



**T R A N S I T I O N A L  
J U S T I C E  
W O R K I N G G R O U P**

**Submission prepared for the UN Special Rapporteur on the situation of  
human rights in the Democratic People's Republic of Korea (DPRK) and the  
UN Group of independent experts on accountability for human rights  
violations in the DPRK**

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**Transitional Justice Working Group (TJWG)**  
**전환기 정의 워킹그룹**  
Office #302, Koryo Building,  
91 Saemunan-ro, Jongno-gu,  
Seoul, 03182,  
Republic of Korea  
[www.tjwg.org](http://www.tjwg.org) / [info@tjwg.org](mailto:info@tjwg.org)

## Authors

**Dr. Sarah A. Son** is Research Director at the Transitional Justice Working Group (TJWG) in Seoul, and is also a Postdoctoral Research Associate at the School of Oriental and African Studies (SOAS) at the University of London. She earned her Ph.D. in international studies and politics with a focus on the Korean peninsula at SOAS, as well as her M.A. in international studies and diplomacy. Her research interests and recent publications include coverage of inter-Korean relations, human rights, North Korean refugees, nationalism, identity, reconciliation and transitional justice in the East Asian context.

**Ethan Hee-seok Shin** is a Research Fellow at the TJWG, and is also a Ph.D. candidate in international law at Yonsei University Graduate School with an LL.M. degree at Harvard and a B.A. in economics at Yonsei University. His research interests and recent publications include the history of international criminal law and tribunals, World War II-era reparation movement and the development of human rights consciousness and institutions on the regional and domestic levels in East Asia.

## Contributors

**Sehyek Oh** is a North Korean defector and researcher at the TJWG. Prior to joining TJWG, Oh was a research team officer at Citizens' Alliance for North Korean Human Rights (2012-2013) and a news reporter at Daily NK (2013-2014). He left North Korea in 1999, and settled in South Korea in 2002. He holds master's degrees in sociology from Korea University, and in globalization and development from the University of Sheffield, U.K., earned while on a Chevening scholarship from the Foreign and Commonwealth Office of the U.K. He received his B.A. in Chinese Language from Hankuk University of Foreign Studies.

**Kyung-mo Kang** is Research Fellow at the TJWG and an attorney of District of Columbia in the U.S. He authored a book titled "A Study of Extraordinary Chambers in the Courts of Cambodia: Transitional Justice in Cambodia and Unification of the Korean Peninsula." His research and practice interest covers international criminal and humanitarian law, refugee law, and international dispute settlement procedures, including arbitration and litigation.

## **Overview**

This submission comprises five sections:

1. An introduction to TJWG and its major projects;
2. Recent observations regarding the political landscape of the Korean Peninsula as it pertains to the mandate of the Special Rapporteur and the Group of Independent Experts;
3. Analysis of relevant norms of international law and the domestic laws of the ROK (South Korea) and DPRK (North Korea) as well as Japan including key recommendations;
4. TJWG's survey of North Korean defectors on transitional justice - preliminary findings; and
5. Summary of recommendations and key questions for the Special Rapporteur and the Group of Independent Experts.

### **1. About the Transitional Justice Working Group (TJWG)**

Transitional Justice Working Group (TJWG) was founded in 2014 to collect, document and visualize evidence of crimes against humanity in the DPRK to support the ongoing effort to hold perpetrators accountable, and to bring victims' needs and rights to mainstream awareness.

#### *1.1 Digital Map of Crimes Against Humanity*

TJWG's primary project is the development of a digital mapping system to catalogue and visualize the ongoing crimes against humanity in North Korea by collecting and recording information on the location of crime scenes, clandestine burial sites, and possible repositories of documentary evidence using satellite imagery and in-depth interviews with defectors in a secure manner. TJWG's core goal is to increase the volume and type of evidence available for international advocacy for use in a future transitional justice process. The capacity of TJWG's mapping project will be further developed to perform geo-spatial analysis, and to visualize the data, which can be customized for public dissemination, or shared with UN organisations and special procedures.

The creation of multifunctional digital maps in view of future exhumation operations itself sends a strong signal to past and current human rights abusers in the country. This preparatory work is crucial in securing forensic evidence for speedy investigations and trials on serious human rights violations, and will assist the recovery of survivors and families who have lost loved ones. In addition, this project will be a foundation for developing reparation and memorialisation measures.

#### *1.2 Conducting Surveys*

In addition to the mapping project, at present we are engaged in surveying North Korean defectors in South Korea on a range of issues regarding the design and application of a transitional justice process that may include the pursuit of criminal accountability, truth and reconciliation commissions, reparations and other measures to both address victimhood, and facilitate personal and collective recovery from decades of abuses. The preliminary findings of these surveys are presented below in section 4.

#### *1.3 Raising Awareness of Transitional Justice from Victims' Perspectives*

TJWG's two years' of activities have included a number of seminars and conferences with international participants aimed at introducing transitional justice frameworks from other countries' experiences into the discourses on North Korean human rights and the potential for transition there.

We are now undertaking a project involving the production of short animated videos which explain, in the North Korean dialect, some of the key principles and possibilities of transitional justice, via the use of examples from other countries which have undergone political transitions and where leaders have faced accountability processes.

#### *1.4 Capacity Building for Korean Civil Society*

TJWG is currently applying for funding to run a major international conference and technical workshop in Seoul in July 2017 to advance methods of research and documentation regarding human rights abuses in the DPRK. The conference will bring together expertise in advances in law, forensic science, digital security, database creation, statistical analysis and satellite imaging with practical application to situations of mass atrocities, to provide training and address local needs in these fields. Longer term, the project will establish an Asia-based platform for forming an international coalition for documentation and advocacy in support of transitional justice practices worldwide.

## **2. Recent observations and current discourse on DPRK accountability**

### *2.1 Current discourses:*

The current discourses on accountability for serious human rights violations in the DPRK include a range of issues with varying interpretations of the width of accountability. Considerations also differ depending on the eventual context of transitional justice, whether before or after a regime change in the DPRK and, in the latter case, in the form of an inter-Korean unification scenario or the continuance of the current two-state system. Experts and informed observers have highlighted the following points, which we agree are key considerations:

1. The importance of engaging in work which creates “accountability anxiety” among the DPRK leadership;
2. The need to engage in preparatory work on human rights documentation which addresses the most current legal, technical and investigatory advances in the work of the International Criminal Court (as a standard-setting body), and ensure that non-governmental organisations are trained and equipped to gather, store and supply evidence that is accurate and admissible in whatever legal proceedings may eventuate;
3. The need to examine closely international law and domestic laws of the relevant states as they may pertain to the pursuit of accountability for perpetrators of human rights abuses in the DPRK, and consider all available procedural options under a range of potential geopolitical scenarios: inter-Korean unification, peaceful transition in North Korea, an inter-Korean peace agreement (two-state scenario), and unstable/violent transition in North Korea;
4. The need to ensure that multilateral and unilateral sanctions on North Korea are applied and enforced in a coordinated and sustained manner and that their impact is felt at the top levels of the regime, without causing undue harm to the general population;
5. The need to protect North Korean defectors in China and Southeast Asia from being returned to North Korea to face harsh penalties (*non-refoulement*).

**The work of TJWG focuses primarily on the first three areas, as laid out in the organisational description above.**

### *2.2 Current perspectives in South Korea*

As was discussed during the visit of the Group of Independent Experts, South Korean politics is highly polarized as a result of the 1945 partition of the Korean peninsula into the US and Soviet occupation zones, the Korean War (1950-1953) that killed 2 million people, and a succession of right-wing autocrats with poor human-rights records until the 1990s. Most civil society organisations prioritize peace along the world’s most heavily militarized frontier and look to the examples of post-1980s China and Vietnam, and now Myanmar and Cuba. Many also fear

jeopardizing humanitarian assistance. Some conservative groups have been vocal about human rights and democratization in the DPRK over the past decade. However, the government's past Red Scare tactics and the recent payment of North Korean defectors for their participation in pro-government rallies have not helped advocacy in this direction.

