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Human rights situations that require the Council's attention

**Report of the group of independent experts on
accountability***

Note by the Secretariat

Summary

The Secretariat has the honour to transmit to the Human Rights Council the report of the group of independent experts on accountability, pursuant to Council resolution 31/18.

In the report, the experts explore appropriate approaches and practical steps to seek accountability and secure truth and justice for the victims of human rights violations in the Democratic People's Republic of Korea, in particular where such violations amount to crimes against humanity.

* The present report was submitted after the deadline in order to reflect the most recent developments

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I. Introduction

1. This report is presented pursuant to Human Rights Council resolution 31/18¹, which requested the High Commissioner for Human Rights to designate “two existing independent experts in support of the work of the Special Rapporteur on the situation of human rights in the Democratic People’s Republic of Korea” (hereinafter “DPRK”) to “focus on issues of accountability for human rights violations in the country, in particular where such violations amount to crimes against humanity, as found by the commission of inquiry”. The High Commissioner designated Sonja Biserko (Serbia) and Sara Hossain (Bangladesh) as independent experts.

II. Mandate and methodology

A. Interpretation of the mandate

2. Paragraph 11 of resolution 31/18 requested the group of independent experts (hereinafter “GIE”), “taking into account existing international law and prevailing State practices with regard to accountability: (a) to explore appropriate approaches to seek accountability for human rights violations in the Democratic People’s Republic of Korea, in particular where such violations amount to crimes against humanity, as found by the commission of inquiry; (b) to recommend practical mechanisms of accountability to secure truth and justice for the victims of possible crimes against humanity in the Democratic People’s Republic of Korea, including the International Criminal Court”.

3. Given that paragraph 10 referred to ‘human rights violations [...] found by the Commission of Inquiry’ (hereinafter “COI”), the GIE considered that its mandate covered all such violations², notably systematic, widespread and gross human rights violations, including abductions which took place outside the DPRK and led to enforced disappearances continuing in the DPRK. The GIE did not undertake any fact-finding (including on specific allegations brought to its attention)³; its meetings focused on approaches and processes of accountability.

B. Non-cooperation by the DPRK

4. Through communications dated 20 September 2016, 14 October 2016, 6 December 2016, and 17 January 2017, the GIE conveyed to the Government of the DPRK that it was committed to a fully independent and impartial approach, sought meetings with its Permanent Representatives in Geneva and New York, requested permission to visit the country, and solicited the Government’s views and any information on the country’s accountability processes. The GIE regrets that the meeting requests were denied and the other requests remained unanswered. The GIE remains committed to engaging with the DPRK to discuss the findings of this report.

¹ Para. 10 and 19.

² A/HRC/25/63; A/HRC/25/CRP.1.

³ E.g. alleged forced labour of North Koreans working abroad.

C. Methods of work

5. The GIE undertook missions to Geneva (20-23 September 2016), The Hague (24-26 October 2016), Seoul (21-25 November 2016), Tokyo (28-29 November 2016) and New York (12-14 December 2016). During these missions, the GIE met with and received information from government officials, officials at international tribunals including the International Criminal Court (hereinafter "ICC"), UN entities, humanitarian actors, legal practitioners and experts, the National Human Rights Commission of Korea, and national and international civil society groups. In Seoul and Tokyo, the GIE met victims of human rights violations in the DPRK; civil society groups representing victims; individuals who had lived in the DPRK; and others directly affected by the human rights situation there. The GIE received 16 written submissions, including from civil society organizations, legal experts and individuals.⁴ The GIE expresses its sincere appreciation to those who shared their views and provided information.

6. The GIE received advice and support from OHCHR, including its field-based structure in Seoul, and interacted with mandate holders under the Special Procedures of the Human Rights Council. Finally, the GIE coordinated its work with the Special Rapporteur on the situation of human rights in the DPRK, Tomás Ojea Quintana, including through joint meetings in Geneva and Seoul.

III. Previous recommendations on accountability for human rights violations in the DPRK

7. The COI, Special Rapporteurs on the situation of human rights in the DPRK, and others have made repeated and strong calls and recommendations for accountability for human rights violations in the DPRK.

8. The COI considered issues of institutional⁵ and individual criminal accountability.⁶ It reflected on the accepted responsibility of the international community to protect the population of every state from crimes against humanity⁷ and deemed that given the COI findings, it is incumbent on the international community to ensure that the perpetrators are brought to justice.⁸ The COI called for the UN to ensure that those most responsible for crimes against humanity in the DPRK are held accountable, and for the Security Council to refer the situation to the ICC or establish an ad hoc international tribunal.⁹

9. Subsequently, the General Assembly decided to submit the report of the COI to the Security Council and encouraged it to consider the COI's relevant conclusions and recommendations and take appropriate action to ensure accountability, including through consideration of a referral of the situation in the DPRK to the ICC.¹⁰ The Security Council has since held three meetings on the human rights situation in the DPRK (during which several States called for accountability),¹¹ but not yet referred the situation to the ICC.

⁴ <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20890&LangID=E>;
<http://ohchr.org/EN/HRBodies/SP/CountriesMandates/KP/Pages/GroupofIndependentExpertsonAccountability.aspx>.

⁵ A/HRC/25/CRP.1, paras 1167-1194.

⁶ Ibid., paras 1195-1199.

⁷ Ibid., para 1166.

⁸ Ibid, para 1199.

⁹ Ibid, para 1218; 1225.

¹⁰ A/RES/69/188, para 8. See also A/RES/70/172 para 10; A/RES/71/202, para 9.

¹¹ E.g. <https://www.un.org/press/en/2016/sc12615.doc.htm>

10. Accountability for human rights violations has been a consistent focus of the mandate of the Special Rapporteur on the situation of human rights in the DPRK. In his reports, the first Special Rapporteur, Vitit Muntarbhorn, concluded that “there are a variety of discrepancies and transgressions - several of an egregious nature - in the implementation of human rights in the country, calling for immediate action to prevent further abuses and provide redress”, by the DPRK authorities as well as the international community.¹² Former Special Rapporteur Marzuki Darusman equally urged the international community to take bold steps to address crimes against humanity in the DPRK while recalling their duty to prosecute such crimes.¹³ The current Special Rapporteur emphasized the importance of ensuring accountability for human rights violations, in the interests of justice and as deterrent for further violations.¹⁴

IV. Concept of accountability

A. International law and practice

11. The Human Rights Council requested the GIE to take into account “existing international law and prevailing State practices with regard to accountability”. Under international law and practice, accountability for gross human rights violations is not a matter of choice or convenience, but of legal obligation. International norms and standards articulate the requirement for a State to meet this obligation and to ensure an adequate response to allegations of gross human rights violations.

12. States are under a duty to investigate and prosecute human rights violations that amount to crimes under national or international law, in particular genocide, war crimes, crimes against humanity or other gross violations of human rights.¹⁵ Article 2(3) of the International Covenant on Civil and Political Rights (hereinafter “ICCPR”) guarantees every victim of a human rights violation the right to remedy. This requires States to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies, and, where the investigations reveal violations of certain ICCPR rights, bring those responsible to justice. A failure to investigate and bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the ICCPR.¹⁶ The DPRK acceded to the ICCPR in 1981 and is legally bound by its provisions. With respect to crimes against humanity, in 1984, the DPRK acceded to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which emphasizes the importance of punishing perpetrators of such crimes.

