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Rethinking the 1948 Genocide Convention for North Korean Political Camps

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RETHINING THE 1948 GENOCIDE CONVENTION
FOR NORTH KOREAN POLITICAL CAMPS

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ABSTRACT

The term genocide implies attacks on only four groups – national, racial, ethnic and religious – enumerated in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide. In terms of protection of political group, severe political persecutions targeting a certain political group would not establish a successful genocide charge in courts and international courts have rendered judgements applying crimes against humanity to such atrocities. However, it is important to consider the possibility of protecting political groups regarding the victims in the North Korean political camps were selected on political grounds and their groupness is similar to other characteristics of the protected groups. It seems plausible to convict the genocide crime in North Korean context due to the unique nature of the incidents.

This thesis is, therefore, to analyze possible accusation of genocide crime in North Korean political camps in order to bring more tangible discussions to provide justice to the detained in the camps. It aims to demonstrate the detained in the political camps may constitute a political group and the Genocide Convention should be interpreted to include them, based on the limited factual descriptions in the camps. It was impossible to conduct a direct investigation in the camp sites since the state persists to remain exclusive, however, the most reliable findings were found by national and international authorities including the United Nations. In addition to the criminal charge of crimes against humanity found by the authorities, this thesis ultimately focuses on establishing genocide charge to the inhumane atrocities in the state political camps with more flexible and individual approach to the case. Although it is too challenging to bring a new interpretation or amendment to the existing Convention, the research conducted in this thesis hopefully predicts domestic or transitional justice procedure to incorporate the genocide term in a way which this thesis suggests, for the fairness and justice in North Korea’s future.
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INTRODUCTION

Thomas Buergenthal, a former International Criminal Court judge and survivor of the Auschwitz concentration camp, once spoke to the Washington Post as an author of a report about North Korean human rights violations released by the War Crimes Committee of the International Bar Association. He described the situations in North Korean political camps as even worse than what he witnessed and experienced in his lifetime.¹ There are tortures, physical violence, brainwashing, extremely forced labors, disease, child segregation, forced abortion and direct killings against the inmates in the North Korean political camps. Despite this list of the atrocities, the current interpretation of the Convention on the Prevention and Punishment of the Crime of the Genocide would preclude a finding that genocide is occurring within the North Korean political camps.

The very beginning of this thesis arose from a similar question: why would killing masses of people be less punishable than killing a single person? It is hard but true to believe a massive scale of killings may fail to receive justice in courts unlike individual murder cases. Such gap between the ethical awareness and the legal responsibility would be provoked by the strict application of the legal definition and interpretation of the genocide resulting in limited space to render necessary protections. Thus, this led questions into exploring language of the Genocide Convention; is it possible to provide an explanation for why generalized harms in the North Korean political camps do not establish a crime of genocide?

In the present Convention, genocide means any of the following acts committed with intent to 
destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(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.\(^2\)

In the article II of the Genocide Convention, the first paragraph explicitly provides definition of 
certain types of groups to protect. The enumeration for limited scope of protection seems 
reasonable because genocide is “the crime of crimes”, owning strong rhetorical power to provoke 
tangible solutions over the world.\(^3\) It is also a reflection of the historical experience under 
Hitler’s Nazi government which inflicted innocent human beings by classifying them on the 
basis of nationality or race. The Convention’s obvious objective is to protect the existence of the 
groups and appreciate the importance of minorities in modern democratic societies. However, 
since some groups are not entitled to receive the Genocide Convention’s protection, the 
international courts have convicted the perpetrators who conducted genocidal inflicts of crimes 
against humanity to protect excluded groups and several advocates have argued that customary 
international law could protect a wider set of groups than the Convention. Some states have 
attempted to prosecute genocide criminals in national courts with its legislation regardless of the 
type of groups harmed in order to supplement the Convention’s vacant protections. Therefore, 
we may have to see from domestic adaptations and different examples of the Convention applies

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\(^3\) William Schabas has called the genocide crime as the crime of crimes in his book. WILLIAM SCHABAS, GENOCIDE 
in our perception, that its’ article II of the Convention does not necessarily protect the ‘right’ people.

But it is time to consider what the British prosecutor in prosecuting Nazi war criminals at Nuremberg Trial tried to imply when he was making a closing statement that “genocidal technique varied in different forms, but the aim was the same in all cases.” 4 It is important to recall this statement today in order to address the atrocities occurring in the North Korean political camps because even though the Convention does not generally protect political groups in genocidal offenses, the essential grounds for massive persecution are same in the present case. Some people are targeted and eradicated for being sent to one of the political camps. The procedure for the classification of political purges is in fact a process of stigmatization of citizens on political grounds. So one may ask some questions: what if the political faith has become the identity of the people and stigmatized them for their lifetime, in a manner that is unchangeable, similar to race or nationality? what if there is no racial or ethnic difference among the people except only political identification? These questions must be counted into the Korean contexts when defining what ‘political’ means in order to inquiry human rights violations in the North Korean political camps. Korea has been a nation-state for centuries until the Korean War divided the Northern part as Communist state, the Democratic People’s Republic of Korea (“DPRK” hereinafter), and Southern part as democratic state, the Republic of Korea. In fact, there have been genocide incidents against innocent citizens, which could be framed as severe persecutions on different political beliefs based on the ideological polarization, but none of them has received proper analysis in genocide contexts.

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4 Goring [IMT 1946] 19 IMT Proceeding 1, 497 (British prosecutor).
It is also essential to note the fact that political group’s protection was once in the first draft of the Convention but disappeared at some point of the discussions in terms of protecting political groups in genocide crimes. No records provided the reason behind the sudden exclusion, but the Soviet Union delegate submitted a document that explicitly lacked political groups in the enumeration. To one’s surprise, the Soviet Union’s intention was reflected in the Convention’s final draft and is still preserved by its own text, excluding challenges for different possible groupness.

This thesis aims, therefore, to provide an idea because genocide has strong power to open the gate for more approaches in the North Korean atrocities while the state tries to remain exclusive and silent. The North Korean political camps are built on the intention of mass destruction, as a method to eradicate the existence of political opponents including their family members by implementing the involvement system. The North Korean involvement system was made by Kim Il-sung’s personal policy that national enemies must be eradicated for three generations of their family. In short, the camp system including on-going operation contains the essential elements to establish a genocide crime, although they still cannot constitute a genocide crime because of exclusion of political group in interpreting the Convention’s enumeration. In this regard, the Genocide Convention should be reread to include this group of people in order to provoke faster and more tangible solution to resolve this situation as concerned about the similar atrocities that are happening today’ world and might happen in the future.

This thesis will first demonstrate the current situations of the political camps based on official reports made by international or national authorities in order to give a glimpse of the

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shadow in the state’s hidden sites. Secondly, it will introduce the drafting history of how the Convention was drafted, to contemplate the reason behind sudden disappearance of ‘political group’ in the final draft. Next, it will demonstrate the applications of the Genocide Convention when a political group is targeted and destroyed. International courts strictly respect the words in the Convention so there has been no case that protected a political group. But the next part explores the reason why the courts’ norm should be challenged again to address the North Korean political camps because the gathered in the camps share some similar characters to national, racial or religious groups. This thesis will ultimately recommend solutions for broader application of the term, ‘genocide’ at the end.
CHAPTER I. POLITICAL CAMPS IN THE DPRK

The political camp is the most devastating and secret place to destroy human dignity in the DPRK as one renamed the sites as “hidden gulags of the DPRK.” The political camps, or “Kwan-li so” in its own language, however, cannot be found if one reads thoroughly the DPRK’s policies or laws. Unlike the state’s labor camps, which are also called as “reeducation camps”, neither the legislation or judicial authority in the Democratic People’s Republic of Korea (“DPRK” hereinafter) recognizes the existence of the political camps. According to the findings of the United Nations’ report on human rights in the DPRK (“UN DPRK report” hereinafter) political camps are disguised as military camps or agricultural facilities and the Bureau No. 7, the authority to manage the camps, is known as a “farming bureau” to public. The state has consistently insisted every report revealing human rights violations in the state, including the hidden political camps, is fabricated and compromised by international agencies, when human

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7 Political camps have different names such as political prisons or concentration camps when translated in different languages. This thesis only uses the term political camps to indicate the “Kwan-li-so” in the DPRK system, in order to distinguish the legal imprisonment which is provided by the DPRK’s judicial process. The detained in the camps are different from modern meaning of the prisoners due to the unique characteristic of the political persecution in the DPRK, and also the difference between the camp system and regular prison system.

8 DPRK law has the term “labor camps” in the provision. Article 30 of criminal law says, “Lifetime and limited term of reform through labor shall be executed by sending an offender to a long-term prison labor camp where he or she will engage in labor.” Hyongbeob [Criminal Law of the Democratic People’s Republic of Korea], amended and supplemented by Decree No. 2387 of the Presidium of the Supreme People’s Assembly on May 14, 2012, art. 30 (N. Kor.), translated by Amanda Won in Committee for Human Rights in North Korea (emphasis added). DPRK also developed a different model of concentration camp besides political camps. The labor camps are less known to world and barely investigated by other agencies when the DPRK human rights issues arise. This thesis does not consider labor camps as another type of political camp because the inmates are detained for minor offence, not for political reasons, and released soon compared to those serving in the political camps for their lifetime. However, these camps must receive further investigations in order to identify human rights abuses in DPRK regarding the severe conditions similar to the political camps. See ASAN REPORT, HUMAN RIGHT SITUATIONS IN NORTH KOREAN REEDUCATION CAMPS (2017).

right abuses in the political camps have received the worldwide attentions after a number of the DPRK defectors testified to reveal the grave infliction in the camps.¹⁰

1. History of the DPRK political camps

The establishment of the political camps was the state leader’s strategy to stabilize his political grounds in the authoritarian state. Concentration camps, which are original models of the DPRK’s political camps, have functioned as a tool in different forms to stabilize the political power throughout the human history and DPRK adopted the Soviet Gulag system, which was designed and developed to serve Stalin’s political achievements, as one of the Communist allies.¹¹ The DPRK political camps have become another example of the most destructive institutes to conduct massive scale persecutions.

Kim Il-sung, the first leader of the Kim’s regime, secretly established political camps in order to solidify his political grounds over the state in 1950s.¹² Mr. Hwang, the former secretary of the Workers’ Party in the DPRK, testified the first camp was built as a control zone near a mining area in Pyeong-an Nam do, following Kim’s internal policy in 1958, after the August Jongpa Case.¹³ Most of Kim’s primary political enemies were first executed, then their families

¹⁰ Most of the inquiries to human right violations in the DPRK have been challenged by the methods of work and heavily relied on the defectors’ testimonies due to the limited access into the state. For instance, the UN DPRK report said “in the absence of access to witnesses and sites inside the DPRK, the Commission decided to obtain first-hand testimony through public hearings that observed transparency, due process and the protection of victims and witnesses. Victims and witnesses who had departed the DPRK, as well as experts, testified in a transparent procedure that was open to the media, other observers and members of the general public.” Rep. of the Detailed Findings of the Commission of Inquiry on Hum. Rts. in the Democratic Peoples’ Republic of Korea (DPRK), Supra ¶30.