There are some pragmatic, centrist advocacies, but it is no easy task for them to find a footing in the polarized politics of South Korea. Nevertheless, South Korean CSOs with the requisite commitment and expertise may help bridge the gap between theory and practice, law and politics to prepare for and realize a measure of transitional justice in the DPRK if and when the opportunities present themselves.

### *2.2.1 Referral of the situation in the DPRK to the ICC*

The UN COI's recommendation for the referral of the situation in the DPRK to the ICC was welcomed by North Korea-focused human rights groups in South Korea. However, we are fully aware of the numerous obstacles, including the lack of temporal jurisdiction for crimes committed prior to the establishment of the International Criminal Court (ICC) in 2002 under Article 11(1) of the Rome Statute as well as North Korea's hostility to the ICC, and China and Russia's objections to the ICC referral by the UN Security Council. Although the Prosecutor can initiate investigations only for "crimes within the jurisdiction of the Court" under Article 15(1), the ICC may exercise jurisdiction over the crimes committed by nationals of States Parties to the Rome Statute such as South Korea and Japan but not China, perhaps the DPRK's reluctant, last remaining ally.

**It would, however, be possible to prepare for possible future cases at the ICC.** Long-term political changes in the DPRK may lead it to accede to the Rome Statute with a declaration accepting jurisdiction for cases reaching back to July 1, 2002 per Articles 11(2) and 12(3) of the Rome Statute. In the case of the reunification of the two Koreas, the successor state may issue a declaration to the same effect. If so, it would be possible for the Prosecutor to initiate investigations *proprio motu* or for the successor state to refer the situation to the ICC.

### *2.2.2 An ad hoc tribunal*

The COI also mentioned the possibility of an *ad hoc* tribunal. However, the current DPRK regime is no more likely to consent to investigating and prosecuting its own leaders and their executioners for the numerous atrocities they committed. Therefore, this option also must be preceded by fundamental political change within the DPRK to become viable.

Thus far, when thinking about transitional justice for regime crimes in the DPRK, **South Korean civic groups and academic advisors to the government have shown a growing preference for an *ad hoc* tribunal**, over the ICC proceedings in The Hague which is geographically far removed from the scene of crimes as well as the domicile of the perpetrators, victims and the interested population. The logistics and resource requirements for the recruitment of Korean-speaking personnel and the transportation of the witnesses and documents to a court located on the other far end of the Eurasian landmass would be inefficient and detrimental to the investigation and trials. The vast majority of the victims and concerned individuals in the Korean Peninsula would have difficulty following the proceedings even via TV or webcast given the 8-hour time difference. The same may be said of Japan which would have particular interests because of the abduction of its citizens by the DPRK in the past. Moreover, South Korea's judicial institutions and legal expertise may provide helpful infrastructure for the investigation and trial of the atrocities in the DPRK.

**One option may be a hybrid tribunal** akin to the Special Court for Sierra Leone (SCSL) or the Extraordinary Chambers in the Courts of Cambodia (ECCC), which would ideally be situated in Pyongyang. The Cambodian case may be pertinent to the DPRK given the similar pattern of murder, extermination, enslavement, torture, deportation, imprisonment, rape, persecutions and enforced disappearance committed as state policy by a totalitarian regime in the context of a communist-influenced, post-colonial national liberation movement radicalized by devastating war into xenophobic paranoia. The ECCC as an institution also suggests a way to by-pass the UN Security Council, where China may wield its veto, and rely upon the authority of the UN General Assembly which may enjoy greater international legitimacy.

### *2.2.3 Domestic transitional justice process*

The COI also alluded to the urgent need for a “**Korean-led transitional justice process**” parallel to the international judicial procedures including “extensive, nationally owned truth seeking and vetting measures to expose and disempower perpetrators at the mid- and lower-levels ... coupled with comprehensive human rights education campaigns to change the mind-sets of an entire generation of ordinary citizens who have been kept in the dark about what human rights they are entitled to enjoy and in how many ways their own state has violated them”. A special national prosecutor “relying on international assistance to the extent necessary” should also investigate and prosecute crimes against humanity.

Even prior to the transition, **domestic courts may on occasion prosecute and try individual perpetrators** who happen to be in their custody by the exercise of universal jurisdiction other legal basis. For example, the South Korean courts have convicted and sentenced ethnic Korean Chinese for collaborating in the abduction of ROK nationals in China to the DPRK upon arresting them as undocumented workers in South Korea. Similarly, the pre-unification West German courts punished East German defectors who were responsible for the shooting of border crossers before their own successful flight. It may also be noted that Japan has been conducting the criminal investigation of the abductions of its nationals to the DPRK and may also proceed to try and convict in its courts those responsible for the abductions.

## **3. Legal Considerations**

### *3.1.1. North Korean Law*

The text of the DPRK penal code (last amended by Presidium of the Supreme People’s Assembly decree no. 2387 on May 14, 2012) is provided by the ROK Ministry of Government Legislation,<sup>1</sup> but it contains no provisions regarding genocide, crimes against humanity or war crimes. Although not all North Korean laws are accessible to the outside world or even to many of its citizens, it seems unlikely that they contain any provisions on crimes under the jurisdiction of the International Criminal Court. However, as will be seen below, **the DPRK is a State Party to a number of international treaties that may be of importance in the future transitional justice process notwithstanding the uncertainty of the status of such treaties in North Korea’s domestic legal order given the silence of the DPRK Constitution on the matter.**<sup>2</sup>

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<sup>1</sup> As provided by the ROK Ministry of Government Legislation  
<http://world.moleg.go.kr/KP/law/21240?astSeq=585> (Korean only)

<sup>2</sup> <https://nkleadershipwatch.wordpress.com/2016/09/04/dprk-constitution-text-released-following-2016-amdendments/> (English)

### 3.1.2. South Korean Law

For outside observers relatively new to inter-Korean politics, the salience of unification as the national imperative in both Koreas is often difficult to understand at first. However, it must be noted that to date virtually all South Korean policy discourse on North Korea, including planning for transitional justice, implicitly or explicitly assumes that inter-Korean unification is the *sine qua non* for the realization of transitional justice. The legal corollary to this assumption is that the South Korean Constitution would be the governing law for the future unified state. In fact, the Constitution sustains the legal fiction that the ROK territory encompasses the entirety of the Korean Peninsula (Article 3) notwithstanding the evident failure to exercise its authority over the northern half for the past seven decades. The case-law of the Supreme Court and Constitutional Court leaves little room for debate on this matter. One of the legal consequences is that the DPRK nationals who manage to settle in South Korea “recover” their ROK citizenship with all the attendant rights instead of being treated as refugees or asylum-seekers.

The South Korean Constitution vests judicial power in courts composed of judges whose qualifications are stipulated in law (Article 101). It does not provide for special courts other than courts-martial for the military personnel although their decisions can be appealed to the Supreme Court which is the highest court of the land (Articles 101 and 110). The creation of extraordinary mixed courts with non-South Korean judges whose rulings are not subject to review by the Supreme Court may conflict with these constitutional provisions as they stand.

