing Talks to Stall*, N.Y. TIMES, Nov. 12, 2005. In January 2006, U.S. Treasury officials visited Seoul to discuss ways to stop the D.P.R.K.'s alleged illegal financial activities that may help finance the D.P.R.K. nuclear weapons effort. The U.S. has clamped down on companies it suspects of aiding the D.P.R.K. in counterfeiting, money laundering and the drug trade. *U.S. Officials in Seoul on N. Korea's Financial Moves*, REUTERS, Jan. 21, 2006.

⁴⁹ ICC Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/9(1998), <http://www.icc-cpi.int/about.html> (last visited July 27, 2005) [hereinafter the ICC Statute].

⁵⁰ See *id.* art. 13(b).

⁵¹ Prosecution before the ICC is one of several actions that could be pursued against Kim Jong Il or the D.P.R.K. Other possibilities vary in effectiveness and may not have the political weight of a Security-Council-initiated ICC prosecution, but with such a prosecution create a comprehensive legal strategy against the regime. They include actions against Kim Jong Il in state courts, such as Japan, with jurisdiction based on grounds such as injury to that state's citizen; actions in any court willing to exercise jurisdiction if adequately merited under a theory of universal jurisdiction; actions against Kim Jong Il in

jurisdiction would be limited to genocide, crimes against humanity, and war crimes pursuant to Article 5 of the ICC Statute.⁵² The acts also must have been committed after

U.S. courts under the Alien Tort Claims Act. Regarding actions brought before U.N. treaty bodies, the D.P.R.K. is a state party to two of the four treaties with bodies that may consider individual communications, the ICCPR and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), but it is not a party to the Optional Protocols required for such communications. (The D.P.R.K. is also a party to the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.) The D.P.R.K. sought to withdraw from the ICCPR in August 1997 but the Secretary-General was of the opinion that such a withdrawal would not be possible unless all state parties to the ICCPR agreed to it. The D.P.R.K. also has not declared an acceptance of the competence of the U.N. Human Rights Committee for hearing complaints from state parties of the ICCPR. Regarding other inter-state complaints in the treaty body system, the D.P.R.K. has made a reservation specifically opting out of the CEDAW Article 29 regarding disputes between state parties. The D.P.R.K. also does not recognize compulsory jurisdiction by the International Court of Justice. The U.N. Commission on Human Rights has passed resolutions condemning D.P.R.K. human rights violations and has appointed a Special Rapporteur on the situation of human rights in the D.P.R.K. Other relevant Special Rapporteurs include those on extrajudicial executions, the right to food, freedom of opinion and expression, freedom of religion, and violence against women. Relevant U.N. Working Groups include those on Arbitrary Detention and on Enforced and Involuntary Disappearances. D.P.R.K. victims and others with direct evidence who have exhausted domestic remedies or can show that domestic redress would be ineffective may use the 1503 procedure of the U.N. Commission on Human Rights. They may also for violations of women's rights present a complaint to the U.N. Commission on the Status of Women. However, this mechanism and the 1503 procedure are not intended for direct redress of individual injury. Other mechanisms for individual complaints exist in U.N. organizations, such as the International Labor Organization.

⁵² See ICC Statute, *supra* note 49, art. 5. Although the crime of aggression is also referenced in Article 5, it is not an actionable crime under the ICC Statute until the treaty is amended with a definition and elements for that crime.

the entry into force of the ICC Statute, which was July 1, 2002, pursuant to Article 11.⁵³ Article 17 also requires that the domestic court system of the state in question must not be adequately addressing the crimes, as the ICC's jurisdiction is complementary to national judicial systems.⁵⁴ Among the criteria for admissibility, if the state that has jurisdiction over the case is "unwilling or unable genuinely to carry out the investigation or prosecution" and the case is of sufficient gravity to justify further action by the ICC, then the ICC may hear the case.⁵⁵ Given Kim Jong Il's control of all government functions, the DPRK legal system's failure to provide adequate judicial process generally, and the severity of the regime's abuses, these admissibility requirements are most probably met.

⁵³ See *id.* art. 11.

⁵⁴ See *id.* art. 1 and art. 17. In its Jan. 25, 2005, report, the UN's International Commission of Inquiry on Darfur stated that complementary jurisdiction may extend to jurisdiction exercised by states on the basis of universal jurisdiction. It stated that a general rule of international law exists authorizing States to assert universal jurisdiction over war crimes, crimes against humanity and genocide. It stated further that generally principles currently prevailing arguably make the exercise of universal jurisdiction subject to two major conditions. First, the person suspected or accused of an international crime must be present on the territory of the prosecuting state. Second, before initiating criminal proceedings, this State should request the territorial State (where the crime has allegedly been perpetrated) or the State of active nationality (the State of which the person suspected is a national) whether it is willing to institute proceedings against that person and hence prepared to request his or her extradition. Only if the State or States in question refuse to seek the extradition, or are patently unable or unwilling to bring the person to justice, may the State on whose territory the person is present initiate proceedings against him or her.

⁵⁵ See ICC Statute, *supra*, note 49, art. 17.

It is difficult to imagine under current circumstances the DPRK judiciary fairly trying the man who controls it.⁵⁶

In addition, Section V of this article will demonstrate that the abuses most likely constitute genocide, crimes against humanity, and war crimes. The magnitude and severity of the crimes are of sufficient gravity to justify further action by the ICC. The DPRK situation is at least of the same order as, if not worse than, the Darfur, Democratic Republic of Congo, and Northern Uganda situations currently under investigation by the ICC. At least one million persons are estimated to have died in the DPRK's prison camps, assuming that 10 percent of a constant prison population of 200,000 to 300,000 died each year.⁵⁷ In addition, famine due to government intent or recklessness has killed one to 2.5 million persons. While many deaths occurred prior to July 1, 2002, they are an important reminder of the character of the Kim Jong Il regime. Since this date, an

⁵⁶ KINU (2005), *supra* note 7, at 90-91, states: "Structurally, the North Korean court system is placed below the Supreme People's Assembly, the National Defense Commission, and the cabinet. As a result, there is a strong possibility of human rights violations because the independence of the court system is not guaranteed and the courts are controlled by the 'guidance' of other state organizations. Most importantly, the independence of the court is difficult to maintain since the judges are politically responsible for the sentences they impose." KINU (2005), *supra* note 7, at 93, also notes that North Korea has adopted a people's jury system. It appears to follow somewhat the jury system of the Anglo-American courts. "But, in reality, it is a system employed to exercise the Party's control over the judicial system... In fact, their primary role is not to provide fair and objective trials but to rubberstamp the conviction of the accused wrongdoer." KINU (2005), *supra* 7, at 119, notes that whether an accused is executed usually depends on his or her family background.

⁵⁷ BECKER, *supra* note 15, at 87.

estimated 80,000 or more have died.⁵⁸ This figure is constantly growing. Today's victims, many of whom have suffered for decades, would undoubtedly have their interests served by an ICC investigation and prosecution.

Crimes against humanity and war crimes in the situation of Sudan have been sufficient to be a threat to peace, pursuant to Chapter VII⁵⁹ of the UN Charter, thereby allowing Security Council referral to the ICC on this basis.⁶⁰ While the DPRK is not

⁵⁸ See *infra* notes 138 and 139 and accompanying text. It is difficult to determine the number of deaths caused by crimes against humanity, genocide, and war crimes in the D.P.K.R. Becker's estimate of 200,000 to 300,000 persons in the camps is higher than the U.S. State Department's estimate of 150,000 to 200,000. However, the 10 percent death rate may be too conservative. In addition, it does not include deaths outside of the camps.

⁵⁹ Article 39 of Chapter VII states that the "Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." Article 41 states "the Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures..." Article 42 provides for use of force if the Article 41 measures are inadequate. Articles 25 and 48 of the U.N. Charter obligate member states to carry out decisions taken under Chapter VII. The DPRK as a member state would thus be obligated.

In addition, the concept of "the responsibility to protect" has been emerging as required of states regarding their own citizens and that failure to meet this responsibility allows for the international community to act to address this breach. S. C. Res. 1674, adopted April 28, 2006, expresses the Security Council's support for the protection of civilians and other enforcement of international legal obligations, although it does not invoke its Chapter VII powers. S. C. Res. 1674, available at <http://www.un.org>.

⁶⁰ S. C. Res. 1593 took note of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur, determined that the situation in Sudan

troubled by fighting between rebel and government forces as is Sudan, its activities in total pose a threat to international peace and security. The DPRK's likely production of nuclear, chemical, and biological weapons of mass destruction, its known proliferation of missiles and potential WMD transferal to terrorists are threatening to peace. Trade with terrorists is not difficult to contemplate given that the government engages in trade of illegal drugs and other illegal items in criminal networks that terrorists may also access.

The oppression of the Kim Jong Il regime and the refusal by China to protect DPRK refugees prevent the instability that characterizes the Darfur situation. Such "stability" (which may be ultimately precarious) founded upon crimes against humanity, genocide, and war crimes, while inadequate food supplies also continue in the DPRK, should not preclude a Security Council referral to the ICC. Security Council Resolution 1593 used broad language to describe the basis for its Chapter VII action. It stated that "the situation in Sudan" constituted a threat to international peace and security, not specifically limiting the threat to violations of international humanitarian law and human rights law in Darfur. Similarly, the situation in the DPRK constitutes a threat to international peace and security. A Security Council referral of the DPRK situation, in which one or more of the crimes under Article 5 appears to have been committed, to the ICC would thus be possible on that basis. The language of the Security Council Resolution would necessarily not name particular suspects to avoid any pre-judgment of guilt.

continued to constitute a threat to international peace and security, acted under Chapter VII of the UN Charter, and decided to refer the situation in Darfur since July 1, 2002, to the Prosecutor of the ICC. The International Commission of Inquiry found the perpetration of crimes against humanity and war crimes, but not genocide.

Security Council action to refer the DPRK situation to the ICC prosecutor would be difficult to achieve, in some ways for the same reasons economic sanctions would also be. The PRC, for example, would be highly unlikely to support such an action. The United States, because of the Bush administration's opposition to the ICC, may also have difficulty with this avenue. However, both the PRC and the United States did not veto such an action in the case of Darfur in the Sudan and so demonstrate an unwillingness to completely close off such a possibility. The PRC also did not veto Security Council sanctions against four Sudanese individuals, and the US voted in favor.⁶¹ Given its energy needs and strategic goals in Africa, the PRC has an interest in maintaining good relations with the Sudan, yet allowed these Security Council sanctions.

Thus various factors could conceivably coalesce to allow all permanent Security Council members to either abstain or vote positively for a referral of the DPRK situation to the ICC. Such factors include extreme lack of cooperation by the DPRK in the six-party talks, highly publicized exposure of DPRK human rights violations that makes a veto politically difficult, DPRK engagement in terrorism or crime of a magnitude that makes continued PRC support untenable, any security threat or gain that makes cooperation with the permanent Security Council members more attractive than continued support of the DPRK. This type of cooperation was the case during the last

⁶¹ S. C. Res. 1593 and 1672 available at <http://www.un.org>. In subsequent Security Council Resolution 1679, the PRC voted in favor of and even suggested tough language to consider under Chapter VII "strong and effective measures, such as a travel ban and assets freeze, against any individual or group that violates or attempts to block the implementation of the Darfur Peace Agreement." USUN Press Release, *Remarks by Ambassador John R. Bolton, U.S. Representative to the United Nations, on Iran, Sudan and Other Matters, at the Security Council Stakeout*, May 16, 2006, <http://www.state.gov>.