¹³ KOREAN BAR ASS’N, WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA 2018, 365 (2018). Several party members who opposed Kim Il-sung’s political line and insisted different Socialism approach were purged between
and other potential threats to his power were sent to the camp sites. The camps became subject to armed surveillance as Kim ordered to prevent and suppress any possible future rebellions after the August Jongpa while growing to detain any other opponents to the DPRK’s only party during 1970s, and later, to the successor Kim Jong-il, during 1980s.14

The camps still function to repress any different political ideas to Kim’s own-defined Socialist regime and prevent the nationals from developing their own political ideas against the state. Additionally, the camps are provoking great fears among the citizens as the camp system does not have legal grounds to operate but on arbitrary basis which can be rewritten by the officials. The DPRK government, of course, has not mentioned related information to confirm the existence and implementation of the camps in any of the government-issued publications. Only the defectors, who managed to arrive in other states, brought out the existence of the camps at first. Therefore, the current locations are presumably estimated mostly based on the defectors’ testimonies, without the state’s specific confirmation.

2. Current situations of the political camps

It is in fact impossible to conduct a field investigation on the political camp sites. However, the findings of the official reports written by the United Nations, United States government and South Korean Institute help demonstrate general conditions over the camps. UN DPRK report clarified the commission’s standard of proof is lower than one required in normal June and August in 1956. Kim Il-sung eventually founded a solid system to strengthen his sole leadership after this case.

legal proceedings, reasonable grounds.\(^{15}\) Most of testimonies are made by the North Korean defectors who hated and fled from the country, therefore, it is not expected to meet the normal standard in procedure for evidence.

2.1. Current locations of the camps

Due to the state’s exclusiveness, however, several obstacles often appear to discourage inquires which aim to review the state’s reaction is convincing or not. In addition, it is even impossible to locate the current sites of the existing political camps on the map. United States Department of State detected 6 camps in 2017 based on the satellite images and reported in assumption that several prisoners have been transferred to different locations while some of them are missing.\(^{16}\) Korea Institute of National Unification has different finding in 2018 that only 5 camps are still in operation.\(^{17}\) In 2013 the institute made a calculation to assume that at least 8,000 or at most 12,000 inmates were detained in entire camps, but did not provide the estimated current number of the detained, due to the frequent changes of the regime’s policy and stricter internal security.\(^{18}\) This unpredictable change in the regime’s policy is one of the main factors that strengthens the role of the political camps in maintaining the power and provoking the fear among the people under the regime.

Several attempts have been made to affirm the existence of the camps but failed to provide a conclusion on the exact locations of the political camps. In 2014, the UN DPRK report concluded that the state used to have about 12 camps in the first period of establishing the state

\(^{15}\) Rep. of the Detailed Findings of the Commission of Inquiry on Hum. Rts. in the Democratic Peoples’ Republic of Korea (DPRK), Supra ¶68. “…when it has obtained a reliable body of information, consistent with other material, based on which a reasonable and ordinarily prudent person has reason to believe that such incident or patter of conduct has occurred.”


\(^{17}\) KOREA INSTITUTE OF NATIONAL UNIFICATION, WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA 2018 (2018).

\(^{18}\) Id.
and now only 4 of them are still under operation. The report did not exclude the possibility of other existing camps but was only able to roughly assume the situation in the four camps. The 4 camps are Camp 14 Kaechoen, Camp 15 Yodok, Camp 16 Myong-gan, and Camp 25 Chengjin. It has been known that the camps have 2 different zones, a total control zone and a revolutionary zone. Only Camp 15 Yodok seems to have both zones in the sites. The report also assumed that Camp 14, 15, and 16 are under State Security Department’s control. Social Security Agency, which was used to be Ministry of Peoples’ Security, is currently in charge of overall management of the camps and still follows the Party’s decision.¹⁹

The United States Department of State produced a different finding. The Department detected 6 camps based on the satellite image analysis over the DPRK territory in 2017; Camp 14 Kaechon, Camp 25 Chongjin, Camp 16 Hwasong, Camp 22 Hoeryong (2012), Camp 18 Pukchang and Camp 15 Yodok.²⁰ According to the Department’s report, the detained are not allocated to stay in one camp and have to leave the initial camp and wander throughout the different sites. The Department assumed the detained in the Camp 22 are transferred to Camp 16 and some of them disappeared.²¹

More recent source is provided by Korea Institute of National Unification (“KINU” hereinafter). KINU published an annual 2018 report, finding 5 camps are existing in the state. It concluded Camp 14 Kaechon, Camp 14 Yodok, Camp 16 Myeong-gan, Camp 18 Kaechon and Camp 25 Cheongjin are still under operation based on a testimony that Camp 22 Hoeryong is currently padlocked. Earlier in 2017, KINU also found that the supporters and relatives of Lee

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²⁰ U.S. DEP’T OF STATE, Supra.
²¹ U.S. DEP’T OF STATE, Supra.
Yeong-ho and Jang Sung-taek, previous party members who were executed in 2013, were detained in the camps as well. Lee and Jang were in high positions in the Worker’s Party of Korea and Jang was Kim Jong-un’s uncle, one of the great supporters of Kim’s political debut.

2.2. Current situations of the inmates

The current status of the detained are highly vulnerable. They were not provided any legal right from the stage of the arrest. No law describes the process in arresting the accused and sending them to the political camp. In short, no legal procedures are guaranteed during the entire process. Once accused, the suspect is directly sent to the camps without an opportunity to counsel or even defend oneself in the courts and segregated from the society upon the arrival, losing the ordinary citizenry. The sudden apprehension thus results in suspicious disappearances in the state and assists in building a solid threatful system among the people. KINU reported in 2018 that some apprehensions are made because of the religious beliefs, for instance, a citizen was sent to and detained in a camp when the bible was found at home.

The detained have to face more risks from the moment they arrived the camp sites. Camp guards sometimes receive rewards for catching the fugitive with their guns, furthermore, never become subject to penalties when they eventually or mistakenly kill one of the inmates. It can be said the entire process for the camp system works without a judicial review or oversight. The punishments given to the detained are not provided by legal basis and range from severe labor which exceeds the normal amount a person can handle a day, to physical violence sometimes leading to death. The forced labor is another fatal factor that increases the number of the death in the camps. When an inmate fails to meet the daily quota of his work, even without a day off in

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22 KINU, Supra.
23 KINU, Supra 370.
weeks, he gets severely beaten by the camp guards. Tortures are unexceptionally conducted among the camps, often even in the interrogation process, without explanations. Sometimes children are forced to watch the entire torture process.\textsuperscript{24}

General basic human rights cannot be guaranteed as well over the camp sites. Separate rooms are given to divide males and females as marriage and family rights are prohibited. A family cannot live together and a couple should divorce when a spouse is sent to the camp in order to avoid the broad application of involvement system.\textsuperscript{25} Inmates cannot be sexually engaged but sometimes female inmates become pregnant because they are raped by camp guards and no public record reported such cases. A testimony in the UN DPRK report described executions and tortures were followed when the woman was forced to have an abortion and even watch the babies killed at birth.\textsuperscript{26}

In the conclusion of the UN DPRK report, there are cases of lack of food supply, excessive forced labor, dangerous diseases, arbitrary execution, rapes, murder and other persecutions in the DPRK political camps. The inquiry commission concluded crimes against

\textsuperscript{24} Shin Dong-hyuk, who managed to successfully arrive South Korea in 2006 after three attempts, was born and grew up in the Kaecheon political camp until he decided to escape the camp in 2005. His interviews and book revealed the wretched life of the prisoners in political camps including his personal stories. His book was published in English, \textit{See SHIN DONG-HYUK, ESCAPE FROM CAMP 14} (2012). A short review also introduced him that he was born in one of the political camps in the DPRK and raised while competing with his family members for foods. The most shocking story of Shin is that he reported to a camp guard that his mother and brother were planning to escape then he was forced to watch their public execution. This extreme story immediately gained humanitarian concerns from all over the world. When the review quoted a previous camp guard’s words that “the theory behind the camps was to cleanse unto three generations the families of incorrect thinkers.”, it demonstrated the intention camp system is built on was to eradicate a class of people and the consequence is the inmates become inhumane and worse than being hopeless. They eventually become to never consider even suicide. It was evident that Shin suffered mental disease as a result of lifetime brainwashing when he arrived another country. But Mr. Shin showed a glimpse of hope since Shin could recover from his nightmare memories and now works as a human right advocate for the North Korea. Carl Gershman, \textit{A Voice from the North Korean Gulag}, 24 J. OF DEMOCRACY 165, 168 (2013).

\textsuperscript{25} KINU, \textit{Supra} 373.

\textsuperscript{26} Rep. of the Detailed Findings of the Commission of Inquiry on Hum. Rts. in the Democratic Peoples’ Republic of Korea (DPRK), \textit{Supra} \S 764
humanity have been committed throughout the camps but did not discuss the application of genocide crime.\textsuperscript{27}

2.3. Classification of the inmates

The detained are officially called as “li-joo-min”, a Korean word to indicate people who cannot settle down in a permanent residence and wander around for a long period of time. The renaming of the detained implies that they deprive of ordinary citizenry, often for life time, and are never able to live in a certain place. They are classified as “class enemies”, in fact, considered to be threats to the national security and the regimes’ great policy to stabilize the peoples’ wealth and national prosperity. As the camps’ size and locations have changed, the inmates consist of not only the collaborators under Japanese invasion, private property owners but also defectors and some religious leaders. These changes were developed with an involvement system, “yeon-jwa-je”, which is to imprison up to three generations of the accused. The involvement system was also developed with accords to Kim’s policies that the class enemies must be eradicated through three generations.

Korean Bar Association provided statistics about the names of charges of the detained in the camps. The involvement system itself was the first reason that led to the detention as 29% of the inmates were detained under the charge of involvement system.\textsuperscript{28} 10.5% were those who once tried to flee to South Korea and other 4.9% were religious activists.\textsuperscript{29} Other charges included secret divulgence, treasury, and criticizing the regime. Moreover, 70% of the detained were families and relatives of ‘original’ inmates.\textsuperscript{30} Implementation of the involvement system is

\textsuperscript{27} Rep. of the Detailed Findings of the Commission of Inquiry on Hum. Rts. in the Democratic Peoples’ Republic of Korea (DPRK), Supra ¶1158.
\textsuperscript{28} KOREAN BAR ASSOCIATION, WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA 2018, 366 (2018).
\textsuperscript{29} Id.
\textsuperscript{30} Id.
the core foundation to sustain the threatening institutes, that is, constitutes a certain vulnerable group in the society.
CHAPTER II. THE GENOCIDE CONVENTION

The atrocities occurring in the DPRK political camps reasonably seem likely they could meet the definition of genocide, however, the Convention on the Prevention and Punishment of the Crime of the Genocide (“the Convention” hereinafter) does not allow the brutal offences to receive the title. The Convention, which once was intentionally drafted to protect the political group from the genocide crimes, expressed more narrow concerns in preserving the existence of certain groups by enumerating only four groups could be targeted in genocidal intents. When a brilliant lawyer invented the term as a memorial to prevent future tragedies, he wished to protect any vulnerable groups that might encounter destructive discriminations in enormous scales. Although he did not anticipate a political group could be perpetrated due to the groupness for certain grounds, the interpreters of the Convention should be reminded that the detainees in the DPRK political camps are one of the most vulnerable targeted groups, which needs the Convention’s great protections.