No provision of the Constitution explicitly bans the extradition of South Korean nationals to foreign jurisdictions and in fact South Korean courts regularly approve such extradition requests upon review under the Extradition Act (Act No. 4015 of August 5, 1988, last revised by Act No. 13722 of January 6, 2016. “범죄인 인도법”)<sup>3</sup>. The Extradition Act provides that “[i]f an extradition treaty contains provisions contrary to the provisions in this Act, the extradition treaty shall prevail” (Article 3-2), but the Extradition Act refers only to an extradition treaty with a foreign state (Article 2(1)). To date, there have been no cases of extradition to any international criminal jurisdiction let alone a mixed one created to cover crimes against humanity that took place in the Korean Peninsula. **Nevertheless, this constitutional minefield may be avoided by emphasizing the international nature of the hybrid procedure and presenting the surrender of the culprits to such procedure as a relatively uncontroversial matter of extradition to a foreign jurisdiction rather than trial under a special procedure within the South Korean judiciary. TJWG also asks the Special Rapporteur and the Group of Independent Experts to recommend the ROK officials to amend the Extradition Act to explicitly permit an extradition treaty with an international body.**

The principle of legality enshrined in Article 13(1) of the Constitution may present obstacles in the prosecution of the DPRK leaders in the case of reunification if “the law in force at the time” refers only to domestic penal provisions as the term is commonly understood in South Korea. The ROK promulgated the Act on Punishment, etc. of Crimes under Jurisdiction of the International Criminal Court (Act No. 8719 of December 21, 2007, last revised by Act No. 10577 of April 12, 2011. “국제형사재판소 관할 범죄의 처벌 등에 관한 법률”)<sup>4</sup> in 2007 to criminalize genocide, crimes

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<sup>3</sup> <http://www.law.go.kr/lsInfoP.do?lsiSeq=179035> (Korean)

<http://www.law.go.kr/lsInfoP.do?lsiSeq=103951&chrClsCd=010203&urlMode=engLsInfoR&viewCls=engLsInfoR> (English)

<sup>4</sup> <http://www.law.go.kr/lsInfoP.do?lsiSeq=112303> (Korean)

against humanity and war crimes as implementing legislation of the Rome Statute, but it is without retroactive effect. **One possibility may be for the ROK to incorporate in its Constitution the principle of legality as stated in Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR) which it acceded to in 1990.** Article 15(1) prohibits conviction for act or omission not constituting a criminal offence “under national or international law”.

While it would be plausible for the South Korean courts to read Article 13(1) of the Constitution in conjunction with Article 15(1) of the ICCPR, South Korean jurists in general have relatively limited exposure to international law and as a rule are reluctant to apply human-rights treaties or customary law, which formally should have the same legal effect as domestic law under Article 6(1) of the Constitution. Notably, the South Korean courts failed to consider the non-applicability of the statute of limitations for grave human-rights violations during the trial of former leaders of the military junta in the 1990s for the massacre of citizens in Gwangju in May 1980. The Supreme Court has also refused to give direct effect to the provisions of the ICCPR in its case-law while the Constitutional Court prefers to rely on the bill of rights contained in the Constitution with marginal reference to international human-rights treaties.

**Therefore, the surest course of action would be revising Article 13(1) of the Constitution to explicitly include the violation of international law as well as domestic law at the time of specific acts or omissions as the legal grounds for the criminal conviction.** Examples include Article 31 of the Croatian Constitution, Article 42(1) of the Polish Constitution, Article 20 of the Rwandan Constitution, Article 35(3)(1) of the South African Constitution and Article 13(6) of the Sri Lankan Constitution.<sup>5</sup> **Alternatively, it could be possible to specify that prosecution for certain international crimes such as genocide, crimes against humanity and war crimes do not violate the principle of legality or is an exception to it** as in Article 29(1) of the Albanian Constitution, Article 47(3) of the Bangladesh Constitution, Article 33(1) of the Kosovar Constitution and Article 19(4) of the Seychelles Constitution. Given the importance of the principle of legality as a human right and fundamental principle of criminal justice, the former option which is in line with Article 15(1) of the ICCPR as well as Article 11(2) of the 1948 Universal Declaration of Human Rights (UDHR) may be preferable.

**While a stand-alone amendment of Article 13(1) of the ROK Constitution is perhaps not politically feasible, its inclusion in the broader package of constitutional reform may not be beyond reach.** The Constitution was last revised in 1987 mainly to restore the direct popular election of the president following a nationwide protest against the military government. At the same time the bill of rights was also substantially strengthened along with the creation of the Constitutional Court as its guardian. The move to revise the current Constitution has been gaining momentum especially in light of the recent political scandal that has been blamed widely on the excessive concentration of power in the president without appropriate checks and balances. As the amendment of Article 13(1) may become too politically sensitive by the time of transition in the DPRK, TJWG considers it desirable to realize it at an earlier date. **Therefore, we ask the Special Rapporteur and the Group of Independent Experts to bring this matter to the attention of the South Korean government, parliamentarians and civil society. It is also urged that the**

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<http://www.law.go.kr/lsInfoP.do?lsiSeq=112303&chrClsCd=010203&urlMode=engLsInfoR&viewCls=engLsInfoR> (English)

<sup>5</sup> See Appendix C (Constitutional and Other National Provisions Implementing the Principle of Legality Today) in Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge, UK; New York: Cambridge University Press, 2009) pp.438-539.



**Supreme Court and the Constitutional Court be encouraged to interpret the principle of legality in Article 13(1) of the Constitution to encompass international law in force at the time.**

*3.1.3. Japanese Law*

Although Japan acceded to the Rome Statute in 2007, its implementing legislation, Act on Cooperation with the International Criminal Court (Act No. 37 of May 11, 2007, last amended by Act No. 54 of June 3, 2016. “国際刑事裁判所に対する協力等に関する法律”)<sup>6</sup>, does not criminalize genocide, crimes against humanity and war crimes as such under the domestic law, but merely provides for cooperation with the ICC. This arrangement has potential to create obstacles in the future transitional justice process for the atrocities in the DPRK. While the fugitive suspects apprehended in Japan may be indicted for ordinary crimes such as murder under the Japanese penal code, the statute of limitations, personal jurisdiction or other legal technicalities may hinder domestic prosecution. Of particular concern would be the crimes against humanity perpetrated against over 93,000 ethnic Koreans in Japan “repatriated” to North Korea in 1959-1984 in the aftermath of their unilateral denationalization following the entry into force of the San Francisco Peace Treaty in 1952.<sup>7</sup> They and their Japanese spouses may not be of high priority for either North or South Korea and Japan may fail to take the initiative in redressing their plight and injustice.

This would be problematic to say the least in view of the principle of complementarity. It would also be difficult for the Japanese authorities to cooperate with extradition requests for genocide, crimes against humanity or war crimes from a domestic court or a future *ad hoc* international court other than the ICC as these are not stipulated as crimes under Japanese law and may be considered non-extraditable “political offence”. **It would be helpful, in TJWG’s view, for the Special Rapporteur and the Group of Independent Experts to suggest that Japan criminalize genocide, crimes against humanity and war crimes under its domestic law to adequately discharge its obligations as a State Party to the Rome Statute.**

Article 2(9) of Act of Extraditions (Act No. 68 of July 21, 1953, last amended by Act No. 37 of May 11, 2007. “逃亡犯罪人引渡法”)<sup>8</sup> stipulates that no Japanese national may be extradited unless “extradition treaty provides otherwise”. Japan concluded extradition treaties with only the USA in 1980 and South Korea in 2002 (Treaty on Extradition between the Republic of Korea and Japan<sup>9</sup>). Article 1(1) of the Act defines an extradition treaty as a treaty concluded with “a foreign state”. Various difficulties may arise in the future extradition requests for Japanese and foreign nationals wanted for complicity in genocide, crimes against humanity or war crimes in other domestic jurisdictions or future hybrid courts. **Therefore, TJWG recommends that the Special Rapporteur and the Group of Independent Experts urge Japan to close the loopholes in its extradition regime to remove any potential obstacles for the North Korean transitional justice process.**

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<sup>6</sup> <http://www.japaneselawtranslation.go.jp/law/detail/?id=2269> (Japanese/English)

<http://law.e-gov.go.jp/htmldata/H19/H19HO037.html> (Japanese)

<sup>7</sup> See Tessa Morris-Suzuki, *Exodus to North Korea : shadows from Japan's cold war* (Lanham, Md.: Rowman & Littlefield Publishers, Inc., 2007)

<sup>8</sup> [http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=&vm=&id=1879](http://www.japaneselawtranslation.go.jp/law/detail_main?re=&vm=&id=1879) (Japanese/English)

<http://law.e-gov.go.jp/htmldata/S28/S28HO068.html> (Japanese)

<sup>9</sup> <http://www.oecd.org/site/adboecdanti-corruptioninitiative/39798181.pdf>

### 3.2 Universal Jurisdiction

As the UN Human Rights Council's recent resolution alluded to the DPRK "leadership", not just the supreme leader, the ICC or an international *ad hoc* tribunal **should exercise its universal jurisdiction to allow for the widest possible range of opportunities** to take custody of North Korean suspects, where the jurisdiction exists. Other countries should also explore the option of trying them in their domestic courts or extraditing them to a national jurisdiction which is willing to try them.

