

DÖRMANN [2002, p. 97-99] notes that the ban covers all forms of participation in military operations obtained by coercion. A defendant is guilty when they “knowingly” commit this offense.

Communist forces violated Article 130 of the Geneva Conventions and Article 8(2)(a)(v) of the Rome Statute by incorporating the POWs into military units and labor brigades during the war. The POWs did not individually volunteer to serve but were assigned to their units by the camp administrators. The camp administrators had complete control over the POWs, so it is not conceivable that an individual POW could refuse their assignments without consequences. Therefore, the POWs were coerced into joining the units.

The work that the POWs did in the North Korean Army units, and the repair work the POWs performed on bombed railroads and airfields were clearly part of the Communist military effort. While the mining for coal and iron many POW labor units could in theory be unrelated to the war effort, and therefore a legal form of POW labor according to Article 50(b), it is unlikely that this was the case. If the POWs were indeed performing lawful work, there would be no reason to keep tens of thousands of the South Korean POWs off the rosters and hide them from the Red Cross and NNRC. The pattern of behavior by the Communist forces clearly raises suspicions that all the work done by these South Korean POWs involved grave breaches of the Geneva Conventions.

The use of POWs in the Communist war effort was conducted knowingly by the Communist leadership. The measures the leaders took, including moving the POWs into the Northeast to prevent their escape and contact with the NNRC, and the strict surveillance that continued after the war clearly indicates the North Korean leadership was aware that they had unlawfully exploited these POWs.

#### ***4.4.1.2 Denials NNRC interviews constitutes a deprivation of rights of fair and regular trial***

The “rights of fair and regular trial” usually concern the protection of the judicial guarantees for POWs as specified in Geneva Conventions III, Articles 82-108. [DÖRMANN 2002, pp. 100-105]. The repatriation interviews with the NNRC were not a trial in the conventional sense because the POWs being interviewed were not under trial for a wrongdoing. However, the interviews were an important administrative hearing in front of state representatives. The result of the interview would determine the future legal status of the individual POW. Therefore, the stakes for an individual POW were as high as any judicial process.

The interviews were also formal and explicit process. The process balanced the rights of the individual POW who was staying with his captors against the rights of his home military service to verify whether the individual was staying truly according to his own convictions.

Because of these similarities to a judicial trial, the Korean War POW's due process right to a repatriation interview with the NNRC should be protected by the Geneva Conventions with the same gravity as it protects POWs' rights to a fair trial in a judicial hearing. Willful denial of a repatriation interview should therefore be a "grave breach" of the Geneva Conventions and punishable under Article 8(2).

In the case of the South Korean POWs in question, none of them were allowed to have their repatriation interview. North Korean head of state Kim Il Sung himself said that the POWs were being moved into the Northeastern areas specifically to prevent them from contacting the NNRC. [VOLOKHOVA 2000, pp. 89-90]. North Korean leaders willfully denied the POWs contact with the NNRC and thus deprived the POWs of the rights to a fair and regular trial.

The denial of an opportunity for the South Korean POWs to contact international officials and express whether to return to South Korea or stay in North Korea continues to this day without a proper remedy. The defendants continue the grave breach and continue to commit an Article 8 War Crime.

#### ***4.4.1.3 Detaining POWs for almost 60 years constitutes unlawful confinement***

The text "unlawful deportation and transfer, and unlawful confinement" in Article 8(2)(a)(vii) comes from Article 147 of Geneva Convention IV. Geneva Convention IV specifically concerns protections for civilians caught in combat zones but Article 8 of the Rome Statute, applies to all "persons or property protected under the provisions of the relevant Geneva Convention" and therefore includes Prisoners of War protected under Geneva Convention III as well as the wounded and sick combatants protected under Geneva Conventions 1 and II. [DÖRMANN 2002, p. 112].

With respect to POWs, unlawful confinement is defined by violations of Articles in Geneva Convention III defining the quality of the quarters of their internment (Articles 21-23 and 25), standards for any disciplinary punishment against them (Articles 87, 90, 91, 95, 97 and 103), regarding the repatriation of wounded POWs (Article 109), and repatriation at the end of hostilities (Article 118). In particular, Geneva Convention III Article 118 states that POWs are to be "released and repatriated without delay after cessation of active hostilities. [DÖRMANN 2002, pp. 118-122].