DPRK nuclear crisis in 1994. Before a sanctions resolution against the DPRK was to be considered by the Security Council, the PRC told the DPRK it may not be able to count on its veto because of the strength of international opinion against it. The PRC also had been privately irritated by the DPRK's actions and concerned that they could lead to problems at its borders. The DPRK soon after the Chinese pressure engaged in negotiations to end the crisis. Thus, PRC cooperation is not an impossibility.⁶²

Despite these political difficulties, this article explores the possibility of prosecution before the ICC because it demonstrates the gravity of the abuses of the DPRK regime and how legal action would be useful. If the current six-party talks fail to make concrete progress in denuclearizing the Korean peninsula, the prospect of UN Security Council sanctions is likely. In such a case, Security Council members should consider an investigation and referral of the DPRK situation to the ICC (or, as Section VI of this article will discuss, to a special tribunal) as seriously as it considers economic sanctions. Prosecution targets the persons responsible for DPRK behavior and thus is more just than the blunt instrument of economic sanctions that harm millions. Of course, economic sanctions would offer the advantage of being more enforceable at this time than arrest warrants for Kim Jong Il and his cadres.

⁶² DON OBERDORFER, *THE TWO KOREAS* 320 (Basic Books 2001). Current informal Chinese commentary has included disrespect of Kim Jong Il as someone who inherited rather than earned his position, contrary to Communist doctrine, and as responsible for the D.P.R.K.'s own version of "cultural revolution," which is considered by many Chinese to be former Communist Party Chairman Mao Zedong's great mistake.

Still, the political weight of the issuance of an arrest warrant based on the prosecutor showing “reasonable grounds” to believe that the person has committed a crime within the jurisdiction of the ICC (Article 58), and even more strongly, a confirmation by the ICC Pre-Trial Chamber that the prosecutor has shown “sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged” (Article 61(7)),⁶³ would bear potentially negative consequences for Kim Jong Il. The stigma of an objective legal determination by the ICC that it found reasonable grounds to believe that he was criminally responsible for crimes against humanity, genocide, and war crimes would carry greater credibility than political condemnations from self-interested states.

Perhaps even the political situation could change sufficiently to allow an arrest and prosecution of Kim Jong Il. Such was the situation in the case of then-Federal Republic of Yugoslavia (FRY) President Slobodan Milosevic, who was indicted four years after negotiating the Dayton accords and was at trial in The Hague until his death by natural causes on March 11, 2006. The events leading up to his trial included his loss of an election, his attempt to rig the results, his loss of office by popular revolution, and finally his arrest and deportation.⁶⁴ The political circumstances necessary for an actual prosecution of Kim Jong Il would also probably require the popular support of the North Korean people. While difficult to imagine at this time, the removal of Kim Jong Il under

⁶³ See ICC Statute, *supra* note 49, art. 58 and 61(7).

⁶⁴ Prosecutor v. Slobodan Milosevic et. al., Case No. IT-99-37, Initial Indictment, para. 43 (May 22, 1999). Marlise Simons, *World Briefing/ Europe: The Hague: Inquiry Shows Milosevic Died a Natural Death*, N.Y. TIMES, Apr. 6, 2006. Gary J. Bass, *Milosevic in The Hague*, FOREIGN AFFAIRS, May/June 2003.

these circumstances would mean a “regime change” founded on far sounder ground than any that could result from the use of military force.⁶⁵

In addition, just as the Milosevic indictment advanced the development of international law, the instigation of a prosecution against Kim Jong Il would pose a significant addition to the growing international legal regime against impunity. A charge for the crime against humanity of extermination, for example, for the DPRK policies that

⁶⁵ The United States used military force to invade Panama in December 1989 and gained custody of General Manuel Noriega, who was tried in Florida on drug trafficking charges. A U.S. invasion of the D.P.R.K. to arrest Kim Jong Il would not be a recommended course, however, as the risk of excessive casualties would be high. MICHAEL O’HANLON & MIKE MOCHIZUKI, *CRISIS ON THE KOREAN PENINSULA, HOW TO DEAL WITH A NUCLEAR NORTH KOREA* 60-62 (McGraw-Hill 2003) (“even though U.S.-ROK forces enjoy superiority and could increase their superiority quickly through a U.S. military buildup, they could not be confident of winning an offensive war against the DPRK with low casualties to themselves and surrounding civilian populations...North Korea would likely be much harder to defeat than Iraq.”). A peaceful, popularly supported, more democratic removal of Kim Jong Il would also be more likely to produce an acceptable replacement for him.

The question of D.P.R.K. governance can be linked to the larger question of resolving the Korean War. The problems on the Korean peninsula may be framed as unfinished business of the UN (and its key member states) in ending Japanese colonialism and in ending the Korean conflict. See Grace M. Kang, *The Three Freedoms of the United Nations in Northeast Asia*, *KOREA OBSERVER*, Vol. 36, No. 4 (2005). The UN Security Council acted under Chapter VII to create a US-led multilateral force to repel northern forces from the south in 1950. The UN Command continues today. A possible outcome could be the creation of a UN peacekeeping mission to monitor a peace treaty officially ending the Korean War and the unification of north and south. Democratic elections would be a key component of peacebuilding efforts. A rotating or joint presidency could accommodate both northern and southern constituencies. This is one type of context that could allow for the enforcement of arrest warrants against Kim Jong Il and his cadres.

have led to mass starvation, would mark new ground for a crime that has occurred repeatedly in states and will undoubtedly appear again.⁶⁶ A growing caseload against “atrocities crimes” – a term for the complex categories of crimes that are under the jurisdiction of international criminal tribunals and established by “atrocity law”⁶⁷ - reinforces their illegality, promoting deterrence and universal intolerance of their commission.

IV. THE LEGAL FRAMEWORK FOR A CASE AGAINST KIM JONG IL FOR CRIMES AGAINST HUMANITY, GENOCIDE, AND WAR CRIMES.

The applicable law for cases before the ICC is stated in Article 21 of the ICC Statute. It states that the ICC shall apply first, the ICC Statute, Elements of Crimes and its Rules of Procedure and Evidence; second, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; and failing that, general principles of law derived by the Court from national laws of legal systems of the world.⁶⁸ Thus, let us turn to the key articles of the ICC Statute to begin our analysis of a legal case against Kim Jong Il for crimes against humanity, genocide, and war crimes.

⁶⁶ David Marcus, *Famine Crimes*, 97 AM. J. INT’L L. 245 (2003).

⁶⁷ David J. Scheffer, *The Future of Atrocity Law*, 25 SUFFOLK TRANSNAT’L L. REV. 389 (2002).

⁶⁸ See ICC Statute, *supra* note 49, art. 21.

Establishing individual criminal liability linking crimes to Kim Jong Il is of course critical for any prosecution against him. ICC Statute Article 25 Individual criminal responsibility states:

...a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide; ...⁶⁹

⁶⁹ See *id.* art. 25.

In addition, the ICC Statute provides for individual criminal liability by attaching it to superior authority. This enhances a case against Kim Jong Il as he enjoys apparently absolute superior authority. The ICC Statute also specifically states that official capacity as a Head of State or Government does not exempt criminal responsibility, thus allowing the possible prosecution of Kim Jong Il, irrespective of his position.⁷⁰ This codifies the precedent set by the indictment of then-FRY President Slobodan Milosevic in 1999.⁷¹

Article 28 Responsibility of commanders and other superiors makes the link between those who actually carried out the crimes and those who are their superiors when the superiors failed to prevent or repress the crimes. It states:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

⁷⁰ See *id.* art. 27. The Security Council's reliance on Chapter VII of the UN Charter for a referral to the ICC would allow for prosecution of the head of a state that is not a party to the ICC Treaty.

⁷¹ Prosecutor v. Slobodan Milosevic et. al., *supra* note 64.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.⁷²

While the above includes mental elements for criminal responsibility, the ICC Statute also sets forth the requirements for the mental aspect of crimes generally in Article 30 Mental Element. This article requires:

a person shall be criminally responsible and liable for punishment ...only if the material elements are committed with intent and knowledge... [A] person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events...

“[K]nowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.⁷³

⁷² See ICC Statute, *supra* note 49, art. 28.

⁷³ See *id.* art. 30.

The Elements of Crimes, named as a source of law in Article 21, provide further instruction on the mental element, as they shall assist the Court in the interpretation and application of [A]rticle 6 Genocide, Article 7 Crimes against humanity, and Article 8 War Crimes, according to Article 9.⁷⁴ The general introduction to the Elements of Crimes states that “Existence of intent and knowledge can be inferred from relevant facts and circumstances.”⁷⁵ Thus the requirements of Article 30 Mental Element to the crimes addressed by Articles 6, 7, and 8 can be met by inference.

Articles 6, 7, and 8 provide the additional legal requirements for establishing Genocide, Crimes against Humanity and War Crimes. The Elements of Crimes breaks each crime down into component parts (elements) that must be proved for a conviction. The elements generally list conduct first and then consequences and circumstances associated with each crime. The Prosecutor must prove the elements of each crime, including mental intent, beyond a reasonable doubt, as the accused is presumed innocent until proven guilty, pursuant to Article 66.⁷⁶ In addition, Article 22(2) Nullum crimen sine lege states that a definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. This codifies existing customary

⁷⁴ See *id.* art. 9. See David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT’L L.J. 47, 53 (2002) (“Narrow-minded analyses that only examine the ICC Treaty and ignore the supplemental documents can be greatly misleading and simply erroneous.”).

⁷⁵ See Report of the Preparatory Commission for the International Criminal Court; Addendum: Finalized Draft Text of the Elements of Crimes, U.N. Doc. PCNICC/2000/INF/3/Add.2 (2000), at 112, available at http://www.iccnw.org/documents/iccbasics/ElementsOfCrimes_eng.pdf [hereinafter Elements of Crimes].

⁷⁶ See ICC Statute, *supra* note 49, art. 66.

law.⁷⁷ Section V of this article provides the additional specific legal requirements for each type of crime.

Thus, the above is the basic legal framework for forming a case against Kim Jong Il. Section V analyzes facts using this framework to determine whether Kim Jong Il is liable for specific crimes. It aims to determine if published facts from credible sources form “a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed” pursuant to Article 53 Initiation of an investigation.⁷⁸ After the initiation of an investigation by the Prosecutor, the factual standard for an issuance of an arrest warrant by the Pre Trial Chamber is “reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court,” pursuant to Article 58 Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear.⁷⁹ After the accused’s appearance before the Court, the factual standard for a confirmation of the charges by the Pre-Trial Chamber is “sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged,” pursuant to Article 61 Confirmation of the charges before trial.⁸⁰ Of course, these are lower standards than the “beyond a reasonable doubt” standard for a conviction.⁸¹

⁷⁷ See ICC Statute, *supra* note 49, art. 22(2); ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 154 (Oxford University Press 2001).

