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# A CASE FOR THE PROSECUTION OF KIM JONG IL FOR CRIMES AGAINST HUMANITY, GENOCIDE, AND WAR CRIMES

Grace M. Kang, Esq.\*

## I. INTRODUCTION

As the world focuses on efforts to denuclearize the Democratic People's Republic of Korea (D.P.R.K. or North Korea), profound human rights abuses persist under the dictatorship of North Korea's leader, Kim Jong Il. This article seeks to demonstrate the magnitude of these abuses by showing that they may constitute crimes against humanity, genocide, and war crimes, and that Kim Jong Il may be criminally liable for them. Although the goal of diplomatically resolving the nuclear problem is presently at odds with the notion of prosecuting Kim Jong Il, it is an idea that must be explored. Prosecution should be considered not only for moral and legal reasons, but also to add to the arsenal of possible disincentives to use against the D.P.R.K. should the six-party talks for denuclearization fail, or should the D.P.R.K. neglect to abide by any agreement reached.<sup>1</sup> The threat of criminal prosecution could serve,

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\* Formerly Visiting Professor at Renmin University of China in 2005, Visiting Assistant Professor at Seoul National University from 2003–2005. This article was completed prior to my current employment at the State Department; the views expressed here do not necessarily represent the views of the Department of State or the United States. I wish to especially thank Professor David Scheffer for his invaluable comments. His strong contributions to the development of international prosecutions are an inspiration. I also wish to thank Heran Song, Dong-bok Lee, Deborah Fikes, Rev. Timothy A. Peters, Joanne Welsh, Ann Buwalda, and Richard Roan for their good will. Thanks also to Renmin University of China for the use of its facilities to write this article, and particular thanks to Professor Xinning Song. I am also grateful for my years at Seoul National University and wish to especially thank Professors Kyong-Whan Ahn, Wookhee Shin, and Yong-Chool Ha. In addition, I wish to thank the Korea

in effect, as a *de facto* United Nations (UN) Security Council sanction. Indeed, it should be considered as seriously as other sanctions, financial or otherwise.<sup>2</sup>

A primary requirement for determining whether a Prosecutor should initiate an investigation under Article 53 of the Rome Statute of the International Criminal Court (ICC) is to evaluate whether there is “a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.”<sup>3</sup> This article evaluates whether facts as provided by credible sources—

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Institute for National Unification for my time as a Visiting Researcher there. Thanks also to Jennifer Stark of the Columbia Human Rights Law Review for her excellent editing. Finally, let me give special thanks to my relatives in the Republic of Korea and the United States for making my work in Asia a personal journey of better understanding. This article is dedicated to my grandfather, Young-Man Kang, and my parents, Cheul Weun Kang and Unhi Kang.

1. The six parties engaged in negotiations to denuclearize the Korean peninsula are the United States, the D.P.R.K., the Republic of Korea, the People's Republic of China, the 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 & David E. Sanger, *U.S.-Korean Deal on Arms Leave Key Points Open*, N.Y. Times, Sept. 20, 2005, at A1. On July 15, 2006, the UN Security Council unanimously passed resolution 1695 to condemn the D.P.R.K.'s multiple launches of ballistic missiles on July 5, 2006, to demand the D.P.R.K.'s suspension of its ballistic missile program, to require member states to stop related technology transfers with the D.P.R.K., and to urge the D.P.R.K. to return to the six-party talks. See S.C. Res. 1695 paras. 1–3, 6, UN Doc. S/RES/1695 (July 15, 2006).

2. 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, at A6. “The U.S. has clamped down on companies it suspects of aiding North Korea in counterfeiting, money laundering, and the drug trade.” *U.S. Officials in Seoul on N. Korea's Financial Moves*, Reuters, Jan. 21, 2006, available at [http://www.boston.com/news/world/asia/articles/2006/01/21/us\\_officials\\_in\\_seoul\\_on\\_nkoreas\\_financial\\_moves/](http://www.boston.com/news/world/asia/articles/2006/01/21/us_officials_in_seoul_on_nkoreas_financial_moves/). These efforts have been cited by the D.P.R.K. as a reason for its ongoing failure to return to the six-party talks.

3. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, art. 53, 2187 UNT.S. 90, para. 1(a) (entered into force July 1, 2002) [hereinafter Rome Statute].

particularly D.P.R.K. refugees who have disclosed their personal accounts to human rights, governmental, and media organizations<sup>4</sup>—demonstrate a reasonable basis for believing that the Kim Jong Il regime is criminally liable for crimes against humanity, genocide, and war crimes.

Section II provides an overview of the deplorable human rights situation in the D.P.R.K. Section III shows how the ICC could have jurisdiction over these crimes. Section IV provides the legal framework for establishing individual criminal liability for crimes under the ICC's jurisdiction. Section V applies this legal framework and the criminal standards for crimes against humanity, genocide, and war crimes to published facts about the D.P.R.K. The section concludes that the facts indicate that there is a reasonable basis for holding Kim Jong Il and his cadres individually liable for these crimes. Section VI therefore recommends that the UN Secretary-General launch an investigation into the situation in the D.P.R.K. Pursuant to the findings of this investigation, the UN Security Council should intervene judicially in the D.P.R.K. by referring the situation to the ICC, or by creating a special tribunal to investigate and prosecute Kim Jong Il and other members of the D.P.R.K. leadership. This article is not an exhaustive study of legal and factual arguments; rather, it lays a broad foundation for further action towards the criminal investigation and prosecution of the D.P.R.K. regime.

## II. FACTUAL OVERVIEW

The following is a factual overview, based on credible reports in the public domain, that demonstrates Kim Jong Il's control and likely knowledge of human rights abuses which constitute crimes against humanity, genocide, and war crimes. The reports were produced by professionals from a variety of organizations who typically had human rights expertise. The organizations included the Korea Institute for National Unification (KINU), the U.S. Committee for Human Rights in North Korea, the UN Special Rapporteur on the situation of human rights in the D.P.R.K., Human Rights Watch,

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4. While reports by human rights, governmental, and media organizations may be construed as hearsay, they provide strong leads for the ICC prosecutor. In addition, the testimony from various D.P.R.K. refugees may be the most reliable evidence currently available.

Amnesty International, and the U.S. State Department. In most cases, the D.P.R.K. refugees were interviewed in a manner that allowed for corroboration and assessment of credibility.

#### A. Kim Jong Il Controls the D.P.R.K.

The D.P.R.K. is probably the most controlling, authoritarian regime in the world. Through promoting a political philosophy called “juche,”<sup>5</sup> which generally means self-reliance, the “Dear Leader” Kim Jong Il and his deceased father, “Great Leader” Kim Il Sung, have created a unique regime structure<sup>6</sup> that resembles a religion.<sup>7</sup> For example, portraits of Kim Jong Il and Kim Il Sung are ubiquitous; every home has a set.<sup>8</sup> Indeed, the obedience required by the regime is so extreme that people have died simply to protect these portraits.<sup>9</sup> Juche ideology has even 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 God.<sup>10</sup> In fact, according to the Seoul-based, government-funded Korea Institute for National Unification (KINU), D.P.R.K. citizens are mandated to “worship”

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5. “Juche” was initially used by Kim Il Sung as the rationale for purging his political foes. Korea Institute for National Unification (KINU), White Paper on Human Rights in North Korea 6 (2004) [hereinafter White Paper 2004].

6. E-mail Interview with Hwang Jang Yop, former Chairman of the Supreme People’s Congress (highest ranking North Korean government defector) (Dec. 20, 2005) (on file with the Columbia Human Rights Law Review).

7. Bureau of Democracy, Hum. Rts., and Lab., U.S. State Dep’t, Democratic People’s Republic of Korea: Country Reports on Human Rights Practices 2005 § 1(f) (2006), <http://www.state.gov/g/drl/rls/hrrpt/2005/61612.htm> [hereinafter U.S. State Dep’t Human Rights Report] (“The cult of personality of Kim Jong Il and his father remained important ideological underpinnings of the regime, at times seeming to resemble tenets of a state religion.”).

8. Peter Carlson, *Sins of the Son*, Wash. Post, May 11, 2003, at D1.

9. White Paper 2004, *supra* note 5, at 163 (reporting how, before a fishing boat sunk during a typhoon, the sailors on board tied their portraits of 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.).

10. See Anthony Faiola, *An Act of Subversion, Carried by Balloons*, Wash. Post, Aug. 10, 2005, at A11 (“[P]ossessing a Bible is punishable by death or imprisonment [in a country where Kim Il Sung and Kim Jong Il] are referred to as gods.”); see also Barbara Demick, *A Vigil Against Faith in North Korea*, L.A. Times, Nov. 15, 2005, at A6 (“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.”).

Kim Il Sung and Kim Jong Il according to the “Ten Great Principles of Unique Ideology,” which may be analogous to Christianity’s Ten Commandments.<sup>11</sup> The Ten Great Principles are so normatively expansive that they control every expression of the D.P.R.K. citizenry. Those who disobey become political or ideological criminals. For example, a nine-year-old child’s family was punished 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. The family subsequently disappeared.<sup>12</sup> The Principles’ vagueness allows for arbitrary interpretation, which makes them convenient “legal” tools for punishing people on political grounds and ensuring total political

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11. Korea Institute for National Unification (KINU), White Paper on Human Rights in North Korea 167 (2005) [hereinafter White Paper 2005]. The Ten Great Principles of Unique Ideology 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.
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.

*Id.*

12. White Paper 2004, *supra* note 5, at 168.

submission.<sup>13</sup>

In addition to this cult-like mentality, a culture of surveillance pervades North Korean society, primarily due to the government's covert program.<sup>14</sup> The People's Security Agency, the State Security Protection Agency, and the Korean Workers' Party "each plant their own informants in all work-places and units of organization."<sup>15</sup> The informants are recruited locally and may number from one out of five to one out of ten workers. As a result, workers must assume that everyone is an informant and behave accordingly.<sup>16</sup> Moreover, school children are instructed to report their parents to government officials if they read from the Bible or discuss Christianity.<sup>17</sup> As Kongdan Oh and Ralph C. Hassig have written, "[p]eople watch each other, and security officials watch one another. No one can be sure what will be reported. Everyone becomes a prisoner facing the classic dilemma of not knowing whether to incriminate others or risk being incriminated himself."<sup>18</sup>

The pervasiveness of Kim Jong Il's control is also manifest in the many positions he holds in the government organizational structure. He is the general-secretary of the KWP,<sup>19</sup> which controls the government.<sup>20</sup> He also chairs the Politburo, which is the KWP's

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13. *Id.* at 167–68.

14. Bradley K. Martin, *Under the Loving Care of the Fatherly Leader: North Korea, and the Kim Dynasty 262–65* (St. Martin's Press 2004) (explaining how the government spied on people at all times by methods such as going through mail, wiretapping, and even maintaining regiments of secret police at the university to infiltrate the student body).

15. White Paper 2004, *supra* note 5, at 4–5.

16. *Id.*

17. Soon Ok Lee, *Eyes of the Tailless Animals: Prison Memoirs of a North Korean Woman 151* (Bahn-Suk Lee & Jin Young Choi trans., Living Sacrifice Book Company 1999) (1996).

18. Kongdan Oh & Ralph C. Hassig, *North Korea Through the Looking Glass 191* (The Brookings Institution 2000).

19. White Paper 2004, *supra* note 5, at 2–3.

20. He inherited his position as KWP general-secretary from his father Kim Il Sung, although hereditary succession, as stipulated in the tenth of the Ten Great Principles, is not embraced by other communist states. Scott Snyder, *Negotiating on the Edge: North Korean Negotiating Behavior 39* (United States Institute of Peace 1999). *See also* Bureau of East Asian and Pacific Affairs, U.S. Dep't of State, *Background Note: North Korea* (Oct. 2006), <http://www.state.gov/r/pa/ei/bgn/2792.htm> [hereinafter *Background Note*] ("Following the death of Kim Il Sung, his son—Kim Jong Il—inherited supreme power.").

council of policy advisors.<sup>21</sup> Most notably, Kim Jong Il chairs the National Defense Commission, the supreme state military organization<sup>22</sup> that he had strengthened after his father's death in 1994 to become the most powerful governmental organization.<sup>23</sup> The Supreme People's Assembly merely approves Kim Jong Il's annual budget without question.<sup>24</sup> In addition, the D.P.R.K. judiciary is not independent. This has potential implications for ICC jurisdiction, which is discussed in Section III of this article.<sup>25</sup> While Kim Jong Il keeps the elites in his machinery satisfied with lavish gifts and privileges,<sup>26</sup> millions suffer from a chronic food shortage that is perpetuated by his government.<sup>27</sup>

The fact that the D.P.R.K. is such a controlled, authoritarian society works to the advantage of the prosecution of Kim Jong Il because it lessens the difficulty of proving that he knowingly committed, ordered, solicited, induced, aided, abetted, assisted, or contributed to the commission of crimes against humanity, genocide, and war crimes, and that he is therefore individually liable for them.<sup>28</sup> As the supreme authority in the D.P.R.K., he may also be individually liable for failing to repress the commission of these crimes, or for failing to submit them to judicial authorities.<sup>29</sup> Other governmental officials at the top of his regime<sup>30</sup> are also likely to be

21. Oh & Hassig, *supra* note 18, at 117.

22. *Id.* at 118.

23. Dae-Sook Suh, *New Political Leadership, in The North Korean System in the Post-Cold War Era* 65, 75 (Samuel S. Kim ed., 2001).

24. Oh & Hassig, *supra* note 18, at 18; U.S. State Dep't Human Rights Report *supra* note 7, § 3.

25. Rome Statute, *supra* note 3, art. 17.

26. Martin, *supra* note 14, at 276.

27. Food insecurity is a long-standing problem in North Korea, as famine resulting from government intent or recklessness killed over one million persons in the 1990's. See Stephan Haggard & Marcus Noland, U.S. Comm. for Hum. Rts. in N. Korea, *Hunger and Human Rights: The Politics of Famine in North Korea* 9 (2005) (noting that Congress found that more than two million North Koreans have died since the early 1990s due to the failure of government distributions, and that many North Korean children suffer from some form of malnutrition); Grace M. Kang, *Understanding the North Korean Human Rights Act of 2004*, 13 *Int'l J. of Korean Unification Stud.* 153, 158 (2004).

28. Rome Statute, *supra* note 3, art. 25, para. 3.

29. See *id.* art. 28.

30. E-mail Interview with Hwang Jang Yop, former Chairman of the Supreme People's Congress (highest ranking North Korean government defector) (Cheul W. Kang trans.) (Dec. 20, 2005) (on file with the Columbia Human Rights Law Review). Hwang believes other officials responsible for crimes include the



criminally culpable, and therefore must be included in any UN investigation.

B. The D.P.R.K. has a Policy of Committing Crimes Against Humanity, Genocide, and War Crimes

The D.P.R.K. is permeated by human rights violations in every aspect of its society. Based on family background and loyalty, the government divides the entire population into three classes: core, wavering, and hostile.<sup>31</sup> Although this practice has allegedly been abolished by law, defectors indicate that it persists.<sup>32</sup> Those in the

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Party Secretaries: Chung Ha Chul, for Propaganda; Kae Eung Tae, Public Security; Kim Kuk Tae, Personnel; Chun Byung Ho, Military Industry; Kim Jung Lin, Worker Mobilization; Han Sung Ryong, Economy; Cho Tae Bok, Science Technology; and Kim Ki Nam, Revolution Record. Other responsible persons are the principal chiefs of departments or offices: Inspection, Kim Jong Il's Office Management, Party Organization, Propaganda and Promotion, International 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 Management, 39th Room Office Management, Party History Research Institute, 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.

As a former member of Kim Il Sung and Kim Jong Il's inner circles, Hwang could provide the above names and positions in addition to an explanation as to 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 D.P.R.K. regime. He emphasizes that Kim Jong Il is the most responsible for international human rights violations, as the other officials have little choice but to follow his decisions.