1. The origin of the term

It has not been a century since the term genocide was coined. A Polish lawyer and professor Raphael Lemkin, who had to escape from Nazi government and arrived the United States, was the inventor of the term, combining Greek word genos (race, tribe) and Latin cide (killing). He was first to introduce legal concept to explain atrocities occurring throughout human history with the new term. It was an astonishing invention and discovery. He distinguished the crime of genocide from a mere conduct of killing in a massive scale, which is often conducted by a state, and cemented the objective of genocidal acts among different state

31 RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 79 (1944).
crucial acts in order to provide legal meaning for the term.\textsuperscript{32} His idea accordingly provided the core element of the crime by requiring the acts must accompany a certain plan to destroy the fundamental foundations of a group while the plan aims to exterminate the entire members of the group.

In addition to the invention of the term, Lemkin provided that genocidal acts include various acts rather than killing members of a certain group. He adopted a broader view to account characters of such acts than what is today generally accepted.\textsuperscript{33} This view included political, economic and cultural genocide. Depriving of political rights would eventually result in extermination of a national or racial group as well as economic genocide. According to his definition, any act that deliberately leads to annihilation of a group would be named as genocide.\textsuperscript{34} However, note genocidal acts which Lemkin described in his work do not imply the protection of political groups and actually have different meaning from genocide against political groups. It is undeniable true that he provided a wide scope of acts to terminate the living condition of a special group to explain the concept of genocide, however, he did not count a political group as one of the groups that may become extinct as a result of the persecution and need protection.\textsuperscript{35} Nazi’s denationalization of Jews and others who did not have any connection to German root were mainly vulnerable due to their nationality and race. It is true that Nazi

\begin{itemize}
\item \textsuperscript{32} Supra.
\item \textsuperscript{33} Supra.
\item \textsuperscript{34} Supra.
\item \textsuperscript{35} William Schabas, \textit{Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunals for Rwanda} 6 ILSA J. INT’L & COMP. L. 375, 386 (2000). “In his famous study, he associated the prohibition of genocide with the protection of minorities. Lemkin clearly did not intend the prohibition of genocide to cover all minorities, but rather those that had been contemplated by the minorities treaties of the inter-war years. The term "national" had an already well-accepted technical meaning, having been used to describe minorities in the legal regime established in the aftermath of the First World War. For Lemkin, genocide was above all meant to describe the destruction of the Jews, who cannot in a strict sense be termed a national group at all.”
\end{itemize}
regime persecuted other political parties in the nation, however, it was not perceived as severe violation as “final solution” to Jews.\textsuperscript{36}

A remarkable feature of Lemkin’s first framework is, nevertheless, his invention suggested an insightful point for further discussions for broadening the scope of the protection in genocide crimes. His endeavor has preserved in the works for broader range of acts that could be defined as genocide regardless of the character of the act and addition of more groups to the protection. His ultimate point that when a group of people are left vulnerable by the harms which devastated their life and destiny of the group, there should be a prevention as well as protection. He appealed to establish a legal frame both in international and domestic legislation in order to prevent and punish the genocide crimes that might happen in the same scale in the future, contributing in imposing international norm against the crime.\textsuperscript{37}

2. Drafting a convention on genocide

Provoked by the awareness of the tragedies occurring under the Nazi government’s occupation, the International Military Tribunal was established in Nuremberg following the Charter of the International Military Tribunal and the previous main Nazi leaders were tried in the court.\textsuperscript{38} They were first prosecuted for extermination of the Jewish people and other nationals in their occupied regions, however, the judges refused to consider the genocide charge although it was the first time the term genocide appeared in court. The Tribunal instead rendered decisions of crimes against humanity, establishing war-time nexus to the crime.\textsuperscript{39} Since the trial, the

\textsuperscript{36} RAPHAEL LEMKIN, Supra.
\textsuperscript{37} RAPHAEL LEMKIN, Supra 90-95.
\textsuperscript{39} This decision, of course, did not satisfy Lemkin. A former Nuremberg prosecutor Henry T. King, Jr. remembered the first meeting with Lemkin as “Lemkin was very upset. He was concerned that the decision of the International Military Tribunal—the Nuremberg Court—did not go far enough in dealing with genocidal actions. This was
genocide crime and the crime against humanity have become overlapped throughout the
development of the international criminal law.

The Nuremberg Trial then created Nuremberg Principles in the United Nation General
Assembly Resolution 95(I).\textsuperscript{40} The Resolution tended to adopt crimes against humanity as
Nuremberg legacy rather than genocide.\textsuperscript{41} In addition to the Resolution 95(I), the General
Assembly made Resolution 96(I) on the same day to devise a legal norm to prevent and punish
the crime of genocide.\textsuperscript{42} The Resolution 96(I) did not use crime against humanity in the text and
during the discussion several attempts were made to reveal a clear relationship between the
genocide crime and crimes against humanity.

The Economic and Social Council (ECOSOC) was then assigned to prepare the drafting
the Convention following the Resolution 96(I). ECOSOC did not consider the Secretary-
General’s suggestion to refer the Commission on Human Rights or a special committee of the
Council.\textsuperscript{43} The Secretariat at the same time prepared to draft the Convention with prominent
experts including Raphael Lemkin. France insisted genocide to be incorporated as the most
serious type of crime against humanity by distributing a memorandum of its own definition and
refused to use the term in a distinct way. But this argument did not receive enough supports
because others agreed to use genocide term separately from broad translation of crime against
humanity.

The General Assembly next regular session was held in 1947 to discuss the texts in the
draft. The United Kingdom hesitated to adopt the radical term of genocide and suggested the

\textsuperscript{40} G.A. Res. 95(I) (Dec. 11, 1946).
\textsuperscript{42} G.A. Res. 96(I) (Dec. 11, 1946).
\textsuperscript{43} William A. Schabas, \textit{Origins of the Genocide Convention – From Nuremberg to Paris Supra}.
International Law Commission reviewed the confusion between the two crimes. However, Cuba, India and Panama instituted the discussion on the agenda and proceeded to negotiations. Panama, Cuba, Egypt and China consistently appealed to draw a clear line between the Nuremberg Charter and the Genocide Convention. The ECOSOC then sent the draft to an Ad Hoc Committee to review the Secretariat draft. The final draft was prepared by the Sixth Committee of the General Assembly in 1948.

While polishing the words in the draft, there was an evident change between the first and final draft regarding the Convention’s protection. The first draft of Resolution 96(I) mentioned “national, racial, ethnical or religious groups” as to protected groups in the Convention, while the final version drafted by the Sixth Committee stated “racial, religious, political and other groups.” No official record explained the sudden addition in the draft.

General Assembly Resolution 96(I) led to creation of the Convention on the Prevention and Punishment of the Crime of Genocide 1948 and later drafts of the Convention included racial, religious, political and other groups. The Resolution was adopted without any debate and unanimously. It was to accord to the historical precedent, Nuremberg Charter article 6(c) which provided specific definition of crimes against humanity such as persecution on political, racial, or religious grounds. The line between crimes of humanity and genocide crime has been blurred. The French delegate affirmatively held its position in arguing that genocide was a sub-

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45 G.A. Res. 96, 1 GAOR, 1st Sess., 55th mtg. at 188-89. U.N. Doc., A/66/Add 1 (1947). “The General Assembly, therefore, affirms that genocide is a crime under international law which the civilized world condemns and for the commission of which principals and accompanies - whether the crime is committed on religious, racial, political or any other grounds – are punishable.”
47 William A. Schabas, Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunals for Rwanda, Supra 377.
47 William A. Schabas, GENOCIDE IN INTERNATIONAL LAW (2009).
category of crimes against humanity. But others conceived the importance of genocide in international law so that the crime could be punished under universal jurisdiction.

The drafting history of the Convention clearly shows the drafters’ intention to include political groups in the Convention. However, the two words ‘political group’ disappeared when the Convention was ratified. The exclusion of specific groups in the enumeration provoked several controversies after the Convention was ratified and the draft has faced large challenges to retain its first texts. One of main controversies was to decide the jurisdiction to prosecute the international crime. Since the states’ sovereignty were absolute and preserved within the territory, most states were hostile to a situation where the power was restricted by universal jurisdiction. In this regard, such discussions were more like trades between the proponents of the original draft and opponents who were frustrated by the establishment universal jurisdiction. Hence in order to encourage more states’ participation, the last draft was designed to include the least essential elements which were frequently mentioned in the first draft of the Convention. As a result, the final draft abandoned the ‘political group’ with other groups and was finally ratified.

3. Exclusion of political group

The Convention still requires evolving interpretations and indirect route to achieve its goal because of the “blind spots” embodied in itself. While additions of other groups to the enumerated protected groups encountered frustrations in reaching an agreement, ‘political group’ has brought the most controversial debates in applying genocide terms because its exclusion has raised several questions of the effectiveness of the protection, since the Convention was officially signed by the states. The strongest arguments made by the opponents to the inclusion is

the political group lacked stability to receive the Convention’s protection and implied an ambiguous concept to attribute to the protected groups. One of the powerful opponents during the drafting process was the Soviet Union, strongly asserting the exclusion of political groups because if the Convention had protected political groups, the mechanism of genocide would have highly likely lose the scientific basis in explaining such situations with legal grounds and the Convention accordingly would lack utility in providing protections as an international convention. But it is presumed the Convention would provide chances for other states to intervene if such group were protected. The Soviet Union delegate did not express such reasons in the document. Compared to the previous U.N. resolution which explicitly mentioned “political” in the Convention’s protected groups, however, it was unexpected that the Soviet Union’s document omitted the word “political” in the groups while suggesting basic principles in drafting the Convention.\(^{49}\) In the first paragraph, it used the word “theories” saying the genocide was conducted under Fascism, Nazism and other similar race “theories”. This would be the first evidence for the exclusion because there was no theory for protecting political groups when the Convention was drafted. Additionally, it was obvious that the Soviet delegate emphasized the category of race and nationality (or religion) in defining the term genocide.\(^{50}\) One point that Soviet uniquely made in the document was to include cultural genocide. It boarded the scope of the concept beyond the physical destruction of racial or national groups, insisting acts which destroy the national language or culture should be considered as genocidal acts. Except the omission of the political groups, it seemed to adopt a broader definition of the term.\(^{51}\) It also seemed to strengthen the power of domestic legislation and courts in punishing the crime rather


\(^{50}\) Id.

\(^{51}\) Id.
than more relying on international cooperation.\textsuperscript{52} No clear evidence other than the Soviet delegate’s reasoning was found in the official records which identified specific grounds for removing some vulnerable groups.