While South Korea provides for *de facto* universal jurisdiction for genocide, crimes against humanity and war crimes under Article 3 of the Act on Punishment, etc. of Crimes under Jurisdiction of the International Criminal Court, North Korea and China are not even State Parties to the Rome Statute.

### 3.3 International Legal Obligations

#### 3.3.1. International Covenant on Civil and Political Rights (ICCPR)

As discussed above, South Korea acceded in 1990 to the ICCPR which stipulates that the principle of legality does not preclude conviction for "a criminal offence, under national or international law" in Article 15(1). North Korea too had acceded to the ICCPR in 1981 without reservation and it implicitly retracted its unprecedented notification of withdrawal from the ICCPR on 25 August 1997 by submitting a periodic report to the Human Rights Committee. **Therefore, it may be argued that the principle of legality should be no barrier in the prosecution of DPRK officials for their recent international crimes including crimes against humanity.**

#### 3.3.2. International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED)

South Korea is not a State Party to the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED). The ICPPED not only obliges the State Parties to investigate and criminalize enforced disappearance (Articles 3 and 4) but stipulates that "widespread or systematic practice of enforced disappearance constitutes a crime against humanity" attracting "the consequences provided for under such applicable international law" (Article 5) and provides for command responsibility and rejects the doctrine of superior order (Article 6). As the DPRK's abductions of foreign nationals are textbook cases of enforced or involuntary disappearances, **the ROK's accession to the ICPPED will increase pressure on the DPRK to resolve the issue and put the future prosecution of these crimes on a firmer international legal footing.** In fact, Japan, whose nationals have been abducted by the DPRK in the past, ratified the ICPPED in 2009 with the DPRK cases in mind. **TJWG asks the Special Rapporteur and the Group of independent experts to encourage the ROK to follow suit as well.**

#### 3.3.3. Convention on the Prevention and Punishment of the Crime of Genocide

North and South Korea, as well as China, are States Parties to the Convention on the Prevention and Punishment of the Crime of Genocide. The State Parties undertake to prevent and punish genocide "whether committed in time of peace or in time of war" (Article 1) and those responsible are to be tried in the domestic court "in the territory of which the act was committed" or competent international court (Article 6). Oddly enough, Japan is not a State Party to the Convention. It is debatable whether the atrocities in the DPRK qualify as genocide, but **certain allegations like the annihilation of the Christians and the forced abortion and infanticide of children borne of**

**North Korean women repatriated from China on the basis of non-Korean ethnicity of their Chinese fathers, deserve serious consideration. Given the possibility of certain perpetrators escaping to Japan and mindful especially of the legal complications that may arise with the extradition request for possible genocide charges similar to the Pinochet case, it would be highly desirable for Japan to accede to the Genocide Convention.**

#### *3.3.4. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*

It is worth noting that the DPRK in 1984 acceded to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. In the 1990s, the Hungarian Constitutional Court initially rejected the extension of the statute of limitations for the communist-era crimes by legislation as a violation of the principle of legality but subsequently upheld a similar law based on this Convention, which Hungary had ratified in 1969. The Convention bolsters the legal principle, which is made binding upon the DPRK, that the statute of limitations is not applicable for crimes against humanity although, as the term was used in the Nuremberg Principles (Article 1), without taking into account the developments over the past few decades. This is especially pertinent as North Korea's penal code does not stipulate crimes against humanity or other international crimes. **The ROK is not a State Party to the Convention , but TJWG believes that the Convention could be an important legal instrument in the future transitional justice process. We ask the Special Rapporteur and the Group of Independent Experts to suggest accession to the South Korean government.**

#### *3.3.5. 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*

The UN General Assembly in its unanimous resolution 60/147 of 16 December 2005 adopted 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. As the resolution was adopted without a vote, it may be said that the Basic Principles support the existence of customary rules binding upon the DPRK as well as the ROK, China and Japan. **States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the “gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law” and, if found guilty, the duty to punish her or him (principle 4).**

#### *3.3.6. ILO Convention Concerning Forced or Compulsory Labour, 1930 (No.29) and Convention concerning the Abolition of Forced Labour, 1957 (No. 105)*

It should also be noted that in the context of mass-scale forced labour which is prevalent in North Korean *gwanliso* (political prison camps), akin to the Soviet gulags, the DPRK, the self-proclaimed “workers’ paradise”, is in fact not a member State of the International Labour Organization (ILO). While not directly related to international criminal responsibility, the ILO’s Convention Concerning Forced or Compulsory Labour, 1930 (No.29) and Convention concerning the Abolition of Forced Labour, 1957 (No. 105), two of the eight ILO fundamental conventions, provide objective international criteria on the legality of certain forms of labour. South Korea and China are both ILO member States, but they are one of less than a dozen member States yet to have acceded to the two treaties; Japan likewise has not acceded to the latter Convention. **Therefore, in TJWG’s opinion, the Special Rapporteur recommending the DPRK to join the ILO and urging the two Koreas,**

**China and Japan to become parties to the two ILO Conventions would fortify the legal foundation for future transitional justice regarding *gwanliso*.**

### *3.4 Complementarity*

The politically charged trial of ex-leaders of the DPRK for crimes against humanity by ROK authorities in the case of the unification of the two Koreas may test the competence, independence and impartiality of South Korea's criminal justice system to its limits. **International assistance either in the form of technical support or of an *ad hoc* mixed tribunal of South Korean and international investigators, prosecutors and judges would complement potential shortcomings and raise the quality of transitional justice for mass atrocities in the DPRK.**

#### *3.4.1. Legal/Technical Aspect*

While few can doubt the expertise of the South Korean jurists in domestic law, relative judicial isolationism pervades South Korea's legal landscape. The ROK government, inaugurated in 1948 in the midst of violent ideological struggle that would culminate in the Korean War, had no chance to investigate or try Japanese war criminals as in China or the Philippines. During the trial of the former military junta including two ex-presidents in the mid-1990s, both the prosecutors and judges based their arguments strictly on domestic legal grounds and failed to cite international legal norms such as crimes against humanity, non-application of the statute of limitations and command responsibility. The Supreme Court has refused to give direct effect to the provisions of the ICCPR and there has been no investigation or prosecution under the 2007 Act on Punishment, etc. of Crimes under Jurisdiction of the International Criminal Court to date. The five Somali pirates tried by South Korean courts in 2011 were convicted under domestic penal provisions while the UN Convention on the Law of the Sea was briefly mentioned in relation to jurisdiction.