13. The prohibition of crimes against humanity is a rule of binding international customary law. The duty of States to ensure accountability for such crimes is widely accepted and has been referenced in international treaties including the Rome Statute of the ICC, and regularly reiterated in resolutions and other soft law instruments.¹⁷ Additionally, States have a responsibility to prevent the commission of crimes against humanity. The international community has declared that when States are “manifestly failing” in their responsibility to protect their populations from such crimes, it is prepared to take collective

¹² E/CN.4/2005/34, para. 67; A/60/306, para. 68(vii); A/62/264, para. 59; A/HRC/7/20, para 83.

¹³ A/HRC/31/70.

¹⁴ A/HRC/34/66, para. 43.

¹⁵ A/HRC/27/56, para. 27.

¹⁶ CCPR/C/21/Rev.1/Add.13, paras 15 and 18.

¹⁷ E.g. A/RES/67/1, para. 22.

action, in a “timely and decisive manner”, and bearing in mind the principles of the United Nations Charter and international law.¹⁸

14. Ensuring accountability for gross human rights violations goes beyond establishing individual criminal responsibility. A comprehensive approach also requires measures towards the realization of the right to know the truth about violations and the right to adequate, effective and prompt reparation - as grounded in international law¹⁹ and further articulated in the Updated Set of principles for the protection and promotion of human rights through action to combat impunity²⁰ and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.²¹

15. The occurrence of a human rights violation gives rise to a right to receive reparation for or on behalf of the victim or their beneficiaries, and a duty on the part of the State to make reparation and provide a possibility for the victim to seek redress from the perpetrator.²² The right to the truth entitles the victim, their relatives and the public at large to seek and obtain all relevant information concerning the commission of the alleged violation, the fate and whereabouts of the victim, and where appropriate, the process by which the alleged violation was officially authorized²³, as well as the extent and pattern of past violations, and their root causes. It requires States to establish processes that lead to the revelation of the truth about what took place. Such processes contribute to the fight against impunity, the reinstatement of the rule of law, and ultimately reconciliation.²⁴ Truth-seeking processes also contribute to the prevention of violations through specific recommendations including on reparations and reforms. In this regard, education,²⁵ measures of memorialisation, trauma counselling and psycho-social support are crucial.

16. The GIE notes the critical importance of eschewing one-size-fits-all models,²⁶ and that diverse mechanisms and measures have been implemented to address gross human rights violations: international tribunals, hybrid courts, domestic courts with or without international support, truth commissions, parliamentary enquiries, civil-society driven processes (including mock trials/tribunals, consultations, memorialisation, and education initiatives), reparations schemes (including psycho-social support) and vetting programmes, as well as legal and policy measures seeking to guarantee non-recurrence.²⁷ The management and preservation of existing and future archives has also proven to be of paramount importance.²⁸

¹⁸ A/RES/60/1, paras. 138-139.

¹⁹ On the right to the truth, see E/CN.4/2006/91, A/HRC/5/7, A/HRC/12/19, A/HRC/15/33; on reparations, see OHCHR Rule-of-Law Tools for Post-conflict States, Reparations Programmes.

²⁰ E/CN.4/2005/102/Add.1.

²¹ A/RES/60/147.

²² E/CN.4/2005/102/Add.1, Principle 31.

²³ A/HRC/24/42, para 20.

²⁴ Ibid.

²⁵ See ICTJ/UNICEF, <https://www.ictj.org/publication/education-transitional-justice-opportunities-challenges-peacebuilding>.

²⁶ Reports of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (http://ap.ohchr.org/documents/dpage_e.aspx?m=193); OHCHR Rule-of-Law Tools for Post-Conflict States.

²⁷ A/HRC/30/42.

²⁸ A/HRC/17/21; A/HRC/30/42 and Annex; OHCHR Rule-of-Law Tools for Post-Conflict States (Archives).

17. The GIE further recalls that under various sources of international law and United Nations policy,²⁹ amnesties are impermissible if they prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or other gross violations of human rights; interfere with victims' right to an effective remedy including reparation; or restrict victims' and societies' right to know the truth about violations of human rights and humanitarian law.

B. A framework for accountability for human rights violations in the DPRK

18. Given the severity and complexity of the human rights situation in the DPRK, a comprehensive and multi-pronged approach is required to addressing violations, in line with international norms and standards. Investigation and prosecution of serious crimes is critical to this. Additionally, the approach must comprise measures to ensure the right of victims to reparations, the right of victims and society to know the truth about violations, and guarantees of non-recurrence of violations. It must be tailored towards the specificities of the situation in the country.

19. Further, the approach to and measures of accountability must be human rights-based, ensuring that the rights and needs of victims are placed at the centre of their design and implementation. They must enable acknowledgement and reparation of injustice, allow for a dialogue that fosters an understanding of the past, and educate individuals on the importance of justice and human rights. These goals can only be achieved through a fully participatory process: accountability measures must reflect the experiences and views of those who lived or live in the DPRK, and other victims of human rights violations in the DPRK.

20. Consultations are particularly effective for victims and affected communities to share priorities for achieving accountability, and to ensure ownership and effectiveness of mechanisms subsequently established.³⁰ Currently, the lack of access to the country, as well as restrictions on the rights to liberty of movement, peaceful assembly, freedom of association and expression within the DPRK, present particular challenges to conducting consultations among and with those living there. Nonetheless, awareness-raising, capacity-building, and consultation can commence with those who lived in the DPRK and other victims living outside the DPRK. The GIE has sought views on accountability for human rights violations committed in the DPRK from victims and affected communities, including individuals who lived in the DPRK and organizations which represent them, and has sought to give voice to their views in this report. Considering its limited number of interlocutors within the short duration of its mandate, the GIE urges this work to continue.

21. The following paragraphs present some of the key issues and challenges identified by the GIE, to be considered in the design and implementation of any accountability mechanisms.

²⁹ OHCHR Rule-of-Law Tools for Post-Conflict States (Amnesties).

³⁰ A/HRC/34/62; A/71/567.

a) No willingness from the authorities to address the past and safety concerns

22. The Government of the DPRK categorically rejected the findings of the COI³¹ and has not engaged with the GIE. Where there is no demonstrable willingness to address allegations of human rights violations, and where gross violations are purportedly ongoing,³² efforts to ensure accountability face serious challenges. These include severe limitations on the processes of information or evidence-gathering, and consulting with victims, affected communities and civil society within the DPRK, while – critically – ensuring their safety. Several interlocutors expressed their deep concerns to the GIE about the safety and wellbeing of their relatives and friends in the DPRK, and how this constrained them in pursuing an accountability agenda. In the GIE's view, any accountability measures must be premised on a sound assessment and plans for mitigation of the security risks for victims and witnesses.

b) Different groups of victims, with different needs and expectations

23. The Secretary-General³³, Special Rapporteurs on the human rights situation in the DPRK³⁴, the COI, OHCHR³⁵ and civil society organizations have reported a wide range of gross human rights violations in the DPRK spanning several decades. The GIE highlights the need to acknowledge that different groups of victims may seek different kinds of redress, and to take into consideration these perspectives in designing appropriate accountability measures, while ensuring a non-discriminatory approach.³⁶

24. Victims underscored the importance of receiving acknowledgment and recognition of the wrongs done and the suffering caused to them. Several interlocutors expressed fears that their suffering would be forgotten and emphasized that addressing impunity and providing redress for violations, whether ongoing or past, is and must be a continuing concern for the international community.

c) Limited exposure to human rights concepts and practice

25. While the DPRK has ratified a number of core international human rights treaties³⁷ and guarantees some human rights in its Constitution, people within the country are said to have very limited exposure to human rights concepts as internationally understood. Furthermore, interlocutors noted that there was minimal experience within the DPRK of seeking accountability for human rights violations before effective redress mechanisms.