⁷⁸ See ICC Statute, *supra* note 49, art. 53.

⁷⁹ See *id.* art. 58.

⁸⁰ See *id.* art. 61.

⁸¹ See *id.* art. 66.

V. ANALYZING THE LAW AND FACTS FOR SPECIFIC CRIMES.

The following discussion systematically applies the law to facts to determine if Kim Jong Il and his cadres are criminally liable for genocide, crimes against humanity, and war crimes. It sets forth the legal requirements for particular crimes and applies them, with the legal requirements for individual responsibility and mental intent stated in Section IV, to credible facts in the public domain. While many recent reports rely on testimonies of crimes prior to July 1, 2002, they indicate the likelihood of such crimes taking place within the temporal jurisdiction of the ICC. There is no indication of a substantial reduction of these crimes.⁸²

A. Genocide.

Article 6 Genocide states “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;

⁸² KINU (2005), *supra* note 7, Executive Summary (In response to international pressure to improve its human rights, the DPRK has chosen to emphasize sovereignty and ‘our-style human rights.’ They also have revised relevant laws, but have not genuinely improved the human rights situation.). U.S. State Dep’t Human Rights Report, *supra* note 38 (The government decreed a new penal code in 2004. Gaps remain between principles and practice.)

- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁸³

In addition to the forms of individual criminal responsibility described above, Article 25 Individual criminal responsibility also states that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person “(e) In respect of genocide, directly and publicly incites others to commit genocide.”⁸⁴

Genocide is one of the most serious international criminal law violations and therefore is strictly construed, reinforcing the strict construction requirement of Article 22 Nullum crimen sine lege.⁸⁵ The Statute and the Elements of Crimes do not define “national, ethnical, racial or religious group.” Other tribunal rulings and authorities on international law are instructive as to their meaning. The International Criminal Tribunal for the former Yugoslavia (ICTY) Trial Chamber in *Blagojevic & Jokic* stated that a national, ethnical, racial or religious group is identified “by using as a criterion the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics.”⁸⁶ The International Criminal Tribunal for Rwanda (ICTR) Trial Chamber in *Akayesu* stated that a national group is a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties; an ethnic group is generally

⁸³ See *id.* art. 6.

⁸⁴ See *id.* art. 25.

⁸⁵ See *id.* art. 22.

⁸⁶ Prosecutor v. Blagojevic & Jokic, Case No. IT-02-60, Judgment, Trial Chamber I (January 17, 2005).

defined as a group whose members share a common language or culture; the conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors; the religious group is one whose members share the same religion, denomination or mode of worship.⁸⁷

While many prisoners probably do not constitute a “national, ethnical, racial or religious group” as such, that is distinguishable on those grounds from the DPRK officials who inflict harm on them, there is still substantial testimony of actions against persons based on national and religious grounds. In addition, *Akayesu* indicates that it is not impossible to punish under the Genocide Convention the physical destruction of a group that is stable and membership is by birth but nonetheless is not a national, racial, ethnical, or religious group.⁸⁸ This would arguably support a finding of genocide for those North Koreans who suffer physical destruction because they are the relatives of political prisoners or politically suspect persons - a group determined by birth. Given the persistent division of the population into core, wavering, and hostile categories based

⁸⁷ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment Trial Chamber I, para. 512-515 (Sept. 2, 1998). The UN’s International Commission of Inquiry on Darfur has stated that national groups means those sets of individuals who have a distinctive identity in terms of nationality or of national origin; racial groups means those sets of individuals sharing some hereditary physical traits or characteristics; ethnical groups refer to sets of individuals sharing a common language, as well as common traditions or cultural heritage; religious groups encompass sets of individuals having the same religion, as opposed to other groups adhering to a different religion. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Jan. 25, 2005.

⁸⁸ See *Akayesu*, *supra* note 87, para. 516.

primarily on the actions of previous generations and the punishment of relatives of alleged “criminals” in addition to the “criminals” themselves, certainly an argument can be made that a relatively stable and permanent group is targeted whose membership is determined largely by birth.

However, the UN’s International Commission of Inquiry on Darfur (Darfur Commission) still relied on the four groups, not the more open-ended “stable and permanent” characterization, as affording protection from genocide. It allowed for an expansive definition of membership by emphasizing a subjective standard: whether the victim perceived and was perceived to be a member of one of the four groups. It stated that this expansive determination based on subjective perceptions of members of groups is part of international customary law.⁸⁹ The Commission noted in the case of the Rwandan genocide:

the Tutsi and the Hutu do not constitute at first glance distinct ethnic, racial, religious or national groups. They have the same language, culture and religion, as well as basically the same physical traits. In *Akayesu* the ICTR Trial Chamber emphasized that the two groups were nevertheless distinct because (i) they had been made distinct by the Belgian colonizers when they established a system of identity cards differentiating between the two groups ...and (ii) the distinction was confirmed by the self-perception of the members of each group.⁹⁰

⁸⁹ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Jan. 25, 2005, para. 501.

⁹⁰ *Id.* para. 498.

Cases subsequent to *Akayesu* also ground genocide to the four groups. *Nahimana, Barayagwiza & Ngeze*, for example, called the Tutsis an ethnic group.⁹¹ That the Tutsis were associated with a political agenda, “effectively merging ethnic and political identity” did not erode the protection due them nor, apparently, the characterization of their group as ethnic. This would help support a case of genocide for North Koreans born into a targeted political class.⁹² Whether the ICC would rule in favor of an expansive reading of protected groups, i.e. any group that was stable and permanent, as mentioned by *Akayesu* is unknown. Article 22’s strict construction requirement indicates it would not.⁹³ Thus whether North Koreans who suffer physical destruction perceive themselves and are perceived to be targeted on national, ethnical, racial, or religious grounds, and other requirements of genocide (e.g. special intent, as discussed below), would have to be determined.

Perhaps the court could seize upon an expansive reading of culture as a way to distinguish on ethnical grounds persons who suffer physical destruction because they are relatives of political prisoners or are born into a persecuted class. The physical destruction, in part, of such a group would include killing and causing serious bodily or mental harm (well-documented in the prison camps), deliberately inflicting conditions of life calculated to bring about physical destruction (particularly in the prison camps, but also through inadequate food distribution outside of the camps), imposing measures intended to prevent births (due to the prohibition of sex and forced abortions in the prison

⁹¹ Prosecutor v. *Nahimana, Barayagwiza & Ngeze*, Case No. ICTR-99-52-T Judgment and Sentence, Trial Chamber I, para. 969 (3 December 2003).

⁹² *Id.*

⁹³ See ICC Statute, *supra* note 49, art. 22.

camps), and forcibly transferring children (to the prison camps). However, strict construction as required by Article 22 makes such a reading unlikely.⁹⁴

While a case for genocide on these grounds may thus be a legal stretch, the targeting of North Koreans on national and religious grounds appears to be well within the definition of genocide. The national (and potentially ethnical) cases are the forced abortions and killing of babies who were fathered by Chinese or other non-Koreans. Perpetrators have explicitly stated that they were performing these acts because the fetus or baby was “half-Han Chinese.”⁹⁵ The mother was typically a North Korean who had fled to China, become pregnant there and was forcibly repatriated to the DPRK.

In addition, there have been numerous accounts of persons who were targeted with greater levels of torture and killing because of their religion, e.g. Christianity.⁹⁶

⁹⁴ *Id.*

⁹⁵ HAWK, *supra* note 19, at 59. Bill Powell, *Running Out of the Darkness*, TIME, May 1, 2006, at 33-35 (North Korean guard Hwang Myong Dong repeatedly referred to a pregnant North Korean woman’s unborn baby as ‘the Chink’ and beat her after ordering her to abort the fetus herself. She underwent a forced abortion.). See Article 33 of the PRC’s Constitution, which states, “All persons holding the nationality of the People’s Republic of China are citizens of the People’s Republic of China...” Article 5 of the Nationality Law of the PRC states, “Any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality...” Thus the half-Chinese babies are targeted on national grounds. They are targeted on potentially ethnical grounds in that the baby perhaps would have been raised learning Chinese language and culture and would have taken on Chinese identity, particularly given the patriarchal character of Korean and Chinese societies.

⁹⁶ HAWK, *supra* note 19, at 58.

Victims of execution include members of underground Christian churches.⁹⁷ Persons engaging in religious proselytizing may be arrested and subjected to harsh punishment, including imprisonment, prolonged detention without charge, torture, or execution.

While the number of religious detainees or prisoners is undetermined, many people are reportedly detained for their religious beliefs and activities. Starvation and forced labor are common in incarceration.

In 2002, witnesses testified before the US Congress on the treatment of persons held in prison camps through the early 1990s.⁹⁸ The witnesses stated that prisoners held on the basis of their religious beliefs generally were treated worse than other inmates. One person testified that in 1990, while serving a sentence in a prison that had a cast-iron factory, she witnessed the killing of several elderly Christians by security officers who poured molten iron on them after they refused to renounce their religion and accept the state ideology of *juche*. KINU reported that a defector testified that five persons who were caught trying to propagate religion in 2001 were executed by firing squad. While these crimes took place before 2002, they indicate the likelihood of similar crimes taking place within the temporal jurisdiction of the ICC. This is particularly likely given that the

⁹⁷ U.S. State Dep't, *International Religious Freedom Report*, (2004), at <http://www.state.gov> (last visited Aug. 4, 2005) [hereinafter U.S. State Dep't Religious Freedom Report]. DAVID HAWK, U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, THANK YOU FATHER KIM IL SUNG: EYEWITNESS ACCOUNTS OF SEVERE VIOLATIONS OF FREEDOM OF THOUGHT, CONSCIENCE, AND RELIGION IN NORTH KOREA 49 (2005).

⁹⁸ U.S. State Dep't Religious Freedom Report, *supra* note 97.

regime has increased repression of unauthorized religious groups in recent years.⁹⁹ The US State Department reported that persons who proselytize or were repatriated and found to have contacted Christian missionaries outside the country were reportedly punished severely, tortured, or executed. News reports indicated that the DPRK government had taken steps to tighten control and increase punishments at the Chinese border, and had also increased the award for information on any person doing missionary work.¹⁰⁰

KINU's reporting is consistent with this scenario. It noted that the DPRK imposes heavier punishment on those who make contact with ROK practitioners of religion, believing that it would lead to foreign encroachment and hamper discipline. One person who contacted Christians in the PRC was sentenced to three years of work "rehabilitation." Another defector reported that he was arrested twice because someone informed the authorities that he had contacted a missionary. He was released after he testified that he was not a Christian. Some 60 persons reportedly received 15-year prison terms for visiting a church upon unconfirmed news that they would be given 15 kilograms of corn if they became Christians.¹⁰¹ A Seoul-based NGO reported that a family of four refugees, who converted to Christianity in the PRC, was forcibly

⁹⁹ *Id.* KINU (2005), *supra* note 7, at 163 (North Korean authorities have recently begun to control Christian missionary work more strictly.)