Although the South Korean criminal justice system administered by career judges and prosecutors is relatively efficient and immune from the vagaries of public opinion, the scale of mass atrocities may also present a daunting challenge. Few perpetrators of the massacres committed by both sides during the Korean War period that left at least 120,000 dead ever stood trial while the prosecution of the military junta for the 1980 Gwangju massacre of around 160 civilians left many questions unanswered. The investigation and prosecution of the crimes against humanity in the DPRK that meets the international standards would be an unprecedented endeavor for the ROK police, prosecutors and judges. **Hence, the legal and technical expertise of the international community should provide welcome input in the case of ROK-led transitional justice. The hybrid court with its international elements in particular, would complement South Korea's dearth of experience or expertise in the prosecution of international crimes.**

South Korean jurists and experts have served or are serving in the ICTY, the ICTR, the ICC and the ECCC. As discussed above, the ECCC may be of particular importance and lesson for the future transitional justice process for the atrocities in the DPRK. **The South Korean government may further the preparation by closely monitoring the proceedings of various international criminal courts and providing Korean translations of the key documents and decisions to the public as well as maintaining liaison with the ECCC.**

#### *3.4.2. Political Aspect*

While the key judicial institutions in South Korea may possess legal or technical competence and, if not, attain it through international cooperation, the question of their independence and impartiality may be an even more thorny issue. Although often criticized by their failure to uphold the rule of

law under authoritarian regimes and generally considered traditional and formalistic, the post-democratization South Korean courts have bolstered their independence and have not shied away from ruling against the government in many prominent cases. Their organisation and competence are governed by the Court Organisation Act (Act No. 51 of September 26, 1949, last amended by Act No. 14033 of February 29, 2016)<sup>10</sup>. While the president appoints the chief justice with the consent of the National Assembly (Article 104(1) of the Constitution, Article 41(1) of the Court Organisation Act) and 13 other justices with the consent of the National Assembly (Article 104(2), Article 41(2) of the Court Organisation Act) for 6-year terms, the Supreme Court is by no means subservient to the government. The judges of lower courts who pass judgments in one-judge or three-judge panels and whose appointment and promotion are generally based on their legal competence in the technical sense are even farther removed from the sphere of governmental influence. The National Court Administration under the Supreme Court formally oversees the personnel decisions for judges (Article 19 of the Court Organisation Act). This arrangement has been criticized for concentration of power in the chief justice, but it has at least kept the courts relatively free from the executive branch.

The same cannot be said of the state prosecutors, who will play the key role in the investigation and prosecution of the DPRK leaders for their mass atrocities. All South Korean prosecutors are career bureaucrats in the unitary Prosecutors' Office under the administration of the Minister of Justice in the executive rather than judicial branch. Their organisation and competence are governed by the Prosecutors' Office Act (Act No. 81 of December 20, 1949 last amended by Act No. 11690 of March 23, 2013)<sup>11</sup>. South Korea's prosecutor system may trace its historical origin to the modern prosecutor system introduced by Japan, which in turn was greatly influenced by the investigating judge (*juge d'instruction*) in France. In fact, the prosecutors in Japan and colonial Korea were part of the judiciary in the pre-1945 period.

As an institution, the prosecutors have the power to command the police in criminal investigations which they invariably exercise in major political cases and are solely responsible for choosing whether to issue indictment. While the prosecutors have the legal duty to maintain political neutrality and refrain from abusing their authority (Article 4(2) of the Prosecutors' Office Act), the individual prosecutors are subject to the command and supervision of their superiors within the Prosecutors' Office in their prosecutorial decisions unlike their judicial counterparts (Article 7(1)). The institutional history and culture emphasizing military-style top-down discipline, formulated during the authoritarian period as the elite bastion of power, have been slow to change, especially in the top ranks. All prosecutors including the Prosecutor General are appointed by the President upon the recommendation of the Minister of Justice and even the Prosecutor General only requires a hearing at the National Assembly (Article 34 of the Prosecutors' Office Act). Although the Committee for Recommendation of Prosecutor General Candidates was created in 2011 (Article 34-2 of the Prosecutors' Office Act), it has done little to raise confidence.

Successive presidents since democratization have continued the old practice of appointing ex-senior prosecutors as their aides in the presidential office to personally direct the prosecutors to harass

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<sup>10</sup> <http://www.law.go.kr/lsInfoP.do?lsiSeq=181403> (Korean)  
<http://www.law.go.kr/lsInfoP.do?lsiSeq=176697&chrClsCd=010203&urlMode=engLsInfoR&viewCls=engLsInfoR> (English)

<sup>11</sup> <http://www.law.go.kr/lsInfoP.do?lsiSeq=136691> (Korean)  
<http://www.law.go.kr/lsInfoP.do?lsiSeq=121948&chrClsCd=010203&urlMode=engLsInfoR&viewCls=engLsInfoR> (English)

opponents or shield allies using the hierarchical chain of command with the Prosecutor-General, appointed by the president, at the apex and to reward or punish the prosecutors through the control of personnel decisions made by the Ministry of Justice. In the 1990s, the state prosecutors initially rejected the criminal complaints against the members of the former military government as non-justiciable political question only to arrest and (successfully) prosecute them in a complete reversal when the then-president issued a public statement in support of meting out justice. A blanket presidential pardon for all perpetrators in the name of national unity less than a year after the final convictions and sentences, which to many undermined the entire project of South Korean transitional justice. Recently, the prosecutors who actively pursued the criminal case against the former head of the National Intelligence Service (NIS) for ordering his agents to write critical posts online about the opposition before the 2012 presidential election, suffered humiliating demotions.

As most senior cadres within the organisation received their legal training and began their careers during the authoritarian era, and due to their organisational ethos and self-conscious role as the guardians of social order, prosecutors are generally considered more politically conservative than their counterparts in the judiciary. The prosecutors have been reluctant to investigate former torturers in the police and in at least one case held out until the statute of limitations expired despite a criminal complaint by the victim in 2007. On the other hand, the prosecutors not only refused to apologize for manifestly unjust authoritarian-era convictions based on confessions extracted by torture, but obstinately appeal recent court decisions overturning them all the way to the Supreme Court. The prosecutors also faithfully enforce the controversial National Security Law, long criticized by the UN and the US State Department, and actively intervene in labour disputes by indicting union officials for obstruction of business.

The real or perceived bias of the prosecutors in their investigation and indictment may seriously undermine the procedural fairness and public legitimacy of the criminal cases against the DPRK leaders for their mass atrocities. The institutional and political independence of the prosecutors have fallen into disrepute in recent years.

**In light of the above, the participation of internationally respected jurists and experts nominated by the UN in a hybrid prosecution section and judicial bench for the investigation, indictment and trial of the DPRK leaders would bolster the political legitimacy by complementing the independence and impartiality of the proceedings. This would be crucial in displaying sufficient willingness and ability to meet the complementarity requirement as stipulated in Article 17 of the Rome Statute of the International Criminal Court.**

### *3.5 Capital Punishment*

The DPRK and ROK both retain capital punishment in their penal system although the latter may be considered a *de facto* abolitionist state given the moratorium on the execution since 1997. In South Korea, the Constitutional Court and the Supreme Court have repeatedly upheld the constitutionality of capital punishment and the courts have continued to pass death sentences in heinous murder cases. In 2004, the National Assembly came very close to abolishing capital punishment, largely because many politicians themselves had been wrongly convicted and sentenced to death under the military governments, but the sensational arrest of a serial killer ended the momentum. As the possibility of politically motivated death sentences against opposition figures becomes remote in South Korea and public concerns over crime rises, it is not clear if the government or the National Assembly will take the lead to formally abolish capital punishment. Given the gravity of crimes against humanity committed by the DPRK leaders, the popular call for vengeance may demand the ultimate punishment.

The international and hybrid criminal tribunals since the 1990s have rejected the death penalty as a form of punishment for the convicted perpetrators taking into consideration the global trend of abolishing capital punishment to respect the right to life in the international community. The government of Rwanda refused to cooperate with the International Criminal Tribunal for Rwanda (Rwanda) over the issue. The death penalty was also an issue at the Supreme Iraqi Criminal Tribunal established by the Coalition Provisional Authority as the occupying power of Iraq. Not only the death sentence for the former president, Saddam Hussein, but his execution which was carried out in the presence of a Shi'ite mob chanting for his death shocked observers and helped to inflame the Sunni insurgency against the occupation authorities and later the Shi'ite-led government of Iraq. The killing of Muammar Gaddafi, the long-time dictator of Libya, as he tried to surrender to the rebels, also show the level of popular anger built over decades that may be unleashed.