26. It is not uncommon for accountability demands to be raised in a context where those that have been most affected have a limited understanding of their rights and of their status as rights-holders. Such challenges can be overcome by conducting awareness-raising initiatives, providing information to and undertaking capacity-building of those concerned, including duty-bearers, and by working with representatives of victims' groups.³⁸ In the

³¹ <http://webtv.un.org/meetings-events/human-rights-council/regular-sessions/25th-session/watch/id-commission-of-inquiry-on-dprk-31st-meeting-25th-regular-session-of-human-rights-council/3350537719001>.

³² A/HRC/34/66 para 45(a).

³³ E.g. A/71/439.

³⁴ <http://www.ohchr.org/EN/HRBodies/SP/CountriesMandates/KP/Pages/SRDPRKorea.aspx>; A/HRC/22/57.

³⁵ E.g. http://ohchr.org/Documents/Publications/Report_TORN_APART.pdf.

³⁶ A/HRC/34/62, para 29.

³⁷ ICCPR; ICESCR; CEDAW; CRC and Optional Protocol on the sale of children, child prostitution and child pornography; CPRD.

³⁸ A/HRC/34/62, para. 72.

context of the DPRK, some steps may be initiated despite the lack of opportunity to engage with or among individuals within the country, including with persons who have left the country. In addition, further reflection is needed on how to make information available to people within the DPRK about human rights and redress mechanisms.³⁹

d) Complexity of accountability in the DPRK context

27. Several interlocutors, in particular individuals who have left the DPRK, highlighted the complexity of attributing responsibility for human rights violations in the country given their scale, duration and systemic nature. There may be vast numbers of perpetrators and distinguishing between ‘perpetrator’ and ‘victim’ may not always be clear-cut, given that many may have participated in the broader system of abuse. The GIE heard of individuals who were compelled to commit crimes to ensure their own survival, and of different motivations and circumstances that may have led to the commission of crimes. Various interlocutors strongly articulated the need for deeper reflection on the concept of responsibility in such a context, and a consequent differentiation or gradation in the assessment of individual culpability. Some noted that the focus should lie on ensuring criminal accountability for those who are responsible for the establishment and maintenance of the system of abuse and that some leniency could be shown for others.

28. Crimes under international law are committed by individuals. However, the pursuit of accountability in the DPRK context requires a comprehensive analysis of the underlying systems and policies of abuse and the identification both of individuals and institutions directly involved in the commission of heinous acts, and of those who ordered, oversaw, allowed or supported such crimes, in line with internationally accepted modes of liability. Such analysis must ultimately feed into a prosecutorial (and broader accountability) strategy that adequately takes into account the range and scope of violations, types and impacts of victimisation, and degrees of liability.⁴⁰

e) Broader regional dynamics

29. Several interlocutors indicated that the human rights situation in the DPRK is to some extent rooted in or explained by the history of the Korean peninsula, and that addressing this situation comprehensively requires a full and impartial examination of historic events on the peninsula and in the sub-region, including of any allegations of human rights violations.

30. The GIE’s mandate is limited to accountability issues pertaining to violations committed in the DPRK. While historic events and actions of others may provide important contextual information, they cannot be invoked as a justification for any party committing human rights violations or crimes under international law. That said, the GIE also believes that the path towards long-term peace and stability on the Korean peninsula and the broader region is through a genuine, joint and comprehensive accountability exercise involving all regional actors.⁴¹

³⁹ E.g. “Connection Denied - Restrictions on mobile phones and outside information in North Korea”, Amnesty International, ASA 24/3373/2016.

⁴⁰ A/HRC/27/56.

⁴¹ The COI recommended that the Korean People foster inter-Korean dialogue; and that the UN and the parties to the Korean War take steps to convene a high-level political conference to consider a final peaceful settlement. A/HRC/25/CRP.1, para 1222; 1225(j).

V. Mapping of options for accountability for human rights violations in the DPRK

31. With a view to making practical recommendations for seeking accountability for human rights violations in the DPRK, the GIE mapped out certain options.

A. In the DPRK

32. The DPRK is the primary duty-holder of the obligation to hold accountable perpetrators of human rights violations committed in the country. As recalled, states must respond to allegations of human rights violations with a prompt, thorough, and effective investigation through independent and impartial bodies, and bring those that are found responsible for such violations to justice. Domestic responses and remedies are generally preferable considering their closeness to the victims and access to evidence. A review of domestic accountability options is therefore imperative.

33. The COI had questioned whether it was a viable option to seek accountability within the DPRK criminal justice system, considering it found that crimes against humanity had been committed “pursuant to policies established at the highest level of the state”⁴². The COI found that the security and justice apparatus of the DPRK was and remained implicated in human rights violations, including those amounting to crimes against humanity.⁴³ It highlighted that both the Office of the Prosecutor and the court system in the DPRK had important functions in legitimizing human rights violations, as they were used to prosecute and punish persons for political wrongdoing “in a legal process involving fundamentally unfair trials”, and therefore also carried institutional responsibility.⁴⁴ It determined that, absent profound institutional reforms, the DPRK’s institutions were neither willing nor able to effectively investigate and prosecute crimes against humanity.⁴⁵

34. The Human Rights Committee also raised serious concerns regarding the DPRK’s justice system and the country’s response to allegations of human rights violations. These related, *inter alia*, to the constitutional and legislative provisions that endanger the impartiality and independence of the judiciary; the vague and subjective formulation of certain crimes, in particular where they are punishable with the death penalty; the “consistent and substantiated” allegations of ill-treatment and torture by law enforcement personnel; and the compatibility of pre-trial detention practices and investigation procedures with the ICCPR.⁴⁶

35. The GIE acknowledges that in 2016, the DPRK ratified the Convention on the Rights of Persons with Disabilities⁴⁷; submitted its combined second, third and fourth periodic reports to CEDAW,⁴⁸ and its combined fifth and sixth reports to the CRC.⁴⁹ The DPRK’s common core document reports that “there is a system of compensation for

⁴² Ibid, para. 1160.

⁴³ Ibid, para. 1167.

⁴⁴ Ibid, paras. 1173-1174.

⁴⁵ Ibid, para 1199.

⁴⁶ CCPR/CO/72/PRK, paras 8; 13; 15; 18. The COI similarly referred to constitutional and legal provisions that violate the principle of legality and severely affect the independence and impartiality of the judiciary (A/HRC/25/CRP.1, paras. 123-124). See also Korea Institute for National Unification, 2016 White Paper on Human Rights in North Korea, p. 142-169.

⁴⁷ <https://treaties.un.org/doc/Publication/CN/2016/CN.904.2016-Eng.pdf>

⁴⁸ CEDAW/C/PRK/2-4.

⁴⁹ CRC/C/PRK/5.

damage for the citizens whose rights are violated, which are civil compensation and criminal compensation.”⁵⁰ Further, in the UN Strategic Framework for cooperation between the UN and the DPRK for 2017-2021⁵¹ the Government and the UN agreed that a human rights-based approach will be applied in the formulation and implementation of UN programmes and projects. It also provides for UN support to the Government in implementing its commitments under a variety of human rights conventions and processes.