31. White Paper 2004, *supra* note 5, at 121; see also *Advancing Human Rights in North Korea: Hearing on the North Korean Nuclear Calculus: Beyond the Six Power Talks Before the U.S. S. Comm. on Foreign Rel.* 108th Cong. (Mar. 2, 2004) [hereinafter *Hearing on the North Korean Nuclear Calculus*] (testimony of Tom Malinowski), [http://hrw.org/english/docs/2004/03/02/usint7793\\_txt.htm](http://hrw.org/english/docs/2004/03/02/usint7793_txt.htm) (discussing North Korea's atrocious human rights record, including the North Korean government's effort to have total control over its peoples' lives and its practice of dividing people into three classes based on loyalty).

32. UN Econ. & Soc. Council [ECOSOC] Comm'n on Hum. Rts., *Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World: Report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea*, para. 35, UN Soc. E/CN.4/2005/34 (Jan.

lower classes face special scrutiny and often suffer arbitrary punishment for alleged political misbehavior. As New York-based Human Rights Watch has 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.”<sup>33</sup>

Citizens must demonstrate absolute loyalty to Kim Jong Il, or else they may be forcibly sent to political labor colonies, camps, or prison facilities without due process. According to David Hawk’s *The Hidden Gulag, Exposing North Korea’s Prison Camps*, these facilities constitute a distinct system of incarceration in the D.P.R.K.<sup>34</sup> A second system of incarceration consists of smaller, shorter-term detention facilities along the border of the D.P.R.K. and the People’s Republic of China (P.R.C. or China). They are used to punish North Koreans who flee to China and are then forcibly repatriated to the D.P.R.K. by Chinese authorities.<sup>35</sup>

Death rates are high in both incarceration systems. Journalist Jasper Becker speculates that about one million people have died in the penal system over the last half century.<sup>36</sup> Those who have been repatriated from China face torture and, if pregnant, forced abortion or infanticide motivated by the nationality of the child.<sup>37</sup> Other reported human rights violations include rape, beatings, torture, and the testing of chemical and biological weapons.<sup>38</sup> Christian prisoners face heightened abuse because of their religious faith.<sup>39</sup> In addition, relatives of purged political

10, 2005) (prepared by Viti Muntarbhorn) [hereinafter Muntarbhorn].

33. *Hearing on the North Korean Nuclear Calculus*, *supra* note 31.

34. David Hawk, U.S. Comm. for Hum. Rts. in N. Korea, *The Hidden Gulag: Exposing North Korea’s Prison Camps* 10 (2003), <http://www.hrnk.org/HiddenGulag.pdf> [hereinafter Hawk, *The Hidden Gulag*] (including satellite photography to corroborate victims’ testimonies).

35. *Id.* at 10; see also Sang-Chul Kim, On the Status of N.K. Defectors in China (Comm’n to Help N. Korean Refugees (CNKR)) (1999), <http://www.cnkr.org> (follow “English” hyperlink; then follow “Materials” hyperlink) (discussing the situation of defectors forcibly returned to North Korea).

36. Jasper Becker, *Rogue Regime: Kim Jong Il and the Looming Threat of North Korea* 87 (Oxford University Press 2005). Becker has worked as a foreign correspondent for 20 years, including 14 years based in Beijing. He has written four books on the region. See generally Jasper Becker resume, [http://www.jasperbecker.com/jb\\_resume.htm](http://www.jasperbecker.com/jb_resume.htm) (highlighting his career accomplishments and subsequent expertise).

37. Becker, *supra* note 36, at 95.

38. White Paper 2005, *supra* note 11, at 309.

39. Lee, *supra* note 17, at 113.

prisoners are often found guilty by association and sentenced to a lifetime of brutal forced labor without legal due process.<sup>40</sup> This labor can include mining, textile production, logging, and farming under grueling, slave-like conditions.<sup>41</sup> Living conditions in these labor camps are horrifically unsanitary and—with near starvation-level rations—often result in illness and death.<sup>42</sup> While these prison facilities provide strong evidence for building a criminal case against Kim Jong Il and his cadres, crimes by the regime are by no means limited to the domestic penal system.<sup>43</sup> Non-D.P.R.K. citizens have also been victims of crimes perpetrated by Kim Jong Il's regime, including more than 500 Republic of Korea (R.O.K.) prisoners of war and hundreds of kidnapping victims.<sup>44</sup>

These crimes reflect the culture of criminality that characterizes the Kim Jong Il regime. His government also engages in other illegal activities, such as drug smuggling, trafficking in persons, and the production of counterfeit money.<sup>45</sup> Moreover, D.P.R.K. embassies and diplomats abroad are known to channel funds from illegal activities to Kim Jong Il's personal slush fund.<sup>46</sup> Indeed, the D.P.R.K.'s gross national product is surely enhanced by the productivity of the forced labor camps, borne through the loss of many lives.<sup>47</sup> Forced labor may also extend beyond the D.P.R.K.'s

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40. Becker, *supra* note 36, at 90.

41. Hawk, *The Hidden Gulag*, *supra* note 34, at 10; U.S. State Dep't Human Rights Report, *supra* note 7, § 1(c).

42. Christian Solidarity Worldwide, *Human Rights in North Korea: A Report of Christian Solidarity Worldwide*, Dec. 10, 2002, <http://www.cnkr.org> (follow "English" hyperlink; then follow "Materials" hyperlink).

43. See White Paper 2004, *supra* note 5, at 206.

44. H. R. Con. Res. 168, 109th Cong. (2005) (enacted).

45. *North Korea: Illicit Activity Funding the Regime Before the Subcomm. on Fed. Fin. Mgmt., Gov't Info, and Int'l Sec. of the U.S. S. Comm. on Homeland Sec. and Governmental Affairs*, 109th Cong, 2–3 (2006) [hereinafter *Illicit Activity Funding the Regime*, Noland] (statement of Marcus Noland, Senior Fellow, Institute for International Economics); see also U.S. Congressional Research Service, *North Korean Counterfeiting of U.S. Currency* (RL 33324; March 22, 2006), by Raphael F. Perl & Dick K. Nanto (discussing North Korean production of U.S. counterfeit currency).

46. Marcus Noland, *Avoiding the Apocalypse: The Future of the Two Koreas* 119 (Institute for International Economics 2000).

47. *Id.* at 120; *North Korea: Illicit Activity Funding the Regime Before the Subcomm. on Fed. Fin. Mgmt., Gov't Info, and Int'l Sec. of the U.S. S. Comm. on Homeland Sec. and Governmental Affairs*, 109th Cong, 1–2 [hereinafter *Illicit Activity Funding the Regime*, Coburn] (statement of Sen. Tom Coburn, Chairman, S. Comm. on Homeland Sec. and Governmental Affairs).

boundaries to North Korean-owned farms and factories abroad.<sup>48</sup> Trafficking of women and girls also extends beyond the D.P.R.K.'s borders.<sup>49</sup>

### C. Kim Jong Il Knows of the Crimes

Due to the tightly controlled society that Kim Jong Il and his father have constructed, Kim Jong Il and his cadres most likely have the requisite knowledge of these crimes. 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 and reorganized the Party's security apparatus.<sup>50</sup> Under his direct control, the number of inmates grew substantially and, in 1980, four more camps were created.<sup>51</sup> His direct control has also been evident in the years subsequent to his takeover of the Party's security apparatus.<sup>52</sup> For

48. See *Illicit Activity Funding the Regime*, Coburn, *supra* note 47, at 1; Barbara Demick, *N. Koreans Toil Abroad Under Grim Conditions*, L.A. Times, Dec. 27, 2005, at A1.

49. The traffickers must be investigated to determine if they are linked to the D.P.R.K. government. See *infra* notes 148–150 and accompanying text. *North Korea: Human Rights, Refugees, and Humanitarian Challenges: Joint Hearing Before the H. Subcomm. on Asia and the Pacific and the H. Subcomm. on Int'l Terrorism, Nonproliferation and Human Rights of the H. Comm. on Int'l Relations*, 108th Cong. 76 (Apr. 28, 2004) [hereinafter *Joint Hearing on Human Rights, Refugees, and Humanitarian Challenges*] (statement of Timothy A. Peters, Founder and Director, Helping Hands/Korea); White Paper 2004, *supra* note 5, at 180. For direct accounts of trafficking from D.P.R.K. defectors, see *Lifting the Veil: Getting the Refugees Out, Getting Our Message In: An Update on the Implementation of the North Korean Human Rights Act: Joint Hearing Before the H. Subcomm. on Africa, Global Human Rights and Int'l Operations and the H. Subcomm. on East Asia and the Pacific of the H. Comm. on International Relations*, 109th Cong. (Oct. 27, 2005) (statement of Cha Kyeong Sook, North Korean Refugee, and Ma Soon-Hee, North Korean Refugee, both recounting their experience with trafficking and their daughters' abduction into the trade).

50. Becker, *supra* note 36, at 86.

51. *Id.*

52. After Kim Il Sung's death in 1994, executions in the camps were suspended for about a month. But they recommenced when "the word spread that Kim Jong Il wanted to hear the sound of gunshots again." *Id.* at 98. Executions thus became daily in 1995, allegedly pursuant to Kim's orders. *Id.* KINU also reported that in 1998, Kim Jong Il instructed firing squads in public executions to aim at "victims' heads, as their brains were bad." White Paper 2005, *supra* note 11, at 47. Kim Jong Il also reportedly has directly engaged with the camps. For example, a former body guard of Kim Jong Il believes the Dear Leader personally intervened to release him from a political prison camp after nearly four years of

example, the National Security Agency, which administers the prison camps and is the key agency for information collection, reports directly to Kim Jong Il.<sup>53</sup> It is highly likely, therefore, that Kim Jong Il knows of the abuses that occur regularly in these camps.<sup>54</sup> This knowledge is further supported by the fact that Kim Jong Il has reportedly closed down multiple prison camps out of fear that the international community, particularly Americans, would discover their existence.<sup>55</sup>

Considering Kim Jong Il's involvement in the development of the camps and his efforts to hide them, Becker has concluded that "Kim Jong Il must therefore 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."<sup>56</sup> In addition, Kim Jong Il has used the government-controlled press to deny or disparage any international criticism.<sup>57</sup>

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quarrying stones for 14 hours a day. Hawk, *The Hidden Gulag*, *supra* note 34, at 33.

53. Hawk, *The Hidden Gulag*, *supra* note 34, at 26.

54. 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*, *The Daily NK*, Dec. 17, 2005, <http://www.dailynk.com>. Kim Jong Il also controls confinement facilities outside of the prison camps, in which it is likely human rights violations are occurring. "In compliance with Kim Jong Il's instructions contained in 'Regarding Military's Self-education for Minor Violators,' forced-labor units are organized and operating in each city and county." White Paper 2004, *supra* note 5, at 103.

55. Becker, *supra* note 36, at 99 (stating that Kim closed five camps, including several near Pyongyang, and moved the inmates to other camps because he apparently became alarmed that the outside world might learn about them).

56. *Id.* at 100. Journalist Bradley K. Martin has also written that Kim's secretiveness may be motivated by fear of the consequences of having his secrets revealed. He noted that Hwang Jang Yop, the highest ranking defector from the D.P.R.K. and a key architect of *juche* ideology, has said that, "Kim 'has cruelly killed countless people . . . His worst fear is having these crimes exposed.'" Consequently, "keeping secrets is the essence of life in the party." Martin, *supra* note 14, at 287 (quoting Hwang Jang Yop, *The Problems of Human Rights in North Korea 2* (Network for the North Korean Democracy and Human Rights trans., Seoul: NKnet 2002), <http://www.dailynk.com/english/keys/2002/8/04.php>). Hwang has also stated that, "[w]henever 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." *Id.* at 285.

57. For example, when U.S. President George W. Bush met with North Korean defector Kang Chol Hwan, who wrote about his horrendous life in a D.P.R.K. prison camp in the book *The Aquariums of Pyongyang*, the state-run

Since there is no indication that Kim Jong Il is mentally incapacitated or under the control of others who block information from him,<sup>58</sup> it is highly improbable that he would be unaware of the existence of the abuses occurring within his regime. Indeed, it is more probable that he, as the supreme leader of the D.P.R.K., instigated them.

### III. THE EXERCISE OF ICC JURISDICTION

Although the D.P.R.K. is not a party to the treaty creating and governing the ICC, known as the "Rome Statute,"<sup>59</sup> the ICC may have jurisdiction over crimes committed by D.P.R.K. citizens<sup>60</sup> if: (1)

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Korean Central News Agency specifically attacked the meeting by dismissing "defectors" as "just a handful of hooligans and criminals." *KCNA Urges U.S. to Clearly Understand Purport [sic] and Agenda of Six-party Talks*, Korean Central News Agency, June 23, 2005, <http://www.kcna.co.jp/item/2005/200506/news06/24.htm>.

58. See Interview with Madeleine Albright, former U.S. Secretary of State, *Newsmaker: Albright*, Online NewsHour, Oct. 30, 2000, available at [http://www.pbs.org/newshour/bb/international/july-dec00/albright\\_10-30.html](http://www.pbs.org/newshour/bb/international/july-dec00/albright_10-30.html); see also Wendy Sherman, *Sherman: 'Doing things we'd rather not,'* MSNBC Nightly News with Brian Williams, July 5, 2006, <http://www.msnbc.msn.com/id/13724290> (stating that Kim Jong Il is not crazy).

59. Rome Statute, *supra* note 3, art. 53, para. 3.

60. 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 an ICC prosecution initiated by the Security Council. However, any additional prosecutions may add to a comprehensive legal strategy against the regime. See Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press 2000). Actions also include those against Kim Jong Il in state courts, including actions in U.S. courts under the Alien Tort Claims Act, 28 U.S.C. § 1350 (2003). Regarding actions brought before UN treaty bodies, the D.P.R.K. is a party to two of the four treaties with bodies that may consider individual communications: the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR], and the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter Women's Convention]. Unfortunately, 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, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 171 (entered into force Jan. 3, 1976) [hereinafter ICESCR], and the Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 144 U.N.T.S. 123 (entered into force Sept. 2, 1990) [hereinafter CRC]. The D.P.R.K. sought to withdraw from the ICCPR in August 1997 but the Secretary-

the UN Security Council refers a case to it, acting under Chapter VII of the UN Charter; (2) a State Party refers the situation to the ICC; or (3) the prosecutor initiates an investigation *proprio motu*, pursuant to Article 13 of the Rome Statute.<sup>61</sup> Article 5 of the Rome Statute limits the court's jurisdiction to crimes against humanity, genocide, and war crimes.<sup>62</sup> The crimes must also have been committed after the Rome Statute entered into force on July 1, 2002.<sup>63</sup> For a case to be admissible, Article 17 requires that the crimes must be inadequately addressed by the domestic court system of the state in question, as the ICC's jurisdiction is complementary to national judicial systems.<sup>64</sup> In addition, the State with jurisdiction over the case must be "unwilling or unable genuinely to carry out the investigation or prosecution"; and the case must be of sufficient

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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 accepted the competence of the UN Human Rights Committee to hear 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 Women's Convention Article 29 regarding disputes between State Parties. Victims of abuse in the D.P.R.K. and others with direct evidence of abuses who have exhausted domestic remedies or can show that domestic redress would be ineffective may use the 1503 procedure of the UN Commission on Human Rights. (The UN Human Rights Council has assumed special procedures of the Commission and will review them; for an explanation of the process, see <http://www.ohchr.org/english/bodies/chr/special/index.htm>).

61. Rome Statute, *supra* note 3, art. 13.

62. Rome Statute, *supra* note 3, art. 5. Although the crime of aggression is also referenced in Article 5, it is not an actionable crime under the Rome Statute until the treaty is amended to include elements for that crime as well as a definition for it.