Advocates who have insisted to include political group and others argue that the exclusion was a merely political compromise or trade rather than a theoretically grounded decision.\textsuperscript{53} No legal grounds supported in imposing limitations to the protected groups, considering the drafts of the Convention explicitly intended to protect a diversity of the groups. Also regarding the timing when the Convention was drafted, a plausible explanation of the exclusion entailed there would have been political trades to encourage Soviet and other Communist states’ participation, who were not willing to confine themselves to possible penalties followed by the Convention in the near future.\textsuperscript{54} When the Convention was drafted, for example, Joseph Starlin had already operated the gulag system to detain political opponents so the Soviet Union might have to provide plausible explanations when accused of genocide charges. But some delegates at the drafting discussions specifically agreed to include political groups to the protected groups, pointing out political group had similar characters like permanency of the membership, therefore, the groups would be likely to pass the Convention’s threshold in deciding to render the protections to a minority or a group.\textsuperscript{55} With a glimpse of upcoming Cold War, they were even able to predict there would be more serious persecutions based on different ideologies and destroying one’s faith.\textsuperscript{56} On the other hand, some advocates to have agreed extension of the Convention’s protection and criticized political trades behind the

\textsuperscript{52} Id.
\textsuperscript{56} Beth Van Schaack, \textit{Supra} 2264-2265.
final draft because the international convention standing for the most vulnerable human lives were the mere reflection of the compromises.\textsuperscript{57}

\textsuperscript{57} Beth Van Schaack, \textit{Supra}.
CHAPTER III. GENOCIDE AND GENOCIDE CRIME

The drafters failed to predict that the exclusion of certain groups, including political groups and unfinished debates over the intended enumeration would gradually create difficulties for the Convention’s role in real genocidal atrocities. They were not able to see that political concentration camp would appear to conduct the same or even worse harms in the DPRK. As a result, to deal with the mass destructions which cannot receive the Genocide Convention’s protection, the international courts and some states have developed their own strategies to rescue the victims who are left vulnerable to grave crimes. Such a gap provoked confusion between the public understanding of genocide and legal framing in establishing a genocide crime. While the international courts strictly adhere to original texts and avoid to extend the scope of definition, which may weaken the application of the norm, protecting political groups from genocidal harms is one of the famous challenges made by advocates with different approaches in order to achieve the ultimate goal of the Convention.

1. Inherent limitations of the Convention due to the exclusion of political group

The omission of “political group” in the drafting history of the Convention could be then summarized by the Polish delegate’s statement that “genocide was basically a crime committed against a group of people who had certain stable and characteristic features in common.”58 Moreover, the Brazilian delegate insisted that political genocide was rarely conceived in a Latin American context.59 But others saw the upcoming glimpse of extreme divisions of political

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ideology, as the Haiti delegate predicted that political groups would face more serious threats than other groups in the Convention when arguing over the exclusion of the political groups:

“One must look further, and realize that strife between nations had now been superseded by strife between ideologies. Men no longer destroyed for reasons of national, racial or religious hatred, but in the name of ideas and the faith to which they gave birth. A majority Government had nothing to fear from the inclusion of political groups among the groups to be protected by the convention. It was when the majority of the people was opposed to the ideology of the Government that there was a danger of the minority using force to hold the majority in check. The notion of an attack on internal security of a State was very vague, and any act could be presented as an attack of that nature. The future convention should therefore contain an enumeration of all crimes against basic human liberties, as defined in the Charter of the United Nations. If the Committee wished to do useful work, it must make the concept of genocide cover crimes committed against political groups.”

Nonetheless, no further amendment was made to the Convention’s language and the consequences of the exclusion have been far beyond the drafters’ original expectation in terms of preventing annihilation of other excluded groups, specifically the political group.

The narrow scope of interpretation, therefore, has confused both public awareness and international lawyers as to where the legal term cannot fit into the facts and has raised the basic question to the capability of the Convention: how can the genocide against political groups be punished? David Hawk and Hurst Hannum presented a related memorandum to International Court of Justice (ICJ) accusing Pol Pot, the leader of the previous Khmer Rouge regime of Cambodia, of murdering the nationals who opposed the regime’s policy. The memorandum did not explicitly cover the possibility of applying the genocide against political groups or political genocide, but built its own claim based on the fact that political context was one of the factors of

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the persecution, in framing genocide crime against national groups. As political context arose explaining the reason for harsh persecution in massive scales, several advocates have challenged the current international norms.

1.1. Domestic prosecution in genocide against political groups

France is a great example of a state with domestic penal code which provides broader scope to cover genocide crimes in light of the Convention’s strict definition. In Article 211-1 of French Penal Code, the range of protected groups could be broadened with more flexible criteria than the Convention’s enumerated groups as the article provides:

“Genocide occurs when, in the enforcement of a concerted plan aimed at the partial or total destruction of a national, ethnic, racial or religious group, or of a group determined by any other arbitrary criterion, one of the following actions are committed or caused to be committed against members of that group:…” (emphasis added.)

The code does not explicitly mention “political group” in its enumeration, however, any group distinguished “by other arbitrary criterion” can be protected with interpretations. According to the French definition, therefore, the crime could be committed against political groups and such persecutors could be sentenced to lifetime imprisonment in French courts.

Some states have also developed their own procedures to protect political groups from the crime of genocide. For example, Ethiopia established a case prosecuting and punishing criminals who committed genocide against political groups. In SPO v. Colonel Mengistu

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62 Id. The claim in the memo was that the national group was intentionally destroyed in part, following the Democratic Kampucheon’s policy to purify the state, and the Khmers are ethnically distinct due to their own language and political history.

63 CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 211-1 (Fr.).

64 Id. “The genocide is punishable by felony imprisonment for life.” (French Code also provides crimes against humanity with much broader application. See CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 212-1, 212-2 (Fr.) Chapter II: Other crimes against humanity).
Hailemariam et al. (1994-2008), the First Division Criminal Bench of the Federal High Court found the defendants, the political leaders of the previous regime, accountable for committing genocide against political groups. The decision was supported by Ethiopian legislature which reserved the French legacy to prosecute a broader range of genocide criminals than the Convention provided.

A. Special Prosecutor v. Colonel Hailemariam in Ethiopian court

Ethiopia successfully established legislation to provide broader definition of the genocide crime like France as well as a court decision to prosecute and punish those who committed genocide against political groups as a transitional justice process for the previous regime. When the former Derg government was overthrown by the Ethiopian People’s Democratic Front (EPRDF), the EPRDF provided the legal basis to prosecute the previous Derg officials for committing genocide by targeting the vulnerable political groups who opposed the Derg regime during 1974-1991 and the Transitional Government of Ethiopia eventually instituted Special Prosecutor Officer (SPO) for prosecutions.

In SPO v. Colonel Mengistu Hailemariam et al. (1994-2008), the Federal High Court, First Division Criminal Bench, convicted the defendants for genocide in Ethiopian jurisdiction even though the Genocide Convention does not protect political groups. Before the indictment, “political group” was listed as one of the protected groups for genocide crime in the article 281 of 1957 Penal Code as it provide: “Whosever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, organizes, order or engages in, be it in time

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65 Federal High Court Jan. 11, 2009, Special Prosecutor v Colonel Hailemariam (Mengistu) (Eth.).
of war or in time of peace: (emphasis added).” The case has provided clear answers to some major questions or issues in protecting political groups in genocide crimes. First, when the defendants claimed sovereign immunity for holding high positions in the previous government, SPO explained that even a head of a state could be punished by law and it was accepted by the Court. Secondly, defendants tried to dismiss the genocide charge because international law did not punish genocidal criminals in attacking political groups and the Convention also did not protect political group. SPO did not rebut the exclusion of the Convention but confirmed the existence of the domestic legal basis for punishing genocide crime which implemented broader protections for more groups than international convention, as a French legacy in the Code. The Court did not exclude such argument and finally convicted the defendants of genocide against political group, strongly establishing the first precedent in its national justice system.

1.2. International understanding on genocide against political groups

Van Shaack was one of the eminent pioneers to capture the “blind spots” of the Convention in discussing the genocidal atrocities which occurred during the previous Khmer regime of Cambodia. Although the Convention did not protect the groups persecuted, the broader inclusion would be provided by customary international law, which was not fully reflected in the Convention’s languages. She argued that the genocide is prohibited as jus cogens of customary international law under universal jurisdiction, although the Convention limited itself to the territorial jurisdiction. In this regard, public international law is not contrary to domestic penal codes, which disapproves of individual wrongful activities even sometimes

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68 [1957 Penal Code] art. 281 (Eth.)
69 Girmaschew Aneme, Supra. 10.
70 Girmaschew Aneme, Supra. 11.
71 Beth Van Schaak, Supra.
72 Beth Van Schaak, Supra, 2277-2278.
beyond the borders. Therefore, customary international law has priority in possibly addressing the issues hidden in the “blind spots” of the Convention.

Her claim faced the following questions to acquire comprehensive consensus in building a solid foundation. For instance, in discussing the broader application of customary international law for genocide crimes, Bettwy suggested it would be far more difficult than her expectation for the courts to recognize the existence of customary international law in order to address the consequences of excluding “political group.” Bettwy did not agree, furthermore, that the groups excluded by the Convention itself would be instead protected by the customary international law since the Convention made the enumeration in the Article II exhaustive and the courts have respected the intention. Customary international law cannot be, therefore, a cure-all for the Convention’s lack of protection. It is difficult for the courts to solely implement the custom when the ratified agreement stands for the opposite direction. There is no case law or precedent established by international courts to find concrete basis for customary international law to instead provide protections to political groups, even though the courts often find the genocide crime is prohibited by the corresponding customary international law. The courts have strictly preserved the Convention’s definition and rendered decisions applying the Convention first.

When the charges of committing genocide against political groups are present at international court, therefore, the claims are highly likely to be dismissed in the preliminary

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74 Beth Van Schaak, *Supra*.
75 David Bettwy, *The Genocide Convention and Unprotected Groups: Is the Scope of Protection Expanding under Customary International Law?* 2 NORTE DAME J. OF INT’L & COMPARATIVE L. 167, 171 (2011). Bettwy concluded political group is not protected by the customary international law, but indigenous group is eligible to receive such protections.
76 *Id.* 183.
procedure because they are not ‘genocide crimes’ according to the Convention’s definition. At the same time the courts often find genocide is one of the international crimes prohibited by customary international law before the Convention was ratified, but the charges then are made as crimes against humanity, which have a broad scope of application to cover any inflictions on individuals or groups regardless of the grounds of the attack. Political genocide or genocide against political groups thus are prosecuted as crimes against humanity in international courts.

