

## **The Use of Domestic and International Law Against North Korean Subversion and Human Rights Violations**

### ***(Slide 2)***

Oskar Gröning, a 93-year-old former SS member of a Nazi death camp shuffled into a German court in April this year, seven decades after his war crime involvement in Auschwitz.

In South Korea, a bill for establishing an organization for collecting evidence of human rights crimes in North Korea has failed to pass the National Assembly for the last 10 years.

The main question of this presentation is “Is it possible to indict Kim Jong-un in a criminal court?” The short answer is, “It is possible but hard to expect such an event now.”

However, we should not stop collecting evidence or pursuing any and all legal means to prosecute human rights violations.

### ***(Slide 3)***

I will review some domestic and international criminal issues related to North Korea.

### ***(Slide 4)***

Recent Political Party Disbanding

Let’s start with the “Recent Political Party Disbanding”.

In Dec. last year, the Constitutional Court of South Korea decided to disband the Unified Progressive Party (UPP).

The UPP was a small political party. The membership was about 100,000, and the supporters were about 1 million.

### ***(Slide 5)***

A key leader of the UPP, Lee Seok-ki was elected as a member of the National Assembly in 2012.

In 2013, North Korea conducted a third nuclear test and threatened to ignore the previous ceasefire agreement. During that tense moment, when the risk of war was high, Mr. Lee and about 130 supporters had several secret meetings.

They discussed plans to destroy key infrastructure like electric and communication facilities in South Korea in the event of an inter-Korean war.

Mr. Lee was arrested and indicted for inciting an armed rebellion and plotting to overthrow the government. The Supreme Court sentenced him to 9 years of prison. Several other key members of the UPP were convicted as well.

### **Constitutional Court Case**

Following the first indictment in the criminal case, the Ministry of Justice referred the case to the Constitutional Court to disband the UPP.

By an 8-1 majority, the court ruled that the UPP should be disbanded because its objective and activities violate the basic democratic order upheld by the Constitution.

It was the first case in South Korean history of a political party being disbanded by judicial power.

### ***(Slide 6)* Response from the people**

The ruling sparked a discussion with conservatives welcoming it and progressives condemning it.

Polls taken shortly after the decision showed that 61 percent of the public agreed with the ruling, 28 percent were against it, and the rest were undecided.

### ***(Slide 7)* Key points of the ruling**

The minority opinion said that the activities of some individuals cannot be imputed to the responsibility of the party itself.

It was based on the premise that 100,000 of its members and 1 million of its supporters would not support the illegal activities of Mr. Lee.

On the contrary, the majority opinion concluded that because the convicted key members were dominating the party, their objective and activities were connected to those of the party. And it emphasized that the special situation of South Korea should be considered - that we are confronted with an enemy which is trying to overturn the democratic system.

### ***(Slide 8)* Implications**

In the future, some people may appraise this decision as the best one which protected democracy from its enemies. And others may blame it as a retreat from democracy that severely restricts the freedom of political parties.

It is noteworthy the opinion was 8 to 1 because it represented overwhelming consensus. In other constitutional court cases that contain hot issues, the decisions were more divided like 6 to 3 or 5 to 4.

This case has another important aspect that the general public came to recognize exactly what the leaders of the UPP had planned to do. Even many of the supporters of that party

were totally unaware of its leader's ulterior intentions.

### **North Korean spy case *(Slide 9)***

Why did the large majority of the judges feel the necessity of disbanding the party? I think the precedent National Security Law cases give us a clue.

Let me introduce a sensational woman spy case in South Korea. I was on the investigation team at that time.

Won Jeong-hwa was 34 years old when arrested in 2008. She was jailed for five years for leaking classified information to North Korea.

Her first mission was to kidnap North Korean defectors staying in China for repatriation to North Korea.

After her arrival in South Korea in 2001, she reported herself as a North Korean defector. But her secret mission was to gather information on the locations of military installations, personal data of military officers and lists of North Korean defectors.

She gave lectures about North Korea at 57 military camps nationwide.

She maintained romantic relations with three military officers and even shared an apartment with an Army First Lieutenant. The 27-year-old Lt. handed her some military information even after knowing she was a spy.

After some failures on her missions, she became deeply stressed and was taking heavy tranquilizers out of concern that a North Korean agent might kill her. There were 4 locks installed at her home when she was arrested.