36. The GIE also notes that in 2014 the DPRK accepted recommendations during the second Universal Periodic Review that are directly related to the issue of accountability. For example, it committed to: take all necessary measures to prevent or punish violations of human rights (124.118), and ensure the fight against impunity for the perpetrators of crimes, acts of violence and all human rights violations (124.117); create a national mechanism for the review of complaints of the populations concerning human rights violations (124.116); enshrine fully the right to fair trial and due process guarantees (124.114); and further strengthen the independence of the judiciary (124.113).⁵²

37. In 2014, the DPRK agreed to set up a Special Investigative Committee to conduct comprehensive investigations into four issues concerning the Japanese nationals in the country, including the whereabouts of those allegedly abducted by the DPRK, and committed to the objectivity and transparency of the investigation.⁵³ Although this Committee reportedly commenced its work, it appears that no substantial progress or investigative results were communicated to Japan by early 2016. Following the DPRK’s nuclear tests in January 2016 and Japan’s sanctions in response, the DPRK reportedly conveyed that it would stop the comprehensive investigation and that the Committee would be dissolved.⁵⁴

38. In conclusion, despite commitments described above, the GIE has no information indicating that viable domestic options to seek accountability for human rights violations currently exist or have been used in the DPRK. Furthermore, the range of acts criminalised under domestic law appears insufficiently broad to capture the gravity of the allegations in the COI report. For example, while DPRK law treats some of the underlying acts of crimes against humanity as criminal offences, such as murder⁵⁵, deprivation of liberty⁵⁶, rape⁵⁷ or abduction⁵⁸, it contains no provisions capturing the specific context and nature of crimes against humanity (i.e. acts committed in the context of a widespread or systematic attack against any civilian population).

B. In other domestic systems

39. The GIE examined whether other domestic legal systems provide avenues for redressing human rights violations in the DPRK, in particular crimes against humanity.

⁵⁰ HRI/CORE/PRK/2016, para. 52.

⁵¹ <http://kp.one.un.org/content/dam/unct/dprk/docs/DPRK%20UN%20Strategic%20Framework%202017-2021%20-%20FINAL.pdf>.

⁵² A/HRC/27/10.

⁵³ A/69/548, para 40.

⁵⁴ <http://www.mofa.go.jp/mofaj/files/000209107.pdf>;
<http://www.kcna.co.jp/item/2016/201602/news12/20160212-29ee.html>.

⁵⁵ Penal Code of DPRK (2012), Art. 266-270.

⁵⁶ Ibid, Art. 241 and 276.

⁵⁷ Ibid, Art. 279-281.

⁵⁸ Ibid, Art. 277-278.

a) Republic of Korea, Japan and China

40. In considering accountability options for violations in the DPRK, possible avenues within the legal systems of the Republic of Korea, Japan and China merit particular attention, given that nationals of these countries have been victims of human rights violations in the DPRK; that violations may have been (partially) committed on their territories; and/or that they host sizeable groups of people who have lived in the DPRK, including potential victims, perpetrators and witnesses of human rights violations. The GIE met with stakeholders in Seoul and Tokyo to seek information about accountability processes in the ROK and Japan respectively. The GIE regrets that China's Permanent Representatives in Geneva and New York were not able to meet them, and its request for permission to visit China remained unanswered.⁵⁹

Criminal justice

41. The criminal laws of all three states include relevant substantive legal provisions. The ROK ratified the Rome Statute on 13 November 2002 and Japan acceded to it on 17 July 2007, and both countries adopted implementing domestic legislation regulating cooperation with the ICC.⁶⁰ Whereas the ROK incorporated the Rome Statute crimes (genocide, crimes against humanity and war crimes) into ROK criminal law, Japan deemed that its Penal Code already covered them under its common criminal law provisions. China has not ratified the Rome Statute, nor does its Criminal Code cover genocide, crimes against humanity and the full range of war crimes.⁶¹ Whereas all three countries have ratified or acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations treaty bodies have raised concerns with respect to the definition of torture (or the lack thereof) in their domestic laws.⁶² Japan is the only one of these states that has ratified the International Convention for the Protection of All Persons from Enforced Disappearance, although it has not incorporated the crime of "enforced disappearance" in its domestic legislation. While common criminal law provisions such as murder, rape or kidnapping could be invoked to prosecute certain human rights violations committed in the DPRK, they may not always adequately cover the extent or specificity of the facts, in particular where these amount to crimes against humanity. The GIE therefore encourages the ROK, Japan and China to ensure that all crimes under international law are fully incorporated into their domestic laws.

42. All three legal systems allow courts to exercise criminal jurisdiction further to the principles of territoriality and active personality, meaning that crimes committed (in whole or in part) on their territories, as well as crimes committed by their nationals on the territory of the DPRK, could be prosecuted.⁶³ The Japanese authorities have thus conducted investigations into certain abductions (from Japan) of Japanese citizens by the DPRK and into other alleged disappearances in which the possibility of such abduction could not be

⁵⁹ Letter of 24 October 2016.

⁶⁰ ROK: Act on the Punishment, etc. of Crimes within the Jurisdiction of the International Criminal Court (Law No. 8719, 21 December 2007); Japan: Act on Cooperation with the International Criminal Court (Act No. 37, 11 May 2007).

⁶¹ China did ratify the Genocide Convention in 1983 and its Criminal Code includes a number of war crimes (articles 446 and 448).

⁶² CAT/C/KOR/CO/2, para 4; CCPR/C/KOR/CO/4, para 26; CAT/C/JPN/CO/2, para 7; CAT/C/CHN/CO/5, para 7.

⁶³ ROK Criminal Act, articles 2 and 3; Japan Penal Code, article 1 and 3; China Criminal Law, articles 6 and 7.

ruled out, and issued some arrest warrants.⁶⁴ Interlocutors highlighted the potential implication of the principles of territoriality and active personality in the ROK given that the ROK Constitution and laws provide that the entire Korean peninsula forms part of its territory and that all Koreans are ROK nationals. However, prosecution on this basis alone seems tenuous as the DPRK is recognized as a sovereign state under international law and a member of the United Nations, and inter-Korean political agreements state that the two countries acknowledge each other as parties aiming for peaceful unification.⁶⁵

43. All three legal systems also allow prosecution in their courts when the victim of the crime is their national (passive personality),⁶⁶ and recognize some form of universal jurisdiction. On the basis of the passive personality principle, Japan could open investigations into crimes against its nationals in the DPRK, but the GIE is unaware of any such instances. Japanese law also recognises the principle of universal jurisdiction for a limited range of crimes.⁶⁷ Through its ICC implementation law, the ROK provided for jurisdiction for Rome Statute crimes committed by a foreign national outside the ROK where the perpetrator is present in the ROK.⁶⁸ While the Chinese Criminal Code also includes a universal jurisdiction clause with respect to crimes stipulated in international treaties concluded or acceded to by China⁶⁹, crimes against humanity, enforced disappearances and torture do not currently fall into this category.⁷⁰

44. Additional challenges remain with regard to the investigation and prosecution of crimes in these jurisdictions pertaining to human rights violations in the DPRK. The first concerns the compromised access to evidence and suspects. Despite the Japanese authorities having identified a number of suspects in the abduction cases, prosecutions cannot be initiated until the suspects are apprehended or extradited, given that Japanese courts do not hold in absentia trials.⁷¹ Similar challenges arise in the ROK. For example, a petition that sought the release of relatives of the petitioners allegedly detained in the DPRK was dismissed on the grounds that the petition had to be filed in the district court of the detainee's locality, that it could not meet the legal requirements with respect to hearing the petition, and that any ruling granting the petition could not be enforced.⁷²

45. Second, challenges arise given the application of statutes of limitations for some crimes (in particular where they cannot be framed as crimes against humanity). Third, the existence of immunities and a narrower range of modes of liability in domestic law, in particular with respect to command and superior responsibility, may present challenges in

⁶⁴ <http://www.mofa.go.jp/files/000044846.pdf>. The Japanese North Korea Human Rights Act 2006 requires the authorities to 'actively seek out information from the public, as well as to conduct thorough investigations, in order to determine the fate of actual or suspected Japanese abductees' (translation at http://www.hrnk.org/uploads/pdfs/Japan_NKHRA_2005.pdf).