A. Customary international law and genocide crimes

In addition to international human right treaties or conventions’ significant roles in implementing protections, customary international law is another source of law to protect human rights. It is therefore often argued that customary international law provides protections to the excluded groups of the Genocide Convention because the Convention reflects the existing customary international law. Before drafting the Convention, General Assembly affirmed that genocide is against international law and declared it as an international crime. The languages used in the resolutions suggest that genocide was already a crime prohibited by international law and drafting a convention was a codification of an existing customary international law. Moreover, this can be found in the most recent genocide case decided by the Extraordinary Chamber of the Courts of Cambodia (“ECCC” hereinafter). The Chamber again found genocide is a crime under customary international law. This consistent logic that customary international law also prohibits the genocide crime found in the courts’ decisions then led to more challenges.

77 G.A. Res. 96(I), at 189 (Dec. 11, 1946); G.A. Res. 180(II) at 129 (Nov. 21, 1947).
78 Case 002/02, Prosecutors v. Nuon Chea et al, 002/19-09-2007/ECCC/TC, ¶788 (2018). Despite the longstanding debates over the possibilities of framing genocide crime against political groups, the Chamber concluded that the genocide crime was committed against national and ethnic groups.
that genocide against political groups could be prosecuted and punished under the customary international law.

B. Crimes against humanity for political groups

International courts then prefer more successful approach to impose legal responsibility to the defendants. Since the genocide often overlaps with crimes against humanity and it is yet clear to draw a line between two categories, genocide is often considered as the most severe sort of crime against humanity.\(^7^9\) This analysis is well supported by the Nuremberg legacy and preserved in broadening the application of crime against humanity. Therefore, international jurisprudence explains the groups excluded from the Convention’s protections are protected by crime against humanity and courts also have followed this current understanding.

A U.N. report on Darfur follows another aspect of the international jurisprudence in deciding the charges for the atrocities, while the United States referred genocide in 2004. The commission decided to frame the prosecutions against political groups as crimes against humanity avoiding direct application of genocide charges.\(^8^0\) The commission again confirmed genocide crime cannot be found in Darfur because the present evidence is not sufficient to prove the intention to commit genocide, one of the essential elements of the crime. The report provided supporting testimonies proving the policy was not intentionally made to distinguish a certain

\[^7^9\] Andrew Altman, *Genocide and Crimes Against Humanity: Dispelling the Conceptual Fog*, 29 SOC. PHIL. AND POL. ’Y 280 (2012). Altman claims that genocide is not subcategory of the crimes against humanity and has a different definition in applying the term. What Altman brought in his arguments is ‘moral concept’ and he also mentions ‘totality’ in such situations to fill the gap between the reality and the word. With this model, he also explores the cultural genocide and discrimination. Altman further claims to divide the concept of genocide into three dimensions; the current legal definition of genocide provided in terms of the crime of genocide in international law, an ideal concept to redefine the situations which unfits the terms provided by the current law, and moral category to describe a broader scale violence.

group from the other because the killings were conducted on random populations on merely arbitrary basis. The finding thus took an alternative approach by applying crimes against humanity in this situation. Luban, however, insisted this gap between the reality and legal application in Darfur was simply promoted by the fear that there should be a duty to intervene to prevent and protect in a state where the crime of genocide is conducted. It is less risky to frame it as a crime against humanity because the charge does not require the same types of moral burdens for U.N. or other member states to become involved. Moreover, the crimes against humanity charge is more successful to prosecute because the crime also prohibits extermination of any group, which could include a political group and does not require this as a criminal element.

The tendency to avoid adoption of the common term creates empty spaces in the Convention’s protection. The confusion then misled the U.N. report’s conclusion to exclude the genocide frame in the atrocities. Luban again pointed out that the Kristic court in International Criminal Tribunal for the former Yugoslavia took a different approach in deciding the crime of genocide, while the U.N. report did not find enough evidence for genocidal intent. The Kristic court found that excluding women and children from killings was a mere reflection of sensitive public opinion, not evidence to demonstrate the lack of genocidal intent. To the court, it was clearly a crime of genocide which was conducted with the specific intention to destroy a group of

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81 Id.
82 David Luban, *Calling Genocide by Its Rightful Name: Lemkin’s Word, Darfur, and the UN Report*, 7 CHI. J. INT’L L. 1, 1-6 (2006). Luban claimed the U.N. Report on Darfur erred in denying the existence of the genocide crime in Darfur. The report showed there were some examples disproving the evidence of the crime. But he reasoned that a single episode could not explain the shortage of the entire plan of crime.
people.\textsuperscript{83} The commission did not consider the court’s decision to make the conclusion in spite of similar circumstances in its disproving evidence.

C. International courts’ decisions in genocide-like crimes

Despite the frequent failures, international courts have been consistently challenged by the claims attempting to prosecute those who committed genocidal scale crimes against political groups. Both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) resolutely affirmed that the Convention’s intention to protect distinct groups was clearly expressed in the languages in the Article II and III, therefore, rejected such challenges. ICTR pointed out that, in order to warrant the Convention’s protection, the group must share the same nature of the enumerated groups in the Convention. The Court also emphasized in defining the national group the Convention protects “a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.”\textsuperscript{84} ICTY later reaffirmed this by finding the Convention provided protections to “stable and permanent groups” and political group did not share such characteristics.\textsuperscript{85}

Additionally, in determining the group’s existence in genocide, the ICTY adopted a unique approach, the subjective standard. In order to find a group’s existence, a group should be detected by a perpetrator’ mind which recognizes the group’s existence. This standard welcomed and opened the door for potential groups that may not fit into the Convention’s enumeration when supplementing the previous objective standard. However, the subjective standard does not guarantee the protections to the groups the Convention explicitly excluded, for instance, political

\textsuperscript{83} Id. 12-14.
\textsuperscript{84} Prosecutor v. Akayesu, ICTR-96-4-T, Trial Chamber I, ¶512 (Sep. 2, 1998).
\textsuperscript{85} Prosecutor v. Jelisic, ICTY-95-10-T, Trial Chamber ¶ 69 (Dec. 14, 1999).
or social groups.\textsuperscript{86} Also the standard can be used on case-by-case inquiry to consider contextual backgrounds of the perpetration, not a general standard for the courts to rely on.\textsuperscript{87}

One of the famous arguments regarding protection of political groups has been recently discussed in the Extraordinary Chamber of the Courts of Cambodia, established by the U.S and Cambodian agreement, on whether there was in fact a genocide crime committed during Cambodian Khmer regime. Several debates have again challenged the Convention’s legal definition of the term regarding the protection of political groups for more than a decade. The current ECCC’s decision on Case 002/02, which involved genocide charges against previous political leaders who assisted Pol Pot during Khmer regime, convicted the defendants of committing genocide. However, the Chamber rendered the decision based on the fact that the perpetrators targeted national and ethnic groups confirming the intention in the Convention. The Chamber’s majority did not find the defendants were planning or indeed acting to terminate the political groups.\textsuperscript{88}

\textsuperscript{86} DAVID NERSESIAN, GENOCIDE AND POLITICAL GROUPS 29 (2010).
\textsuperscript{87} Id.
\textsuperscript{88} Case 002/02, Prosecutors v. Nuon Chea et al, Supra.
CHAPTER IV. GENOCIDE IN THE DPRK POLITICAL CAMPS

In order to address the genocidal harms in the DPRK political camps within the Convention’s protection, the major issue for such discussions will be the determination of the existence of a group the Convention protects. Unfortunately, the crimes occurring throughout the state have been committed on political grounds, failing to constitute a distinct in the Convention, although such persecuted seem to be categorized as a group in the society. Considering both Korean governments manipulated political groupness to promote the tensions between them, the DPRK has successfully been benefited by political persecutions in stabilizing the regime.

Therefore, strictly applying the Convention’s interpretation, no genocide crime has been committed in the state. The UN DPRK report unexceptionally demonstrated the current application of the term in summarizing the overall atrocities in the state as crimes against humanity. It did not specifically discuss the chances genocide elements may have existed in the political camps in reaching the conclusion without legitimate grounds but mentioned the word ‘politicide’, implying future discussions with more plausible analysis.

“Such crimes might be described as a ‘politicide’. However, in a non-technical sense, some observers would question why the conduct detailed above was not also, by analogy, genocide. The Commission is sympathetic to the possible expansion of the current understanding of genocide. However, in light of finding many instances of crimes against humanity, the Commission does not find it necessary to explore these theoretical possibilities here…” (emphasis added).89

Instead, it emphasized the magnitude of the crimes against humanity because the crime possibly involves a broader implementation covering overall general human right violations in

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the state. However, as discussed above, genocide against political groups has always caused diverse approaches toward the interpretation of the Convention since the original texts rendered rare applications of the term. Here again, the massacres in the DPRK political camps requires more accurate diagnosis for its treatment. When other main elements are found to establish the crime of genocide, the interpretation of the Convention limits its capability of protection due to the strict textualism and discourages the further discussions for real tangible solutions. New interpretations for the term, therefore, shall be introduced in every possible case for recommendations.

1. Establishing the crime in the DPRK political camps

A prosecutor must present evidence meeting the three requirements to prosecute genocide crime in a court; evidence proving the defendant (i) conducted at least one of the acts described in the Article II of the Convention; (ii) had an intention to destroy a certain group; and (iii) targeted the protected group in the Convention. To convict the defendant, these three requirements must be satisfied the presented evidence.

1.1. Genocidal acts in the political camps

Article II of the Convention provides the punishable acts, defining actus reus of the crime:

(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.\(^{90}\)

According to the UN DPRK report, the commission categorized the inflictions occurring in the camps as tortures, executions, sexual violence, denial of family and reproductive rights, starvation, forced labor and diseases, deaths in custody and lack of respect for the dignity of the dead based on their findings.\(^{91}\) The inmates are extremely vulnerable to sudden deaths because the camp guards are ordered to kill any fugitive and the punishment process for any violation of camp rules are totally controlled by the officials.\(^{92}\) Also the commission found the death penalty can be imposed arbitrarily in the camps and never meet judicial process even before the accused inmate are under the severe tortures and long interrogation.\(^{93}\) Other punishments include reducing the ration amount, increasing the forced labor time, individual confinement, beatings and physical harms.\(^{94}\) Physical harassments and tortures are conducted in special punishment rooms.\(^{95}\) Children are not spared from suffering the harsh treatments.\(^{96}\) The commission additionally found women are to forced abortions when they are not allowed to sexually engaged with others and appear pregnant, furthermore, tortures and executions.\(^{97}\) In addition to direct killing with arms, the inmates are subject to “gradual extermination” due to the starvation and excessive labors in dangerous circumstances.\(^{98}\) Above all, the political camps are considered to be the place where the inmates are removed from the society because their bodies cannot be

\(^{90}\) Convention on the Prevention and Punishment of the Crime of Genocide, \textit{Supra}, art. II.


\(^{92}\) Id. ¶757-758.

\(^{93}\) \textit{Id.} ¶758.

\(^{94}\) \textit{Id.} ¶760.

\(^{95}\) \textit{Id.}

\(^{96}\) \textit{Id.}

\(^{97}\) \textit{Id.} ¶764.