63. Rome Statute, *supra* note 3, art. 11.

64. *Id.* 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. Current prevailing principles 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, the prosecuting 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. International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General*, para. 614 (Jan. 25, 2005).

gravity to justify further action by the court.<sup>65</sup> Given Kim Jong Il's control of all government functions, the failure of the D.P.R.K.'s legal system to provide adequate judicial process generally, and the severity of the regime's abuses, the ICC admissibility requirements are most likely met. Under the current circumstances, it is difficult to imagine the D.P.R.K. judiciary genuinely trying the men who control it.<sup>66</sup>

In addition, Section V of this article will demonstrate that the abuses most likely constitute crimes against humanity, genocide, and war crimes. The magnitude and severity of the crimes are of sufficient gravity to justify further action by the ICC. The D.P.R.K. situation is at least of the same order as—if not worse than—the situations in Darfur, the Democratic Republic of Congo, and Northern Uganda, which are currently under investigation by the ICC. At least one million people are estimated to have died in the D.P.R.K.'s prison camps, assuming that 10 percent of a constant prison population of 200,000 to 300,000 died each year.<sup>67</sup> In addition, famine due to government intent or recklessness has killed 1 to 2.5 million people. While many deaths occurred prior to July 1, 2002, they are an important reminder of the character of the Kim Jong Il regime. Since that date, it is estimated that at least 80,000 people have died.<sup>68</sup> This figure is constantly growing. Today's victims, many

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65. Rome Statute, *supra* note 3, art. 17.

66. White Paper 2005, *supra* note 11, at 90–91 (“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.”); *see also id.* at 93–94 (noting that North Korea has adopted a people’s jury system that is similar to the Anglo-American courts, but it appears that “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 rubber stamp the conviction of the accused wrongdoer.”); *see also id.* at 119 (reporting that whether an accused is executed usually depends on his or her family background).

67. Becker, *supra* note 36, at 87.

68. It is difficult to determine the exact number of deaths caused by crimes against humanity, genocide, and war crimes in the D.P.R.K. The U.S. State Department estimates that there are 150,000 to 200,000 prisoners in camps. U.S. State Dep’t Human Rights Report, *supra* note 7, § 1(c). Becker’s estimate of 200,000 to 300,000 persons in the camps is higher than the U.S. State



of whom have suffered for decades, would undoubtedly have their interests served by an ICC investigation and prosecution.

Whereas the blunt instrument of economic sanctions harms millions, the ICC prosecution of Kim Jong Il and his cadres would target the individuals actually responsible for the D.P.R.K.'s behavior. Even though economic sanctions may be more enforceable at this time than an arrest warrant for Kim Jong Il and his cadres, the political weight of issuing 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, Issuance by the Pre-Trial chamber of a warrant of arrest or a summons to appear)<sup>69</sup> would bear potentially negative consequences for Kim Jong Il. The stigma of an objective legal determination by the ICC would carry greater credibility than condemnations from states that may appear politically motivated.

Perhaps even the political situation could change sufficiently to allow an arrest of Kim Jong Il. Such was the case of then-Federal Republic of Yugoslavia (F.R.Y.) President Slobodan Milosevic, who was indicted four years after negotiating the Dayton Accords, and was at trial in the Hague until he died of natural causes.<sup>70</sup> The events leading to Milosevic's 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.<sup>71</sup> The necessary political situation 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 these

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Department's estimate and therefore produces a higher estimate of deaths; however, this estimate does not include deaths outside of the camps.

69. See Rome Statute, *supra* note 3, art. 58, para. 1; see also *id.* art. 61, para. 7 (elucidating the requirements for a pre-trial chamber determination of whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged).

70. Prosecutor v. Slobodan Milosevic et. al., Initial Indictment, Case No. IT-99-37, para. 43 (May 22, 1999), available at <http://www.un.org/icty/indictment/english/mil-ii990524e.htm> [hereinafter *Prosecutor v. Slobodan Milosevic*]; see also Marlise Simons, World Briefing/Europe, *The Hague: Inquiry Shows Milosevic Died a Natural Death*, N.Y. Times, Apr. 6, 2006, at A12 ("The Dutch Inquiry . . . concluded that [Milosevic] died a natural death as a result of a heart attack on March 11, dismissing allegations that he was poisoned while in United Nations custody.").

71. Gary J. Bass, *Milosevic in The Hague*, Foreign Affairs, May-June 2003, at 93.

circumstances would mean a “regime change” founded on far sounder ground than any that could result from externally imposed force.<sup>72</sup>

In addition, just as the Milosevic indictment advanced the development of international law, the instigation of a case against Kim Jong Il would serve as a significant addition to growing international precedents against impunity. The charge of extermination as a crime against humanity for the D.P.R.K. policies that have led to mass starvation, for example, would mark new ground for a crime that has occurred repeatedly and will undoubtedly appear again on the international stage.<sup>73</sup> A growing caseload against “atrocities crimes”<sup>74</sup> reinforces their illegality, promoting deterrence

72. 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) (“Though U.S.-R.O.K. 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 D.P.R.K. 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 and effective 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 United Nations (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*, 36 *Korea Observer* 717, 724 (2005). The UN Security Council acted under Chapter VII to create a U.S.-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 the North and the 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.

73. See David Marcus, *Famine Crimes*, 97 *Am. J. Int’l L.* 245, 247–48 (2003).

74. “Atrocities crimes” is a term created by Professor David Scheffer to denote the complex categories of crimes that are established by “atrocities law.” He conceptualizes the latter as “a new category of international law that facilitates the prosecution of those who commit [atrocities] crimes.” Scheffer explains that atrocities law is basically the law of the international criminal tribunals. David J. Scheffer, *The Future of Atrocities Law*, 25 *Suffolk Transnat’l L. Rev.* 389, 398

and universal intolerance of their commission.

#### A. UN Security Council Referral

The UN Security Council has made one referral to the ICC prosecutor since July 1, 2002: the situation in Darfur, Sudan.<sup>75</sup> The Security Council's authority for this referral derives from the fact that the situation in Sudan posed a threat to international peace and security, pursuant to Chapter VII of the UN Charter.<sup>76</sup> Notably, the broad language used in Security Council resolution 1593 for justifying Chapter VII action was not limited to violations of international humanitarian law and human rights in Darfur.

While the D.P.R.K. is not troubled by fighting between rebel and government forces, as in the Sudan, the situation in the D.P.R.K. nonetheless poses a threat to international peace and security. Although the oppression perpetrated by the Kim Jong Il regime and China's refusal to protect D.P.R.K. refugees makes the D.P.R.K. more stable than Darfur, this "stability" (which may ultimately be precarious) is founded upon crimes against humanity, genocide, and war crimes, and therefore should not preclude a Security Council referral. Moreover, the D.P.R.K.'s likely production of nuclear,

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(2002).

75. Pursuant to S.C. Res. 1593, the UWSC took note of the report of the International Commission of Inquiry on Darfur on violations of international humanitarian law and human rights law in Darfur—which determined that the situation in Sudan continued to constitute a threat to international peace and security—and 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. S.C. Res. 1593, para. 1, UN Doc. S/RES/1593 (March 31, 2005). The International Commission of Inquiry on Darfur found crimes against humanity and war crimes were very likely committed, but did not find the crimes to be an act of genocide. Int'l Comm'n of Inquiry on Darfur, *Report of the Int'l Comm'n of Inquiry on Darfur to the United Nations Secretary-General*, paras. 630, 640, UN Doc. S/2005/60 (Jan. 15, 2005).

76. Article 39 of Chapter VII states that the "Security Council shall determine the existence of any threat to the peace." UN Charter, art. 39, para. 1. 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." *Id.*, art. 41, para. 1. Article 42 provides for use of force if the Article 41 measures are inadequate. Articles 25 and 48 of the UN Charter obligate member states to carry out decisions taken under Chapter VII. *Id.*, art. 25, para. 1; *Id.*, art. 48, paras. 1–2. The D.P.R.K., as a member state, would thus be obligated to carry out decisions made by the Security Council.

chemical,<sup>77</sup> and biological weapons of mass destruction,<sup>78</sup> as well as its known proliferation of missiles and its potential to sell these weapons to terrorists,<sup>79</sup> poses a serious threat to international security. Trade with terrorists is not difficult to contemplate, given that the D.P.R.K. government trades illegal drugs and other illegal items in criminal networks that terrorists may access.<sup>80</sup> Thus, a Security Council referral to the ICC that makes out Article 5 violations could succeed on the basis of the D.P.R.K.'s threat to international peace and security, much as was the case with the Sudan referral.

In addition, states have endorsed "the responsibility to protect" as an obligation governments have toward their citizens. Failure to meet this responsibility creates the possibility that the international community could act in order to address the breach. Judicial intervention is one permissible way of doing so. Security Council resolution 1674, adopted on April 28, 2006, encourages the use of "justice and reconciliation mechanisms" to end impunity, "including national, international and 'mixed' criminal courts and tribunals."<sup>81</sup> It also "[e]mphasizes . . . the responsibility of States to comply with their relevant obligations to end impunity and to prosecute those responsible for war crimes, genocide, crimes against humanity, and serious violations of international humanitarian

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77. Ctr. for Nonproliferation Studies, North Korea: Chemical Overview, Monterey Inst. of Int'l Studies (Feb. 16, 2006), [http://www.nti.org/e\\_research/profiles/NK/Chemical/index.html](http://www.nti.org/e_research/profiles/NK/Chemical/index.html); see also CNN.com, *Facts on North Korea: One of the World's Most Secretive Nations* (Feb. 10, 2005), <http://www.cnn.com/2004/WORLD/asiapcf/04/22/nkorea.facts/index.html> (stating that North Korea is said to have an extensive chemical weapons program, and citing a report by the Federation of American Scientists saying that North Korea has chemical stockpiles of at least 180–250 tons of reserve-weaponized agents).

78. Ctr. for Nonproliferation Studies, North Korea: Biological Weapons Overview, Monterey Inst. of Int'l Studies (2003), [http://www.nti.org/e\\_research/profiles/NK/Biological](http://www.nti.org/e_research/profiles/NK/Biological).

79. E-mail Interview with Hwang Jang Yop, former Chairman of the Supreme People's Congress (highest ranking North Korean government defector) (trans. Cheul W. Kang) (Dec. 20, 2005) (on file with the Columbia Human Rights Law Review) (stating the opinion that the D.P.R.K.'s illegal activities are increasing, despite the international community's heightened surveillance, and that weapons transactions account for most of the D.P.R.K.'s foreign currency earnings).

80. *Illicit Activity Funding the Regime*, Coburn, *supra* note 47, at 1–2.

81. S.C. Res. 1674, paras. 7–8, UN Doc. S/RES/1674 (Apr. 28, 2006).

law.<sup>82</sup> Thus, the Security Council should be compelled by its own resolution to intervene judicially in the D.P.R.K.

However, achieving a Security Council referral of the D.P.R.K. situation to the ICC prosecutor would be difficult politically. The P.R.C. would be highly unlikely to support such an action, and the U.S. may also have difficulty with it because of the Bush Administration's opposition to the ICC. However, neither the P.R.C. nor the U.S. vetoed such an action in the case of Darfur, indicating an unwillingness to completely close off such a possibility.<sup>83</sup> The U.S. also voted in favor of Security Council sanctions against four Sudanese individuals, and the P.R.C. withheld its veto,<sup>84</sup> even though the P.R.C. has an interest in maintaining good relations with the Sudan because of its energy needs and strategic goals in Africa.<sup>85</sup> Thus, various factors could conceivably coalesce to allow all permanent Security Council members to either abstain from voting or to vote positively for a referral of the D.P.R.K. situation to the ICC.<sup>86</sup>

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82. S.C. Res. 1674, *supra* note 81, paras. 7–8.

83. S.C. Res. 1593, *supra* note 75, para. 1.

84. See S.C. Res. 1672, UN Doc. S/RES/1672 (Apr. 25, 2006); see also S.C. Res. 1679, UN Doc. S/RES/1679 (May 16, 2006) (involving the P.R.C. voting in favor of considering, 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 . . . .”); see also Press Release, U.S. Mission to the UN, Remarks by Ambassador John Bolton on Iran, Sudan and Other Matters, at the Security Council Stakeout, USUN Press Release # 120 (06) (May 16, 2006) (discussing the unanimous vote to pass resolution 1679, which invokes Chapter VII in dealing with the Sudan situation).

85. Anthony Lake & Christine Todd Whitman, *More than Humanitarianism: A Strategic U.S. Approach Toward Africa* 40 (Council on Foreign Relations 2006).

86. Such factors may include: extreme lack of cooperation by the D.P.R.K. in the six-party talks; D.P.R.K. engagement in crime or terrorism of a magnitude that makes continued P.R.C. support untenable; highly publicized exposure of D.P.R.K. human rights violations that makes a veto politically difficult; and any security threat or gain that makes cooperation with the permanent Security Council members more attractive than continued support of the D.P.R.K. This type of cooperation was the case during the last D.P.R.K. nuclear crisis in 1994. Before a sanctions resolution against the D.P.R.K. was to be considered by the Security Council, the P.R.C. alerted the D.P.R.K. that it may not be able to count on the P.R.C.'s veto because of the strength of international opinion against it. The P.R.C. also had been privately irritated by the D.P.R.K.'s actions and concerned that they could lead to problems at its borders. Soon after the Chinese pressure, the D.P.R.K. engaged in negotiations to end the crisis. Thus, P.R.C.

B. State Party Referral and Prosecutor's Initiation of an Investigation *Proprio Motu*

Two alternatives to a Security Council referral are referral by a State Party to the Rome Statute or the prosecutor's initiation of an investigation *proprio motu*.<sup>87</sup>

Article 12 allows ICC jurisdiction for these types of cases only if the relevant state has accepted the jurisdiction of the ICC, the accused is a national of a State Party, or the conduct occurred on a State Party's territory.<sup>88</sup> The great majority of D.P.R.K.-related crimes have been perpetrated by D.P.R.K. nationals acting in the D.P.R.K. However, the D.P.R.K. is not a party to the Rome Statute.

Nonetheless, the perpetrators may be subject to the ICC's jurisdiction because the Republic of Korea (R.O.K.) is a party to the Rome Statute. According to R.O.K. law, the perpetrators are R.O.K. nationals who are committing crimes on R.O.K. territory. Article 3 of the R.O.K. Constitution states that "[t]he territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands."<sup>89</sup> Thus, under R.O.K. law, the area commonly called the D.P.R.K. is within the territory of the R.O.K. The perpetrators could be considered R.O.K. nationals because the R.O.K. Nationality Act<sup>90</sup> and the R.O.K. Constitutional Court have established that a person born to a Korean father or mother is a national of the R.O.K., even if he or she already acquired D.P.R.K. nationality according to D.P.R.K. law.<sup>91</sup> Thus, R.O.K. law arguably establishes that the perpetrators of

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cooperation is not impossible. See Don Oberdorfer, *The Two Koreas: A Contemporary History* 320 (Addison-Wesley 1997).

87. See Rome Statute, *supra* note 3, art. 14–15.

88. *Id.* art. 12.

89. Const. of the Republic of Korea, art. 3 (S. Korea), <http://www.ccourt.go.kr/home/english/welcome01.jsp>. Due to the unresolved status of the Korean War, the claim of the entire Korean peninsula continues in the present-day R.O.K. Constitution and reflects the well-accepted goal of eventual unification.

90. *Id.*, art. 2, § 1 ("Nationality in the Republic of Korea is prescribed by law."); see also Nationality Act case, 12-2 KCCR 167, 97Hun-Ka12 [Korean Const. Ct.] (Aug. 31, 2000), available at <http://www.ccourt.go.kr/english/decision2001.htm> ("A person . . . shall be a national of the Republic of Korea at the time of his or her birth [if] . . . A person whose father or mother is a national of the Republic of Korea at the time of his or her birth.").

91. *E.g.*, Nationality Act case, *supra* note 90. In this case, the Court stated: Our Constitution has stated since the Founding Constitution, the territory of the Republic of Korea shall consist of the

crimes under the ICC's jurisdiction in the D.P.R.K. are in fact R.O.K. nationals committing such crimes on R.O.K. territory. Of course, some states, such as the D.P.R.K., would certainly object to this characterization of the Korean peninsula. But while controversial, this argument is nonetheless worth advancing as a way for the ICC to explore exhaustively all possible means for jurisdiction.