¹⁰⁰ *Id.*

¹⁰¹ KINU (2004), *supra* note 5, at 190-191.

repatriated to the DPRK in 2002 and summarily executed because they refused to deny their Christian faith.¹⁰²

While both the half-Chinese babies and the Christians may be numerically small in comparison to the overall population of abuse victims, they nonetheless meet the legal requirements to constitute genocide. A large number of victims is not necessarily required for a genocide conviction. Article 6, which codifies the customary international rule, does not seem to require that the victims of genocide be numerous. ...as long as the other requisite elements are present, the killing or commission of the other enumerated offences against more than one person may amount to genocide.¹⁰³ In *Krstic*, the Trial Chamber held that “an intent to destroy only part of the group must nevertheless concern a substantial part thereof, either numerically or qualitatively.”¹⁰⁴

With respect to the half-Chinese babies, it appears that all of that group who were born to detainees have been targeted. While facts need to be further investigated, they constitute at least qualitatively a substantial part of a group defined by its national character. Reports on this targeting make no mention of some half-Chinese babies being spared; all were seemingly killed in detention.¹⁰⁵ KINU reported “All North Korean defectors testify that they have never seen any female inmate being released from detention centers accompanied by their children. This fact supports the fact that murders

¹⁰² Tim A. Peters, *Helping Hands Korea, Pathétique: A Symphony of Refugee Tears Unheeded*, Testimony Before Subcomm. on Asia and the Pacific of the U.S. House of Rep. Comm. on International Relations, 108th Cong. (April 28, 2004).

¹⁰³ See ICC Statute, *supra* note 49, art. 6; CASSESE, *supra* note 77, at 107.

¹⁰⁴ Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, Trial Chamber, para. 634 (Aug. 2, 2001).

¹⁰⁵ Example is HAWK, *supra* note 19.

of newborn babies are routinely carried out at detention facilities.”¹⁰⁶ Christians also appear to be significantly targeted.¹⁰⁷ For example, all who have been in contact with Christians while abroad are sought out by DPRK officials when they are repatriated and suffer heightened punishment for their Christian association.

Regarding the mens rea (mental intent) requirements for genocide, they include special intent by the perpetrator to target the victim not on account of his or her individual qualities or characteristics, but rather only because he or she is a member of a particular group. This special intent is an aggravated criminal intention in addition to the criminal intent (intent and knowledge) accompanying the underlying offence (e.g. killing). In *Akayesu*, an ICTR Trial Chamber held that special intent is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. This intent is a mental factor which is “difficult, even impossible to determine.”¹⁰⁸ Given this difficulty, in the absence of a confession from the accused, his intent can be inferred from a certain number of

¹⁰⁶ KINU (2005), *supra* note 7, at 83.

¹⁰⁷ A police official involved in the arrest of eleven individuals accused of involvement with religious activities reported that two were tortured to death during interrogation and the other nine were executed. Ownership of a Bible or other religious materials is punished by sentences ranging from imprisonment to execution. Regarding the division of the population into core, wavering, and hostile groups, those with religious backgrounds are placed into hostile classes 34, 35, 36, 37 of the total 51 sub-categories of the three main groups. HAWK, *supra* note 97, at 14.

¹⁰⁸ Prosecutor v. Akayesu, *supra* note 87, para. 523.

presumptions of fact. As noted above, the Elements of Crimes also allows for intent to be inferred from actions.¹⁰⁹

Attaching individual criminal responsibility to Kim Jong Il thus is a high standard. It requires proof that the persons who committed the genocide did it with intent and knowledge, as defined above, to commit the underlying offence plus the special intent to destroy, in whole or in part, a particular group. To attach liability to Kim Jong Il, the prosecution must prove that he was a co-perpetrator; an aider and abettor; an inciter, pursuant to the Article 25 (e) (directly and publicly incites others to commit genocide);¹¹⁰ or other form of participant – (all with special intent); or a superior responsible for the actions of those who committed genocide.

Given the well-known absolute control of the Kim Jong Il regime, one could argue that the very fact that the genocide occurred may allow for an inference that he specifically intended it. This may be true particularly in the case of the Christians, as Christianity is fundamentally at odds with Kim Jong Il's *juche* ideology.¹¹¹ Such an

¹⁰⁹ See Elements of Crimes, *supra* note 75, at 112.

¹¹⁰ See ICC Statute, *supra* note 49, art. 25(e).

¹¹¹ See generally HAWK, *supra* note 97; Demick, *supra* note 6 (“Christianity is particularly threatening if only because it has been extensively plagiarized by North Korea’s propaganda writers. For example, doctrine has it that Kim Jong Il’s birth was heralded by a bright star in the sky, as in the story of Jesus’ birth.”); KINU (2005), *supra* note 7, at 166 (“One of the most important reasons for North Korean’s perception of religion as a source of foreign intrusion and exploitation, as well as of social confusion, is the antithetical nature of religion vis-à-vis the unitary ruling structure of Kim Il-sung/Kim Jong-il. Religion worships an all-powerful entity. This is diametrically opposite to, and clashes with, the stature of Kim Il-sung and Kim Jong-il who need to be revered as all-powerful entities. *Juche* Ideology demands exclusive worship...)

inference of special intent may be reasonable, although meeting the “beyond a reasonable doubt” standard for a conviction¹¹² may be difficult. But given the extraordinary control of the Kim Jong Il regime, it may be reasonable to believe that he (with the requisite special intent) committed the genocide through others; ordered, solicited or induced the genocide; aided, abetted, or otherwise assisted with the genocide; or intentionally contributed to the genocide. He would thus be a co-perpetrator, aider and abettor, or other form of participant. Regarding attaching liability to Kim Jong Il as an inciter, this author is not aware of any direct and public statements by Kim Jong Il to incite others to commit genocide.

Attaching liability to Kim Jong Il for a failure to act would be the easiest standard, as he would not be required to have the specific intent of committing genocide, only his subordinates would be. A superior official may be held responsible for genocide if it is proved that he knew that crimes were about to be, or were being, perpetrated, and deliberately failed to thwart their commission. In *Blagojevic & Jokic*¹¹³ the ICTY Trial Chamber stated that the mens rea required for superiors is that the superiors knew or had reason to know that their subordinates (1) were about to commit or had committed genocide and (2) that the subordinates possessed the requisite specific intent. As discussed above, Kim Jong Il’s control and surveillance, statements of state-controlled media, and the ease of access to human rights reports condemning the DPRK for killing and other abuses against half-Chinese babies and Christians all indicate that Kim Jong Il knew of these crimes. It is reasonable to believe that he knows of these crimes and has

¹¹² See ICC Statute, *supra* note 49, art. 66.

¹¹³ Prosecutor v. Blagojevic & Jokic, *supra* note 86, para. 686.

failed to stop their commission or submit the matter to competent authorities for investigation and prosecution. He would therefore be liable as a superior.

The Elements of Crimes elaborates on each type of genocide by breaking each one down into elements that must be proved for a conviction. Turning to a specific type of genocide then, the Elements for Article 6(a) Genocide by killing are:

1. The perpetrator killed one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.¹¹⁴

The first three elements are met in the case of killing newborn half-Chinese babies, because they are half-Chinese. DPRK officials have intentionally killed numerous newborn babies because they were half-Chinese, thereby destroying in part a national group of half-Chinese persons.¹¹⁵ The first three requirements are also met in the case of DPRK officials intentionally killing Christians because they are Christians, thereby destroying in part a religious group of Christians.

The fourth element is one that is required of all the genocide crimes. The Introduction to Genocide in the Elements of Crimes elaborates on its meaning. It states:

¹¹⁴ See Elements of Crimes, *supra* note 75, at 113.

¹¹⁵ HAWK, *supra* note 19, at 62, 72.

With respect to the last element listed for each crime:

- The term “in the context of” would include the initial acts in an emerging pattern;
- The term “manifest” is an objective qualification;
- Notwithstanding the normal requirement for a mental element provided for in [A]rticle 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by case basis.¹¹⁶

Given that the killing of babies and forced abortions occurred regularly and was conduct that could itself effect destruction of the protected group, it appears this requirement is met. The same may be concluded for the killing of Christians. Thus all four elements are met to support a case of genocide by killing. Again, given Kim Jong Il’s absolute authority and control, it is reasonable to believe he and his cadres are individually liable, as discussed previously.

The elements for Article 6(d) Genocide by imposing measures intended to prevent births are:

1. The perpetrator imposed certain measures upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The measures imposed were intended to prevent births within that group.

¹¹⁶ See Elements of Crimes, *supra* note 75, at 113.

5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.¹¹⁷

Repeated forced abortions of half-Chinese fetuses because they are half-Chinese meets these requirements. DPRK officials imposed abortions on North Korean women who were impregnated by Chinese men with the intent to destroy in part that national group by preventing births within that group.¹¹⁸ The conduct took place in the context of a manifest pattern of similar conduct (e.g. infanticide) directed against that group and was conduct that could itself effect such destruction.

Regarding the targeting of Christians, in the same state-run prison camps and detention facilities or outside of them, an additional applicable article is Article 6(b) Genocide by causing serious bodily or mental harm. The Elements for this crime are identical to that for Genocide by killing, except that the first element is:

1. The perpetrator caused serious bodily or mental harm to one or more persons.¹¹⁹

Again, regular targeting of Christians because they are Christians to serious bodily or mental harm, in addition to the other required elements, supports a case for genocide by this means.

In addition, Article 6(c) Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction may also be applicable. The Elements for

¹¹⁷ See *id.* at 114.

¹¹⁸ HAWK, *supra* note 19, at 61, 65.

¹¹⁹ See Elements of Crimes, *supra* note 75, at 113.

this crime are identical to that for genocide by killing, except that the first element is changed and an additional element is added:

1. The perpetrator inflicted certain conditions of life upon one or more persons.
5. The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.¹²⁰

Given the horrific conditions of the prison camps and the obviously high mortality rate, the perpetrator inflicted certain conditions of life that were likely calculated to bring about physical destruction of persons – but whether they were directed particularly at the Christian detainees, perhaps by a showing of heightened adverse conditions for them because they are Christians, would have to be proved. In any case, facts indicate a reasonable basis to believe that Kim Jong Il is liable for genocide against Christians pursuant to Article 6(a) and (b), in addition to possible liability under (c).

B. Crimes against humanity.

Article 7(1) Crimes against humanity states:

“[C]rimes against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;

¹²⁰ See *id.* at 114.

- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical.¹²¹

Article 7(2) states:

(a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack...¹²²

¹²¹ See ICC Statute, *supra* note 49, art. 7.

¹²² *Id.*

The great majority of DPRK human rights abuses likely falls within the category of crimes against humanity. The vast prison camp system holding 200,000 persons¹²³ is rife with crimes listed in Article 7(1). They include murder and extermination, in that large numbers have been killed and conditions such as food deprivation have been allowed; enslavement, such as the forced labor in the camps; forcible transfer of the population to these camps; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, again in the arbitrary detention of persons in these camps; torture; rape or any other form of sexual violence; persecution against any group on political, national, or religious grounds in connection with crimes under ICC jurisdiction; enforced disappearance of persons, such as the kidnappings of ROK and Japanese citizens; other inhumane acts, such as medical experiments using weapons of mass destruction.