⁶⁵ E.g. "Agreement on Reconciliation, Non-aggression, and Exchanges and Cooperation Between South and North Korea (The Basic Agreement)", 13 December 1991.

⁶⁶ ROK Criminal Act, article 6; Japan Penal Code, article 3-2 (following a 2003 amendment); China Criminal Law, article 8.

⁶⁷ Japan Penal Code Articles 2 (insurrection, counterfeiting, etc.); 4-2 (crimes governed by a treaty).

⁶⁸ For crimes committed prior to entry into force of the law (promulgated on 21 December 2007), jurisdiction would be based on international customary law. Art. 5 of the ROK Criminal Act also lists a number of universal jurisdiction crimes.

⁶⁹ Criminal Law of China, article 9.

⁷⁰ Z. Lijiang, The Chinese universal jurisdiction clause: how far can it go?, *Netherlands International Law Review*, LII, 85-107, 2005.

⁷¹ The GIE was informed that in absentia trials may be problematic based on Article 32 of the Japanese Constitution, which guarantees the right of access of persons to courts.

⁷² Case number 2016IN3 Habeas Corpus (2016인3 인신보호), Seoul Central District Court, 24 October 2016.

bringing cases against higher-level officials. Finally, all three jurisdictions retain the death penalty, which may constitute an obstacle for any future collaboration with United Nations-assisted accountability mechanisms.⁷³

Other accountability mechanisms

46. In Japan, victims of human rights infringements and other relevant parties may file requests for relief with the Japan Federation of Bar Associations, which can issue a warning, recommendation or request to the infringing institution or organization. Such pronouncements are considered to have a strong influence and the procedure is not limited by statutes of limitations as criminal proceedings may be.⁷⁴

47. In the ROK, the National Human Rights Commission (NHRCK) established a Center for Human Rights Violations in North Korea and a North Korean Human Rights Archive to document and maintain, in a systematic way, records of human rights violations in the DPRK for use in future accountability and reparations processes and for the purpose of human rights education. While the NHRCK may receive complaints from individuals who have left the DPRK, it cannot consider these without access to the suspected perpetrator.

48. The ROK's new North Korean Human Rights Act established inter alia a Centre for Investigation and Documentation on Human Rights in North Korea, mandated to collect, research, preserve, publish, or otherwise deal with materials and information pertaining to human rights in the DPRK. These materials must be transferred to the Ministry of Justice every three months, including for possible future legal proceedings. Several civil society organizations, including in the ROK and Japan, also work with people who have left the DPRK to collect testimonies and undertake valuable research with respect to human rights violations in the country.

49. In anticipation of their use in possible future criminal proceedings or other accountability processes, the GIE encourages all organizations and institutions that gather information concerning human rights violations in the DPRK to coordinate their efforts and to ensure that sound methodologies and protocols for the collection of evidentiary materials are in place, that protection concerns of victims and witnesses are fully met, and that their consent is adequately sought and recorded.

b) In other states

50. Courts in other states may provide avenues to seek accountability for crimes under international law committed in the DPRK⁷⁵, including where the principle of universal jurisdiction is recognized. However, most states require at least the presence of a suspected perpetrator on their territory to activate an investigation or prosecution. Another possible avenue would be through strategic litigation in foreign jurisdictions⁷⁶ or in regional courts, for example in relation to human rights abuses outside the DPRK by third parties, including

⁷³ United Nations Juridical Yearbook 2007, p. 476, para. 6-7.

⁷⁴ E.g. petition by 12 individuals including against Japan and the DPRK to request an investigative committee to examine the causes of human rights violations associated with the Repatriation Programme for Korean residents in Japan that began in 1959 ("Paradise on Earth"), and make recommendations for reparations. The matter remains under consideration. <http://koreaofall.com/summary2.php?&lang=en>.

⁷⁵ E.g. cases recorded by the COI of abductions and enforced disappearances of nationals notably of Lebanon, Malaysia, Romania, Singapore, Thailand (A/HRC/28/71, para 30).

⁷⁶ E.g. under the US Alien Tort Claims Act.

business enterprises, if these are attributable to the State⁷⁷ and initiated within the country. The GIE encourages civil society and public interest lawyers to explore such possibilities, in particular where they involve violations committed in the DPRK.

C. International and internationally-assisted courts

a) International Criminal Court

51. Strong calls continue to be made for the Security Council to refer the situation in the DPRK to the ICC,⁷⁸ arguing that recourse to an existing institution provides the most expedient approach to achieve accountability for human rights violations committed in the country.

52. Even without a Security Council referral⁷⁹, or the DPRK ratifying the Rome Statute or accepting the ICC's jurisdiction, the ICC may exercise jurisdiction following referral of a State Party⁸⁰ or at the initiative of the Prosecutor,⁸¹ including on the basis of communications received from civil society. For example, the Office of the Prosecutor evaluated whether two incidents in 2010 in the Yellow Sea could amount to war crimes under the jurisdiction of the ICC. The Prosecutor concluded that the requirements to seek authorization from the Trial Chamber to initiate an investigation of the situation in the ROK had in this case not been satisfied.⁸²

53. Regardless of how the ICC acquires jurisdiction of the situation in the DPRK, practical challenges - including resource constraints and the number of cases that can be examined - will imply that many serious crimes will not be tried. Additionally, since the ICC has jurisdiction only with respect to crimes committed after the entry into force of the Rome Statute,⁸³ on 1 July 2002, it cannot address a considerable number of crimes against humanity described in the COI's report which occurred earlier. In this regard, several interlocutors raised a question as to whether the ICC could exercise jurisdiction over crimes that had commenced prior to the entry into force of the Rome Statute but were continuing (e.g. with respect to enforced disappearances, considering that the detention or abduction has not been acknowledged, or that the fate of the victim has not been clarified).⁸⁴

54. This legal question is contested but not settled.⁸⁵ With respect to the crime against humanity of enforced disappearance specifically, some refer to footnote 24 of the Elements

⁷⁷ A/HRC/17/31, Guiding Principles on Business and Human Rights.

⁷⁸ E.g. by the Working Group on Enforced or Involuntary Disappearances (WGEID): A/HRC/27/49, para. 72.

⁷⁹ For recent initiatives calling for Security Council members to voluntarily refrain from using the veto where crimes against humanity may have been committed, see: http://www.globalr2p.org/our_work/un_security_council_code_of_conduct

⁸⁰ Rome Statute, article 14.

⁸¹ Ibid, article 15.

⁸² <https://www.icc-cpi.int/iccdocs/otp/SAS-KOR-Article-5-Public-Report-ENG-05Jun2014.pdf>

⁸³ Rome Statute, article 11.