A less controversial basis for jurisdiction is the fact that some crimes have been committed within the territory of State Parties to the Rome Statute. Such crimes include the abductions of R.O.K. fishermen who were in R.O.K. territorial waters or aboard R.O.K. registered vessels or aircraft.<sup>92</sup> Abductions have also allegedly taken place in other State Parties to the Rome Statute, such as Romania, France, Italy, the Netherlands, Denmark, the United Kingdom, Spain, and Jordan.<sup>93</sup> In addition, more than 500 P.O.W.s from the Korean War remain in detention in violation of the laws of war.<sup>94</sup> Although most of these crimes took place prior to July 1, 2002, they

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Korean peninsula and its adjacent islands . . . The Supreme Court has ruled accordingly that North Korea is part of the Korean peninsula and therefore subject to the sovereignty of the Republic of Korea . . . [T]he Provisional Ordinance on Nationality (South Korean Provisional Government Act No. 11, May 11, 1948) stated in Article 2(1) that a person born to a Korean father shall acquire the nationality of *Chosun*. Then, the Founding Constitution, in Article 3, stated that the qualifications of nationality of the Republic of Korea should be prescribed by statute, and in Article 100, stated that all current laws and rules were effective unless they violated the Constitution. So, the Supreme Court ruled that, a person born to a Korean father *even though he or she had already acquired a North Korean nationality according to the North Korean law, acquired the nationality of Chosun according to the Provisional Ordinance and then became a national of the Republic of Korea upon the promulgation of the Founding Constitution on July 17, 1948* (Kong 1996 Ha, 3602, 96Nu1221, Sup. Ct., Nov. 12, 1996).

*Id.* (emphasis added).

92. The R.O.K. government reports that 486 R.O.K. civilians are currently held in the D.P.R.K. H.R. Con. Res. 168, *supra* note 44, at 3.

93. See *infra* notes 166–67.

94. H.R. Con. Res. 168, *supra* note 44, at 6; Su Hyun Lee, World Briefing Asia: *North Korea Admits 21 South Koreans Are Captives*, N.Y. Times, Oct. 26, 2005, at A6 (“North Korea has admitted that it is holding 10 South Korean soldiers captured in the Korean War . . . The South Korean Red Cross believes that 546 prisoners of war and 485 abductees are being held in North Korea.”).

have not been resolved. Moreover, North Korean farms and factories that arguably use coerced labor also operate today in countries such as Bulgaria, a State Party to the Rome Statute. Consequently, the territorial and personal jurisdiction requirements for a *proprio motu* investigation and for a State Party referral may be met for those crimes that were committed within the territory of a State Party.<sup>95</sup>

A State Party referral may be difficult to get at this juncture for political reasons, however. The R.O.K. has the strongest grounds for a State Party referral, but the current political circumstances there make such an action improbable. Under the presidency of Roh Moo-hyun, the R.O.K. has been seeking to warm relations with the D.P.R.K.<sup>96</sup> In addition, State Parties Uganda and the Democratic Republic of Congo referred their own situations to the ICC, but the D.P.R.K. is not a State Party and is highly unlikely to accept ICC jurisdiction.

A referral from the ICC prosecutor may be even harder to obtain. The ICC prosecutor has yet to initiate a *proprio motu* investigation. In early 2006, the ICC prosecutor considered communications from the public asking him to exercise his *proprio motu* powers in regard to Iraq and Venezuela. He declined to exercise such powers. In the Iraq situation, the number of victims was insufficient (there were four to twelve victims of willful killing and a limited number of victims of inhumane treatment). In the Venezuela situation, the crimes were not within the ICC's Article 5 jurisdiction.<sup>97</sup> The D.P.R.K. situation, however, does not have those

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95. Although the State Party with the strongest grounds for a referral is the R.O.K., other possible State Parties include Romania, France, Italy, the Netherlands, Denmark, Jordan, the United Kingdom, and Spain. These State Parties may have grounds for a referral, if it appears the crimes in these territories constitute crimes against humanity, genocide, or war crimes and occurred on or after July 1, 2002. While probably a stretch, these State Parties may even have enough of a nexus to an Article 5 crime to open the door to ICC jurisdiction.

96. Muntarhorn, *supra* note 32, para. 50.

97. Letter from Luis Moreno-Ocampo, Chief Prosecutor of the ICC, regarding Iraq (Feb. 9, 2006), available at [http://www.icc-cpi.int/library/organs/otp/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf) (explaining the limitations of his ability to do anything about alleged abuse in Iraq); see also letter from Luis Moreno-Ocampo, Chief Prosecutor of the ICC, regarding Venezuela (Feb. 9, 2006), available at [http://www.icc-cpi.int/library/organs/otp/OTP\\_letter\\_to\\_senders\\_re\\_Venezuela\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf) (explaining the procedural limitations which prevented him from acting on alleged persecution in



weaknesses. It is just as serious as the Darfur, Uganda, and Democratic Republic of Congo situations currently under ICC investigation. If the Security Council or an appropriate State Party fails to act, the ICC prosecutor should exercise his *proprio motu* powers to investigate the D.P.R.K. situation.

The strongest basis for establishing ICC jurisdiction is a Security Council referral. Failing that, a state referral is the second choice, with the prosecutor's initiation as a last—but nonetheless worthwhile—resort.

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

Establishing the individual criminal liability of Kim Jong Il for crimes against humanity, genocide, and war crimes is critical for any prosecution against him. Three categories of legal sources can be used to determine individual criminal liability for these crimes in the International Criminal Court. First, the ICC can refer to the Rome Statute,<sup>98</sup> the ICC Elements of Crimes,<sup>99</sup> and the ICC Rules of Procedure and Evidence.<sup>100</sup> Second, where appropriate, the court can rely on applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict. And, failing that, the court may draw on general principles of law derived by municipal laws of the world's legal systems. As the Rome Statute, Elements of Crimes, and Rules of Procedure and Evidence are the primary sources of law for prosecuting in the ICC, this section draws upon those sources to provide the legal framework for forming a case against Kim Jong Il.

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Venezuela).

98. See Rome Statute, *supra* note 3, art. 21.

99. ICC Elements of Crimes ICC-ASP/1/3, available at <http://www.icc-cpi.int/legaltools/> (accept the terms of agreement; then follow "Basic ICC documents" hyperlink; then follow "Rules of Procedure and Evidence (09-09-2002)(E)" hyperlink) [hereinafter Elements of Crimes].

100. ICC R. P. & Evid. ICC-ASP/1/3, available at <http://www.icc-cpi.int/legaltools/> (accept the terms of agreement; then follow "Basic ICC documents" hyperlink; then follow "Rules of Procedure and Evidence (09-09-2002)(E)" hyperlink) [hereinafter Rules of Procedure and Evidence].

## A. Individual Criminal Responsibility

### 1. Actus Reus and Mens Rea

To hold an individual responsible for an action, the ICC requires proof of an actus reus and mens rea. Article 25 of the Rome Statute defines the many actions that would allow the ICC to hold an individual responsible for a crime. Examples of such actions are: committing a crime through another person; ordering, soliciting or inducing a crime; and assisting, contributing to, or inciting a crime.<sup>101</sup> Article 25 also outlines the mental elements necessary for criminal responsibility. The mental state requirements for crimes generally can be found in Article 30, which requires that the material elements of a crime be committed with intent and knowledge.<sup>102</sup> The United

101. See Rome Statute, *supra* note 3, art. 25. It 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[.]

*Id.*

102. See Rome Statute, *supra* note 3, art. 30. It states:

[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

Nations Draft Text of the Elements of Crimes provides further instruction on the mental elements required for crimes against humanity, genocide, and war crimes in Article 6, Article 7, and Article 8, respectively.<sup>103</sup> In addition, the introduction to the Elements of Crimes states that intent and knowledge can be inferred from facts and circumstances.<sup>104</sup>

## 2. Prosecuting Superiors

Kim Jong Il may be held individually liable for criminal activity as the commander or superior of his forces. Under Article 28 of the Rome Statute, individual superiors or commanders can be held criminally liable for failure to prevent or to repress their subordinates from committing a crime.<sup>105</sup> Kim Jong Il apparently

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.

(3) . . . '[K]nowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.

*Id.*

103. See Rome Statute, *supra* note 3, art. 9; see also 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.").

104. See Preparatory Commission for the International Criminal Court, *Addendum: Finalized Draft Text of the Elements of Crimes*, 5, UN Doc. PCNICC/2000/INF/3/Add.2 (2000), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N00/724/27/PDF/N0072427.pdf?OpenElement> ("Existence of intent and knowledge can be inferred from relevant facts and circumstances.").

105. See Rome Statute, *supra* note 3, art. 28. 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.

enjoys absolute superior authority in the D.P.R.K. He also possesses command responsibility as chairman of the People's Army. In addition, the Rome Statute establishes that a Head of State or Government is not exempt from criminal responsibility, thereby allowing the possible prosecution of Kim Jong Il, irrespective of his position.<sup>106</sup> This statute codifies the precedent set by then-F.R.Y. President Slobodan Milosevic's indictment in 1999.<sup>107</sup>

#### B. Establishing Crimes Against Humanity, Genocide, and War Crimes

Articles 6, 7, and 8 of the Rome Statute provide the additional legal requirements for establishing liability for crimes against humanity, genocide, and war crimes. The Elements of Crimes divides each crime into elements that must be proven for a conviction.<sup>108</sup> Generally, conduct elements are listed first, followed by consequence elements and circumstance elements. The prosecutor must prove the elements of each crime, including a culpable mental state, while remaining in compliance with the Rules of Procedure and Evidence.<sup>109</sup> The accused is presumed innocent until proven guilty,

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(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.

*Id.*

106. See Rome Statute, *supra* note 3, 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. Mahnoush H. Arsanjani, *Developments in International Law: The Rome State of the International Criminal Court*, 93 Am. J. Int'l L. 22, 26-7 (1999).

107. Prosecutor v. Slobodan Milosevic, *supra* note 70, paras. 62, 84.

108. Elements of Crimes, *supra* note 99.

109. See Rules of Procedure and Evidence, *supra* note 100.

and the prosecutor must prove guilt beyond a reasonable doubt.<sup>110</sup> In addition, Article 22(2) states that in case of ambiguity, the definition of a crime shall be interpreted in favor of the person being investigated, prosecuted, or convicted.<sup>111</sup> This codifies existing customary law.<sup>112</sup> Section V of this article provides the additional specific legal requirements for each type of crime.

The prosecutor may initiate an investigation if he determines that there is “a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.”<sup>113</sup> After the prosecutor initiates an investigation, the pre-trial chamber may issue an arrest warrant. The standard for an issuance of an arrest warrant is “reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.”<sup>114</sup> After the accused’s appearance before the court, the charges by the pre-trial chamber may be confirmed if there is “sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.”<sup>115</sup> These are lower standards than the “beyond a reasonable doubt” standard which must be met for a conviction.<sup>116</sup>

#### V. ANALYZING THE LAW AND FACTS FOR SPECIFIC CRIMES

The following discussion analyzes whether Kim Jong Il and his subordinates could be found criminally liable for crimes against humanity, genocide, and war crimes at the ICC. This section develops the legal requirements for each crime, and then systematically applies facts of the D.P.R.K. situation to these requirements, incorporating the requirements for individual responsibility and a culpable mental state noted in Section IV *supra*.<sup>117</sup> This Section also draws upon cases decided by other

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110. See Rome Statute, *supra* note 3, art. 66.

111. See Rome Statute, *supra* note 3, art. 22 (2).

112. Antonio Cassese, *International Criminal Law 154* (Oxford University Press 2003).

113. See Rome Statute, *supra* note 3, art. 53.

114. *Id.* art. 58.

115. *Id.* art. 61.

116. *Id.* art. 66.

117. While many recent reports on D.P.R.K. atrocities rely on testimonies about crimes prior to July 1, 2002, there is no indication of a substantial reduction of these crimes. See White Paper 2005, *supra* note 11, Executive Summary (noting that, in response to international pressure to improve its human rights, the D.P.R.K. has chosen to emphasize sovereignty and to create a

international criminal tribunals, although these decisions are not binding upon the ICC.

#### A. Crimes Against Humanity

The great majority of D.P.R.K. human rights abuses may be categorized as crimes against humanity. For example, the vast D.P.R.K. prison camp system, filled with approximately 200,000 people,<sup>118</sup> is rife with acts the ICC considers crimes against humanity.<sup>119</sup> The considerable food deprivation in labor camps could

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cultural relativism called “our-style human rights.” Although the D.P.R.K. has revised relevant laws, it has not genuinely improved the human rights situation); see also U.S. State Dep’t Human Rights Report, *supra* note 7 (noting that the government decreed a new penal code in 2004, but gaps remain between principles and practice).

118. *Hearing on the North Korean Nuclear Calculus*, *supra* note 31, at 2; Becker, *supra* note 36, at 87; Martin, *supra* note 14, 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 . . . was that they would never return from the North Korean gulag. They would die . . . or be shot for trying to escape.”).

119. See Rome Statute, *supra* note 3, art. 7, para. 1. It 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;
- (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

be classified as an act of murder or extermination. Prisoners are arbitrarily detained and forcibly transferred to labor camps without adequate due process; there, many suffer enslavement, torture, rape, sexual violence, persecution, and other inhumane acts. Outside the prison camps, kidnappings of R.O.K. and Japanese citizens have added to the litany of gross infringements of human rights.

### 1. Actus Reus and Mens Rea

A conviction for crimes against humanity requires proof of two actus reus elements. First, there must be proof that the accused (or a subordinate under the control of the accused) perpetrated one of the underlying offenses enumerated in Article 7(1) of the Rome Statute. Second, the prosecutor must prove that the accused committed the underlying offense as part of a widespread or systematic attack directed against a civilian population. This second element is a context element. The requirements for proving this context element are discussed further below.

Each of these elements has a different mens rea requirement. The accused must possess the intent to commit the underlying offense, but he need only have knowledge of the widespread or systematic practice constituting the context of the offense. It may be difficult to argue that Kim Jong Il intended to personally commit these crimes. However, given the absolute control over the D.P.R.K. that Kim Jong Il enjoys, it is not unreasonable to argue that he intentionally committed the underlying offense through other people by ordering, inducing, assisting, or contributing to the underlying offense.<sup>120</sup>

#### a. Superior Liability

Even if the ICC found that Kim Jong Il did not personally perpetrate the underlying offense, he could potentially be liable under Article 28(b). Under this statute, Kim Jong Il might be found liable for crimes committed by subordinates under his effective authority as a result of his failure to properly control them. This failure to regulate is most incriminating in situations where Kim Jong Il either knew or consciously disregarded information which

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or physical health.

*Id.*

120. See Rome Statute, *supra* note 3, art. 25.

clearly revealed that his subordinates were committing human rights violations. However, the prosecutor must prove that the subordinates' actions concerned activities within Kim Jong Il's effective responsibility and control and that he failed to take all necessary and reasonable measures, either to repress their commission, or to submit the matter to competent authorities for investigation and prosecution.<sup>121</sup> Given Kim Jong Il's control and surveillance capabilities, as well as the wide availability of international human rights reports, it is improbable that he would not know that those under him were committing acts which the Rome Statute classifies as crimes against humanity. The available information makes for a strong case for Kim Jong Il's liability as a superior.

#### b. The Context Requirement

In addition to proving that the accused perpetrated an underlying offense, the prosecutor must also prove that the accused met the context requirement. The context requirement distinguishes a crime against humanity from an ordinary crime.<sup>122</sup> The context requirement, which is the final element for each crime against humanity, comprises an actus reus requirement and a mens rea requirement. The actus reus requirement demands that the underlying offense be part of a widespread or systematic attack directed against a civilian population.<sup>123</sup> The mens rea requirement demands that the accused have knowledge that the underlying offense was part of such an attack.