While it would be desirable for the ROK to abolish the death penalty by legislation or by constitutional adjudication, that may not happen before the transitional justice process for the DPRK. **It would be helpful for the Special Rapporteur and Group of independent experts to discuss the matter with South Korean officials at the current stage to express the international community's stance on this issue and to reach an informal agreement long before the actual transitional justice process occurs.**

It should also be noted that Japan continues to execute death sentences, though the annual figure is usually in single digits, while China executes thousands each year. As Japan in particular may be willing to try those responsible for the abduction of its nationals as well as the atrocities committed against over 93,000 ethnic Koreans and their Japanese spouses who were "repatriated" to Japan during the 1959-1984 period in Japanese courts, the death penalty issue may hinder judicial cooperation or extradition. **TJWG suggests that the Special Rapporteur and Group of independent experts also discuss the issue of capital punishment in DPRK-related transitional justice process with Japanese officials in advance.**

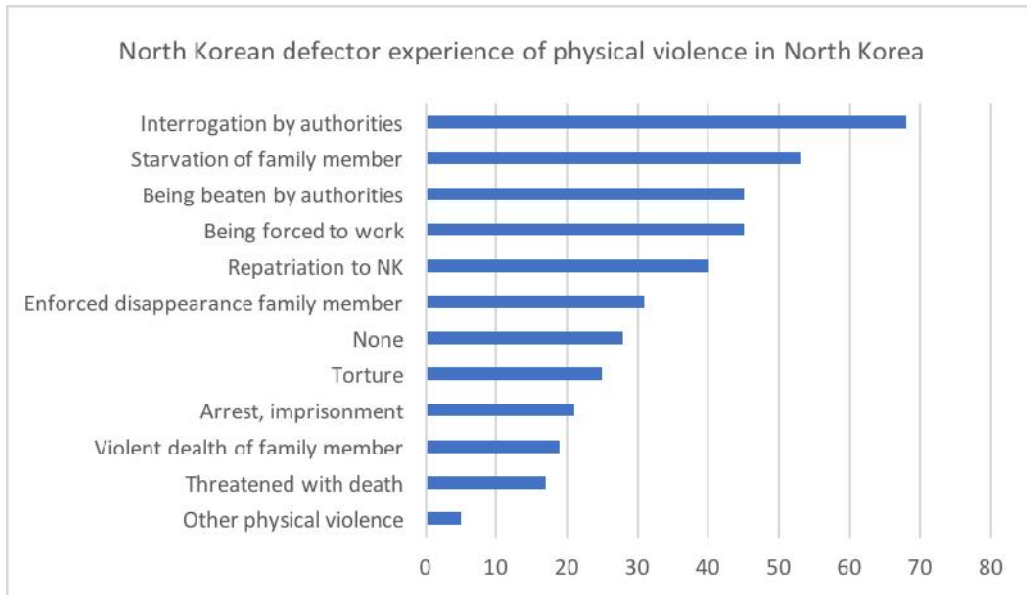
#### **4. TJWG North Korean Defector Opinion Survey on Transitional Justice**

In March 2016, TJWG commenced a survey of North Korean defectors on themes of transitional justice. The survey is given to participants as they come to the office to take part in a research interview for the mapping project. **The vast majority of participants have not previously encountered transitional justice discourse of any kind.** The respondents are not a random sample, and may also demonstrate a bias towards defectors who have been in Korea for at least a year, as our access to newer arrivals is more limited. Having analysed the preliminary demographic composition of the sample, the gender of the sampled population (81% female) is higher in terms of female participants than the general North Korean defector population in South Korea (70.5% female) according to statistics provided by the South Korean Ministry of Unification.<sup>12</sup> As research interviews take place during business hours on weekdays, it is likely that it is more difficult for men to be absent from work in order to attend. For the majority, this survey is their first encounter with ideas about the application of transitional justice to the Korean Peninsula. We have so far surveyed over 180 participants, and some of the key preliminary findings are presented below. Please note that this is a summary of the *preliminary findings only*: the complete data will be presented in the report of our first year's research which is due for release in April/May 2017.

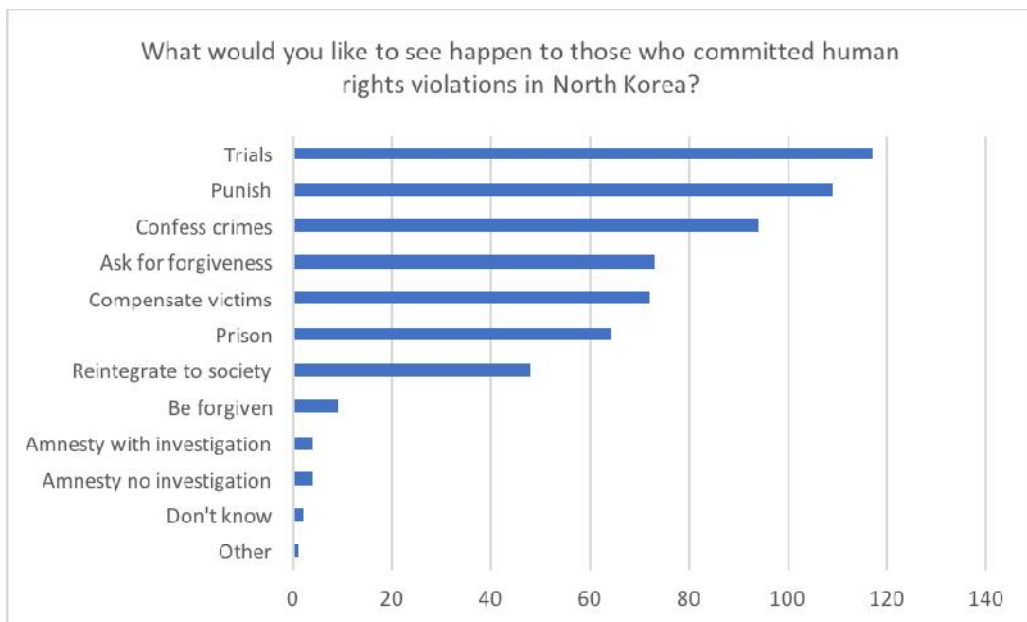
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<sup>12</sup> 2016 White Paper on Korean Unification, Ministry of Unification, <http://eng.unikorea.go.kr/content.do?cmsid=1819>