⁸⁴ E.g. WGEID General Comment on Enforced Disappearance as a Continuous Crime (A/HRC/16/48, para 39); Statement on the *ratione temporis* element in the review of reports submitted by states parties under the International Convention for the Protection of All Persons from Enforced Disappearance (A/69/56); CCPR/C/81/D/1033/2001, para. 6.3.

⁸⁵ W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2016, p. 557.

of Crime of the Rome Statute⁸⁶ to argue that the jurisdiction of the ICC is limited to cases where the initial arrest, detention or abduction occurred after the entry into force of the Rome Statute.⁸⁷ Others highlight that the language in the Elements of Crimes was a careful compromise and that proposed language to explicitly say that the arrest, detention, abduction and refusal all had to occur after the entry into force of the Rome Statute did not find general agreement.⁸⁸ The compromise text therefore states that what must occur after the entry into force is the “widespread or systematic attack on any civilian population”, i.e. the broader context of the crime against humanity. An argument could therefore be made that the ICC has jurisdiction in cases where part of the conduct occurred prior to entry into force of the Rome Statute, as long as it forms part of an “attack” on the civilian population that took place, or continued, after its entry into force.⁸⁹ The GIE encourages further examination of this question, including by the Office of the Prosecutor.⁹⁰

b) Hybrid or internationally-assisted justice mechanisms

55. The COI dismissed the option of a hybrid court (involving international and DPRK prosecutors and judges) as in its view consent from the concerned country would be unlikely, and DPRK judges would lack the impartiality and independence necessary to carry out criminal trials that would likely involve senior officials as defendants.⁹¹ The GIE has not received information indicating that this situation has changed, and deems that any hybrid tribunal involving personnel from the DPRK justice system would first require complete reform of the system.

56. The GIE notes that the DPRK and the ROK have adopted official state policies that aim for unification and that reflection is ongoing as to the implications of unification on the two justice systems.⁹² The GIE recommends that a comprehensive accountability agenda be included in those reflections and that international expertise on best practice be sought where needed, including on a possible internationally-assisted domestic court in a unification scenario.

57. Hybrid or internationally-assisted courts involving domestic justice systems other than the DPRK’s could also be considered. However, this would require addressing potential legitimacy concerns, in particular if its jurisdiction were to include crimes committed entirely in the DPRK. For example, the creation of an international hybrid court

⁸⁶ “This crime falls under the jurisdiction of the Court only if the [widespread or systematic attack directed against a civilian population, of which the conduct forms part] occurs after the entry into force of the Statute.”

⁸⁷ W. Schabas, *op. cit.*, p. 342.

⁸⁸ G. Witschel and W. Rückert, Article 7(1)(I)-Crime Against Humanity of Enforced Disappearance of Persons, in R.S. Lee (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, 2001, p. 102.

⁸⁹ A. Nissel, *Continuing Crimes in the Rome Statute*, 25 *Mich. J. Int’l L.* 653 (2004), p. 670; K. Do, Chapter 4, in <http://lib.kinu.or.kr/wonmun/007/0001477557.pdf>. Additionally, the COI noted that no such jurisdictional limits apply to the crime against humanity of imprisonment and other severe deprivations of liberty in violation of fundamental rules of international law, which are often also committed in connection with international abductions. On this basis, crimes against humanity related to international abductions could also potentially fall under the ICC’s jurisdiction (A/HRC/25/CRP.1, footnote 1673).

⁹⁰ Some interlocutors also suggested that the ROK and Japan could consider a joint referral to the ICC regarding the abductions that occurred on their territories, arguing that the crimes have continued beyond 2002.

⁹¹ A/HRC/25/CRP.1, para. 1202.

⁹² E.g. Judicial Policy Research Institute (<https://jpri.scourt.go.kr/fileDownload.do?seq=651>); Korea Institute for National Unification (<http://lib.kinu.or.kr/wonmun/007/0001477557.pdf>).

involving countries whose nationals have been victim of abductions by the DPRK may merit further reflection, in particular in the absence of a referral of the situation in the DPRK to the ICC or the creation of an ad hoc international tribunal (see below).

c) Ad hoc international tribunal

58. The COI recommended that the Security Council create an ad hoc international tribunal should the situation in the DPRK not be referred to the ICC,⁹³ with jurisdiction extending prior to July 2002 to comprehensively address crimes against humanity in the DPRK. It also highlighted the required substantial resource commitments and institutional planning.⁹⁴ The former Special Rapporteur also raised the option of an ad hoc international tribunal.⁹⁵ Given the limitations and challenges identified above in seeking accountability in domestic systems or through hybrid tribunals involving the DPRK, the GIE concurs that the creation of an ad hoc international tribunal must be examined.

59. A dedicated international tribunal for the DPRK would allow the temporal, territorial, personal and subject-matter jurisdiction to be calibrated to meet the needs and aspirations of the victims, without the jurisdictional constraints of the ICC or domestic courts. It could function as a repository of information and evidence, and serve as a catalyst for other justice initiatives at domestic level.⁹⁶ If the tribunal were to undertake real outreach⁹⁷ to communities across the DPRK, it would enable much-needed awareness-raising and education on human rights and justice issues, thereby contributing to the transformation of DPRK society into one based on the rule of law.

60. However, the establishment of an ad hoc international tribunal would face several challenges. Firstly, the concerned country may not consent to its creation, or collaborate with it. Proceeding in such circumstances is not unprecedented,⁹⁸ but the tribunal's effectiveness in collecting evidence and accessing suspects, and ultimately in bringing cases to trial, may be hampered.⁹⁹ The security of victims and witnesses, as well as meaningful outreach and domestic impact could also be affected.

61. Secondly, international tribunals are costly and lengthy endeavours. The genuine and sustained commitment of the international community from the outset would be critical, including in terms of funding. Thirdly, initiatives will be required to ensure that, given the historical and regional context, the tribunal is perceived as legitimate. This includes ensuring that sources of funding for the tribunal and the selection of judges, prosecutors and staff do not compromise its legitimacy. The same concern applies to identifying an appropriate location for the tribunal, ensuring it is as close as possible to the sources of evidence, including victims and witnesses, while taking into account security concerns.

⁹³ Alternatively by the General Assembly relying on the "Uniting for Peace" resolution [resolution 377 A(V)] and "the combined sovereign powers of all individual Member States to try perpetrators of crimes against humanity on the basis of the principle of universal jurisdiction". A/HRC/25/CRP.1, para. 1201.

⁹⁴ Ibid.

⁹⁵ A/70/362, para. 52.

⁹⁶ See experiences from the International Criminal Tribunal for the former Yugoslavia (ICTY).

⁹⁷ See experiences from the Extraordinary Chambers in the Courts of Cambodia.

⁹⁸ See establishment of the ICTY, or the Security Council referrals of Darfur and Libya to the ICC.

⁹⁹ Experience with conducting in absentia trials before international tribunals is limited and their effectiveness is debated. E.g. M. Trad, *Trials in Absentia at the Special Tribunal for Lebanon: An Effective Measure of Expediency or an Inconsistency with Fair Trial Standards*, 3 SOAS L.J. 38 2016.

D. International human rights mechanisms

62. International human rights mechanisms, including the Human Rights Council and its Special Procedure mandate holders, the Universal Periodic Review and bodies created under the international human rights treaties to monitor State parties' compliance with their treaty obligations, can contribute to accountability for human rights violations in the DPRK.