Courts have defined the phrase "attack directed against a civilian population" as it relates to the context requirement. An "attack" is a "course of conduct involving the commission of acts of violence," according to the ICTY Trial chamber in *Prosecutor v. Kunarac*.<sup>124</sup> It may "encompass situations of mistreatment of persons

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121. *Id.* art. 28.

122. Indeed, the *raison d'être* of crimes against humanity is the punishment of criminal acts committed against a state's own population. Guenael Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 *Harv. Int'l L.J.* 237, 254 (2002).

123. See *Elements of Crimes*, *supra* note 99, art 7, para 2.

124. *Prosecutor v. Kunarac*, Case No. IT-96-23-T, Judgment, para. 415 (Feb. 22, 2001) [hereinafter *Prosecutor v. Kunarac*].



taking no active part in hostilities, such as someone in detention.”<sup>125</sup> The attack must be directed at a “population,” but that “does not mean that the entire population of the geographical entity in which the attack is taking place (a state, a municipality or another circumscribed area) must be subject to the attack.”<sup>126</sup> The population must be composed primarily of civilians.<sup>127</sup> The D.P.R.K. has directed such attacks against the approximately 200,000 D.P.R.K. civilians held in prison camps and detention centers.

The term “widespread” refers to the number of victims of such attacks. In *Prosecutor v. J. Kajelijeli*, the ICTR Trial chamber defined “widespread” as “large scale, involving many victims.”<sup>128</sup> The same chamber found that “systematic” describes the organized nature of the attack.<sup>129</sup> A pattern of conduct is evidence that an attack was “systematic.” The existence of a policy or plan also has evidentiary value. One could make the case that the organized systems of prison camps and detention facilities in the D.P.R.K. indicate a policy or plan for systematic attack. This configuration of prison camps and detention facilities also demonstrates how government-sponsored civilian attacks may involve multiple forms of violence referred to in Article 7(1), “pursuant to or in furtherance of a State or organizational policy to commit such attack[s],” as required by Article 7(2)(a).<sup>130</sup> Thus, the acts committed under the D.P.R.K. are “widespread.” Although according to this ICTR holding an attack need only be either “widespread” or “systematic” to meet the context requirement for crimes against humanity, in the situation of the D.P.R.K., it appears both terms are applicable. Therefore, the *actus reus* context requirement is met.

Given Kim Jong Il’s absolute control over the D.P.R.K., it is also likely that he meets the *mens rea* requirement that he have knowledge that the underlying offenses were part of such a

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125. *Id.* para. 416.

126. *Id.* para. 424.

127. Rome Statute, *supra* note 3, art. 7(1); Elements of Crimes, *supra* note 99, art 7, paras. 2–3; *Prosecutor v. Kunarac*, *supra* note 124, para. 425.

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

129. *Id.* para. 872.

130. Rome Statute, *supra* note 3, art. 7(2)(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.”).

widespread or systematic attack. This element does not require proof that the perpetrator had knowledge of all the characteristics of the attack or the precise details of the plan or policy of the State or organization.<sup>131</sup> Reports on D.P.R.K. human rights abuses that describe these attacks are widely published and easily accessible.<sup>132</sup> It seems improbable that Kim Jong Il would be unaware of the existence of these crimes, especially as master of a culture of surveillance. Given his authority and control, it is reasonable to believe that he instigated the crimes. Thus, the context requirements of the Elements of Crimes are met.

## 2. Elements of Underlying Offenses that Constitute Crimes Against Humanity

The Elements of Crimes elaborates on each crime against humanity by breaking the offense down into elements which must be proven for a conviction.

### a. Extermination

To establish that the accused committed the “crime against humanity of extermination,” the prosecutor must prove that:

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.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. 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.<sup>133</sup>

“Extermination” includes the intentional infliction of conditions of life calculated to bring about the destruction of part of a population, *inter alia*, the deprivation of access to food and medicine.<sup>134</sup>

Reports by various human rights monitoring bodies document extensively that killing has occurred in the prison camps

131. Cassese, *supra* note 112, at 251.

132. *See, e.g., supra* note 45.

133. *See* Elements of Crimes, *supra* note 99, art. 7(1)(b).

134. *See* Rome Statute, *supra* note 3, art. 7(2)(b).

and detention facilities. Eyewitness testimony indicates that some prisoners are killed in the course of medical experiments using chemical or biological weapons.<sup>135</sup> In addition, deplorable prison conditions—including deprivation of food and medicine—cause frequent deaths.<sup>136</sup> Prison officials create and contribute to the situations that cause prisoners' deaths. While one report indicates that some sick prisoners have been allowed to return home to recover or to die in peace,<sup>137</sup> such a report further demonstrates a conscious regulation and management of the number of deaths to be allowed in the confines of the prison camp; authorities apparently find a certain level of death within the camps acceptable.

Although the precise figure is unknown, estimates put the number of deaths in North Korean prison camps close to one million, which should constitute "mass killing." One observer estimates that since July 2002 alone, the number of people who have died in prison camps is likely between 80,000 and 120,000.<sup>138</sup> Applying this calculation to the more conservative State Department estimate of a prison population of 150,000 to 200,000 would still put the total number of deaths for the past four years at 60,000 to 80,000.<sup>139</sup> A Trial chamber for the ICTR found that the murder of 16 people was a sufficient number of killings to constitute extermination.<sup>140</sup> By any

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135. Bureau of Democracy, Human Rights, & Labor, U.S. Dep't of State, Int'l Religious Freedom Report 2005 (2006) [hereinafter U.S. State Dep't Religious Freedom Report]. Soon Ok Lee has witnessed:

. . . prisoners lying on the slope of a hill, bleeding from their mouth and motionless, enveloped by strange fumes and surrounded by scores of guards in gas masks. She says she overheard officials praising Dr. Lee Sung-ki—the inventor of the Vinalon artificial fibres—who is believed to be responsible for the chemical weapons program.

Becker, *supra* note 36, at 95–96. Martin interviewed prison camp guard Ahn Myong-chol, who said the Third Department of State Security was "just like Hitler. They do biological experiments on their prisoners. The Third Department facilities are right next to the prison camps." Martin, *supra* note 14, at 604.

136. Hawk, *The Hidden Gulag*, *supra* note 34, at 37, 42; White Paper 2004, *supra* note 5, at 196–97.

137. See Hawk, *The Hidden Gulag*, *supra* note 34, at 49–50, 52.

138. "[A]ssuming that 10 percent of a constant prison population of 200,000 to 300,000 perished each year," the number of deaths since July 2002 alone would be between 80,000 and 120,000. Becker, *supra* note 36, at 87.

139. See U.S. State Dep't Human Rights Report, *supra* note 7, § 1(c).

140. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, paras. 735–744 (Sept. 2, 1998).

calculation, the situation in the D.P.R.K.'s prison camps constitutes a mass killing.

Given Kim Jong Il's control—and implicit approval—of the prison camps, as well as his absolute control over the D.P.R.K., there is a reasonable basis to conclude that Kim Jong Il bears individual criminal liability for “inflict[ing] conditions of life . . . calculated to bring about the destruction of part of a population.”<sup>141</sup> Such conduct fulfills the elements of the underlying offense of extermination. This conduct took place in the prison camps, which means that it is part of a widespread or systematic attack against a civilian population—an attack about which Kim Jong Il or his subordinates likely had knowledge (see discussion above). Because the context requirement has been met, and because the elements of the underlying offense have been established, the requirements for the crime against humanity of extermination have been satisfied. It is also reasonable to believe that Kim Jong Il, at a minimum, bears individual responsibility as a superior who failed to repress or to submit to judicial authorities the commission of crimes committed by subordinates under his authority.

In addition to causing the deaths of those within the prison systems, the D.P.R.K. government has created conditions outside of the prisons that may constitute the crime against humanity of extermination. Famine due to government intent or recklessness would fall under this category.<sup>142</sup> Over one million people have died due to such famine, which began in the 1990s.<sup>143</sup> While the most extreme years of famine in the D.P.R.K. took place before the Rome Statute came into force, conditions for the lower classes of North Korean society since the effective date of the Rome Statute may be poor enough to meet the requirements for the crime against humanity of extermination, but the requisite calculation, context and other elements would have to be proven. Again, given Kim Jong Il's absolute authority and control, it is reasonable to believe he and his subordinates would be individually liable.

141. Rome Statute, *supra* note 3, art. 7(2)(b).

142. Marcus, *supra* note 73, at 245.

143. Haggard & Noland, *supra* note 27, at 7 (citing at least 1 million deaths resulting from famine); White Paper 2004, *supra* note 5, at 11 (stating that 2.5 million deaths have resulted from famine); Nick Wadhams, *UN Chief: N. Korea Still Needs Food Aid*, Ass'd Press, Sept. 23, 2005 (citing 2 million famine-related deaths).

To avoid repetition, the following sections will not list the context elements or discuss their application to each of the following crimes against humanity, since they closely track the discussion above. The sections will discuss only the non-context elements of specific underlying offenses.

## b. Enslavement

As defined by the Rome Statute, enslavement is “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.”<sup>144</sup> The crime against humanity of enslavement includes one non-context element. The prosecutor must prove that the accused “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 bartering such a person or persons, or by imposing on them a similar deprivation of liberty.”<sup>145</sup> The ICTY Trial chamber in *Prosecutor v. Kunarac* discussed factors that further clarify the meaning of this crime; these include “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.”<sup>146</sup>

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144. See Rome Statute, *supra* note 3, art. 7(2)(c).

145. See Elements of Crimes, *supra* note 99, art. 7(1)(c)(1).

146. *Prosecutor v. Kunarac*, *supra* note 124, para. 543. In elaborating the definition of enslavement, the trial chamber also listed relevant factors as follows:

[I]ndications 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 . . . make [sic] 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

The forced labor in the North Korean prison camps constitutes enslavement. Prisoners are restricted in their freedom of movement. They are also forced to work for the gain of the D.P.R.K. authorities. For example, they mine gold, coal, iron, and magnesite under life-threatening conditions. In addition, they log, farm, and produce textile goods in highly adverse circumstances.<sup>147</sup> Their movements, physical environment, psychology, and sexuality are subject to the control of D.P.R.K. authorities, who prevent their escape and subject them to cruel treatment and abuse for an unlimited duration. This conduct takes place in the prison camps, and therefore constitutes part of a widespread and systematic attack against a civilian population of which Kim Jong Il and/or his subordinates likely had knowledge.

The crime against humanity of enslavement may even extend beyond the D.P.R.K.'s boundaries to the Czech Republic, Russia, Libya, Bulgaria, Saudi Arabia, and Angola, where the D.P.R.K. government owns farms and factories which use and exploit North Korean workers.<sup>148</sup> In addition, North Korean women are widely reported to be trafficked to the P.R.C. and possibly other states.<sup>149</sup> If these activities can be linked to a widespread or systematic practice of the Kim Jong Il regime, such trafficking may constitute the crime

'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.

*Id.* para. 542 (emphasis added); see also Cassese, *supra* note 112, at 75–76 (citing the *Kunarac* case as the latest refinement of the crime against humanity of enslavement).

147. Hawk, *The Hidden Gulag*, *supra* note 34, at 16; U.S. State Dep't Human Rights Report, *supra* note 7, § 1(c).

148. Demick, *supra* note 48, at A8; *Illicit Activity Funding the Regime*, Coburn, *supra* note 47, at 1; see also U.S. State Dep't Human Rights Report, *supra* note 7, § 6(e) (confirming extremely harsh working conditions for North Korean female workers in North Korean controlled facilities based in the Czech Republic).

149. See White Paper 2004, *supra* note 5, at 180–81 (describing human trafficking of women along the border area); see also *Human Trafficking, its Pain and the Current Situation: Hearing Before the Subcomm. on Africa, Global Hum. Rts. and Int'l Operations and East Asia and the Pacific Before the H. Comm. on Int'l Rel.*, 109th Cong. (2005) (testimony of Kyeong-Sook Cha and Soon-Hee Ma, Victims & Witnesses to Trafficking of North Korean Females including their own daughters in China) (providing direct accounts of trafficking from D.P.R.K. defectors).

against humanity of enslavement. According to a Seoul-based non-governmental organization, D.P.R.K. residents have made arrangements with customers in the P.R.C. to purchase North Korean women.<sup>150</sup> “Human traffickers systematically target the women [in the border region] . . . by . . . promising food, shelter, employment, and protection.” But instead of receiving protection, the women are sold, locked in homes, raped, or beaten.<sup>151</sup> Trafficking has also extended to underage girls, many of whom are involved in the sex business.<sup>152</sup> This type of activity falls within the meaning of “enslavement,” as defined by Article 7(2)(c) of the Rome Statute of the ICC, which specifically names trafficking as a context in which enslavement may occur.<sup>153</sup> Given that trafficking is usually intertwined with sexual assault, the facts discussed above may be sufficient to prove the crimes against humanity of rape and sexual violence, if they are part of a widespread or systematic attack.<sup>154</sup> An investigation should be conducted to determine whether this trafficking, rape, and sexual violence can be imputed to the Kim Jong Il regime as part of an intended or known widespread or systematic attack.

### c. Torture

The Rome Statute defines torture as “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.”<sup>155</sup> The non-context elements for the crime 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.

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150. See Joint Hearing on Human Rights, Refugees, and Humanitarian Challenges, *supra* note 49, at 76.

151. UN Econ. & Soc. Council [ECOSOC] Comm’n on Hum. Rts., *Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Addendum*, para. 73, UN Doc. E/CN.4/2006/62/Add.1 (Mar. 27, 2006) (prepared by Sigma Huda).

152. White Paper 2005, *supra* note 11, at 279.

153. See Rome Statute, *supra* note 3, art. 7(2)(c).

154. See Rome Statute, *supra* note 3, art. 7(1)(g).

155. Rome Statute, *supra* note 3, art. 7(2)(e).

3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.<sup>156</sup>

It is widely reported that D.P.R.K. officials perpetrate torture in the prison camps and detention facilities.<sup>157</sup> Perpetrators have inflicted severe physical and mental pain upon prisoners in their custody for reasons that are not lawful. The methods of torture used include severe beatings, electric shock, prolonged periods of exposure, and confinement to small “sweatboxes” in which prisoners are unable to stand upright or lie down for weeks. Such methods have, at times, proved fatal.<sup>158</sup> Former detainee Soon Ok Lee, has recounted many horrific forms of torture and their gruesome consequences in her memoir *Eyes of the Tailless Animals*. In one instance, a guard burned the hips of one woman to test her claim that she had lost sensation due to excessive cramped confinement. Unable to feel the burning, she passed the test. Yet, this woman died after maggots invaded her wounds.<sup>159</sup> This conduct, as perpetrated in the prison camps, constitutes part of a widespread or systematic attack against a civilian population of which Kim Jong Il or his 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.

#### d. Persecution

The Rome Statute defines persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”<sup>160</sup> The non-context elements for for this crime are:

1. The perpetrator severely deprived, contrary to

156. See *Elements of Crimes*, *supra* note 99, art. 7(1)(f).

157. Hawk, *The Hidden Gulag*, *supra* note 34, at 70–72; Suh Ok Hwa, *A Living Hell*, 19 *Keys Network for North Korean Democracy and Human Rights* (Winter 2005),

<http://www.dailynk.com/english/keys/2005/19/02.php> (describing the suffering of the author during her experience in a labor detention facility).

158. U.S. State Dept’ Human Rights Report, *supra* note 7, § 1(c); Kang Chol-hwan & Pierre Rigoulot, *Aquariums of Pyongyang: Ten Years in the North Korean Gulag* (Yair Reiner trans., Basic Books 2002) (2000) (describing various methods of torture which have been inflicted upon prisoners).