**I. To what extent have you experienced physical violence in North Korea?**

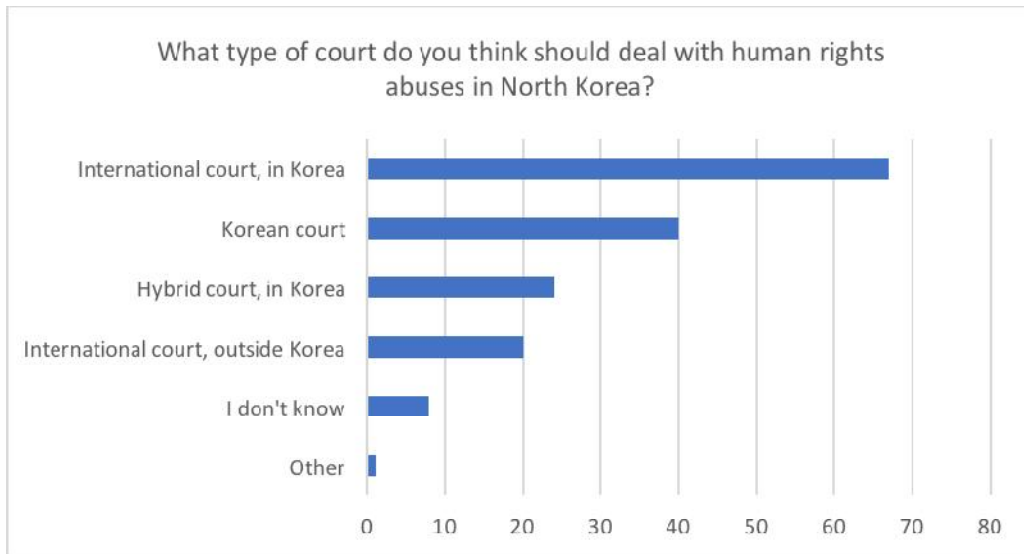


**II. What would you like to see happen to those who committed violent human rights abuses in North Korea?**

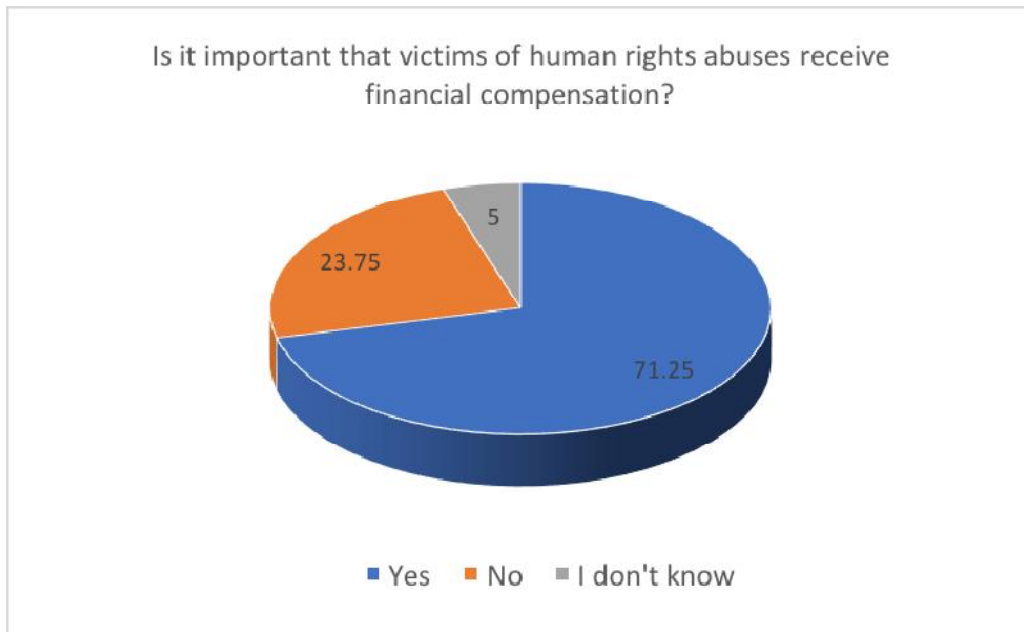




**III. After a regime change or unification, what type of court do you think should be responsible for trying perpetrators of human rights abuses in North Korea?**



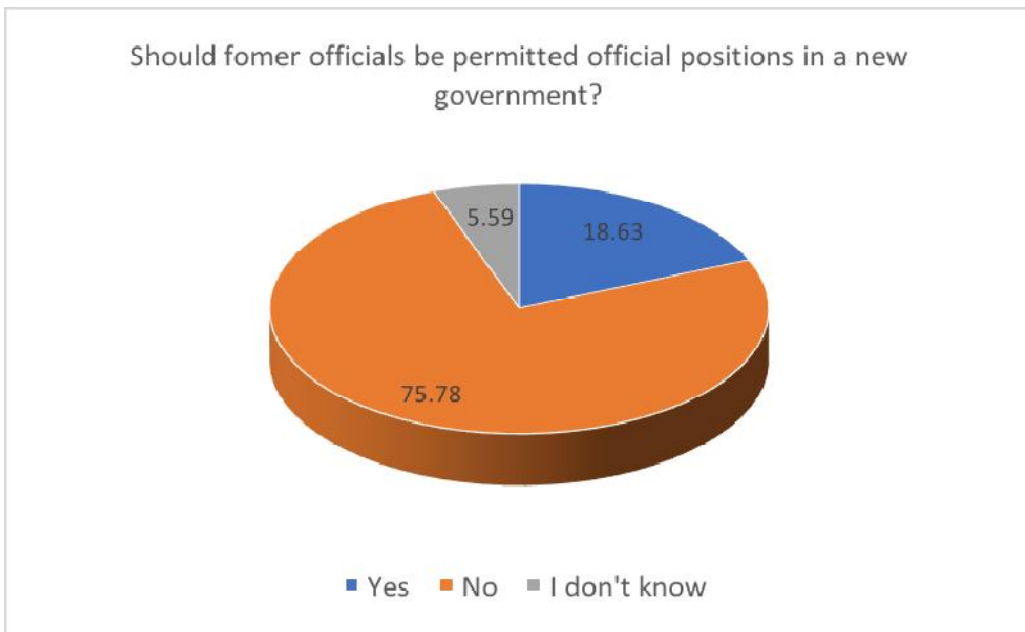
**IV. Is it important that victims of human rights abuses receive financial compensation for their losses and suffering?**



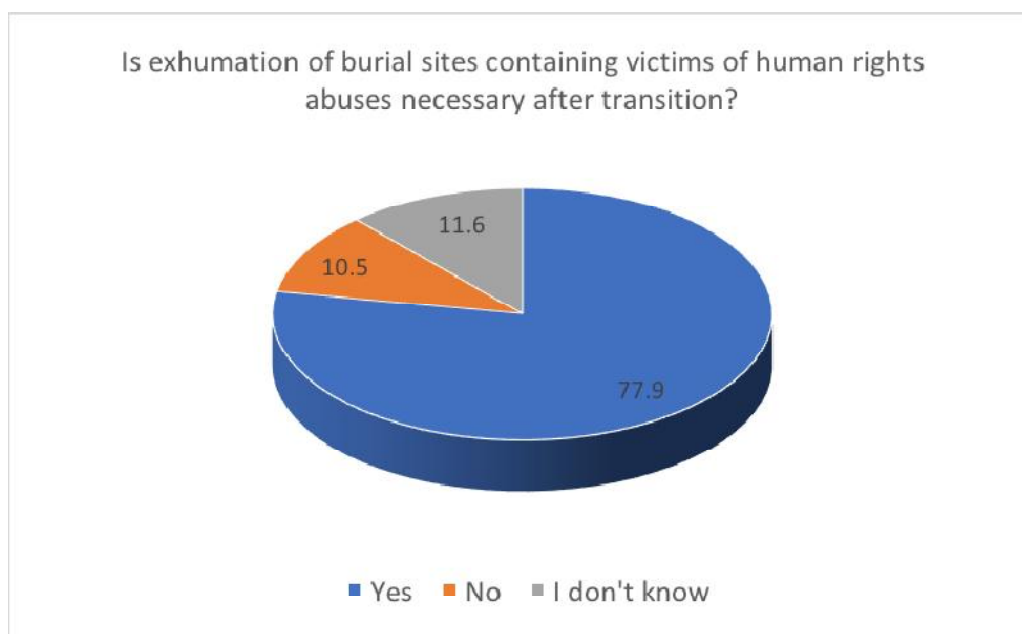
V. **Is it important that victims receive official apology from perpetrators of human rights abuses?**



VI. **Should former officials of the North Korean regime be permitted official positions in a new government (either North Korean, or a unified Korean government?)**



VII. **Is exhumation of burial sites containing victims of human rights abuses necessary after transition?**



The survey findings thus far demonstrate a high level of personal experience of violence, which may be higher than that experienced by the ordinary North Korean population as a whole, simply because this is a defector population. By nature of their choice to defect, many have been repatriated to North Korea (sometimes more than once) prior to a successful defection, and have thus experienced physical punishment, torture and/or interrogation as a result. Others may have had previous experience of violence as the very reason for fleeing the country. Preference for punitive measures against perpetrators of human rights violations in North Korea is high, particularly compared to the suggestion of offering perpetrators amnesties of any kind. Regarding the types of courts which might be created, preference is given to courts located in Korea, with a leaning towards an international court, based in Korea. It must be re-stated, however, that knowledge and understanding of what any transitional justice-oriented court may look like is limited within this population, and there is much work to be done in terms of educating the defector community as to the full range of options available for the pursuit of legal accountability. The majority of respondents see financial compensation (reparations) and apologies as an important part of recovery from the abuses of the North Korea regime, and a similar majority stated a preference for former officials of the North Korean state not being permitted official positions in a new government. Lastly, a large majority also consider the exhumations of burial sites containing victims of human rights violations a necessary action to be taken after a transition – a clear validation of the primary project being undertaken by TJWG.