### ***(Slide 10)* Result of the case**

Ms. Won confessed to her charges and was sentenced to 5 years in prison.

The prosecution also detained a 63-year-old North Korean defector named Kim Dong-soon for collaborating with her. Mr. Kim was her stepfather and arrived in Seoul in 2006. The prosecutor's office concluded that he was also a disguised defector and a controller of Ms. Won.

However, Mr. Kim denied the charges against him and after a 4-year trial, was found not guilty.

The court said that there was some circumstantial evidence to suspect him as a spy, but it was not enough to prove him guilty.

Mr. Kim is still living in South Korea and insists that he was not a spy.

### **(Slide 11) The trends of National Security Law Cases**

The number of cases involving the National Security Law had decreased for a decade since 2001, but has increased over the recent 5 years.

**(Slide 12)** One of the reasons for the decrease is that the Supreme Court and the Constitutional Court have interpreted the law strictly and narrowed down the application scope of the law to minimize the restriction of freedom rights. And there had been several bills to amend or abolish the law, but they were not passed in National Assembly.

This means that it has become more difficult to indict a spy and to get conviction in court.

Additionally, the investigation of North Korean spies should include tracing their lives back in North Korea such as their birth, family and school backgrounds in North Korea.

However, it is very difficult to find out and verify the facts about their lives in North Korea. This is apparent in the not guilty verdict of Mr. Kim.

**(Slide 13)** Another problem that occurs in the cases related to North Korea is that the statements by North Koreans are sometimes changed, exaggerated or inconsistent with previous statements. In a criminal case, even a slight change can raise doubt about the whole statement. There are several reasons for that problem.

Their memory itself is unclear, or can be distorted by damage from trauma.

They don't have strong standards about the importance of facts, because North Korea is not a society which emphasizes facts.

The media pushes them to tell more shocking stories. Sometimes they want to be under the spotlight.

In Mr. Kim Dong-soon's case, the judges did not accept the reliability of Ms. Won's statement by reason that her statement looked partially exaggerated.

### **Crimes against Humanity & ICC**

#### **(Slide 14) UN report**

Now, for the main question of this presentation, "Is it possible to indict Kim Jong-un in a criminal court?"

The commission of inquiry (COI) on human rights in North Korea, under the UN Human Rights Council issued a landmark report in Feb. last year, which said that North Korean leaders are responsible for "widespread, systematic and gross" violations of human rights including torture, rape, public executions, extrajudicial and arbitrary detention, and political prison camps.

There are 275 pages of fact-finding. The issues of prison camps and abductions are more focused.

It also recommended the International Criminal Court (ICC) should handle North Korea's crimes against humanity.

*[Click]* referring North Korea to the ICC. The U.N. Security Council adopted it as an official agenda.

North Korea has protested strongly against the resolution, threatening a nuclear test in response.

***(Slide 16)***

This is the International Criminal Court.

***(Slide 17) Mr. Shin***

North Korea disputed one of the main witnesses named in the report, Shin Dong-hyuk.

He was under the spotlight with the shocking story that he had lived in the most notorious “camp 14” and escaped from there.

***(Slide 18)***

This is the numbers of eyewitness reports from defectors in the UN report.

There are more than 80 witnesses testified publicly and 240 confidential interviews.

***(Slide 19)***

But in Jan. this year, Shin Dong-hyuk changed some of the timeline and locations of his story. He apologized for his lying. He explained that it was too torturous for him to tell the whole truth.

After Shin's confession, North Korea has claimed that the UN report was based on falsehood and therefore the U.N. resolution should be nullified.

Michael Kirby, the former head of the U.N. COI said, “There is ample testimony backing up the report. So the report stands strong despite the recent retraction.”

I agree that the report is still valid. Nonetheless, if we were in a situation of indicting North Korean leaders, the retraction like Mr. Shin’s could be lethal to the case, and it could raise questions about the credibility of testimony from other North Korean defectors.

***(Slide 20) Kenyan President case***

The same month when the resolution was passed at the UN, another case at the ICC was dropped, “The Kenyatta case”. This case illustrates how difficult it would be to indict a head

of state such as Kim Jong-un.