In detaining South Korean POWs for over 50 years after the Armistice was signed, North Korean leaders have failed to "release and repatriate without delay" the POWs after cessation of active hostilities. They have therefore, violated Article 118 of the Geneva Convention III and committed the Article 8 War Crime of unlawful confinement. This violation continues to this day.

#### **4.4.2. Crimes Against Humanity against the children and bereaved families of South Korean POWs**

The systematic discrimination suffered by the children of South Korean POWs violates Article 7(1)(h) of the Rome Statute:

Article 7 - Crimes against humanity

1. For the purpose of this Statute, "crime 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:

...

(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;

The children of the South Korean POWs were an identifiable group. The North Korean authorities designated them as "number 43's."

Persecution is defined as the "intentional and severe deprivation of fundamental rights." [ROME 1998, Art. 7(2)(h)]. One form of persecution would be discriminatory restrictions imposed on individuals solely based upon the status of their parents.

The children suffered the same systematic discrimination as their POW fathers. They were restricted in their employment to similar mining and hard labor jobs as their fathers, restricted in their residence, and placed under increased surveillance based upon their "number 43" status. They were denied opportunities to attend college or join the North Korean military and thereby denied any means to improve their status. By imposing such discrimination upon the children of South Korean POWs, the defendants violated Article 7(1)(h) of the Rome Statute.

These War Crimes against the POWs are particularly outrageous because they flagrantly breach the Geneva Conventions which the North Korean leadership themselves announced that they would honor. The current leadership in North Korea has continued the violation for over 50 years. By persecuting the children the defendants have extended the virtual enslavement suffered by the South Korean POWs to their descendants.

#### ***4.5 Evidence against defendants to be presented to the ICC***

Evidence against the defendants will include direct evidence in testimonies from POWs who have escaped from North Korea, and documentary evidence from declassified Soviet-era Archives.

#### **4.5.1. Direct Evidence against defendants from POW Testimonies**

The testimonies from escaped POWs to be used as evidence of War Crimes and Crimes Against Humanity include the following:

- 1) The denial of any contact with their families in South Korea regarding their whereabouts
- 2) Testimonies that POWs were denied an opportunity to return to South Korea, or to seek asylum in a third country as other POWs held by Communist forces.
- 3) Testimonies that POWs were denied opportunities to contact the Red Cross or Neutral Nations Repatriation Commission.
- 4) Testimonies regarding threats and violence against POWs (including executions) who demanded to be repatriated to South Korea.
- 5) Testimonies from POWs that they were kept under surveillance and restricted in their choice of work and residence after the war, especially testimonies that they were placed under stricter surveillance and restrictions than other North Korean citizens.
- 6) Testimonies of discrimination in education, jobs, and military service against the children of POWs solely based on their parental lineage.

The testimonies from escaped POWs provide evidence regarding whether they had freely choose to join the North Korean forces and to stay in North Korea. All of the escaped POWs have testified they were never given such an opportunity during the fighting and after the cease-fire. The fact that the North Korean leadership denied the South Korean POWs opportunities to contact the Red Cross or Neutral Nations Repatriation Commission shows that the POWs were held against their will.

Testimonies of threats and violence against POWs who demanded to be repatriated to South Korea are evidence that the South Korean POWs were kept in North Korea against their will. Some of the former POWs report that they had seen or had heard of their comrades being executed for demanding repatriation.

The denial of contacts with families in South Korea also shows that the POWs were held against their will. Beginning in 1972, there have been numerous unofficial and official contacts between North and South Korea including a number of divided families that were allowed to see each other. Although almost all the POWs were kept under close surveillance, and that they were likely to have had family in South Korea, North Korean authorities never allowed any contact between the POWs and their families in South Korea in a meaningful scale. If the POWs had voluntarily stayed in North Korea, there would be no reason to deny such contact. The denial of contacts is another indication that North Korea has something to hide about these POWs.