63. Forthcoming concluding observations adopted pursuant to the examination of DPRK reports to the treaty bodies mentioned above will include practical advice on steps to implement the rights contained in each particular treaty. Further, Special Procedures can intervene directly with the country on allegations of human rights violations that come within their mandates by means of letters.¹⁰⁰ The Working Group on Arbitrary Detention has adopted opinions on cases concerning the DPRK,¹⁰¹ and the WGEID has indicated that there are 110 outstanding cases transmitted to the DPRK concerning persons allegedly abducted from a number of countries including in the 1950s.¹⁰²

E. Sanction regimes

64. Sanctions regimes have been imposed on the DPRK by the Security Council in response to its nuclear and ballistic missile tests,¹⁰³ as well as unilaterally by the ROK, Japan, European Union and the United States of America (USA). Additionally, the USA has announced specific sanctions targeting individuals and entities it deems responsible for human rights violations in the DPRK.¹⁰⁴

65. The GIE recalls the COI's recommendation that the Security Council adopt targeted sanctions against those who appear to be most responsible for crimes against humanity; and that the COI did "not support sanctions imposed by the Security Council or introduced bilaterally that are targeted against the population or the economy as a whole".¹⁰⁵ Subsequently, the General Assembly encouraged the Security Council to consider the scope for effective targeted sanctions against those who appear to be most responsible for acts that the COI has said may constitute crimes against humanity.¹⁰⁶

F. OHCHR

66. OHCHR has an important role to play with regard to taking steps towards ensuring accountability for human rights violations in the DPRK, as an independent and impartial office that can collect, preserve, and analyse information, including for the international community.¹⁰⁷ It also supports international human rights mechanisms. In addition, it has

¹⁰⁰ E.g. A/HRC/32/53; A/HRC/26/21; A/HRC/22/67; A/HRC/18/51.

¹⁰¹ E.g. A/HRC/WGAD/2015/29; A/HRC/WGAD/2015/32.

¹⁰² A/HRC/33/51, page 15; A/HRC/WGEID/110/1, para. 32.

¹⁰³ Most recently S/RES/2321 (2016).

¹⁰⁴ <https://www.humanrights.gov/dyn/07/treasury-sanctions-north-korean-senior-officials-and-entities-associated-with-human-rights-abuses/>; <https://www.humanrights.gov/dyn/2017/01/release-of-the-report-on-human-rights-abuses-and-censorship-in-north-korea/>; see also the US North Korean Human Rights Act of 2004.

¹⁰⁵ A/HRC/25/CRP.1, para 1225(a).

¹⁰⁶ A/RES/69/188, para 8.

¹⁰⁷ E.g. "Torn apart - the human rights dimension of the involuntary separation of Korean families". http://ohchr.org/Documents/Publications/Report_TORN_APART.pdf. The High Commissioner also briefed the Security Council on the situation of human rights in the DPRK (see footnote 11).

established a field-based structure in Seoul pursuant to Human Rights Council resolution 25/25, to conduct monitoring and documentation of the situation of human rights in the DPRK to ensure accountability; to enhance engagement and capacity-building with the Governments of all States concerned, civil society and other stakeholders; and to maintain visibility of the situation of human rights in the DPRK.

G. Civil society and public interest group initiatives

67. Civil society and public interest groups regionally and internationally play an important role in advocating for accountability measures. They can assist victims in bringing complaints about human rights violations; convene expert meetings to inform discussions about accountability measures, including drawing on similar experiences in the region or internationally; and hold mock trials or people's tribunals to raise public awareness of the scope of allegations.¹⁰⁸ Civil society organizations also have a role in human rights education and awareness-raising on human rights, and providing psychosocial assistance. Such efforts help create conditions conducive to individuals formulating justice demands.

VI. Conclusions and recommendations: practical steps towards a comprehensive approach on accountability for human rights violations in the DPRK

68. **International norms and standards require that those responsible for human rights violations in the DPRK, in particular for crimes against humanity, be held accountable. Accountability is a legal requirement. In addition, accountability processes hold the potential to restore the position of victims in society as rights-holders, to transform society into one based on the rule of law and respect for the dignity of all, and thereby contribute to long-term peace and stability. Ensuring accountability for such crimes “is an international as much as a Korean challenge and requires the international community to play a role”.**¹⁰⁹

69. **The approach to pursuing accountability for human rights violations in the DPRK must be multi-pronged and comprehensive, and in line with international norms and standards. Investigation and prosecution of serious crimes are indispensable, as are measures to ensure the right of victims and societies to know the truth about violations, the right of victims to reparations, and guarantees of non-recurrence of violations. It will require coordinated efforts in multiple fora, including courts. All accountability measures must be based on solid documentation.**

70. **International human rights law and practice in other states indicate that reflections on accountability should start at an early stage, and that they should place victims at the centre of the design and implementation of accountability measures. It is imperative for any accountability measure to take into account the experiences and views of persons within the DPRK, those who have left the DPRK, and other victims of human rights violations committed in the DPRK. Specific attention should be paid to groups identified by the COI and others as having been particularly affected, including women.**¹¹⁰ Consultations are an effective way to allow victims and affected

¹⁰⁸ E.g. <http://www.ibanet.org/Crimes-Against-Humanity-in-North-Korean-Political-Prisons.aspx>.

¹⁰⁹ A/HRC/31/70, para 23.

¹¹⁰ E.g. A/HRC/25/63, paras 35-36.

communities to share their priorities for achieving accountability, and to ensure ownership, legitimacy and effectiveness of the mechanisms that are subsequently established.

71. The pursuit of accountability is particularly challenging in the DPRK context. The DPRK denies allegations of human rights violations and refuses to collaborate with the international community in addressing them. The lack of access to the country, restrictions on the rights to freedom of movement and expression of its people, and the security risks for those living in the DPRK, must be factored into reflections on accountability measures. The severity, duration, complexity and systemic nature of the alleged violations present unique challenges.

72. The GIE has no information indicating that viable options for accountability exist or have been used in the DPRK. A fundamental reform of its justice system would be needed, including changes to legislative and institutional frameworks and safeguards, and a vetting process of law enforcement and justice officials.

73. Hybrid models involving the DPRK or its justice personnel cannot be currently envisaged given the lack of impartiality and independence of the DPRK judiciary, and its alleged implication in the commission of human rights violations.

74. While other domestic legal systems, in particular in the Republic of Korea, Japan and China, offer some legal bases for investigations and prosecutions of crimes committed in whole or in part in the DPRK, they face legal, political and practical challenges.

75. The ICC could initiate investigations and prosecutions of some high-level perpetrators notably upon a Security Council referral. This avenue must continue to be pursued. The ICC is an existing institution created for addressing situations such as the one in the DPRK, where crimes against humanity are alleged to have occurred and where national authorities are unable and/or unwilling to respond adequately. The ICC provides an important avenue to hold accountable those most responsible for gross human rights violations that may amount to Rome Statute crimes, particularly considering its experience with evidence gathering in challenging environments and its victim and witness protection schemes.

76. The crimes described in the COI report are of a gravity rarely seen, involving systems of abuse that have been operating for decades. These crimes are of international concern and cannot go unpunished. Considering the sheer number of crimes and perpetrators, the prosecution of some high-level perpetrators at the ICC must be complemented by other criminal accountability processes.

77. The GIE believes that the unique context in the DPRK requires the international community to enhance efforts laying the ground for future criminal trials. Regardless of the challenges, the international community should also duly consider the scope for establishment of an ad hoc international tribunal for the DPRK, including as a deterrent for future crimes and a signal that victims will be heard. Preparatory and practical steps are laid out below.¹¹¹

¹¹¹ Preparatory steps can be taken prior to considering mechanisms such as the International Independent Investigation Commission to assist the Lebanese authorities in their investigations of the killing of Rafiq Hariri (S/RES/1595/2005) and the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (A/RES/71/248; A/71/755).