Kenyan President, Uhuru Kenyatta had been indicted in 2009 for inciting ethnic violence after disputed elections in 2007, in which more than 1,000 people were killed. He has denied the charges, and he even won the presidential election in 2013.

The start of his trial had been postponed five times. And then in Dec. last year, prosecutors decided to drop the case. With no enforcement power, the court cannot collect evidence or visit crime scenes without permission from the corresponding national authorities.

Prosecutors had accused the Kenyan government of threatening, intimidating and disappearing witnesses. Actually some witnesses refused to testify or recanted their statements.

This case showed the limits of the court's power to pursue charges against a sitting leader.

*[Click]* And there was the same concern about North Korean witnesses in the UN report.

### ***(Slide 21)*** Possibility of indicting Kim Jong-un

Chances of actual referral of the North to the ICC are slim. Even if the North Korean case is referred to the ICC, it would take a long and hard time to make progress in the investigation, and it looks much more difficult to indict Kim in the current situation.

There are three ways in trigger mechanisms that define how to refer a situation to the court.

First, North Korea is not a state party to the Rome Statute, and it is not expected for North Korea to accept the jurisdiction of the Court now.

Second, The U.N. Security Council is unlikely to approve the resolution because some countries can exercise their veto power.

*[Click]* There is also a rule of non-retroactive jurisdiction. The Court only has jurisdiction over crimes committed after the Rome Statute entered into force in 2002. Some of the testimonies by defectors on the COI report are about facts before 2002.

Additionally, Kim Jong-un became a ruler after the death of Kim Jong-il in 2011. Accordingly, Kim Jong-un is not supposed to be legally accountable for crimes that were committed before 2011.

Therefore in order to indict him, a prosecutor would have to prove that Kim Jong-un actually directly ordered or connived such crimes against humanity.

### ***(Slide 23)*** Changing A little?

Although the recent retraction of Mr. Shin is controversial, North Korea seems to be struggling to overcome these human rights violation issues.

First of all, North Korea cannot persuade the international community as long as it continues to refuse to cooperate with the UN investigators.

Also, even though North Korea has contradicted Mr. Shin's testimony, it has brought the burden to refute many other defector's testimonies against the North, which they have not done yet.

In recent months, there are some signals that indicate change, such as North Korean news reporting that Kim has emphasized the importance of welfare for old people. Another example showed a video of a family living peacefully even though one of the family's members had escaped from North Korea.

These examples of course could be just a propaganda show to promote North Korea. But if Pyongyang improves their human rights conditions somewhat, this should be regarded as a direct result of pressure by the international community.

## **Conclusion**    *(Slide 24)*

It is difficult for the ICC to investigate Kim Jong-Un, let alone to indict him. Nevertheless, we should keep making efforts to gather evidence about the true picture of North Korea and crimes against humanity.

The efforts of collecting evidence and facts are very important in achieving peace on the Korean peninsula. The more we try to enhance the situation of human rights in North Korea, the more North Korean residents will know the true meaning of freedom and democracy.

National Security Law cases are not only a South Korean issue, but also a North Korean human rights violation issue to the international community. For example, Ms. Won Jeong-wha was a North Korean spy and she is guilty of human rights crimes such as kidnapping ; but she is also one of the witnesses or victims of human rights abuse. Also, Mr. Kim Dong-soon could be an adverse witness for the prosecution of a human rights case.

Therefore, it is necessary to revamp the system of collecting evidence about crimes by North Korea. In South Korea, an additional organization for collecting evidence of human rights abuses should be created and put to work as soon as possible.

Additionally, evidence and information in South Korea and those in international organization should be coordinated more closely for verifying facts and crimes by the North Korean regime.

Just recently, some youths who tried to travel abroad to join the forces of ISIS were arrested in the US and in Europe. The methods and tools employed in preventing actual or planned terrorism will often infringe and inevitably restrict an individual's freedom.

A nation should and must protect its citizen's lives and property from the terror and horrors

of war. At the same time, a nation must try to minimize the curtailment of freedom to its people, therefore ensuring the preservation of the people's constitutional rights and freedom.

This is a compelling reason to preserve and protect the integrity of our nation's national security, and why we should also strive to protect humanity from human rights abuse and violations.

In some sense, we, the international community, have a great responsibility to do something about Kim Jong-un.

Thank you!