\(^{98}\) \textit{Id.} ¶767.
delivered to their families.\textsuperscript{99} One of the defector’s testimony also provided the facts that while the inmates died from maltreatment in the prisons, when a prisoner died of dehydration, the body was fed to the guard’s dogs.\textsuperscript{100}

The findings obviously provide the incidents to meet the Article II’s \textit{actus reu}, therefore, satisfying the requirement of the crime since the \textit{killings} in the Article II is also compatible with ‘caused death’ in genocide context according to the Element of rimes of the Rome Statute.\textsuperscript{101} It is both function and goal of establishing the political camps to drive the inmates in slow or instant deaths. If the findings are presented in court, moreover, the Article III’s broader inclusion of criminal acts can be accused as well because the totality of the inflicts would encompass conspiracy to commit the crime, attempt to commit and complicity. Direct and public incitement to commit genocide can be more plausibly found in \textit{mens rea} of the crime, the mental element of the crime.\textsuperscript{102}

1.2. Genocidal intents built in the political camps

Proving genocidal intent in a genocide case is the most difficult project for a successful conviction. However, in fact, the foundation of the political camps is the demonstration of the regime’s intent to commit genocide. Although no DPRK law recognizes the existence and implementation of the political camps, since the basis of state’s government has been made on the leader’s own policy, the first leader’s first policy to eradicate a certain group of people exhibits such intention, automatically meeting another element of the crime. As found in the

\textsuperscript{99} \textit{Id.} ¶780.
\textsuperscript{100} Katie Dangerfield, \textit{Supra.}
\textsuperscript{101} \textsc{William Schabas, Genocide in International Law, Supra} 179.
\textsuperscript{102} Convention on the Prevention and Punishment of the Crime of Genocide Art. III. “The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.”
establishment of the camps, Kim Il-sung rendered a policy to eradicate the “class enemies” including private owners, future possible defectors and collaborators during the Japanese colonial time. Another policy has implement the camps by causing the gradual extinction “with the apparent intent to extract a maximum of economic benefit at a minimum cost” by imposing unbearable amount of labors in dangerous conditions, suggesting that the bottom line for the enforcements in the camps could be further referred as indirect manifestation of massive killings. The UN DPRK report then discovered such harms were “based on deliberate policy.” A court may require more clear evidence in order to clarify individual accountability regarding mens rea in each case because the UN DPRK report’s findings are made on the standard of reasonable basis for proofs, a lower standard than one in criminal procedures. But still the requirement is likely to be met by the quantitative approach since substantial part of the group has been destroyed.

1.3. Targeting a group in the political camps

Although the Convention exhaustively limits the protection to the enumerated groups, it is still challenging to introduce a new approach toward the term of protected group within the DPRK context because the term ‘political’ implies in some extent different context in volume of the DPRK’s political persecutions. Once sent to the political camps, one has to experience lifetime isolation from the society. The detained in the political camps, who are usually referred as political prisoners, cannot receive the same protections under international law due to the

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104 Id. ¶767.
105 Id. ¶770.
106 Id. ¶68 “…when it obtained a reliable body of information, consistent with other material, based on which a reasonable and ordinarily prudent person has reason to believe that such incident or pattern of conduct has occurred.”
107 DAVID NERSESSIAN, Supra 41.
regime’s compulsory repatriations toward the inmates. Amnesty International provides a general
definition of political prisoners: “those who have accused of ‘significant political element;
whether the motivation of the prisoner’s acts, the acts in themselves, or the motivation of
authorities.”108 But it is difficult to define ‘political’ in legal terms.

Defining ‘political’ in legal understanding is still necessary not only in the genocide
terms but in different cases, specifically in political refugee cases, and he U.S. federal courts
have suggested some methods which may broaden the space for genocide cases regarding
political persecutions. In the United States, no fixed terms or standards are settled to determine
the political refugee cases and the courts and related agencies can use case-by-case applications
in reviewing ‘political persecution’ cases.109 The court in Cardoza-Fonseca introduced “a
reasonable possibility” standard to determine the existence of political persecution. INS v.
Cardoza-Fonseca (1987). But the court still confirmed the basic standard in political refugee
cases that case-by-case approach should be applied in individual cases. The Ninth Circuit then
explained the content of the term; persecution “involves the infliction of suffering or harm upon
those who differ (in race, religion or political opinion) in a way regarded as offensive. (emphasis
added.)” According to its holding, persecution occurs when the oppressor persecutes groups or
individuals merely because he does not want to accept the different views. Desir v. Ilchert
(1988). Applying those rulings in the DPRK situation, crime of political persecution in
international context could cover broader scope of violations against human rights, which are
now occurring in the DPRK political camps. It is notable that politically persecuted refugees may
receive different analysis from inmates in the political camps, however, since lawyers still have

108 Amnesty International, AI Handbook, AMNESTY INTERNATIONAL VOLUNTEERS http://www.amnesty-
volunteer.org/aihandbook/ch3.html#Politicalprisoners
difficulties in defining what political means in legal context and have no agreement to define the term and different understanding has resulted in the same text, some state jurisprudence could be referred in defining a legal concept in international law, to be more specific, what ‘political’ means in international crimes.

Considering the DPRK’s own understanding implied by their state behaviors, the detained are more likely to be victims, rather than political prisoners, which should receive strong protections by international law. The state only distinguishes obedience from disobedience in politics and opponents are threats to the entire state, stigmatizing the political vulnerable. In addition to the long-lasting tensions existing between two Koreas for more than a half of a century even one single word mildly in favor of South leads to the lifetime detention in the camps. The political camps are total control area where one loses the citizenry and ordinary rights. The UN DPRK report’s commission found most of the inmates have to remain in the total control zones until they die and only those who were accused of comparatively minor offences are detained in the revolutionizing zone of Camp 15 expecting release in a number of years. Unlike other political criminals, therefore, the inmates in the DPRK political camps cannot escape from the stigmatization or victimization for their lifetime.

Moreover, the DPRK’s policy on the involvement system is another evidence to show the persecution has been conducted on the groupness of the inmates. The UN DPRK report found the camp system has developed with the DPRK’s involvement system, “yeon-jwa-je”, based on the principle of “guilt by association.” According to the report’s findings, the involvement system

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111 Id. ¶755
112 Id. ¶743-746.
functions as a key determination in detaining not only the politically accused, but also the close family members of the accused.\footnote{\textit{Id.} ¶752.} The involvement system or system of guilt by association, originally based on the penal theory of collective responsibility, was first granted by the first leader of the regime, Kim Il-sung in the 1972 statement that “factionalists or enemies of class, whoever they are, \textit{their seed must be eliminated through three generations}. \textit{(emphasis added.)}”\footnote{DAVID HWAK, \textit{Supra} 29.} No membership process is required in targeting potential inmates because the system itself is established based on blood. When one is convicted of a political crime, his or her close family members are together sent to the political camps and the next two generations of the family would be born and live in the camp sites during their entire life.\footnote{Mike Wright, et al., \textit{Brutal and Inhumane Laws North Koreans Are Forced to Live Under, THE NEW ZEALAND HERALD} (Sep. 28, 2017) https://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=11927433.} It has been successfully functioned to oppress different political ideas against the regime and more than one-third of the inmates are assumed to be detained because of the involvement system.\footnote{Rep. of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic Peoples’ Republic of Korea, \textit{Supra} ¶752.}

The UN DPRK report provided striking examples of the execution of the involvement system as well. One unbelievable illustration of the system is given by a defector’s testimony, Ahn Myong-chol. Mr. Ahn found out his father was convicted of criticizing the regime while working for the food ration, when he visited his home town.\footnote{\textit{Id.} ¶748.} His family members were already sent to the political camps including his elementary school student sister and he felt he would be soon sent to one of the camps.\footnote{\textit{Id.}} So he fled to China and finally arrived South Korea. The report additionally found that the government officials were not exceptional in executing the involvement system. The Ministry of People’s Security conducted huge investigation to sort out
political sensitive members from the state official’s families in 1997.119 In short, the entire detention process is based on the involvement system for segregation and stigmatization by blood, constituting extremely unchangeable status for the inmates.

But it is highly predictable a tribunal or court may dismiss the charges of genocide crimes in the DPRK political camps considering the main issues will be the inclusion of political group in the protection. International courts strictly expressed the concerns about broadening the Convention’s protections to arbitrary groups because of the imports in protecting minor ‘groups’, while the crimes against humanity punishes the perpetrators who conduct systematic or widespread attacks against individuals and groups with same gravity the crime of genocide has.

Nevertheless, it is still valuable to challenge the limited capability of the Convention in order to address the grave human right violations in the DPRK camps because the inmates seem qualified to receive the Convention’s protection by constituting a political group or, at least, another certain type of group with the political context. They are usually permanently persecuted in the camps and the involvement system of detention employs the targeting process in spite of the lack of enrollment to a certain membership. Such groupness is the fundamental mechanism in operating the camp system. Since both the ICTR and ICTY rendered decisions questioning which criteria should be adopted in determining the scope of the groups, there is no evident standard to determine the group’s stability and permanency.120 According to Nersessian’s analysis:

“…neither permanence and stability nor inalienability of status are required by the Convention. And although the tribunal linked the concepts together, they are not the same. Voluntary membership in a group is separate from that group’s stability and

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119 Id. ¶745.
120 DAVID NERSESSIAN, Supra 52.
permanence in a given society. The ICTR conflated them and opined that individual choice was ipso facto inconsistent with stability and permanence. But ‘choice’ here is a misnomer. As discussed previously, for purpose of genocide, the relevant characteristics for membership in the target group are those selected by the genocidaire…” 121

It is convincing with regards to the objective of punishing the crime that only subjective standard is necessary required in finding the genocidal intent. Recently, Judge Ottara wrote in the separate opinion on the Case 002/0a2 that, although the ICTR in Akayesu tried to build the concrete ground for protecting four groups in the Convention by revealing the drafters’ intention to protect stable and permanent groups, the Chamber has noted in the previous case that the drafters actually intended to protect “relatively stable and permanent groups and juxtaposed these from political and economic group.” 122 Tefferi appealed, on the other, political group shares distinct stability and permanency with other protected groups. 123 According to his argument, there is no difference between the political group and other groups so massive killings based on political grounds must be considered as genocide crime and when the strong rhetoric power of the genocide is given, more serious and cautious steps could be taken, suggesting to adopt a new protocol to include political group in the Convention or draft a new convention that protects any group of people. 124 Regardless of the extensive consultations, still the detained in the DPRK political camps can be demonstrated as a group which needs the Convention’s protection or at least the political context forming such group should be incorporated with constructive

121 Id. 54.
122 Case 002/02, Prosecutors v. Nuon Chea et al, Judge You Ottara’s Separate Opinion on Genocide (Prolai Pouchsas) ¶4480.
123 Yishak Kassa Tefferi, The Genocide Convention and Protection of Political Groups against the Crime of Genocide, 5 MEKELLE U. L. J. 29 (2017). But he was aware these attempts may fail to reach the consensus in international community. One of his alternatives was a domestic process to prosecute genocide crimes in national courts.
124 Id. 42–44.
interpretation of the Convention to establish the genocide crime, accordingly, promote the implementation of the Convention’s application.