Thus the category of crimes against humanity offers greater scope of actionable offenses against Kim Jong Il than genocide. For example, it goes beyond the “national, ethnical, racial, religious group” requirement by including in Article 7(1)(h) groups identifiable on political, cultural, and gender grounds, in addition to racial, national, ethnic, and religious grounds.¹²⁴ With the exception of Article 7(1)(h), crimes against humanity also do not have a special intent requirement, as genocide does. While there

¹²³ HUMAN RIGHTS WATCH, *supra* note 32; BECKER, *supra* note 15, at 87; MARTIN, *supra* note 25, at 290 (“Politically incorrect North Koreans sent to prisons and concentration camps numbered in the hundreds of thousands, perhaps in the millions... For many political prisoners, the expectation -and the fact- was that they would never return from the North Korean gulag. They would die from overwork and hunger, or be shot for trying to escape.”).

¹²⁴ See ICC Statute, *supra* note 49.

may be overlap in the objective elements (actus reus) of genocide and crimes against humanity, there is none with respect to the subjective or mental element (mens rea).¹²⁵ Crimes against humanity requires the intent to commit the underlying offence plus knowledge of the widespread or systematic practice constituting the general context of the offence. In contrast, genocide requires the intent to commit the underlying offence plus the special intent to destroy, in whole or in part, a particular group. Thus attaching liability to Kim Jong Il for crimes against humanity may be easier than for genocide. Given the absolute control over the DPRK that he enjoys, it would be reasonable to argue that he intentionally committed such crimes (the underlying offense) through other persons; ordered, solicited or induced the crime; aided, abetted, or otherwise assisted with the crime; or in any way intentionally contributed to the crime, to paraphrase Article 25.¹²⁶

Regarding the second mens rea requirement, knowledge of the widespread or systematic practice, it is listed as one of the context requirements in the Elements of Crimes for each crime against humanity. The context requirements are the last two elements for each crime against humanity:

-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 against a civilian population.¹²⁷

¹²⁵ CASSESE, *supra* note 77, at 106.

¹²⁶ See ICC Statute, *supra* note 49, art. 25.

¹²⁷ See Elements of Crimes, *supra* note 75.

“Widespread” refers to the number of victims. In *J. Kajelijeli*, the ICTR Trial Chamber adopted the test of “large scale, involving many victims” to define “widespread.”¹²⁸ The Chamber found that “systematic” describes the organized nature of the attack. A pattern of conduct carries evidential value of such an attack. The existence of a policy or plan also has such evidential value. Clearly the organized systems of prison camps and detention facilities in the DPRK indicate a policy or plan. (This also demonstrates that the attack involved multiple commissions of acts referred to in Article 7(1) against a civilian population “pursuant to or in furtherance of a State or organizational policy to commit such attack” as required by Article 7(2)(a).)¹²⁹ The attack also need be only “widespread” or “systematic.” In the situation of the DPRK, it appears both terms are applicable.

Given Kim Jong Il’s absolute control over the DPRK, it is also likely that he had knowledge of the conduct in whatever form it may have taken place (murder, extermination, enslavement, forcible transfer, arbitrary imprisonment, torture, rape, persecution, abductions) as part of the widespread or systematic attack. This element does not require proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.¹³⁰ As discussed above, reports on DPRK human rights abuses that describe this conduct are widely published and easily accessible. It seems improbable that Kim Jong Il would be unaware of the existence of these crimes, especially as master of a culture of surveillance.

¹²⁸ Prosecutor v. J. Kajelijeli, Case No. ICTR-98-44A-T, Judgment, Trial Chamber, para. 871 (December 1, 2003).

¹²⁹ See ICC Statute, *supra* note 49, art. 7.

¹³⁰ ANTONIO CASSESE, INTERNATIONAL LAW 251 (Oxford University Press 2001).

Indeed, given his authority and control, it is reasonable to believe he instigated them, as discussed above. Thus the context requirements of the Elements of Crimes are met.

Even if the ICC found that Kim Jong Il did not perpetrate the underlying offense, he would be likely liable under Article 28(b) Responsibility of commanders and other superiors for crimes committed by a subordinate under his effective authority and control, as a result of his failure to exercise control properly over such subordinates, where he either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing such crimes, which concerned activities within his effective responsibility and control; and he failed to take all necessary and reasonable measures to repress their commission or submit the matter to competent authorities for investigation and prosecution.¹³¹ Once again, given Kim Jong Il's control, surveillance, and widely available reports, it is improbable that he would not know that his subordinates were committing crimes against humanity and therefore would be liable as a superior.

In addition to the intent (*mens rea*) requirements, each crime against humanity has two conduct (*actus reus*) requirements. First, the accused (or a subordinate under the control of the accused) must have perpetrated the act necessary to accomplish the specific offense (eg murder). Second, the act must be committed as part of a widespread or systematic attack directed against a civilian population (a context requirement as discussed above).

MURDER: Turning then to a specific type of crime against humanity, the Elements for Article 7(1)(a) Crime against humanity of murder are:

¹³¹ See ICC Statute, *supra* note 49, art. 28.

1. The perpetrator killed one or more persons.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.¹³²

It is well known that killing has taken place in the prison camps and detention facilities. The existence of these prisons, Kim Jong Il's control and implicit approval of them, and his absolute control over the DPRK provide a reasonable basis to believe that he bears individual criminal responsibility for the killing. It is reasonable to believe he intentionally committed the killing through others; ordered, solicited or induced the killing; aided, abetted, or otherwise assisted with the killing; or intentionally contributed to the killing. Thus the first element is met. In addition, this conduct constitutes part of a widespread or systematic attack against a civilian population of which Kim Jong Il or subordinates likely had knowledge, as discussed previously. Thus the context elements are met, fulfilling the three elements for the crime against humanity of murder. Given the absolute control Kim Jong Il possesses, it is reasonable to believe he at a minimum bears individual responsibility as a superior who failed to repress or submit to judicial authorities this crime against humanity of murder by subordinates under his authority.

To avoid repetition, we will not list the last two (context) elements for each of the following crimes against humanity, given that they are identical. We will list only the specific offense and non-context elements of each.

¹³² See Elements of Crimes, *supra* note 75, at 116.

EXTERMINATION: Thus for the crime against humanity of extermination (Elements for Article 7(1)(b)), the prosecutor must prove in addition to the context of intended or known widespread or systematic attack:

1. The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population.
2. The conduct constituted, or took place as part of, a mass killing of members of a civilian population.¹³³

Article 7(2)(b) states “Extermination” includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.¹³⁴

Conditions within the prison systems include deprivation of food and medicine that results in frequent death.¹³⁵ Given that these conditions obviously produce fatal consequences, their continued existence arguably indicates some calculation to produce death. Some reports indicate efforts to reduce the number of deaths in the prison camps by allowing some sick prisoners to go home to recover,¹³⁶ but this supports an inference of calculation in that the authorities apparently find a certain level of death acceptable; their release of some prisoners when sick shows conscious regulation and management of the quantity of death to be allowed in the camp.

¹³³ See *id.* at 117.

¹³⁴ See ICC Statute, *supra* note 49, art. 7(2)(b).

¹³⁵ HAWK, *supra* note 19, examples at 37, 42; KINU (2004), *supra* note 5, at 236.

¹³⁶ HAWK, *supra* note 19, examples at 50, 52.

While a precise figure is not known, surely the number of persons who have died in the prison camps is high enough to constitute “mass killing.” An ICTR trial chamber found Jean-Paul Akayesu guilty of extermination for the murder of 16 people, a quantity apparently sufficient for a finding of extermination.¹³⁷ Jasper Becker estimates perhaps “at least a million” have died in the camps, “assuming that 10 percent of a constant prison population of 200,000 to 300,000 perished each year.”¹³⁸ This means about 80,000 to 120,000 deaths since July 1, 2002. The U.S. State Department estimates 150,000 to 200,000 persons in the camps. While it did not provide a figure on the number of deaths, it reported that conditions were “extremely harsh and many prisoners were not expected to survive. In the camps, prisoners received little food and no medical care.”¹³⁹ Thus DPRK authorities have killed persons in numbers that are high enough to constitute mass killing.

The existence of the prison camps, Kim Jong Il’s implicit approval of them, and his absolute control over the DPRK provide a reasonable basis to believe that he bears individual criminal responsibility for the extermination. In addition, this conduct constitutes part of a widespread or systematic attack against a civilian population of which Kim Jong Il or subordinates likely had knowledge. Thus the elements for the crime against humanity of extermination are met. Given the absolute control Kim Jong Il possesses, it is reasonable to believe he at a minimum bears individual responsibility as

¹³⁷ Prosecutor v. Akayesu, *supra* note 87.

¹³⁸ BECKER, *supra* note 15, at 87.

¹³⁹ U.S. State Dep’t Human Rights Report, *supra* note 38, section 1(c).

a superior who failed to repress or submit to judicial authorities the commission of crimes committed by subordinates under his authority.

In addition to the death-producing conditions of the prison systems, the DPRK government has created conditions outside of the prisons that also could constitute the crime against humanity of extermination (and murder). Famine due to government intent or recklessness would fall under this category.¹⁴⁰ An estimated one to 2.5 million persons have died due to such famine, which began in the 1990s.¹⁴¹ While the most extreme years of famine in the DPRK took place before the ICC Statute came into force, conditions for the lower classes of North Korean society since this date may be poor enough to meet the requirements for the crime against humanity of extermination. Again, given Kim Jong Il's absolute authority and control, it is reasonable to believe he and his cadres are individually liable.

ENSLAVEMENT: Article 7(2)(c) states: “‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.”¹⁴² The non-context element for Article 7(1)(c) Crime against humanity of enslavement is:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or

¹⁴⁰ MARCUS, *supra* note 66.

¹⁴¹ HAGGARD & NOLAND, *supra* note 13, at 8, cite as many as one million; KINU (2004), *supra* note 5, at 13, cites 2.5 million; Associated Press cites 2 million, see *UN Chief: N. Korea Still Needs Food Aid*, ASSOCIATED PRESS, Sept. 23, 2005.

¹⁴² See ICC Statute, *supra* note 49, art. 7(2)(c).

bartering such a person or persons, or by imposing on them a similar deprivation of liberty.¹⁴³

The ICTY Trial Chamber in *Kunarac and others*¹⁴⁴ discussed factors to further clarify the meaning of this crime:¹⁴⁵

Under this definition, indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent... Further indications of enslavement include exploitation; the exaction of **forced or compulsory labour** or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking. With respect to forced or compulsory labour or service, international law, including some of the provisions of Geneva Convention IV and the Additional Protocols, make clear that not all labour or service by protected persons, including civilians, in armed conflicts, is prohibited – strict conditions are, however, set for such labour or service. The 'acquisition' or 'disposal' of someone for monetary or other compensation, is **not** a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone. ... The Trial Chamber is therefore in general agreement with the factors put forward by the Prosecutor, to be taken into consideration in determining whether enslavement

¹⁴³ See Elements of Crimes, *supra* note 75, at 117.

¹⁴⁴ Prosecutor v. Kunarac and others, Case No. IT-96-23-T, Judgment, Trial Chamber II, para. 542, 543 (February 22, 2001).

¹⁴⁵ CASSESE, *supra* note 77, at 75.

was committed. These are the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour. ... (emphasis added.)