159. Lee, *supra* note 17, at 92–93.

160. Rome Statute, *supra* note 3, art. 7(2)(g).



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.<sup>161</sup>

Persecution is reminiscent of genocide in that it includes targeting of a group based on certain inherent characteristics and requires special intent. But persecution criminalizes the mistreatment of more possible groups, including political, cultural, and gender groups. The crime against humanity of persecution also must include commission of or connection with an act prohibited in Article 7(1) or a war crime or genocide (as crimes under ICC jurisdiction). This is a more stringent requirement than under customary international law.<sup>162</sup> Like other crimes against humanity, persecution requires that the accused have knowledge that “the conduct was part of or [the accused] intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”<sup>163</sup>

The government’s use of essentially political grounds to divide its entire population into core, wavering, and hostile groups indicates the likely existence of persecution.<sup>164</sup> Most people who are transferred to prison camps are there because of their political beliefs. Some are imprisoned for merely being the relative of someone who committed a political “crime.”<sup>165</sup> In addition, the Kim Jong Il regime has targeted half-Chinese babies on nationality grounds<sup>166</sup> and the Christians on religious grounds.<sup>167</sup> These actions may

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161. Elements of Crimes, *supra* note 99, art. 7(1)(h).

162. Cassese, *supra* note 112, at 93–94.

163. Elements of Crime, *supra* note 99, art. 7(1)(h), para. 6.

164. See White Paper 2005, *supra* note 11, at 106.

165. See Becker, *supra* note 36, at 95; White Paper 2005, *supra* note 11 at 117; Hawk, The Hidden Gulag, *supra* note 34, at 24.

166. Hawk, The Hidden Gulag, *supra* note 34, at 59; Bill Powell, *Running Out of the Darkness*, Time, May 1, 2006, at 33–35.

167. Lee, *supra* note 17, at 113; Hawk, The Hidden Gulag, *supra* note 34,

constitute the crime against humanity of persecution if this targeting was knowingly conducted as part of a widespread or systematic attack against a civilian population.

The conditions in the D.P.R.K. prison systems constitute a widespread or systematic attack against a civilian population of which Kim Jong Il and/or his subordinates likely had knowledge. Thus, there is reasonable basis to believe that the D.P.R.K. situation meets the requirements for the crime against humanity of persecution. Given Kim Jong Il's absolute authority and control, it is reasonable to believe he and his cadres were connected to at least one of the acts prohibited in Article 7(1) (e.g., imprisonment). The ICC should hold him liable.

e. **Murder, Forcible Transfer of Population, Imprisonment, Rape, Sexual Violence, Enforced Disappearance of Persons, and other Inhumane Acts**

This article does not analyze D.P.R.K. responsibility for the crimes against humanity of murder, forcible transfer of population, imprisonment, rape,<sup>168</sup> sexual violence, enforced disappearance of persons, and other inhumane acts. However, these acts occur under the Kim Jong Il regime, and they likely meet the requirements for crimes against humanity, particularly as they are related to

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at 58; David Hawk, U.S. Comm'n on Int'l Religious Freedom, "Thank You Father Kim Il Sung": Eyewitness Accounts of Severe Violations of Freedom of Thought, Conscience and Religion in North Korea 50-52 (2005), available at [http://www.uscirf.gov/countries/region/east\\_asia/northkorea/NKwitnesses\\_WGraphics.pdf](http://www.uscirf.gov/countries/region/east_asia/northkorea/NKwitnesses_WGraphics.pdf) [hereinafter Hawk, Religion Report].

168. Prison officials have raped women under their custody in the prison camps and detention facilities. Hawk, *The Hidden Gulag*, *supra* note 34, at 72; U.S. State Dep't Human Rights Report *supra* note 7, § 5. While the rapes themselves may or may not result from a widespread or systematic attack against a civilian population of which Kim Jong Il or subordinates likely had knowledge, this conduct took place in the prison camps and therefore constitutes part of a widespread or systematic attack against a civilian population of which Kim Jong Il likely had knowledge. *See also* White Paper 2005, *supra* note 11, at 83 (noting that treatment in the prison camps such as tortures, beatings, rapes, starvation, deaths, and murders of newborns led the United Nations Human Rights Commission to recommend international inspection of these facilities). In *Prosecutor v. Kunarac*, the trial chamber determined that "[o]nly the attack, not the individual acts of the accused, must be 'widespread or systematic.'" *Prosecutor v. Kunarac*, *supra* note 124, at 431.

conditions in the prison camps. Although enforced disappearances of people may be difficult to prove as a crime against humanity (given the greater difficulty of meeting the context requirements outside of the prison camps), enough facts<sup>169</sup> indicate that such a determination by the ICC is possible. Therefore, this line of investigation should also be vigorously pursued.<sup>170</sup>

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169. The well-known abductions by the D.P.R.K. have particularly affected its relations with Japan. According to a House resolution condemning the abductions and detentions, "since the end of the Korean War, the Government of the Democratic People's Republic of Korea has kidnapped thousands of South Korean citizens and as many as a hundred Japanese citizens." H.R. Con. Res. 168, *supra* note 44. The D.P.R.K. continues to order and carry out abductions, e.g., in China in March 2005 the D.P.R.K. Security Agency kidnapped Mr. Kang Gun, a defector from North Korea who has South Korean citizenship. NkGulag, *Kim Jong Il, Stop the Amoral Kidnapping Action Immediately!*, Democracy Network Against North Korea Gulag (Aug. 31, 2005) (citing Daily Chosun, Sept. 9, 2005), available at <http://www.nkgulag.org>; see also *Urgent Action North Korea: Kang Gun*, Amnesty International (Sept. 15, 2005), <http://web.amnesty.org/library/Index/ENGASA240032005?open&of=ENG-PRK> (explaining that Kang Gun was likely abducted because he helped North Koreans flee to China to escape the food shortage in North Korea and also because he gave the Japanese media a secretly filmed video of life inside a North Korean labor camp). On August 8, 2004, D.P.R.K. agents also kidnapped Ms. Jin Kyung-sook, a former D.P.R.K. refugee and R.O.K. passport holder. Other abductees still held by the D.P.R.K. include 12 passengers from a hijacked Korean Air flight, hundreds of R.O.K. seamen and fishermen, and R.O.K. Christian ministers. Credible sources report that the D.P.R.K. may have abducted citizens from China, Europe, and the Middle East. The locations of these abductions may include the United Kingdom, Denmark, Lebanon, Thailand, Romania, France, Italy, the Netherlands, Jordan, Malaysia, Singapore, and Spain, as well as R.O.K., Japan, and China. Ministry of Foreign Affairs of Japan, *Outline and Background of Abduction Cases of Japanese Nationals by North Korea* (Apr. 2002), [http://www.mofa.go.jp/region/asia-paci/n\\_korea/abduct.html](http://www.mofa.go.jp/region/asia-paci/n_korea/abduct.html); *On Abductions of Foreign Citizens by North Korea: Hearing before the Subcomm. on Asia and the Pacific and the Subcomm. on Africa, Global Hum. Rts. and Int'l Operations of the U.S. House of Rep. Comm. on Int'l Relations*, 109th Cong. (2006) (testimony of Yoichi Shimada, Professor of International Politics at Fukui Prefectural University, Japan, Vice Chairman of the National Association for the Rescue of Japanese Kidnapped by North Korea (NARKN)). In addition, according to a 1956 Korean National Red Cross survey, D.P.R.K. authorities abducted 7,034 R.O.K. citizens during the Korean War and none have been released. H.R. Con. Res. 168, *supra* note 44. The R.O.K. government estimates that about 486 abducted R.O.K. civilians are alive in the D.P.R.K. U.S. State Dep't, *House Panels Hold Historic Hearing on North Korean Abductions* (Apr. 27, 2006), <http://usinfo.state.gov/usinfo/Archive/2006?Apr/27-857217.html>.

170. Rome Statute, *supra* note 3, art. 7(2)(i) (providing the definition of "enforced disappearance of persons"); see *Elements of Crimes*, *supra* note 99, art.

## B. Genocide

While the distinction between crimes against humanity and genocide may make little difference to a victim who dies, politicians

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7(1)(i). The elements of enforced disappearances of persons are arguably met by published facts. D.P.R.K. 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 and detention of South Koreans arguably constitutes a widespread or systematic attack against a civilian population. Whether it is “widespread” depends on how “population” is defined; the percentage of South Korean victims out of the total population of South Koreans may be too small to be “widespread.” The better argument is that the abductions were part of a policy or plan and therefore “systematic.” While the abductions during the Korean War could not be linked to Kim Jong Il, as he did not have substantial superior authority at the time, the present detention of about 486 R.O.K. civilians is under his government’s policy. Indeed, the D.P.R.K. has admitted to holding R.O.K. citizens who were kidnapped after the 1950–53 conflict, although the government has only admitted to holding 11 civilians. Lee, *supra* note 94, at A6. Thus, Kim Jong Il and/or his subordinates likely have knowledge of this crime, which meets the context requirement.

The “population” subjected to the systematic attack could be described as R.O.K. civilians. A “population” is a sizeable group of people who possess some distinctive features that mark them as targets of the attack. The definition of “population” is significant to exclude isolated or random acts from the scope of crimes against humanity. *Prosecutor v. Kunarac*, *supra* note 124, para. 422. The kidnappings and continued detention of such a large number of R.O.K. civilians indicate that these were not isolated or random acts. Rather, they were targeted because of their nationality, as citizens of the D.P.R.K.’s enemy during the Korean War. Thus, the “population” requirement of the context elements is met.

Similarly, the Japanese civilian population was targeted for kidnappings and attacks because the D.P.R.K. authorities needed Japanese people who could teach their agents about Japan. An attack on a “population” need not be carried out against the entire population. The kidnappings were not isolated or random acts; rather, they were an important part of D.P.R.K. policy. The apparent policy of the D.P.R.K. government to repeatedly kidnap Japanese civilians indicates a systematic attack. Kim Jong Il has publicly acknowledged the abduction of 13 Japanese citizens by his government’s agents, revealing that he had the requisite knowledge of this policy. For example, Sin Gwang Su abducted Japanese citizen Megumi Yogota in 1977 and was the leader of the group that abducted Yasushi Chimura. *Wanted North Korean Agent Told Soga He Abducted Yokota*, *Mainichi Daily News*, Jan. 6, 2006, <http://mdn.mainichi-msn.co.jp>. Thus, the context elements are arguably met. Again, given Kim Jong Il’s absolute authority and control, it is reasonable to believe he and his cadres are individually liable.

and lawyers have made much of determining whether a human rights disaster constitutes genocide, as the term “genocide” is supposed to more effectively galvanize political pressure for a state to intervene.<sup>171</sup> Genocide is undoubtedly a grave and heinous offense, but crimes against humanity and war crimes can be as odious and deserving of the same level of concern. The term “atrocity crimes”<sup>172</sup> is meant to help identify a situation as catastrophic and urgent—whether it be genocide, crimes against humanity, or war crimes—to avoid wasting time and political capital on distinctions that may mean little to victims and can be debated later.<sup>173</sup> However, for prosecution, the current development of international law preserves these categories, as reflected in the Rome Statute.

### 1. Actus Reus and Mens Rea

Article 6 of the Rome Statute defines genocide as certain acts committed “with intent to destroy, in whole or in part, a national,

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171. United Nations Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, 278–86 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention]. However, the required intervention may be in any form, including diplomatic activity, and thus may be ineffective. Many conventions exist that may also be triggered by a relevant crime against humanity, such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the newly created International Convention for the Protection of All Persons from Enforced Disappearance. *See generally* Office of the United Nations High Commissioner for Human Rights, <http://www.ohchr.org/english/> (detailing information and the activities of the office).

172. Scheffer defines “atrocity crimes” in non-legal terms: [H]igh impact crimes that are of an orchestrated character, that shock the conscience of humankind, that result in a significant number of victims, and that one would expect the international media and the international community to focus on as meriting an international response holding the lead perpetrators accountable before a competent court of law. Scheffer *supra* note 74, at 400. Scheffer continues: “Instead of parsing precisely what crime it is, policy makers should adjust their reactive reflexes to atrocity crimes and know that the highest possible attention and greatest effort is required to respond to an atrocity crime. In due course, the lawyers can determine precisely what kind of atrocity crime it is. But we must never again fall into the trap of waiting for a genocide determination before deciding to act effectively to stop the killing.” *Id.* at 420.

173. David Scheffer, *Genocide and Atrocity Crimes* 3 (July 15, 2006) (unpublished manuscript, on file with the Columbia Human Rights Law Review).

ethnic, racial or religious group, as such.”<sup>174</sup> In addition, Article 25, which governs individual criminal responsibility, states that “a person shall be criminally responsible and liable for punishment . . . if that person . . . directly and publicly incites others to commit genocide.”<sup>175</sup>

a. Special Intent and Superior Liability

The mens rea (mental intent) requirements for genocide include special intent<sup>176</sup> 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) necessary for conviction of the underlying offence (e.g. killing). In *Prosecutor v. Akayesu*, an ICTR Trial chamber held that “[s]pecial intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act

174. Rome Statute, *supra* note 3, art. 6. Acts that may fall within genocide include:

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

*Id.*

175. *Id.* art. 25.

176. The special intent requirement distinguishes genocide from crimes against humanity. Crimes against humanity do not have a special intent requirement with the exception of Article 7(1)(h), the crime against humanity for persecution. See Rome Statute, *supra* note 3, art. 7(1)(h). Crimes against humanity require the intent to commit the underlying offense plus knowledge of the widespread or systematic practice constituting the general context of the offence. *Id.* art. 7(2)(g). 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. *Id.* art. 6. Attaching liability to Kim Jong Il for genocide may be more difficult, therefore, than for crimes against humanity. In addition, genocide narrows the scope of actionable offenses against Kim Jong Il. Genocide protects only national, ethnic, racial, and religious groups, while crimes against humanity in Article 7(1)(h) protects additional groups on political, cultural, and gender-related grounds. *Id.* art. 6; *id.* art. 7.

charged.”<sup>177</sup> This intent is a mental factor which is “difficult, even impossible to determine.”<sup>178</sup> Given this difficulty, in the absence of a confession from the accused, his intent can be inferred from the facts. As noted above, the Elements of Crimes also allow for intent to be inferred from actions.<sup>179</sup>

There are several modes of liability under which Kim Jong Il could be prosecuted for genocide. Kim Jong Il’s absolute control over his regime may support an inference that the very fact that genocide occurred indicates that he specifically intended to perpetrate it. Given Kim Jong Il’s extraordinary control of the 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.<sup>180</sup> He would thus be a co-perpetrator, aider and abettor, or other form of participant.

Attaching liability to Kim Jong Il for a failure to act to control his subordinates would be the easiest standard, as he personally would not be required to have the specific intent of committing genocide; only his subordinates would need such intent. In *Blagojevic & Jokic*, the ICTY Trial chamber stated that the mens rea required for superiors is that they “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.”<sup>181</sup> Therefore, as a superior, Kim Jong Il could be held responsible for genocide if it is proven that he knew or consciously disregarded information which clearly indicated that crimes were about to be, or were being, perpetrated, and deliberately failed to thwart their commission.

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177. Prosecutor v. Akayesu, *supra* note 140, para. 498.

178. *Id.* para. 523.

179. See Elements of Crimes, *supra* note 99, para. 3; see also note 104, *supra*.

180. See Rome Statute, *supra* note 3, art. 25.

181. Prosecutor v. Blagojevic & Jokic, Case No. IT-02-60-T, Judgment, para. 686 (Jan. 17, 2005).

b. Definition of National, Ethnical, Racial, or Religious Group

Defining “national, ethnical, racial or religious group” is a key question in determining if genocide provisions apply.<sup>182</sup> The

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182. *Akayesu* indicates that, under the Genocide Convention, it is not impossible to punish the physical destruction of a stable group in which membership is dictated by birth but is not national, racial, ethnical, or religious. *Prosecutor v. Akayesu*, *supra* note 140, para. 516. The UN’s International Commission of Inquiry on Darfur also noted the following in the case of the Rwandan genocide:

[T]he 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.

International Commission of Inquiry on Darfur, *Report to the UN Secretary-General*, para. 498 (Jan. 25, 2005) [hereinafter *Report to United Nations Secretary-General*].