2. Genocide charge to the DPRK

One cannot discard a consistent question from the beginning of the research. Why is it necessary to impose a genocide charge especially for the detained in the political camps where it is sufficiently punishable by convicting crimes against humanity? Still it is a fundamental question in international law whether the crimes against humanity and crime of genocide are the same or totally different in essence. While some commonly adopt a perspective genocide is the most extreme case of crime against humanity, Altman claimed genocide is not a subcategory of the crimes against humanity and has a different definition for the application of the term in certain conditions because crimes against humanity has a distinct element, a widespread or systematic attack on the population, which the crime of genocide does not require. But after removing wartime nexus in crimes against humanity, it is a common confusion in establishing a crime especially in massive killing cases. Thus it is understandable genocide crime is more strictly applied to emphasize the gravity of the term.

Andrew Altman, Supra 280. What Altman brought in his arguments is moral concept in the term. He insisted the current legal term cannot cover the situations which seem to be genocidal but does not fit into the legal definition. In this regard, ‘totality’ of such situations can fill the gap between the reality and the word. With his model, he also explored the possibility to include cultural genocide and discrimination into the genocide crime. He expressed some concerns that legal positivists would draw in the confusion but between law and morality there is a value in discovering the serious crimes in international law. He also divided the concept of genocide into three dimensions; the current legal definition of genocide provided in terms of the crime of genocide in international law, an ideal concept to redefine the situations which unfits the terms provided by the current law and moral category to describe a broader scale violence.
Furthermore, in the DPRK situation, the genocide charge is specifically possible in redressing the grave human right violations especially in the political camps. Most advocates have attempted to prosecute the head of the state in the International Criminal Court (ICC) for violating ICC Statute, however, it is more practical to consider bring the case in the International Court of Justice (ICJ) accusing for the violation of the Convention. Prosecution in ICC is not impossible because the DPRK’s inflicts on basic human rights are against *jus cogens* of international law, but it may take more considerable works to bring the charge because the DPRK did not join the Rome Statute or ICC statute. Considering the complexity in the current diplomacy on East Asian region, political pressure is needed to promote the criminal prosecution but some are expressing negative comments. Also due to the state’s exclusiveness, it is hardly accessible to collect evidence for individual accountability. Rather, if the international community wishes to offer remedy to rescue the victims, a court should impose responsibility to the state. Above all, nonetheless, the detained in the political camps are exposed extremely vulnerable since the entire camp site can be erased abruptly on the state leader’s arbitrary standard.

2.1. Prosecuting the state head in ICC

Several advocates have attempted to bring a charge against the current DPRK leader, Kim Jong-un, in the ICC in Hague. Three prominent jurists, Navy Pillay, a former UN high commissioner for human right, Mark Harmon in a tribunal for accusing Khmer Rouge leader in Cambodia, and Thomas Buergenthal, a survivor from Auschwitz and a previous ICJ judge, wrote a report accusing Kim for committing crimes against humanity in the political camps in 2017.\(^{126}\)

The young leader has also faced several petitions for the state’s unlawful practice in international law and the latest one to prosecute Kim for suspected kidnapping Japanese citizens was dismissed by ICC in 2018 as the court rejected to open a case.\textsuperscript{127} Despite the consistent efforts to prosecute Kim in the court, there has been no case opened by the court yet to summon Kim for the further procedure.

Since the DPRK is not a state party to Rome Statute, to initiate the investigation, the U.N. Security Council is expected to refer the case to the court based on the U.N. Charter Chapter VII.\textsuperscript{128} When a state is not a party to the Rome Statute, the Security Council can adopt a measure to address the peace-threatening situation and this is the only gateway for the DPRK to be prosecuted in the ICC. ICC would be the admit the case because the state cannot establish a judicial process to prosecute the criminals, who are still in the high-level positions with absolute powers.\textsuperscript{129} In 2017, the U.N. Human Rights Council adopted a resolution to invite human rights experts to prepare the judicial process for the state’s grave human rights violations.\textsuperscript{130} However, despite the increasing voice of the advocates, other experts have expressed a feeling of doubt and uncertainty about proceeding the criminal procedures for the court. Considering the Security Council includes China and Russia, old allies of the DPRR with currently economic

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\textsuperscript{128} Rome Statute of International Criminal Court art. 13(b), Jul. 17, 1998, U.N Doc. A/CONF.183.9. “Exercise of jurisdiction. The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: ...(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or...”
\textsuperscript{129} The court must determine admissibility of a case after the referral of the case. \textit{See} Rome Statute, \textit{Supra} art. 20, 17(1).
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relationships, it is highly foreseeable that they would remain opposing to take a measure to the DPRK. If so, such result would decrease the pressure on the state and discourage the advocates from resolving the issues. Furthermore, the U.S. is pessimistic toward the foundation and effectiveness of the international criminal court, although the resolution on Darfur was adopted without the U.S.’s opposition. Thus it remains unclear whether the Security Council would support the initiating process to bring the issues in the criminal court.

Rather there is another path to a different court, the ICJ, for the DPRK’s violation of the Genocide Convention. If the Security Council hesitates to adopt an agreed resolution to initiate the process for criminal accountability in the DPRK, experts should consider assisting a state to bring a charge against the DPRK for the violation of the Convention. Compared to the criminal procedure provided by the Rome Statute for ICC to prosecute a non-member state, a U.N. member state can file a case to ICJ for the violation of an international convention. The DPRK has been a member state to the Genocide Convention since 1989 without reservation and also joined the U.N. in 1991. Thus a complaint by a member state that the DPRK’s detention and devastating treatments of the inmates in the camps were constituting the crime of genocide and in violation of the Genocide Convention can be brought to the court and if the court does not find lack of jurisdiction, the DPRK should defend in the court.

2.2. State responsibility

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132 U.N. Charter art. 93. “1. All Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice.”
133 Regarding the reservation to the Convention, ICJ provided an advisory opinion on the issue. It found the unique objects of the Convention must be considered, humanitarian and civilizing purpose, which yields a common interest, not individual state interest. Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951. I.C.J.14 (May. 28). A state should consider the objects of the Convention in filing a case against the genocide charge to the DPRK.
While it is still unclear whether the DPRK would agree to the court procedure, it should be noted that accusing state responsibility for the violation of the international convention would render faster remedies to the victims in this case since international criminal law provides punishments based on individual accountability. Even though recent inquiries have reached to charge the state for committing crimes against humanity, the state seems to remain exclusive and isolated despite the limited economic activities, burdening the investigators in collecting sufficient evidence. Several efforts to archive remaining evidence and updated testimonies have been consistently made but, on the other hand, raised questions in supporting the charges in individual indictments.\textsuperscript{134} The standard of proof is expected to be higher for the criminal proceedings, specifically requiring intent for committing the crimes prohibited by the international law and not likely to be met by the current collection of the evidence. One may have to merely suppose and expect a situation for the state to voluntarily cooperate in offering the records and information to establish individual indictments and such waiting would highly postpone the future remedies for the victims.

Regarding ICJ can establish a state responsibility to the state for the violation of the Convention, however, the inquiries’ findings can be presented as circumstantial evidence to ICJ in accusing the DPRK. In the case of Corfu Channel, United Kingdom of Great Britain and Northern Ireland v. Albania, the Court admitted circumstantial evidence to establish a responsibility, as the “circumstantial evidence” must be regarded as of special weight when it is

\textsuperscript{134} Database Center for North Korean Human Rights (NKHR), a private association established in 2003, has published biographical dictionary to record the identification of the staffs and inmates including disappeared ones to provide evidence for future prosecutions. See NKHR, 북한 정치범수용소 근무자, 수감자 및 실종자 인명사전 [NORTH KOREAN POLITICAL PRISON CAMPS: A CATALOGUE OF POLITICAL PRISON CAMP STAFF, DETAINES, AND VICTIMS OF ENFORCED DISAPPEARANCE] (2016).
based on a series of facts linked together and leading logically to a single conclusion.”

Although still the difference between standard of beyond reasonable doubt and the Court’s conclusion for such proof is not clear, even the dissenting judges in the case agreed to admit the circumstantial evidence to hear. It is more likely, therefore, to find the state in the violation of the international convention based on the findings rather than establishing individual accountability for committing international crimes.

2.3. Need to protect the group in the camps

Besides other reasons to establish justice in the state, it is fundamentally necessary to rescue the detained in the political camps. The system is serving for the arbitrary decisions, while other different facilities the regime has operated for similar purposes are built on the statutes or laws regardless of the legality of the execution of the rules. But as the existence of camps has been steadily denied by the state, the camps would easily disappear without record when the regime changes its strategy toward the outside. Considering the state has gradually attempts to build economic relationships with others, to stabilize the instate circumstances, the state may impose stricter policies to the famous denouncing institution by instantly eradicating the existence of such sites. Current closure of the certain camp sites does not seem to evidence the changes of the implementing policy or public awareness of sensitive issues but reflects the vulnerable status of the political camps which is arbitrarily employed by the regime or sole leadership of the state.


136 *Id.* 68-70.

137 *Korean Bar Association, Supra* 367.
3. Recommendations

Therefore, the interpretation of the genocide for the detainees in the DPRK political camps should be incorporated to current existing norm in understanding the real atrocities receiving the weight of the term. The current norm preserved by the international courts’ decisions should be challenged as well with three possible suggestions. First, the original texts of the Convention would remain unchanged by incorporating different approaches to read the Convention. Judge Ottara’s opinion to broaden the scope of the genocide term encompasses a chance a court may hear genocide committed in political context. Another recommendation then is drafting or devising a new amendment to the Convention to include political group in the text or adopting a protocol to the Convention to broaden the scope of protection. The new devises would be more directly affects the practical implementation of the interpretation. But in the DPRK case, the most plausible scenario would be establishing a statute for domestic justice procedure or a transitional justice government since it is more difficult to gain consensus to change the international convention agreed by various states.

3.1. Reserving the texts with different approach

Judge Ottara, seating in the Chamber to hear the Case 002/02 to prosecute the closest supporters to the previous political leader of genocide crime, opined separately in the judgement by presenting his perspective for broader application of genocide.138 He found by adopting subjective standard the “as such” part of the Convention’s article was drafted in awareness of different motives to intent genocide and confirmed a sole membership status is required to receive the protection as a group.139 He agreed with the Chamber’s finding that the phrase was

138 Case 002/02, Prosecutors v. Nuon Chea et al, Judge You Ottara’s Separate Opinion on Genocide (Prolai Pouch-sasj Supra.
139 Id. ¶4509.
intentionally written to protect an existence of a group, not individuals.\textsuperscript{140} Regarding the interpretation of the Article II of the Convention, he concluded no requirement for distinguishing certain groups as the article limits the protection and the enumerated protected groups should be determined based on various factors and “consideration should be given to the political, social and cultural context.”\textsuperscript{141} His distinct opinion is remarkable to suggest political factors in genocide crime in a way most jurists have hesitated to adopt political relevant issues. If his opinion is reflected in future applications, the Convention can be read with more individual analysis to protect political groups.