78. Within a comprehensive strategy to account for the past, truth-seeking processes serve an important role. While the conditions are not yet in place to consider designing a truth-seeking mechanism in the DPRK itself, including with respect to political will and the possibility for victims to participate in a secure environment,¹¹² reflection and broad consultation on such future processes must commence.

79. The GIE recalls the COI's recommendations regarding sanctions (see para 65) and equally cautions against any unilateral measure not in accordance with international law or that impedes on the full realisation of human rights in the DPRK.¹¹³

80. The GIE identified the following practical steps that can be taken immediately to contribute to a comprehensive approach towards accountability in the DPRK, in line with international standards:

(a) Adopting a human rights-based and comprehensive approach to accountability, placing the rights and needs of victims at the centre of the design and implementation of accountability processes.

(b) Raising awareness of victims and affected communities about their rights, notably the right to effective remedy for human rights violations, including through media, communications and education campaigns, enabling them to formulate demands for justice in line with international norms and standards.

(c) Undertaking coordinated and comprehensive consultations with victims and other relevant stakeholders, starting with those living outside the DPRK, to seek their views on accountability for human rights violations in the DPRK, while taking measures to ensure the security of participants and minimize the risk of re-traumatization.

(d) Placing the issue of accountability for human rights violations in the DPRK into broader regional debates on accountability and strengthening of the rule of law, including by providing regional platforms for discussion and development of expertise in addressing past violations, fostering regional awareness and cooperation, as well as opportunities for people-to-people dialogue.¹¹⁴

(e) Ensuring continued information and evidence gathering, using sound methodologies and protocols that respect international norms and standards, including with regard to victim and witness protection, consent and confidentiality.

(f) Preserving and storing information and evidence gathered, in a central and independent repository, in order to channel information to appropriate accountability mechanisms.

(g) Undertaking an assessment of available information and evidence from a criminal procedure perspective, identifying gaps and developing possible investigation and prosecution strategies and blueprints for suitable international court models.

(h) Amending relevant domestic legal frameworks, including by incorporating crimes under international law into domestic legislation and ensuring that criminal procedural and extradition laws are in line with international norms and standards; considering the possibility of universal jurisdiction for such crimes;

¹¹² OHCHR Rule of Law Tool for Post-Conflict States on Truth Commissions.

¹¹³ See also A/CONF.157/23, para 31; A/HRC/19/33, para. 41.

¹¹⁴ A/HRC/25/CPR.1, para. 1223.

building the capacity of legal professionals in the investigation, prosecution and adjudication of crimes under international law; and considering abolishing the death penalty.

(i) Creating a fund to support future accountability mechanisms, including enabling victims to participate in accountability processes by addressing their safety and wellbeing concerns.

81. The GIE makes the following specific recommendations:

To the DPRK

82. Continue to engage with international human rights treaty bodies and cooperate with United Nations human rights mechanisms, including the mandate of the Special Rapporteur, notably by granting them access to the country.

83. Implement the recommendations made by UN human rights mechanisms notably the COI and the Special Rapporteur, including taking immediate and effective steps to end gross human rights violations and ensuring that allegations of human rights violations are addressed in line with international norms and standards.

84. Reform its criminal justice legislation and rule of law institutions, including its judiciary and law enforcement and corrections systems, in line with international human rights norms and standards and in furtherance of its commitments during the second cycle of the Universal Periodic Review to fight impunity for human rights violations.

85. Seek technical assistance from the United Nations and other international partners where needed to ensure that human rights are protected, including pursuant to the strategic framework for cooperation between the UN and the government of the DPRK (2017-2021).

86. Create an enabling environment for national dialogue to promote human rights awareness among the DPRK population, including by ensuring the rights to liberty of movement, peaceful assembly, freedom of association and expression, including through access to information.

To all stakeholders

87. Ensure implementation of previous recommendations on accountability for human rights violations in the DPRK made by the COI and international human rights mechanisms, including Special Procedure mandate holders; notably that accountability for crimes against humanity must be part of any discussion about the future of the Korean peninsula.

88. Specifically, adopt a human rights-based and comprehensive approach to accountability and firmly integrate human rights and accountability into any political process for the Korean peninsula, acknowledging that peace and justice are mutually reinforcing imperatives.

To Member States

89. Bearing in mind the ‘responsibility to protect’, take further steps towards achieving accountability for those responsible for human rights violations in the DPRK, including through referral by the Security Council of the situation to the International Criminal Court, and consideration of the establishment of an ad hoc international tribunal.

90. Enact legislation with extraterritorial effect for gross violations of human rights and, for those states which recognize the principle of universal jurisdiction, consider how they may contribute to securing accountability for human rights violations in the DPRK.

91. Support awareness-raising, documentation and other initiatives undertaken by civil society organizations and others that contribute to accountability for human rights violations in the DPRK.

92. Ensure the methodology used to document and collect information and evidence on human rights violations in the DPRK meets international norms and standards including with regard to criminal procedure and issues of consent, confidentiality and victim and witness protection.

To the United Nations

93. Address the serious human rights situation in the DPRK in a coordinated and unified manner, in line with the Secretary-General's Human Rights Up Front strategy, including by promoting the important role of accountability in achieving peace and security.

To the Human Rights Council and the General Assembly

94. Sustain their engagement and monitoring of developments in DPRK with a view to keeping the issue of accountability for human rights violations in the DPRK on the agenda, and take further actions towards accountability at the international level.

To the Human Rights Council

95. Strengthen OHCHR through additional resources, including its field-based structure in Seoul, to increase its contribution towards accountability for human rights violations in the DPRK, including by concurrently

(a) Undertaking and supporting sensitisation of victims and groups representing victims on international norms and standards pertaining to accountability for human rights violations.

(b) Organizing, in collaboration with relevant stakeholders, coordinated consultations of victims and affected communities, in the first instance in China, Japan and the Republic of Korea, and other countries outside the DPRK in which they reside, to seek their views on avenues for accountability.

(c) Strengthening current monitoring and documentation efforts, in line with international norms and standards including on consent, and its capacity to (i) receive, preserve and consolidate information and evidence pertaining to the human rights situation in the DPRK, through a central and independent repository, for use in any future accountability mechanism; and (ii) channel relevant information to UN human rights mechanisms.

(d) Supporting an assessment by international criminal justice experts of available information and evidence including on the crime-base, command structures and linkages, to identify gaps and develop possible investigation and prosecution strategies as well as blueprints of suitable international or internationally-assisted court models.

To the Special Rapporteur –DPRK

96. Integrate the findings of this report into his efforts regarding human rights protection in the DPRK.

97. Cooperate with other mandate holders to ensure that accountability processes duly reflect the needs of groups at risk of marginalisation, including persons in detention, victims of enforced disappearances and their families, and victims of gender-based violence.

To civil society organizations

98. Continue raising awareness, specifically through regional initiatives and professional networks, reporting on human rights violations committed in the DPRK, and supporting victims in formulating justice demands before relevant mechanisms.

99. Consider innovative initiatives by regional networks, such as mock trials and tribunals led by civil society on specific issues or groups of victims, including women or disappeared persons, to enable discussions on reported violations in the DPRK and means of seeking accountability.