*Akayesu* 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. *Prosecutor v. Akayesu*, *supra* note 140, para. 497. “[T]he crime of genocide does not imply the actual extermination of a group in its entirety, but is . . . any one of the acts mentioned in Art. 2(2)(a) through 2(2)(e) is committed with the specific intent to destroy ‘in whole or in part’ a national, ethnical, racial, or religious group.” *Id.* However, tribunal jurisprudence restricts genocide to the four groups, although the definition of the groups may be a subjective determination based on perception. The requirement in Article 22 of the Rome Statute that crimes be “strictly construed” suggests that the ICC would not adopt a broader definition of the protected groups. Rome Statute, *supra* note 3, art. 22(2). International criminal tribunals have, however, engaged in judicial activism that states have apparently accepted. Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 Vand. L. Rev. 1, 42 (2006) (“Members of the Security Council clearly stated that the Tribunals could not make law.”). Innovative arguments are worth pursuing to promote the development of law for changing conditions and to advance its use in the international realm. *Akayesu*, as the first case to find that rape committed with the requisite intent to destroy a particular group constituted genocide, is hailed as a positive example of a court advancing gender jurisprudence. Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 Colum. J. Transnat’l L. 377, 391 (2006).



Rome Statute and the Elements of Crimes do not provide such definitions. As such, other tribunal rulings and authorities on international law, although not binding, are instructive as to their meaning.<sup>183</sup> The ICTR Trial chamber in *Prosecutor v. Akayesu*, for example, 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.”<sup>184</sup> It defined an ethnic group as “a group whose members share a common language or culture,” a racial group as one “based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors,” and a religious group as “one whose members share the same religion, denomination or mode of worship.”<sup>185</sup>

### i. Religious and National Groups

While many prisoners probably do not constitute a “national, ethnical, racial or religious group” distinguishable on those grounds from the D.P.R.K. officials who criminally harm them, substantial testimony reveals that many people are imprisoned and then abused because of their nationality or religion.<sup>186</sup> The national (and potentially ethnic) cases involve the forced abortions and killing of infants who were fathered by Chinese<sup>187</sup> or other non-Koreans.

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183. See, e.g., *Prosecutor v. Blagojevic & Jokic*, *supra* note 181, para. 667 (“[A] national, ethnical, racial or religious group is identified ‘by using as a criterion the stigmatisation [sic] of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics.’”).

184. *Prosecutor v. Akayesu*, *supra* note 140, para. 512.

185. *Id.* paras. 513–15. The UN’s International Commission of Inquiry on Darfur defined the term “national groups” as “those sets of individuals who have a distinctive identity in terms of nationality or of national origin” and defined the term “racial groups” as “those sets of individuals sharing some hereditary physical traits or characteristics.” *Report to United Nations Secretary-General*, *supra* note 182, para. 494. The Commission also defined the term “ethnical groups” as “those sets of individuals sharing a common language, as well as common traditions or cultural heritage,” and defined the term “religious groups” as “sets of individuals having the same religion, as opposed to other groups adhering to a different religion.” *Id.*

186. See Hawk, *The Hidden Gulag*, *supra* note 34, at 28, 59.

187. Article 33 of the Constitution of the People’s Republic of China states, “All persons holding the nationality of the People’s Republic of China are citizens of the People’s Republic of China . . . .” Xian Fa [P.R.C. Const.] art. 33 § 1 (1982) (P.R.C.). Article 5 of the Nationality Law of the P.R.C. states, “Any person born

Perpetrators have explicitly stated that they were performing these acts because the fetus or infant was “half-Han Chinese.”<sup>188</sup> The mother was typically a North Korean who had fled to China, became pregnant there, and was forcibly repatriated to the D.P.R.K.<sup>189</sup> David Hawk reported that all refugee accounts of the forced abortions and infanticide stated that the prison authorities shared an objective of “preventing women who became pregnant while in China from giving birth to ‘half-Chinese’ babies.”<sup>190</sup> The distinction between ethnic Chinese men and Korean-speaking Chinese citizens of Korean origin made no difference. In Sinuiju, Onsong, and Chongjin, accounts show that “women who were pregnant when they were repatriated were compelled to have abortions, or their babies were killed immediately after birth.”<sup>191</sup>

In addition, there have been accounts of persons who were subjected to higher levels of torture and killing because of their religion. Witnesses testified before the U.S. Congress that, in the early 1990s, prison camp inmates who were being held because of their religious beliefs were persecuted on these grounds. One person testified that she saw prison security officers kill several Christians by “pour[ing] molten iron on them after they refused to renounce their religion and accept the state ideology of *juche*.”<sup>192</sup> In particular, members of underground Christian churches and persons in contact with Christian missionaries have been subjected to harsh punishment, prolonged detention without charge, torture, or execution.<sup>193</sup>

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abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality . . . .” Nationality Law, art. 5 (1980) (P.R.C.). Thus, the half-Chinese babies are targeted on nationality grounds. They are also targeted on potentially ethnical grounds in that the baby perhaps would have been raised learning the Chinese language and culture and would have taken on a Chinese identity, particularly given the patriarchal character of Korean and Chinese societies.

188. Hawk, *The Hidden Gulag*, *supra* note 34, at 61; *see also* Powell, *supra* note 166, at 33–35 (reporting that a 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.).

189. Hawk, *The Hidden Gulag*, *supra* note 34, at 59.

190. *Id.*

191. *Id.*

192. U.S. State Dep’t Religious Freedom Report, *supra* note 135. Another defector testified that five people were executed by firing squad for proselytizing. White Paper 2005, *supra* note 11, at 164.

193. U.S. State Dep’t Religious Freedom Report, *supra* note 135; *see also*

ii. Defining “in whole or in part”

While both the half-Chinese babies and the Christians may be numerically small in comparison to the overall population of abuse victims, their abuse likely still meets the requirements of genocide. Article 6, which codifies the customary international rule, does not explicitly require that the number of victims of genocide be large; “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.”<sup>194</sup>

Several tribunal rulings, however, require that the number killed be “substantial.” In *Prosecutor v. Krstic*, the ICTY Trial chamber held that “an intent to destroy only part of the group must nevertheless concern a substantial part thereof, either numerically or qualitatively.”<sup>195</sup> In *Prosecutor v. Jelusic*, the ICTY Trial chamber stated that the phrase “in whole or in part” must mean the “destruction of a significant portion of the group from either a quantitative or qualitative standpoint.”<sup>196</sup> It also required a “substantial part” of the group to be targeted.<sup>197</sup> It noted, however, that genocide can be found to exist within a limited geographic zone.<sup>198</sup>

The quantitative approach has two primary formulations: the “percentage test” and the “numeric test.”<sup>199</sup> The percentage test “compares the number of victims to the size of the overall group,”<sup>200</sup>

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Hawk, Religion Report, *supra* note 167, at 50–52 (2005) (citing eyewitness testimony of public executions of Christian believers).

194. Cassese, *supra* note 112, at 107–08; see Rome Statute, *supra* note 3, art. 6. Hawk, Religion Report, *supra* note 167, at 50–52 (2005) (citing eyewitness testimony of public executions of Christian believers).

195. *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, para. 634 (Aug. 2, 2001). The *Krstic* case addressed the massacre of more than 7,000 Bosnian Muslims in the United Nations’ so-called safe area of Srebrenica in eastern Bosnia-Herzegovina in 1995. The Appeals chamber determined that this number constituted a “substantial part” of a group protected by the genocide provisions of the ICTY statute.

196. *Prosecutor v. Jelusic*, Case No. IT-95-10-T, Judgment, para. 81 (Dec. 14, 1999).

197. *Id.* para. 82.

198. *Id.* para. 83.

199. David L. Nersessian, *The Razor’s Edge: Defining and Protecting Human Groups Under the Genocide Convention*, 36 Cornell Int’l L.J. 293, 319 (2003–2004).

200. *Id.*

while the numeric test considers “whether the number of victims is, in and of itself, sufficiently large.”<sup>201</sup> The former test is better than the latter at protecting small populations. The qualitative test focuses on “the destruction of a key segment of the group, such as its leadership.”<sup>202</sup> An example of the qualitative test from the Balkan wars is the segment of public officials, educated elite, and other leaders of the Bosnian Muslim population who were targeted during the 1990s for destruction.<sup>203</sup>

The test that offers the best protection for the half-Chinese infants is most likely the quantitative approach, as infants are not generally considered to be a key segment of the population. Applying the percentage test to the half-Chinese babies, it appears that all of the infants who were born to detainees in Sinuiju, Onsong, and Chongjin have been systematically targeted.<sup>204</sup> While facts need to be further investigated, half-Chinese babies arguably constitute 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.<sup>205</sup> The 2005 White Paper, summarizing David Hawk’s study, reported that “[a]ll North Korean defectors testify that they have never seen any female inmate being released from detention centers accompanied by their children. This supports the fact that murders of newborn babies are routinely carried out at detention facilities.”<sup>206</sup> Thus, it appears the “in part” aspect of genocide is likely met, although a court may choose to weigh absolute quantity more heavily in determining “substantiality.”

Christians also appear to be significantly targeted.<sup>207</sup> D.P.R.K. officials seek out repatriated individuals who have been in contact with Christians while abroad and inflict heightened

201. *Id.*

202. *Id.* at 317.

203. *Id.*

204. Hawk, *The Hidden Gulag*, *supra* note 34, at 59.

205. *See, e.g.*, Hawk, *The Hidden Gulag*, *supra* note 34, at 59–72 (lacking any mention of half-Chinese babies being spared).

206. *Id.*, as summarized in White Paper 2005, *supra* note 11, at 83.

207. A police official involved in the arrest of 11 individuals accused of involvement with religious activities believed that nine were executed; the other two were tortured to death during interrogation. Ownership of a Bible or of other religious materials is punished by sentences ranging from imprisonment to execution. Religious adherents are also characterized as “hostile” subclasses by the D.P.R.K. government. Hawk, *Religion Report*, *supra* note 167, at 13–14, 73.

punishment on them for their Christian association.<sup>208</sup> As an example of the extreme persecution, a Seoul-based NGO reported that a family of four refugees, who converted to Christianity in the P.R.C., was forcibly repatriated to the D.P.R.K. in 2002 and summarily executed because they refused to deny their Christian faith.<sup>209</sup> David Hawk reported that the D.P.R.K. government has developed a renewed interest in ensuring that North Koreans repatriated from China are not “infected” by exposure to a religion. One North Korean refugee said the D.P.R.K. government fears that “Juche will be toppled by Christianity.”<sup>210</sup> Hence, D.P.R.K. officials interrogate virtually all repatriated refugees specifically about whether they have had contact with Christians and will severely punish them if they have.<sup>211</sup> As such the percentage test seems to offer the best protection for them, although further investigation is required to determine the raw number of Christian victims who have been targeted. In addition, further investigation is required to determine the qualitative aspects of their targeting—perhaps victims tend to be leaders of an underground Christian movement, which would be particularly threatening to the Juche ideology and the very foundation of the Kim Jong Il regime.

Regarding the mens rea requirement for genocide, the fundamental clash between Christianity and Juche ideology, as well

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208. Lee, *supra* note 17, at 113; Hawk, *The Hidden Gulag*, *supra* note 34, at 58; Hawk, *Religion Report*, *supra* note 167, at 50.

209. Joint Hearing on Human Rights, Refugees, and Humanitarian Challenges, *supra* note 49, at 76–77.

210. Hawk, *Religion Report*, *supra* note 167, at 10.

211. *Id.* at 10, 53. The U.S. State Department has reported that persons who had contacted Christian missionaries outside the country were reportedly punished severely, imprisoned, tortured, or executed. News reports indicated that the D.P.R.K. government had taken steps to tighten control and to increase punishments at the Chinese border, and had also increased the award for information on any person doing missionary work. U.S. State Dep’t Religious Freedom Report, *supra* note 135. The White Paper 2005 has also noted that the D.P.R.K. imposes heavier punishment on those who make contact with R.O.K. practitioners of religion, believing that it would lead to foreign encroachment and hamper discipline. 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. One person who contacted Christians in the P.R.C. was sentenced to three years of work “rehabilitation.” Another defector was arrested twice because he had contacted a missionary. He was released after he testified that he was not a Christian. White Paper 2005, *supra* note 11, at 164–65.

as the absolute control of the Kim Jong Il regime, may support an inference that the regime specifically intended the genocide.<sup>212</sup> Such an inference of special intent may be reasonable, although meeting the “beyond a reasonable doubt” standard for a conviction may be difficult.<sup>213</sup> As to attaching liability to Kim Jong Il as an inciter, human rights reports appear not to indicate any direct and public statements by Kim Jong Il to incite others to commit genocide.

The strongest link to the D.P.R.K. leadership would be superior liability. Even if Kim Jong Il lacked the requisite special intent to commit genocide firsthand, he could be liable as a superior who failed to stop the genocide. Kim Jong Il’s control and surveillance in the D.P.R.K., the statements of state-controlled media, and the ease of access to human rights reports condemning the D.P.R.K. for the killing and abuse of half-Chinese babies and Christians, all indicate that Kim Jong Il knows of the crimes being committed in the D.P.R.K. It is therefore reasonable to believe that Kim Jong Il knowingly failed to stop their commission or to submit the matter to competent authorities for investigation and prosecution. He would therefore meet the test for criminal superior liability.

## 2. Applying Various Elements of Crimes for Genocide

The Elements of Crimes elaborates on the definition of each type of genocide by breaking each type down into elements that must be proven for a conviction. To establish genocide by killing, one must prove:

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,

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212. See Hawk, Religion Report, *supra* note 167; see also Demick, *supra* note 10, at A6 (“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.”); see also White Paper 2005, *supra* note 11, 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.”).

213. See Rome Statute, *supra* note 3, art. 66(3).

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.<sup>214</sup>

The first three elements are met in the case of D.P.R.K. officials intentionally killing half-Chinese babies specifically because of their nationality, thereby destroying in part a national group.<sup>215</sup> The fourth element is one that is required of all the genocide crimes.<sup>216</sup> Given that the killing of infants and forced abortions occurred regularly and constituted conduct that could itself effect destruction of the protected group, it appears this requirement is met. In addition, the forced abortions of half-Chinese fetuses on account of nationality demonstrates the elements for "genocide by imposing measures intended to prevent births."<sup>217</sup> These elements are almost identical to those for genocide by killing. The major difference is contained in the fourth article, which states: "The measures imposed were intended to prevent births within that group."<sup>218</sup> Because Kim Jong Il maintains absolute authority and control over such actions, it is reasonable to believe that he and his cadres are individually liable under articles 6(a) (genocide by killing) and 6(d) (genocide by imposing measures intended to prevent births).

214. Elements of Crimes, *supra* note 99, art. 6(a).

215. Hawk, The Hidden Gulag, *supra* note 34, at 72.

216. Elements of Crimes, *supra* note 99, art. 6 ("Notwithstanding the normal requirement for a mental element provided for in article 30 . . . 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.").

217. *Id.*, *supra* note 99, art. 6(d). 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.
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.

*Id.*

218. *Id.* art. 6(d), para. 4.

Christians have also been the target of genocidal actions. They are undoubtedly targeted because of their religious beliefs, but further investigation is necessary as to whether they are killed in numbers high enough to constitute “genocide by killing.” Nevertheless, the targeting of Christians within the state-run prison camps and detention facilities qualifies as “genocide by causing serious bodily or mental harm.” The elements for this crime are identical to those for “genocide by killing,” except that the first element is “[t]he perpetrator caused serious bodily or mental harm to one or more persons.”<sup>219</sup>

Moreover, Christians in the prison camps are being subjected to “genocide by deliberately inflicting conditions of life calculated to bring about physical destruction.”<sup>220</sup> There are two differences between the elements for this crime and those for “genocide by killing.” The first element in “genocide for killing” is replaced by “[t]he perpetrator inflicted certain conditions of life upon one or more persons.”<sup>221</sup> Second, an additional element is included, stating “[t]he conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.”<sup>222</sup> The horrific conditions of the prison camps and the obviously high mortality rate illustrate that the perpetrator inflicted certain conditions of life that were likely calculated to bring about physical destruction of persons. In some instances, it appears that certain conditions were directed particularly at the Christian detainees. For example, former detainee Soon Ok Lee has noted that Christians were mainly assigned to the “horrible” and “dangerous” rubber factory, smelting factory, mine, and discipline department.<sup>223</sup> Thus, the perpetrators appear to have intended to destroy a religious group in part, and this conduct could itself effect such destruction. As such, facts indicate a reasonable basis to believe that Kim Jong Il is liable for genocide against Christians pursuant to Article 6(b) (genocide by causing serious bodily or mental harm), in addition to possible liability under Articles 6(a) (genocide by killing) and (c) (genocide by deliberately inflicting conditions of life calculated to bring about physical destruction).