Without a modification to the existing text, a strategy to only broaden the scope of the application in interpreting the genocide would not infringe the general principle of interpretation of treaty. To incorporate such perspective for further development of the Convention, a judge should remind the guidelines provided by the Vienna Convention in order to make the application legally persuasive. There is no hierarchy between international treaties including human right agreements. Therefore, the Genocide Convention should be interpreted in accordance with the article 31 of the Vienna Convention, following the general rules of the interpretation.\textsuperscript{142} The Vienna Convention then provides supplemental means to facilitate the interpretation of the Convention when the first interpretation of the treaty renders an empty conclusion or unreasonable consequences in the article 32.\textsuperscript{143}

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\textsuperscript{140} Id. ¶4512.

\textsuperscript{141} Id. ¶4516.

\textsuperscript{142} Vienna Convention on the Law of Treaties, May. 23, 1969, 1155 U.N.T.S. 331 art. 31. “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty...”

\textsuperscript{143} Id. art. 32. “Supplementary means of interpretation. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to

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Convention implying exclusion of political group in genocide charges would lead to the unreasonable result specifically in the DPRK situations if the detainees cannot receive proper remedies from international assistance. But such challenge still has to wait longer period of time to witness the altering moment of the term because the courts would need more substantial time to review the prominent norm which have supported by international understandings.

Interpretations on human rights cases in European Convention on Human Rights may suggest useful methods. One may disregard to adopt a different approach specifically in interpreting human rights treaties because all treaties are and should be equally authorized. However, the flexible methods took by the European Court of Human Rights in human right cases could referred in justifying the predicted unreasonable consequences of the current interpretation of the Genocide Convention in the DPRK case. The Court affirmed to protect practical and effective rights in human rights cases. Moreover, continued to consider different principles in reviewing human right cases in order to promote the dynamic implementation of human rights. In interpreting an international treaty, no hierarchy between the treaties should be recognized, however, in interpreting a human right treaty, one could consider the unique characteristic of such agreements for the ultimate objective in protecting and promoting vulnerable human rights. Human right treaties are not ratified to promote one state’s interest but

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to provide fundamental protections for mostly universal jurisdiction. In this regard, some works of “art” would benefit the interpretation of the treaties.\footnote{Anthony Aust, Modern Treaty Law and Practice, 230 (2007). “…the interpretation of document is to some extent an art, not an exact science.”}

3.2. New amendment or protocol to the Convention

A more concrete way to provide the basis for inclusion of political group to the Convention can be made with different texts provided by a new amendment or protocol to the Convention. But the efforts to gain worldwide consensus for such changes are not simple, as expected. Critics of the Convention’s exclusion on political groups once provoked the United States Senate to consider proposing an amendment to the Convention while the Senate contemplated the ratification of the Convention.\footnote{Lawrence J. LeBlanc, The United Nations Genocide Convention and Political Groups: Should the United States Propose an Amendment? 13 Yale J. of Int’L L. 268, 280 (1988.)} A question was raised during the discussions for fundamental reason for the proposal; is a new amendment is only way to stop the genocide against political groups? As the U.S. Senators have faced, a state to propose an amendment or new protocol to add political group as a new protected group to the Convention must rebut the drafters’ original intention for the exclusion and convince the international community to approve a new challenge. Regarding the utility and political risks in proposing a new amendment, mere reliance on the state’s action to change the international norm would take enormous time to bring a change.

3.3. Domestic procedure or transitional justice process

The most persuasive way to incorporate new interpretation to protect the DPRK genocidal victims would be proceeding judicial process in the domestic level or, more possibly, through transitional justice time. It is more difficult to revise or amend an existing international
convention than establishing a case in national system because less state practice to lighten the notion to protect political groups in genocide is found. Nevertheless, some states have legislated and decided to punish the perpetrators committing genocide in political context or against a certain political group like France and Ethiopia and more states have become aware of the gravity the genocidal incidents which occurred out of the scope of the old protection. If more states agree to punish the genocide committed against political groups or in political context, such consensus would affect to lower the standard to more various groups, protecting more diversity in modern societies.

If the DPRK voluntarily establishes a certain procedure to prosecute the perpetrators, some grounds should be made to exercise the jurisdiction. First, legislators should be aware that the entire process to the political camps are promoted by genocidal intent to eradicate a group of people for their political basis. The thesis does not include purview in defining of ‘political’ specifically in such criminal offences, however, it should be noted that political context is a major factor constituting the political offences in the distinct individual case. Secondly, a penal code should be drafted to punish and prevent the genocide crimes in the state. Although the implementation of the political camps was based on arbitrary standards easily influenced by the political decisions, the punishment and justice process to address the problem should be written in law for its legality and legitimacy. Finally, to establish a fair and just precedent to prevent future atrocities, international aids must be provided throughout the process. Although the state itself proceeds the justice process on the domestic or transitional justice grounds, there should be an organization or a set of cooperation from the outside to watch and observe the entire process. One should remember during the justice process the awful crimes committed in the DPRK camps are not a national issue but international crime that threatened the peace of mankind on the globe.
CONCLUSION

The Genocide Convention was drafted in awareness that a great power may destroy a group of people in massive scales. The drafters at first considered a political group could face such threats in certain situations, however, eventually devised a draft to exclusively include only four groups to protect – national, racial, ethnic and religious groups. They could not predict future atrocities now occurring in the present concentration camps, the DPRK political camps.

DPRK has still refused to respond to the inquiries accusing the state’s implementation of political camps to persecute its citizens. It is barely possible to initiate the field investigation to archive direct evidence to prepare individual indictments, however, several official reports published by the U.N. and other state authorities revealed the horrible atrocities, once described as worse than the Nazi concentration camps, to the world and promoted international cooperation to redress. Due to the state’s isolation, it is estimated around 5 or 6 camps are currently under operation. The North Korean defectors as well provided testimonies regarding the grave inflictions in the camps. The inmates in the political camps have been exposed to overall dangerous circumstances. Extreme labor is assigned to every inmate regardless of their age, gender and physical status, and functions to punish them, gradually exterminating their existence. Besides the devasting circumstance in the camps, the inmates are also under the threat of harassment by the guards. Women and children are facing more vulnerable situations. Children die of malnutrition and are sometimes forced to watch the physical violence and tortures occurring in front of them. Family rights and reproductive right are also prohibited in the camps, however, some women are pregnant after raped by the camp guards and they are forced to have an abortion, cannot help witnessing their own baby being killed just after the birth.
However, although the intention of eradication is clearly manifested by the operation of the political camp system, the Genocide Convention would not apply to the victims because the detainees constitute a political group, which the Convention did not intend to protect. The Article II of the Genocide Convention provides an exhaustive list of the protected groups, excluding other groups from the protection, although the draft of the Convention once included political group in the list. Critics argued the omission of political group during the drafting history was caused by unknown political compromise because no records have explained legal grounds to suddenly exclude certain groups. But later the international courts have confirmed the Convention explicitly expressed its power in protecting certain groups’ existence because the protected groups distinguishable due to the stability and permanence and political group lacked such characteristics to receive proper protections from the Genocide Convention.

The ignorance or unexpected failure to see more severe tragedies occurring today for political polarization, such as the extreme harassments in the DPRK political camps, have triggered attentions to the inherent limitations of the Convention which cannot rescue the most vulnerable lives. Advocates, therefore, had to devise some alternatives to address grave human right violations in genocidal situations but not in genocide crimes. To punish the international crime where international law does not provide appropriate steps or measures, states have legislated domestic laws to prosecute perpetrators who committed genocide against any groups including political groups. France has its own penal code for convicting genocide with more encompassing scope to cover the crime and Ethiopian transitional justice government enacted law to punish the genocidal criminals and successfully established an inspiring precedent finding the defendants guilty of committing genocide against certain political groups. In addition, some international advocates argued specifically in investigating the Cambodian atrocities, to
prosecute the leader and supports of the previous regime who persecuted several groups and individuals on political grounds, customary international law can provide legal basis for indictments. But the challenges are rarely acceptable to the courts because rather than directly discussing and applying the genocide charge against the perpetrators, the judges seating in international courts are inclined to render the decision based on the accusation of criminal against humanity, which increases the chances to convict the defendants. The Cambodian judgement recently again confirmed genocide crime is committed against national and ethnic groups, despite the controversial challenges for decades to protect Cambodian political groups in genocidal crimes.

The DPRK’s violations in the political camps should be framed as a genocide crime considering the purpose in establishing the institutes, nevertheless. Other criminal elements are met to establish a genocide crime except the persecuted are gathered on political grounds where the political group cannot be protected by the Convention. However, the groupness of the detainees in the political camps differs from other political associations in general terms due to the unique contexts in the DPRK politics. The detention process to the political camps is basically a process of stigmatization of persons, imposing lifetime stigmas to remain in the camps. The inmates, once sent to the camps, permanently become segregated and gradually eradicated for the regime’s policy. The lifetime detentions including enormous inflicts leading to “gradual eradication” of the inmates manifests the stable existence of a certain group, a political group or national group with particular political contexts.\footnote{Rep. of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic Peoples’ Republic of Korea, Supra ¶767.}
It is essential to discuss genocida charges in the political camps, therefore, because while some experts deliberately work on to bring a charge against the state leader of crimes against humanity for violating human rights in the state, others cannot guarantee the further developments for such approaches. If the preparation takes more than expected, it would more beneficial to the victims to call for the state responsibility in ICJ than filing individual criminal charges waiting for the ICC or other ad hoc tribunals. Considering the state’s silence and stubbornness with risky provocations toward outside world, a faster method is preferably implemented to relieve the tensions caused by grave inflicts. A successful establishment of genocide charge can gain more attentions to rescue the victims in the hidden sites of the camps. Therefore, incorporation or addition of political group to the interpretation of the genocide should be made either in reserving the original texts with adopting such interpretation by the courts or proposing a new amendment or protocol to facilitate the current interpretation regarding the protecting political groups in genocide crimes. But it is infeasible to obtain consensus from the international community to challenge the existing international norm. The most practical way to implement the incorporation would be establishing a legislation and judicial decision to protect the detainees in the political camps from the genocide crime by domestic justice system or, if possible, throughout the transitional justice process.

The fundamental objective of this thesis is not to create a new norm or rule to change the existing prominent rule but to provide a new forum to discuss the specific incidents in the DPRK’s political camps where humans are persecuted on political grounds. Moreover, the DPRK’s political camp sites are not the only occasion which needs analysis in genocide frame. Sadly, still humans are inflicted by absolute political powers and the victimized ones are exposed to more obstacles when the law cannot regulate the powers. The political group in normal sense
is an association to accomplish certain political idea to bring a change or secure the world. But in today’s extreme polarized world with different ideas, the meaning of ‘political’ could harm persons by targetting them as enemies. The current norm of genocide should incorporate the transformations in its own term to provide strong protections to undefined or unclassified groups according to the old interpretations. One is entitled to live free regardless of his or her political status and cannot be inflicted by own belief and existence. I close this argument in hoping to bring freedom and the justice to the victims in the DPRK political camps and similar potential tragedies.
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