The forced labor in the prison camps thus constitutes enslavement, as defined above. Prisoners are restricted in their freedom of movement. They are subject to forced labor to the gain of the DPRK authorities. For example, they mine gold, coal, iron, and magnesite. They also log, farm, and produce textile goods under the harshest conditions.¹⁴⁶ Their movements, physical environment, psychology, and sexuality, are subject to the control of DPRK authorities, who prevent their escape and subject them to cruel treatment and abuse for unlimited duration. This conduct in the prison camps constitutes part of a widespread or systematic attack against a civilian population of which Kim Jong Il or subordinates likely had knowledge. Again, given Kim Jong Il's absolute authority and control, it is reasonable to believe he and his cadres are individually liable.

The crime against humanity of enslavement may even extend beyond the DPRK's boundaries with DPRK-government-owned farms and factories using North Korean workers located in the Czech Republic, Russia, Libya, Bulgaria, and Saudi Arabia, and Angola. While the workers are paid a nominal fee, they live under strict surveillance and

¹⁴⁶ HAWK, *supra* note 19, at 16. U.S. State Dep't Human Rights Report, *supra* note 38, section 1(c).

grim conditions. Experts estimate about 10,000 to 15,000 North Koreans work abroad for the DPRK government.¹⁴⁷

In addition, North Korean women are widely reported to be trafficked in the PRC. They may also be trafficked to other states. DPRK residents have made arrangements with customers in the PRC to purchase North Korean women.¹⁴⁸ Trafficking has also extended to underage girls, many of whom are involved in the sex business.¹⁴⁹ Clearly, this type of activity falls within the meaning of “enslavement,” as defined by Article 7(2)(c). Given that trafficking is usually intertwined with sexual assault, the crimes against humanity of rape and sexual violence may also apply.¹⁵⁰ Whether the criminal linkages between persons in the PRC and elsewhere and the DPRK in furtherance of the trafficking, rape, and sexual violence extend to the Kim Jong Il regime (and are part of an intended or known widespread or systematic attack) should be investigated to determine if individual criminal liability may be imputed to Kim Jong Il and his cadres.

¹⁴⁷ Barbara Demick, *Koreans Toil Abroad Under Grim Conditions*, L.A. TIMES, Dec. 27, 2005.

Tom Coburn, *North Korea: Illicit Activity Funding the Regime*, Chairman’s Statement before the Subcomm. on Federal Financial Management, Government Information, and International Security of the U.S. Senate Comm. on Homeland Security and Government Affairs, 109th Cong. (April 25, 2006). U.S. State Dep’t Human Rights Report, *supra* note 38, section 6(e).

¹⁴⁸ Peters, *supra* note 102, at 3; KINU (2004), *supra* note 5, at 214. For direct accounts of trafficking from D.P.R.K. defectors, see Kyeong-Sook Cha and Soon-Hee Ma, Testimonies before Subcomm. on Africa, Global Human Rights and International Operations and on East Asia and the Pacific of the U.S. House of Rep. Comm. on International Relations, 109th Cong. (Oct. 27, 2005).

¹⁴⁹ KINU (2005), *supra* note 7, at 279.

¹⁵⁰ See ICC Statute, *supra* note 49, art. 7(2)(c). See *infra* notes 160-163 and accompanying text.

FORCIBLE TRANSFER OF POPULATION: Article 7(2)(d) states:
“‘Deportation or forcible transfer of population’ means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.”¹⁵¹ The non-context elements for Article 7(1)(d) Crime against humanity of deportation or forcible transfer of population are:

1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.
2. Such persons or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.¹⁵²

A Trial Chamber of ICTY in *Krstic*¹⁵³ distinguished deportation from forcible transfer. It stated “Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacement within a State.” Thus the prisoners who were sent to DPRK prison camps without genuine due process fall within the definition of forcible transfer, as they remained inside the DPRK. The lack of adequate judicial process in forcing people to leave their homes, where they lawfully resided, to move to prison camps, and that the perpetrators likely recognized the lawfulness of these people’s presence in their

¹⁵¹ See *id.* art. 7(2)(d).

¹⁵² See Elements of Crimes, *supra* note 75, at 118.

¹⁵³ Prosecutor v. Krstic, *supra* note 104, para. 521.

homes, creates a reasonable basis for the crime against humanity of forcible transfer of population. This conduct constitutes part of a widespread or systematic attack against a civilian population of which Kim Jong Il or subordinates likely had knowledge. Again, given Kim Jong Il's absolute authority and control, it is reasonable to believe he and his cadres are individually liable.

IMPRISONMENT: The non-context elements for Article 7(1)(e) Crime against humanity of imprisonment or other severe deprivation of physical liberty are:

1. The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty.
2. The gravity of the conduct was such that it was in violation of fundamental rules of international law.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.¹⁵⁴

An ICTY Trial Chamber, in *Kordic & Cerkez*,¹⁵⁵ held that imprisonment meant “arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population.” Obviously, the facts in the DPRK meet these requirements. DPRK officials imprisoned persons in prison camps and detention facilities, under deplorable conditions, violating several fundamental rules of international law, including bona fide due process, and these officials were likely aware of these circumstances that established the gravity of the conduct. This conduct leading to imprisonment constitutes part of a

¹⁵⁴ See Elements of Crimes, *supra* note 75, at 118.

¹⁵⁵ Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2, Judgment, Trial Chamber III (February 26, 2001).

widespread or systematic attack against a civilian population of which Kim Jong Il or subordinates likely had knowledge. Again, given Kim Jong Il's absolute authority and control, it is reasonable to believe he and his cadres are individually liable.

TORTURE: Article 7(2)(e) states: "'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."¹⁵⁶ The non-context elements for Article 7(1)(f) Crime against humanity of torture are:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were in the custody or under the control of the perpetrator.
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.¹⁵⁷

It is widely reported that torture is perpetrated in the prison camps and detention facilities.¹⁵⁸ Perpetrators have inflicted severe physical and mental pain upon prisoners in their custody for reasons that are not lawful. Methods of torture, sometimes fatal, include severe beatings, electric shock, prolonged periods of exposure, and confinement to small "sweatboxes" in which prisoners were unable to stand upright or lie down for weeks.¹⁵⁹

¹⁵⁶ See ICC Statute, *supra* note 49, art. 7(2)(e).

¹⁵⁷ See Elements of Crimes, *supra* note 75, at 119.

¹⁵⁸ HAWK, *supra* note 19, at 70-72; *A Living Hell* KEYS, NETWORK FOR NORTH KOREAN DEMOCRACY AND HUMAN RIGHTS, vol. 19 (2004-2005) <http://www.nknet.org>.

¹⁵⁹ U.S. State Dep't Human Rights Report, *supra* note 38. KANG CHOL-HWAN, *AQUARIUMS OF PYONGYANG: TEN YEARS IN THE NORTH KOREAN GULAG* (Basic Books 2002).

This conduct constitutes part of a widespread or systematic attack against a civilian population of which Kim Jong Il or subordinates likely had knowledge. Again, given Kim Jong Il's absolute authority and control, it is reasonable to believe he and his cadres are individually liable.

RAPE: The non-context elements for Article 7(1)(g)-1 Crime against humanity of rape are:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.¹⁶⁰

Victims and witnesses have stated that prison officials have raped women under their custody in the prison camps and detention facilities.¹⁶¹ While the rapes themselves may not result from a policy, this conduct constitutes part of a widespread or systematic attack against a civilian population of which Kim Jong Il or subordinates likely had knowledge. Given Kim Jong Il's absolute authority and control, it is reasonable to believe he and his cadres are individually liable, as discussed previously.

¹⁶⁰ See Elements of Crimes, *supra* note 75, at 119.

¹⁶¹ HAWK, *supra* note 19, example at 61.

SEXUAL VIOLENCE: The non-context elements for Article 7(1)(g)-6 Crime against humanity of sexual violence are:

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that cause by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1(g), of the Statute.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.¹⁶²

Again, victims and witnesses have stated that prison officials have committed sexual acts against prisoners in detention under their custody in prison camps and detention facilities.¹⁶³ While the sexual acts themselves may not result from a policy, this conduct constitutes part of a widespread or systematic attack against a civilian population of which Kim Jong Il or subordinates likely had knowledge. Again, given Kim Jong Il's absolute authority and control, it is reasonable to believe he and his cadres are individually liable.

PERSECUTION: Article 7(2)(g) states: “‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the

¹⁶² See Elements of Crimes, *supra* note 75, at 121.

¹⁶³ HAWK, *supra* note 19, example at 46; U.S. State Dep't Human Rights Report, *supra* note 38.

identity of the group or collectivity.”¹⁶⁴ The non-context elements for Article 7(1)(h)

Crime against humanity of persecution are:

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.¹⁶⁵

This type of crime against humanity is reminiscent of genocide in that it encompasses targeting of a group for certain inherent characteristics and requires special intent of that targeting, but it allows for more possible grounds than genocide for the targeting, i.e. political, cultural and gender grounds. The crime against humanity of persecution also requires that the acts be at least one of the acts prohibited in Article 7(1) or a war crime or genocide (as crimes under ICC jurisdiction), or must be ‘connected’ with such acts or crimes, which is a more stringent requirement than under customary international law.¹⁶⁶ In addition, of course, the crime against humanity of persecution has the context

¹⁶⁴ See ICC Statute, *supra* note 49, art. 7(2)(g).

¹⁶⁵ See Elements of Crimes, *supra* note 75, at 122.

¹⁶⁶ CASSESE, *supra* note 77, at 93.

requirements of all crimes against humanity - knowledge and existence of a widespread or systematic attack against a civilian population.

Despite the more stringent requirements of connection to an ICC-jurisdiction crime and special intent, clearly the DPRK situation meets the requirements for the crime against humanity of persecution in many cases. This is not a surprising outcome for a society that divides its entire population on essentially political grounds into core, wavering, and hostile groups. Most of the 200,000 some prisoners in prison camps, who were transferred to them without adequate due process, usually on grounds that were political, including those who were imprisoned for merely being the relative of someone who committed a political “crime,” fall within this category. In addition, as discussed above for genocide, the targeting on national (and potentially ethnic) grounds in the case of the half-Chinese babies and targeting on religious grounds in the case of the Christians, also constitutes the crime against humanity of persecution if they were knowingly conducted as part of a widespread or systematic attack against a civilian population. This conduct in the prison systems constitutes part of a widespread or systematic attack against a civilian population of which Kim Jong Il or subordinates likely had knowledge. They were connected to at least one of the acts prohibited in Article 7(1) (e.g. imprisonment) or other crime (e.g. genocide) under ICC jurisdiction. Again, given Kim Jong Il’s absolute authority and control, it is reasonable to believe he and his cadres are individually liable.

The crime against humanity of persecution also likely occurs outside the prison systems, particularly given the division of the entire society into the three loyalty-dependent groups.

ENFORCED DISAPPEARANCE OF PERSONS: Article 7(2)(i) states:

“Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.¹⁶⁷

The non-context elements for Article 7(1)(i) Crime against humanity of enforced disappearance of persons are:

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

¹⁶⁷ See ICC Statute, *supra* note 49, art. 7(2)(i).