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219. *Id.* art. 6(b).

220. *See id.* art. 6(c).

221. *See id.* art. 6(c), para. 1.

222. *See* Elements of crime, *supra* note 99. art. 6(c), para. 4.

223. Lee, *supra* note 17, at 114.



### C. War Crimes

Prisoners of war from the conflict commonly known as the Korean War, which was active from 1950–1953,<sup>224</sup> are tragically still imprisoned in the D.P.R.K. This detention violates both Article III of the Korean War Armistice Agreement signed July 27, 1953,<sup>225</sup> and the Geneva Convention provision relative to the treatment of prisoners of war.<sup>226</sup> This detention also falls within the Rome Statute's definition of war crimes, which incorporates "grave breaches" of the Geneva Convention.<sup>227</sup> As of February 2005, the

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224. The Korean conflict is still technically ongoing; a peace treaty has yet to be concluded. Background Note, *supra* note 20 ("No comprehensive peace agreement has replaced the 1953 armistice pact.").

225. Korean War Armistice Agreement, Kor.—P.R.C.—UN, July 27, 1953, 41 U.S.T. 243 [hereinafter Armistice Agreement].

226. Geneva Convention Relative to the Treatment of Prisoners in Time of War, art. 118, Aug. 12, 1949, art. 118, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter Third Geneva Convention] ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.").

227. See Rome Statute, *supra* note 3, art. 8. 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 or 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: . . .

R.O.K. Ministry of National Defense estimates that 542 captives from that conflict are still alive in the D.P.R.K.<sup>228</sup> Pursuant to the Third Geneva Convention, these prisoners of war are protected persons. Article 4 of this convention states that prisoners of war include “[m]embers 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.”<sup>229</sup> Thus, R.O.K. soldiers—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 these R.O.K. prisoners of war abusively.<sup>230</sup>

To determine which provisions of Article 8 of the Rome Statute apply, we must first determine whether the Korean War was international or non-international. Pursuant to the criteria of *Prosecutor v. Kordic & Cerkez*,<sup>231</sup> the interventions by the P.R.C. and other states in the Korean conflict made it international. Thus, the Rome Statute definitions of war crimes under Article 8(2)(a) and (b) would apply on this basis.<sup>232</sup> Given that the R.O.K. prisoners of war

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(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion. . . .

(ii) 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. . . .

*Id.*

228. H.R. Con. Res. 168, *supra* note 44, at 6; Lee, *supra* note 94, at A6 (“North Korea has admitted that it is holding 10 South Korean soldiers captured in the Korean War . . . [t]he South Korean Red Cross believes that 546 prisoners of war and 485 abductees are being held in North Korea.”).

229. Third Geneva Convention, *supra* note 226, art. 4.

230. R.O.K. prisoners of war have been forced to perform hard labor for decades, often in mines, under slave-like and lethal conditions. Lee, *supra* 17, at 129–31.

231. *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-T, Judgment, paras. 79–146 (Feb. 26, 2001) (considering whether, through the presence of its troops, Croatia had intervened in the armed conflict between the Bosnian Muslims and the Bosnian Croats in Bosnia-Herzegovina and whether the HVO (Bosnian Croats) acted on behalf of Croatia. Both situations were deemed sufficient for a determination that the armed conflict in Bosnia-Herzegovina was international).

232. See generally Rome Statute, *supra* note 3, art. 8(2)(c) (defining war crimes in the context of non-international armed conflict).

who are abused likely suffer the same horrific conditions as other detainees, it is unnecessary to repeat the analysis of all possible crimes under Article 8 against the R.O.K. prisoners. Because the Rome Statute's crimes against humanity provisions apply to civilians only, the application of Article 8 "War Crimes" would be necessary for a full analysis. For example, the requirements for committing the war crime of willfully causing great suffering, as defined by the Elements of Crimes, include:

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.<sup>233</sup>

Reports indicate that D.P.R.K. authorities have "caused great physical or mental pain or suffering to, or serious injury to body or health of" R.O.K. prisoners of war, who are protected by the Geneva Conventions, despite knowing that they are R.O.K. prisoners of war.<sup>234</sup> Again, Kim Jong Il is likely liable as a co-perpetrator, aider and abettor, or other form of participant, given the absolute control he possesses.

At a minimum, as the chairman of the National Defense Commission and People's Army, Kim Jong Il likely bears individual responsibility as a commander who failed to stop the commission of crimes by forces under his authority. Under article 28(a) of the Rome Statute, a military commander is criminally responsible for:

- (a) [C]rimes . . . committed by forces under his . . . effective command and control . . . as a result of his . . . failure to exercise control properly over such forces, where:
  - (i) [he] either knew or, owing to the circumstances at the

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233. See Elements of Crimes, *supra* note 99, art. 8(2)(a)(iii).

234. See *id.*, art. 8(2)(a)(iii); H.R. Con. Res. 168, *supra* note 44, at 6 ("[A]ccording to the testimony of prisoners-of-war who have successfully escaped from North Korea, South Korean prisoners-of-war have been forced to perform hard labor for decades, often in mines, and are harshly treated by the Pyongyang regime.").

time, should have known that the forces were committing such crimes; and

(ii) [he] 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.<sup>235</sup>

The “should have known” standard for culpability under Article 28(a) is easier to meet than the more onerous “conscious disregard” standard of Article 28(b).<sup>236</sup> In either case, Kim Jong Il’s lack of knowledge is improbable, given his absolute control and surveillance of the D.P.R.K.

Regarding elements four and five, the introduction to Article 8 “War Crimes” in the Elements of Crimes indicates that the determination of the Korean War as international or non-international is irrelevant for the mens rea requirement.<sup>237</sup> However, detaining someone known to be a R.O.K. prisoner of war indicates an awareness of the existence of the Korean War. Thus, Kim Jong Il’s actions satisfy the five elements of the war crime of wilfully causing suffering. As discussed previously, it is reasonable to believe Kim Jong Il and his cadres could be held individually liable for such crimes given Kim Jong Il’s absolute authority and control.

## 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.<sup>238</sup> While this analysis does not prove “beyond a reasonable doubt” that Kim Jong Il is guilty of these crimes,<sup>239</sup> it should raise questions about the crimes being perpetrated in the D.P.R.K. It should also compel the UN Security Council to inquire into—and to take action to end—these crimes.

The Security Council should intervene judicially in the D.P.R.K. situation by investigating and referring it to the ICC. Such

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235. Rome Statute, *supra* note 3, art. 28

236. *Id.*

237. See Elements of Crimes, *supra* note 99, art. 8.

238. See Rome Statute, *supra* note 3, art. 53.

239. *Id.* art. 66.

a referral would be the best route to initiating ICC action, as it would provide the strongest grounds for jurisdiction and is supported by Security Council resolution 1674.<sup>240</sup> The referral would be achieved by passage of a Security Council resolution, which, by invoking Chapter VII, would further empower the ICC prosecutor. Second and third-best alternatives would be a state referral and prosecutorial initiation, respectively.

The recent action concerning Darfur may be instructive as to how a Security Council referral of the D.P.R.K. situation 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 United Nations 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.<sup>241</sup> The Security Council made the referral on March 31, 2005 by resolution 1593.<sup>242</sup> The Chief Prosecutor opened an investigation on June 1, 2005, after considering the Commission's findings and conducting a preliminary analysis.<sup>243</sup>

Neither the Security Council nor the Secretary-General has effectively addressed human rights violations committed by the D.P.R.K. Although the UN Commission on Human Rights has appointed a Special Rapporteur to investigate the human rights situation in the D.P.R.K., the Security Council's response in Darfur indicates that a similar commission would be a prerequisite for a referral to the ICC.<sup>244</sup> The Secretary-General created the Darfur

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240. S.C. Res. 1674, *supra* note 81, paras. 7–8.

241. Marlise Simons, *Sudan Poses First Big Trial for World Criminal Court*, N.Y. Times, Apr. 29, 2005, at A12.

242. S.C. Res. 1593, *supra* note 75, para. 1.

243. Press Release, 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>.

244. UN Comm'n on Hum. Rts. Res. 2004/13, para. 5, UN Doc. E/CN.4/RES/2004/13 (Apr. 15, 2004). The UN Commission on Human Rights requested its Chairman to appoint a Special Rapporteur on the human rights situation in the D.P.R.K. Thai law professor Vitit Muntarbhorn became the Special Rapporteur in July 2004. The Special Rapporteur is directed to cooperate with other bodies, especially the Special Rapporteurs on extrajudicial executions, the right to food, freedom of opinion and expression, freedom of religion, and violence against women, and the UN Working Groups on Arbitrary Detention and

Commission pursuant to Security Council resolution 1564.<sup>245</sup> China and Russia, both permanent Security Council members, abstained when the Council voted on this resolution. However, for the D.P.R.K. situation it is likely that China would veto a similar resolution, unless the political climate changes significantly regarding the six-party talks to end the D.P.R.K.'s nuclear weapons capability or other changes occur, as discussed in Section II.

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—like that in the D.P.R.K. Although such an ideal world has not yet been reached, there exist mechanisms for the prosecution of suspect situations. Should the six-party talks stall indefinitely or the D.P.R.K. violate a future nuclear-arms-eliminating agreement, an investigation into the D.P.R.K. situation could be politically advantageous. The Security Council may then be willing to request the Secretary-General to investigate the D.P.R.K. human rights situation under its Chapter VII powers, in addition to condemning the D.P.R.K.'s lack of cooperation regarding the nuclear issue. If, under these circumstances, the Security Council is unable to produce a resolution for such a request, the Secretary-General should consider investigating the D.P.R.K. human rights situation on his own initiative using a high-level group of experts.<sup>246</sup> The UN General Assembly, which has condemned D.P.R.K. human rights abuses by resolution,<sup>247</sup> could be another source of support for such an

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on Enforced and Involuntary Disappearances. *Id.* para. 2(f).

245. S.C. Res. 1564, para. 12, UN Doc. S/RES/1564 (Sept. 18, 2004).

246. 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.” UN Charter art. 99, para. 1. The Secretary-General has broad authority to appoint experts to address issues of concern. An example is the Secretary-General’s High Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility 2*, UN Doc. A/59/565 (Dec. 2, 2004). The Secretary-General can also appoint high-profile persons to highlight particular issues, such as the appointment of Bill Clinton to respond 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.

247. 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

investigation.<sup>248</sup> The conclusions of such a high profile investigation would hopefully influence the political climate in favor of stronger actions.

If an International Commission of Inquiry on the D.P.R.K. is undertaken, it may find that the ICC's temporal jurisdiction requirement is too restrictive for a referral of the D.P.R.K. case. Instead, the Commission may recommend that a special tribunal be created to address crimes committed before July 1, 2002. This tribunal could cover the egregious famine and atrocity crimes which occurred in the 1990s. A special tribunal may also be more acceptable to the Bush administration, which opposes the ICC. However, the creation of a new tribunal would absorb time and resources. The use of the existing structures such as the ICC would be the most efficient means of prosecuting the D.P.R.K. crimes.

Even if the D.P.R.K. 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 D.P.R.K. Even if the D.P.R.K. no longer poses a threat in terms of nuclear weapons, it will still continue perpetrating human rights abuses that are 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 D.P.R.K. situation to the ICC or to a special tribunal should be laid now to build the requisite political will.<sup>249</sup>

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members were: P.R.C., the Russian Federation, and the D.P.R.K. in opposition; the U.S. and Japan in support; and the R.O.K. in abstention. UN GAOR, 60th Sess., 64th plen. mtg., at 23, UN Doc. A/60/PV.64 (Dec. 16, 2005); *see also* G.A. Res. 60/173, UN Doc. A/RES/60/173 (Dec. 9, 2005).

248. Article 22 of the UN Charter states that the "General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions." UN Charter art. 22, para. 1. Articles 10–17 of the UN Charter state the functions and powers of the General Assembly, which could encompass D.P.R.K. issues. For example, Article 13 states that the "General Assembly shall initiate studies and make recommendations for the purpose of . . . promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all. . . ." *See* UN Charter art. 13, para. 1.

249. There are a number of ways that parties could bring attention to North Korea's human rights abuses in the United Nations. First, individual states could use letters directed at authorities in the UN to bring attention to the human rights abuses in North Korea. Second, a state could raise the topic of D.P.R.K. human rights under the subject of "Other Business" during one of the

## VII. CONCLUSION

This article provides a factual overview of the crimes against humanity, genocide, and war crimes committed by the Kim Jong Il regime in the D.P.R.K. and reviews the legal framework for their prosecution before the ICC. By applying published facts from credible sources to the legal framework for prosecuting crimes before the ICC, the article concludes that these facts provide a reasonable basis to believe that Kim Jong Il and his cadres are individually liable for crimes against humanity, genocide, and war crimes.

To support this claim, this article shows that Kim Jong Il is in control of the D.P.R.K. partly due to an ideology that elevates him to a 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. People 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 near starvation-level rations, in addition to torture, beatings, rape, and other abuses. These abuses constitute the crimes against humanity of murder, extermination, enslavement, forcible transfer of population, arbitrary imprisonment, torture, rape, and persecution on political and other grounds. In addition, women and girls are trafficked to countries such as China. Some 80,000 persons are estimated to have died since July 1, 2002, the date the Rome Statute 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 D.P.R.K. face particularly brutal treatment in detention facilities. Those who are pregnant suffer forced abortions or the murder of their "half-Chinese" infants upon birth. Those who are Christian are also subject to particularly abusive punishment because of their religion. These crimes against national and religious groups, as such, constitute genocide. In addition, the D.P.R.K. has

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daily Security Council meetings, followed by placement of the topic on a subsequent daily agenda with the support of other states. Third, a statement by the President of the Security Council could increase the focus on North Korea's human rights abuses. Fourth, Security Council resolutions that provide deadlines by which the D.P.R.K. must improve its human rights situation could trigger an investigation and increase attention on human rights abuses. In the past, these types of techniques have been used to target the Sudanese government. See S. C. Res. 1593, *supra* note 75.



abducted thousands of South Koreans, Japanese, and others since the Korean War, with hundreds still alive in captivity. These abductions may constitute the crime against humanity of enforced disappearance of persons. More than 500 South Korean prisoners of war are also in D.P.R.K. captivity and may suffer abuses which constitute war crimes. Of course, this is a simplistic summary of complex situations that must be further investigated and proven beyond a reasonable doubt in court.

This article recommends that the UN Security Council intervene judicially in the D.P.R.K. by referring the situation to the ICC. To achieve this, the UN Secretary-General should launch an investigation into D.P.R.K. abuses as he did for Darfur in the Sudan. Such an investigation appears politically necessary to support a Security Council referral of the D.P.R.K. situation to the ICC or the creation of a special tribunal to hear the case if the investigators find it necessary to overcome the ICC's temporal jurisdiction requirement. If the D.P.R.K. refuses to cooperate in the six-party talks for denuclearization 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 D.P.R.K. situation to the ICC or to a special tribunal as seriously as it considers other sanctions.

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 D.P.R.K. cooperates in reaching an agreement to denuclearize and in fact does so, the United Nations should launch an investigation into D.P.R.K. abuses with the intent to refer the case to the ICC or to a special tribunal. This is necessary to the preservation of millions who suffer under the regime of Kim Jong Il.