As we continue this work, we are conducting complementary research into the likelihood of social violence occurring in a post-transition scenario, following the application of different transitional justice mechanisms. The findings of this research will also appear in the full report to be released in April/May 2017.

It may also be helpful if similar opinion surveys are conducted for the general South Korean population as well as about 200 defectors who have settled in Japan, most of whom were members of the over 93,000 ethnic Koreans and their Japanese spouses who were “repatriated” to North Korea from Japan during the 1959-1984 period.

## 5. Summary of recommendations and key questions for the Group of Independent Experts

### 5.1 Summary of recommendations

We wish to note that current political sentiment in South Korea provides a unique window of opportunity to pursue the questions and amendments below, particularly in relation to constitutional change, and international recommendation and pressure is influential in this regard.

- It may be possible to prepare for possible future cases at the ICC. Long-term political changes in the DPRK may lead it to accede to the Rome Statute with a declaration accepting jurisdiction for cases reaching back to July 1, 2002.
- South Korean civic groups and academic advisors to the government have shown a growing preference for an *ad hoc* tribunal, over the ICC proceedings in The Hague which is geographically far removed from the scene of crimes as well as the domicile of the perpetrators, victims and the interested population. One option may be a hybrid tribunal akin to the Special Court for Sierra Leone (SCSL) or the Extraordinary Chambers in the Courts of Cambodia (ECCC), which would ideally be situated in Pyongyang.
- The COI also alluded to the urgent need for a “Korean-led transitional justice process” parallel to the international judicial procedures. Even prior to the transition, domestic courts may on occasion prosecute and try individual perpetrators who happen to be in their custody by the exercise of universal jurisdiction other legal basis.
- An international *ad hoc* tribunal should exercise its universal jurisdiction to allow for the widest possible range of opportunities to take custody of North Korean suspects, where the jurisdiction exists. Other countries should also explore the option of trying them in their domestic courts
- Constitutional complications may be avoided by emphasizing the international nature of the hybrid procedure and presenting the surrender of the culprits to such procedure as a relatively uncontroversial matter of extradition to a foreign jurisdiction rather than trial under a special procedure within the South Korean judiciary.
- One possibility may be for the ROK to incorporate in its Constitution the principle of legality as stated in Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR) which it acceded to in 1990.
- A sure course of action would be revising Article 13(1) of the ROK Constitution to explicitly include the violation of international law as well as domestic law at the time of specific acts or omissions as the legal grounds for the criminal conviction.
- Alternatively, it could be possible to specify that prosecution for certain international crimes such as genocide, crimes against humanity and war crimes do not violate the principle of legality or is an exception to it.
- While a stand-alone amendment of Article 13(1) of the ROK Constitution is perhaps not politically feasible, its inclusion in the broader package of constitutional reform may not be beyond reach. Therefore, we ask the Special Rapporteur and the Group of Independent Experts to bring this matter to the attention of the South Korean government,

parliamentarians and civil society. It is also urged that the Supreme Court and the Constitutional Court be encouraged to interpret the principle of legality in Article 13(1) of the Constitution to encompass international law in force at the time.

- It may be argued that the principle of legality should be no barrier in the prosecution of DPRK officials for their recent international crimes including crimes against humanity.
- TJWG requests the Special Rapporteur and the Group of Independent Experts to suggest that Japan criminalize genocide, crimes against humanity and war crimes under its domestic law to adequately discharge its obligations as a State Party to the Rome Statute.
- We recommend the Special Rapporteur and the Group of Independent Experts to urge Japan to close the loopholes in its extradition regime to remove any potential obstacles for the North Korean transitional justice process.
- As the DPRK's abductions of foreign nationals are textbook cases of enforced or involuntary disappearances, the ROK's accession to the ICCPED will increase pressure on the DPRK to resolve the issue and put the future prosecution of these crimes on a firmer international legal footing. TJWG asks the Special Rapporteur and the Group of independent experts to encourage the ROK to follow suit as well.
- It is debatable whether the atrocities in the DPRK qualify as genocide, but certain allegations like the annihilation of Christians and the forced abortion and infanticide of children borne of North Korean women repatriated from China on the basis of non-Korean ethnicity of their Chinese fathers, deserve serious consideration. Given the possibility of certain perpetrators escaping to Japan and mindful especially of the legal complications that may arise with the extradition request for possible genocide charges similar to the Pinochet case, it would be highly desirable for Japan to accede to the Genocide Convention.
- TJWG believes that the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity could be an important legal instrument in the future transitional justice process, and we ask the Special Rapporteur and the Group of Independent Experts to suggest accession to the South Korean government.
- TJWG is also of the opinion that the ILO's Convention Concerning Forced or Compulsory Labour, 1930 (No.29) and Convention concerning the Abolition of Forced Labour, 1957 (No. 105) provide objective international norms regarding the *gwanliso* (prison camp) system in the DPRK. TJWG asks the Special Rapporteur and the Group of independent experts to encourage the DPRK to join the ILO and urge North and South Korea, China and Japan to accede to these two conventions.
- International assistance either in the form of technical support or of an *ad hoc* mixed tribunal of South Korean and international investigators, prosecutors and judges would complement potential shortcomings and raise the quality of transitional justice for mass atrocities in the DPRK.
- The legal and technical expertise of the international community should provide welcome input to ROK-led transitional justice. The hybrid court with its international elements in particular would complement South Korea's dearth of experience or expertise in the prosecution of international crimes.

- The South Korean government may further the preparation by closely monitoring the proceedings of various international criminal courts and providing Korean translations of the key documents and decisions to the public as well as maintaining liaison with the ECCC.
- The participation of internationally respected jurists and experts nominated by the UN in a hybrid prosecution section and judicial bench for the investigation, indictment and trial of the DPRK leaders would bolster political legitimacy by complementing the independence and impartiality of the proceedings.
- Regarding capital punishment, it would be helpful for the Special Rapporteur and Group of independent experts to discuss the matter with the South Korean officials at the current stage to express the international community's stance on this issue and reach consensus long before the actual transitional justice process occurs. Similarly, discussions with Japanese officials concerning possible obstacles to judicial cooperation and extradition posed by their execution of death penalties should they want to try those responsible for the abduction of their nationals in Japanese courts may be desirable.

#### *5.2 Questions for the Group of Independent Experts:*

- Is **genocide** being considered a possible charge against the leaders of the DPRK despite the COI finding it unnecessary or unable to make a determination on the matter?
- South Korea's newly enacted **North Korean Human Rights Act** includes a provision for the South Korean government to establish its own human rights documentation archive. However, there is no detail in the provisions on **how or whether this data will be used beyond its archival use**, and there is no indication that the data will be shared with civic groups working on the same issues. We would ask the Group of Independent Experts to **ask the government** about the plans for this data, especially prior to a transition, and whether the UN will have access to it.
- The UN Seoul office's limited resources make progress on its own documentation work slow and demanding. Is it possible to increase their capacity and resources to increase the speed and effectiveness of their work? This will be particularly important if, as was suggested in the initial mandate, the office is to become a regional hub.