- (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.¹⁶⁸

The abductions by the DPRK are well-known and have particularly affected relations between Japan and the DPRK. Since the end of the Korean War, the DPRK has kidnapped thousands of ROK citizens and as many as 100 Japanese citizens.¹⁶⁹ The DPRK continues to order and carry out abductions. A Seoul-based NGO and London-based Amnesty International reported that Mr. Kang Gun, a defector from North Korea who has South Korean citizenship, was kidnapped by the North Korean Security Agency in March 2005 in China.¹⁷⁰ On August 8, 2004, DPRK agents also kidnapped Ms. Jin Kyung-sook, a former DPRK refugee and ROK passport holder.¹⁷¹ Other abductees still held by the DPRK include 12 passengers from a hijacked Korean Air flight, hundreds of

¹⁶⁸ See Elements of Crimes, *supra* note 75, at 122-123.

¹⁶⁹ H. R. CON. RES. 168, *supra* note 41.

¹⁷⁰ *Kim Jong Il, Stop the Amoral Kidnapping Action Immediately!*, citing the Daily Chosun, Sept. 9, 2005, NKGULAG, DEMOCRACY NETWORK AGAINST NORTH KOREA GULAG, <http://www.nkgulag.org>; *Urgent Action North Korea: "Disappearance"/fear of torture/fear of death penalty: Kang Gun*, AMNESTY INTERNATIONAL, Sept. 15, 2005, <http://web.amnesty.org/library>.

¹⁷¹ H. R. CON. RES. 168, *supra* note 41.

ROK seamen and fishermen, and ROK Christian ministers. Credible sources report that the DPRK may have abducted citizens from China, Europe and the Middle East. The locations for these abductions possibly include the United Kingdom, Denmark,¹⁷² Lebanon, Thailand, Romania, France, Italy, the Netherlands, Jordan, Malaysia, Singapore,¹⁷³ and Spain, as well as ROK, Japan, and China. In addition, 7,034 ROK citizens were abducted during the Korean War according to a 1956 survey by the Korean National Red Cross and none were released.¹⁷⁴ The ROK government estimates that about 485 abducted ROK civilians are currently alive in the DPRK.¹⁷⁵

The elements for this crime against humanity are met by these facts. DPRK government agents abducted one or more persons, knowingly refused to provide information on such persons and deprived them of their freedom and the protection of the law for prolonged periods of time. The repeated conduct of kidnapping of persons constitutes a widespread or systematic attack against a civilian population of which Kim Jong Il or subordinates likely had knowledge. The large number of civilian victims and the apparent policy of the DPRK government to employ this tactic repeatedly indicate such an attack. Kim Jong Il has already publicly acknowledged the abduction of 13

¹⁷² Ministry of Foreign Affairs of Japan, *Outline and Background of Abduction Cases of Japanese Nationals by North Korea*, April 2002, http://www.mofa.go.jp/region/asia-paci/n_korea/abduct.html.

¹⁷³ Yoichi Shimada, *On Abduction of Foreign Citizens by North Korea*, Testimony before Subcomm. on Africa, Global Human Rights and International Operations of the U.S. House of Rep. Comm. on International Relations, 109th Cong. (April 27, 2006).

¹⁷⁴ See H. R. CON. RES. 168, *supra* note 41.

¹⁷⁵ USINFO.STATE.GOV, *House Panels Hold Historic Hearing on North Korean Abductions*, Apr. 27, 2006, <http://usinfo.state.gov/usinfo/Archive/2006/Apr/27-857217.html>.

Japanese citizens by his government's agents.¹⁷⁶ In addition, the ROK government reported that the DPRK has admitted to holding 11 ROK civilians who were kidnapped after the 1950-53 conflict.¹⁷⁷ Again, given Kim Jong Il's absolute authority and control, it is reasonable to believe he and his cadres are individually liable.

OTHER INHUMANE ACTS: The non-context elements for Article 7(1)(k)

Crime against humanity of other inhumane acts are:

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.
3. The perpetrator was aware of the factual circumstances that established the character of the act.¹⁷⁸

Given the pervasiveness and vicious character of crimes perpetrated by the Kim Jong Il regime, it is prudent to include this category to cover any additional crimes that may reveal themselves upon investigation. Examples may be medical experiments and testing

¹⁷⁶ *Id.* On Sept. 17, 2002, Kim Jong Il admitted that agents of his government had abducted 13 Japanese citizens in the 1970s and 1980s. On Jan. 6, 2006, the Mainichi Newspapers reported that former North Korean agent Sin Gwang Su told Japanese abductee Hitomi Soga that he abducted Japanese citizen Megumi Yokota in 1977. Another repatriated Japanese abductee Yasushi Chimura named Sin as the leader of the group that abducted him. *Wanted North Korean Agent Told Soga He Abducted Yokota*, MAINICHI NEWSPAPERS, Jan. 6, 2006, at <http://mdn.mainichi-msn.co.jp/national/news/p20060106p2a00m0na020000c.html>.

¹⁷⁷ Su Hyun Lee, *World Briefing/Asia: North Korea Admits 21 From South Are Captives*, N.Y. TIMES, Oct. 26, 2005.

¹⁷⁸ See Elements of Crimes, *supra* note 75, at 124.

of weapons of mass destruction materials on victims, although they may also fall under the category of crimes against humanity for murder, extermination, torture, and if the requisite special intent is present, persecution.

C. War crimes.

Article 8 War crimes states:

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
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:
 - (i) Wilful killing;
 - (ii) Torture of inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (vi) Wilfully 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;
- (viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: ...

- (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion. ...
- (x) Subjecting persons who are in power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons...¹⁷⁹

Prisoners of war from the Korean War, which was active from 1950-1953,¹⁸⁰ are tragically still imprisoned in the DPRK, in violation of Article III of the Korean War

¹⁷⁹ See ICC Statute, *supra* note 49, art. 8.

¹⁸⁰ The Korean conflict is still technically on-going; a peace treaty has yet to be concluded.

Armistice Agreement signed July 27, 1953,¹⁸¹ and the Geneva Convention relative to the treatment of Prisoners of War.¹⁸²

The ROK Ministry of National Defense estimates that 542 captives are still alive in the DPRK, according to testimony given before the National Assembly in February 2005.¹⁸³ They are protected persons pursuant to the Geneva Convention relative to the treatment of Prisoners of War. Article 4 of this Convention states prisoners of war include “Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces;”¹⁸⁴ thus ROK soldiers as members of the armed forces of a Party to the conflict fall within this category. The Kim Jong Il regime treats an unknown number of ROK prisoners of war abusively. For example, they have been forced to perform hard labor for decades, often in mines, under slave-like and lethal conditions.

¹⁸¹ See text of the Korean War Armistice Agreement, July 27, 1953, available at <http://news.findlaw.com/hdocs/docs/korea/kwarmagr072753.html>.

¹⁸² Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Art. 118 states: Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities. In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph. In either case, the measures adopted shall be brought to the knowledge of the prisoners of war...

¹⁸³ H. R. CON. RES. 168, *supra* note 41. Lee, *supra* note 177 (“North Korea has admitted to holding 10 ROK soldiers captured in the Korean War..., the South Korean government said... South Korean Red Cross believes that 546 prisoners of war and 485 abductees are being held in North Korea.”).

¹⁸⁴ Geneva Convention, *supra* note 182, art. 4.

To determine which Article 8 provisions apply, we must determine whether the Korean War was international or non-international. *Kordic & Cerkez*, based on the *Tadic* appeal, sets forth criteria for this purpose.¹⁸⁵ In the case of the armed conflict in Bosnia-Herzegovina, it considered first whether Croatia had intervened in the armed conflict between the Bosnian Muslims and the Bosnian Croats in Bosnia-Herzegovina through its troops and second whether the HVO (Bosnian Croats) acted on behalf of Croatia. Either situation was sufficient for a determination that the armed conflict was international. Similarly, the interventions by the PRC and other states in the Korean conflict also internationalized it. Thus Article 8(2)(a) and (b) are applicable.¹⁸⁶ Given that the ROK

¹⁸⁵ Prosecutor v. Kordic & Cerkez, *supra* note 155.

¹⁸⁶ Whether the Korean conflict is classified as international or non-international, the ICC Statute's provisions on both international conflicts and non-international conflicts forbid murder, torture, and other injurious treatment. Article 8(2)(c) states: In the case of an armed conflict of not an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) Taking of hostages;
- (iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constitutional court, affording all judicial guarantees which are generally recognized as indispensable.

prisoners of war who are abused likely suffer the same horrific conditions as other detainees, we will not repeat a review of all the possible crimes again, this time under Article 8 War Crimes. It must be noted that the ICC Statute's Crimes against Humanity provisions apply to civilians only, so the application of Article 8 War Crimes would be necessary for a full analysis. We will consider, as an example, the Elements of Crimes for the war crime of wilfully causing great suffering.

The elements for Article 8(2)(a)(iii) War crime of wilfully causing great suffering:

1. The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.¹⁸⁷

Reports indicate that DPRK authorities have “caused great physical or mental pain or suffering to, or serious injury to body or health of” ROK prisoners of war, who are protected by the Geneva Conventions, despite knowing that they are ROK prisoners of war. Again, Kim Jong Il is likely liable as a co-perpetrator, aider and abettor, or other

¹⁸⁷ See Elements of Crimes, *supra* note 75, at 127.

form of participant, given the absolute control he possesses. As the chairman of the People's Army, he at a minimum likely bears individual responsibility as a commander who failed to repress the commission of crimes committed by forces under his authority.

Article 28(a) states that a military commander:

shall be criminally responsible for crimes...committed by forces under his...effective authority and control, ...as a result of his...failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing...such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his ... power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.¹⁸⁸

The "should have known" standard makes meeting the requirements for culpability potentially easier than that for superior authority under Article 28(b).¹⁸⁹ In either case, Kim Jong Il's lack of knowledge is improbable, given his absolute control and surveillance of the DPRK.

Regarding the last two elements, the Introduction to Article 8 War Crimes in the Elements of Crimes states:

-There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;

¹⁸⁸ See ICC Statute, *supra* note 49, art. 28.

¹⁸⁹ *Id.*

-In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;

-There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms “took place in the context of and was associated with.”¹⁹⁰

These elements make clear that the determination of the Korean War as international or non-international is irrelevant for the mens rea requirement. Obviously, detaining someone known to be a ROK prisoner of war indicates an awareness of the existence of the Korean War. Thus the five elements are met for the war crime of wilfully causing suffering. Again, given Kim Jong Il’s absolute authority and control, it is reasonable to believe he and his cadres are individually liable, as discussed previously.

VI. RECOMMENDATION.

The above analysis is intended to show with legal precision how facts in the public domain from credible sources may form a “reasonable basis” for believing that Kim Jong Il is legally liable for crimes against humanity, genocide, and war crimes.¹⁹¹ Of course, none of this proves “beyond a reasonable doubt” that Kim Jong Il is guilty of

¹⁹⁰ See Elements of Crimes, *supra* note 75, at 125.

¹⁹¹ See ICC Statute, *supra* note 49, art. 53.

these crimes.¹⁹² But it certainly should raise questions as to what is being perpetrated in the DPRK and compel the UN Security Council to inquire further to end the crimes.

The recent action concerning Darfur may be instructive as to how a case concerning the DPRK might proceed. UN Secretary-General Kofi Annan established the Darfur Commission in October 2004. The Commission, headed by former ICTY judge Antonio Cassese, reported to the UN in January 2005 that there was reason to believe that crimes against humanity and war crimes had been committed in Darfur and recommended that the situation be referred to the ICC.¹⁹³ The Security Council made the referral on March 31, 2005, by its Resolution 1593.¹⁹⁴ After a preliminary analysis, including the findings of the Commission, the Prosecutor decided on June 1, 2005, to open an investigation into the situation in Darfur.¹⁹⁵

Regarding the DPRK, the UN Security Council and the Secretary-General have not effectively addressed its human rights violations. The UN Commission on Human Rights, however, has appointed a Special Rapporteur for this purpose, in addition to passing three resolutions condemning the DPRK's human rights abuses.¹⁹⁶ Thai law

¹⁹² *Id.* art. 66.

¹⁹³ Marlise Simons, *Sudan Poses First Big Trial for World Criminal Court*, N.Y. TIMES, April 29, 2005.

¹⁹⁴ S. C. Res. 1593, available at <http://www.un.org>.

¹⁹⁵ International Criminal Court, *The Prosecutor of the International Criminal Court reports to the United Nations Security Council on the situation in Darfur*, June 29, 2005, <http://www.icc-cpi.int/press/pressreleases/108.html> (last visited July 4, 2005).

¹⁹⁶ The U.N. Commission on Human Rights passed Resolution 2004/13 in April 2004 and requested the Chairman of the Commission to appoint a Special Rapporteur on the situation of human rights in the D.P.R.K. The Commission has passed two additional Resolutions on the Situation of Human Rights in the Democratic People's Republic of Korea: Resolution 2003/10 in April 2003,

professor Vitit Muntarbhorn became the Special Rapporteur in July 2004. In his address to the UN Commission on Human Rights in March 2005, he covered failures of the DPRK regime in protecting the right to food and the right to life; the right to security of the person, humane treatment, non-discrimination and access to justice; the right to freedom of movement and protection of persons linked with displacement; the right to the highest standards of health and the right to education; the right to self-determination/political participation, access to information, freedom of expression/belief/opinion, association and religion; the rights of specific persons/groups: women and children.

Unlike the Darfur Commission, he did not analyze abuses through the prism of crimes against humanity, genocide and war crimes. The DPRK also did not allow his entry into the country, as Sudan allowed for the Darfur Commission. In addition, he did not have a substantially large team of people to collect information to produce a 176-page report, as the Darfur Commission did. Still, his findings are consistent with the many in-depth reports that already exist on DPRK abuses. The Security Council, however, may not be willing to refer a case to the ICC based on his findings or external reporting. The Security Council did not choose to rely on the reports of the Special Rapporteur on the situation of human rights in Sudan. This indicates that a body more akin to the Darfur Commission would be necessary. An International Commission of Inquiry on the DPRK, with resulting investigation and recommendations, would likely be required to gain the

[http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.RES.2003.10.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.RES.2003.10.En?Opendocument), and Resolution 2005/... in April 2005 (U.N. Doc. E/CN.4/2005/L.30, Apr. 11, 2005).

votes of Security Council members (and abeyance of vetoes by the permanent members) for a referral of the DPRK situation to the ICC.

The Darfur Commission itself was created by the Secretary-General at the request of the Security Council, acting under Chapter VII in its Resolution 1564.¹⁹⁷ Permanent Security Council members China and Russia abstained when the Council voted on this resolution. It is unlikely that China would not veto a similar resolution for the DPRK, unless the political climate changes significantly regarding the six-party-talks to end the DPRK's nuclear weapons capability or other changes occur, as discussed in Section III.

In an ideal world with a fully developed international legal system, political timing would be irrelevant to initiating an investigation of an obviously suspect situation. Although we are not at that stage, the existence of a mechanism to prosecute is still highly useful. An investigation into the DPRK situation could be politically advantageous at the appropriate time. Such could be the case if the six-party talks stalled or, after a nuclear-arms-eliminating agreement is reached, if the DPRK violated it. The Security Council may then be willing to request the Secretary-General to investigate the DPRK human rights situation under its Chapter VII powers, in addition to condemning the DPRK's lack of cooperation regarding the nuclear issue. If the Security Council is unable to produce a resolution for such a request, the Secretary-General should consider investigating the DPRK human rights situation on his own initiative using a high-level group of experts.¹⁹⁸ The UN General Assembly could be another source of support for

¹⁹⁷ S. C. Res. 1564, available at <http://www.un.org/Docs/sc/>.

¹⁹⁸ Article 99 of the UN Charter states that "the Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security." The Secretary General has broad authority to appoint experts to address issues of concern. An example is

such an investigation. It recently passed its first resolution condemning DPRK human rights abuses.¹⁹⁹ The conclusions of such a high profile investigation would hopefully influence the political climate in favor of stronger actions.

An International Commission of Inquiry on the DPRK may find that the ICC's temporal jurisdiction requirement is too restrictive for a referral of the DPRK case. It may recommend that a special tribunal be created to reach crimes committed before July 1, 2002. This could cover famine and atrocity crimes that most significantly took place since the mid-1990s. A special tribunal may also be more acceptable to the Bush administration, which opposes the ICC. However, creation of a new tribunal would absorb time and resources that use of the existing ICC would not. In any case, the Commission's recommendation should include consideration of this issue.

Even if the DPRK abides by a future nuclear agreement, the Security Council should ultimately refer the case to the ICC or if necessary, create a special tribunal for the DPRK situation, for the sake of the persons suffering crimes against humanity, genocide, and war crimes in the DPRK. That the DPRK would be no longer a threat in terms of

the High Level Panel on Threats, Challenges and Change, which produced in 2004 the report *A More Secure World: Our Shared Responsibility*, available at <http://www.un.org/secureworld/report.pdf>. He can also appoint high-profile persons to highlight particular issues, such as Bill Clinton in response to the Asian tsunami of December 2004. In initiating an investigation, the Secretary-General would not be acting under Chapter VII powers and the D.P.R.K. would be highly unwilling to cooperate. The investigators would likely be able to produce an in-depth report using credible sources outside of the D.P.R.K.

¹⁹⁹ After review by the General Assembly's Third Committee, Resolution A/RES/60/173 passed the General Assembly on December 16, 2005, with a vote of 88 in favor to 21 against, with 60 abstentions. The votes of the six-party talk members were: P.R.C., Russian Federation, and D.P.R.K. voted against; US and Japan voted for; R.O.K. abstained.

nuclear weapons does not change the fact that it would still be perpetrating crimes that must be unacceptable on their face. Given the inherent correctness of condemning crimes against humanity, genocide, and war crimes, the first steps on the path toward eventual Security Council referral of the DPRK situation to the ICC or to a special tribunal should be laid now to build the requisite political will.

The use of letters from states, such as the United Kingdom, to authorities in the UN, such as the President of the Security Council or the Secretary-General, could be one, albeit small, step. A state could raise the topic of DPRK human rights under “Other Business” during one of the daily Security Council meetings as another step, followed by placement of the topic on a subsequent daily agenda with the support of other states. A statement by the President of the Security Council could perhaps be on the path. Security Council Resolutions that provide deadlines by which the DPRK must improve its human rights situation are likely necessary steps, in addition to an investigation.²⁰⁰ Ideally, the DPRK would genuinely meet these deadlines, but if not, then the political groundwork should be in place to allow for a Security Council referral of the DPRK situation to the ICC or the creation of a special tribunal to reach crimes prior to July 1, 2002.

²⁰⁰ S. C. Res. 1593 was preceded by several Security Council, General Assembly, and Commission on Human Rights resolutions and statements by the President of the Security Council for, among other matters, improving the human rights situation in Sudan. They include: S. C. Res. 1591, 1590, 1574, 1564, 1556, and 1547, available at <http://www.un.org/Docs/sc/>.

VII. CONCLUSION.

This article provides a factual overview of the crimes against humanity, genocide, and war crimes that are being committed by the Kim Jong Il regime in the DPRK and reviews the legal framework for their prosecution before the ICC. It applies this law to facts from the public domain. It concludes that these facts provide a reasonable basis to believe that Kim Jong Il is individually liable for such crimes. It shows that Kim Jong Il is in control of the DPRK due to an ideology that elevates him to god-like status, thereby placing him at the top of every governmental organ of power. He also maintains absolute power by a system of surveillance and classification of the population based on loyalty. Persons – and their relatives - are placed in prison camps of about 200,000 inmates without adequate due process for alleged political crimes. They suffer enslavement and frequent death by forced labor and starvation-level rations, in addition to torture, beatings, rape, and other abuses. These abuses constitute crimes against humanity for murder, extermination, enslavement, forcible transfer of population, arbitrary imprisonment, torture, rape, and persecution on political and other grounds. Women and girls who are trafficked to countries such as China may also suffer the crime against humanity of enslavement. Some 80,000 persons are estimated to have died since, July 1, 2002, the date the ICC Treaty came into force. Millions have died prior to that date due to the same crimes and famine.

In addition, persons who flee to China and are forcibly repatriated to the DPRK face particularly brutal treatment in detention facilities. Those who are pregnant suffer forced abortions or the murder of their infants upon birth because they are “half-

Chinese.” Those who are Christian are also subject to particularly abusive punishment because they are Christian. These crimes against national (and potentially ethnical) and religious groups, as such, constitute genocide. In addition, the DPRK has abducted thousands of South Koreans, Japanese, and others since the Korean War, with hundreds still alive in captivity. These abductions constitute the crime against humanity of enforced disappearance of persons. More than 500 South Korean prisoners of war are also in DPRK captivity and may suffer abuses. These are war crimes. Of course, this is a simplistic summary. Facts must be proven, crimes may overlap, and additional crimes may emerge.

This article recommends that at the appropriate time in the near future, the UN Secretary-General launch an investigation into DPRK abuses as he did for Darfur in the Sudan. Such an investigation appears politically necessary to support a Security Council referral of the DPRK situation to the ICC or, if the investigators find it necessary to overcome the ICC’s temporal jurisdiction requirement, the creation of a special tribunal to hear the case. While the current six-party talks for denuclearizing the DPRK make the timing now for such an investigation difficult, this article contends that the possibility of it may be beneficial to the talks, as it may prompt Kim Jong Il to be more cooperative. If the DPRK refuses to cooperate in the six-party talks or if it reneges on any agreement reached, UN Security Council action is likely. The Security Council should consider an investigation and referral of the DPRK situation to the ICC or to a special tribunal as seriously as it considers economic sanctions. The former targets the persons responsible for the intransigence, in contrast to the bluntness of economic sanctions that punish millions.

Admittedly, enforcement of arrest warrants against Kim Jong Il and his cadres would be difficult, but that should not stop the legal efforts to have them issued. The stigma of such a legal determination would be in itself potentially harmful. The political situation may also change to allow for their use. Even if the DPRK cooperates in reaching an agreement to denuclearize and in fact does so, the United Nations should launch an investigation into DPRK abuses with the intent to refer the case to the ICC or to a special tribunal. Such is necessary for the millions who suffer under the outrageous regime of Kim Jong Il.