Working Group on Arbitrary Detention

Office of the High Commissioner for Human Rights

United Nations Office at Geneva

8-14, avenue de la Paix

1211 Geneva 10, Switzerland

6 August 2020

Re: Democratic People’s Republic of Korea (DPRK) and China – Mr. Han Man-Taek, a Republic of Korea national, continuously deprived of his personal liberty following his capture in combat as a prisoner of war (POW) during the Korean War (1950-1953)

Esteemed members of the Working Group,

We hereby wish to submit to the Working Group for its judicious consideration the case of Mr. Han Man-Taek (한만택), a citizen and soldier of the Republic of Korea (South Korea), born on 5 June 1932. Mr. Han has been continuously deprived of his personal liberty following his capture as a prisoner of war (POW) during the Korean War (1950-1953) by the Democratic People’s Republic of Korea (DPRK) and China.

*The Korean War (1950-1953) and unrepatriated ROK POWs in the DPRK*

At the outbreak of the Korean War on 25 June 1950, most belligerents were not yet parties to the 1949 Geneva Conventions. However, in response to the notes sent by the International Committee of the Red Cross (ICRC), the United States of America (5 July 1950) and the ROK (7 July 1950) agreed to be bound by them while the DPRK (15 July 1950) sent a telegram to the UN Secretary-General stating that it will be “strictly abiding by principles of the Geneva Conventions in respect to Prisoners of War” (15 July 1950).[[1]](#footnote-1)

While the Armistice Agreement of 27 July 1953 put an end to the active hostilities in the Korean peninsula that had wrought wanton destruction and deaths of millions, its provisions regarding the release and repatriation of the prisoners of war (POWs) and the return of displaced civilians in Article III (paragraphs 51-59), as well as its solemn commitment to abide by the principles of the Convention (III) relative to the Treatment of Prisoners of War, remain unfulfilled to this date by the DPRK.[[2]](#footnote-2)

Article III, paragraph 51 (a) of the 1953 Armistice Agreement stipulates that: “Within sixty (60) days after this agreement becomes effective each side shall, without offering any hindrance, directly repatriate and hand over in groups all those prisoners of war in its custody who insist on repatriation to the side to which they belonged at the time of capture”.

However, the UN Commission of Inquiry on human rights in the DPRK (COI), established by Human Rights Council resolution 22/13 of 21 March 2013, found that at least 50,000 ROK POWs were not repatriated on the basis of the vast discrepancy between the DPRK’s own reported number of ROK POWs and the actual number of returnees.[[3]](#footnote-3) The DPRK concealed the existence and whereabouts of unreturned ROK POWs by transferring them to DPRK military units.[[4]](#footnote-4) Since the mid-1990s, 80 ROK POWs have escaped the DPRK and returned to the ROK, and the COI estimated that approximately 500 survivors are still being held in the DPRK.[[5]](#footnote-5)

According to the COI, the DPRK’s refusal to repatriate thousands of ROK POWs was a flagrant violation of international humanitarian law, namely article 118 of the Geneva Convention (III) relative to the Treatment of Prisoners of War (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities”), as well as the aforementioned provisions of the 1953 Armistice Agreement.[[6]](#footnote-6) Some ROK POWs were never asked whether they wished to be repatriated while others feared responding truthfully after they watched those who did executed.[[7]](#footnote-7)

In the post-war period, most POWs were sent to work for life in mines in remote provinces under atrocious conditions, where many enslaved workers died from accidents or diseases contracted in the mines caused by the dust.[[8]](#footnote-8) The ROK POWs who complained and asked to be returned to the ROK faced imprisonment or disappearance.[[9]](#footnote-9)

Like the over 90,000 Korean War-era ROK civilian abductees, the ROK POWs and their families were categorized into the lowest rank of the *songbun* [성분] sociopolitical classification. As a result, they were subjected to discrimination such as the denial of access to higher education and allotment of the worst jobs in the mines.[[10]](#footnote-10)

The COI report concluded that the DPRK authorities have committed and are committing crimes against humanity against persons from other countries, namely victims of international abduction and other persons denied repatriation.[[11]](#footnote-11) The Working Group on Enforced or Involuntary Disappearances has also expressed its grave concern at the COI’s findings that enforced disappearances have been and are being committed against persons from other countries who were systematically abducted or denied repatriation, so that the DPRK may gain labour and other skills (A/HRC/WGEID/103/1, 25 July 2014, paras. 67-68).

In this regard, the General Assembly’s resolution 74/166 of 18 December 2019, followed by Human Rights Council’s resolution 43/25 of 22 June 2020, on the situation of human rights in the Democratic People’s Republic of Korea, adopted without a vote, “call[ed] upon the Democratic People’s Republic of Korea to address all allegations of enforced disappearances, to provide accurate information to the families of the victims on the fates and whereabouts of their missing relatives and resolve all issues related to all abductees at the earliest possible date, in particular the return of abductees of Japan and the Republic of Korea”.

By contrast, on 2 September 2000, the ROK unilaterally returned 63 DPRK spies and agents who had refused to defect to the ROK in prison for decades, including those held since during the Korean War such as Mr. Kim Sun-Myung who was a subject of the Working Group’s decision No. 1/1995 (Republic of Korea).

*Mr. Han Man-Taek’s continuous deprivation of his personal liberty following his capture as a prisoner of war (POW) during the Korean War (1950-1953) in and by the DPRK*

During the Korean War, Mr. Han Man-Taek enlisted in the Republic of Korea Army (ROKA) on 19 July 1952, was given the military service number 9225645[[12]](#footnote-12) and assigned to the 16th regiment, 8th division. He was captured as a prisoner of war (POW) in combat by the DPRK-allied Chinese People’s “Volunteer” Army in Kumwha in June 1953, a month before the signing of the armistice agreement on 27 July 1953.

After the armistice, Mr. Han was forced to work for decades in the machinery section repairing electric motors in the Musan iron ore mine, which boasts one of the world’s largest iron ore reserves. The Musan iron ore mine is located in Musan County, Hamgyeongbuk-do, the remote northernmost region of North Korea.

In Musan, although he married and had children, Mr. Han was not allowed to communicate with his family in the ROK who assumed for decades that he had died in combat. Like his fellow ROK POWs, Mr. Han was largely confined at home and the iron ore mine under heavy surveillance and restriction of movement, under *de facto* house arrest.

In its Deliberation No. 1, the Working Group has stipulated that without prejudging the arbitrary character or otherwise of the measure, house arrest may be compared to deprivation of liberty provided that it is carried out in closed premises which the person is not allowed to leave.[[13]](#footnote-13) The Working Group has confirmed this interpretation of deprivation of liberty under international law in its Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law[[14]](#footnote-14), as well as in its jurisprudence[[15]](#footnote-15).

In November 2004, Mr. Han was able to contact his relatives in the ROK, and prepared to escape the DPRK and return to the ROK with their help. His relatives informed the ROK authorities in advance about Mr. Han’s escape plan to seek assistance. On 27 December 2004, in accordance with their plan, he crossed the Tomen River and arrived in Yanji, Yanbian Korean Autonomous Prefecture, Jilin Province, China around 23:00. He called his relatives to report that he has escaped the DPRK and safely arrived in Yanji.

However, in the early hours of 28 December 2004, Mr. Han was apprehended by the Public Security (公安) agents. On 29 December 2004, his relatives, who had learnt of his capture, flew to Yanji to find the location and contact information for his place of detention. The Chinese authorities passed on the information regarding Mr. Han to their DPRK counterparts because China has the policy of forcibly repatriating North Korean escapees to North Korea, where they may face severe punishment including torture, imprisonment or even execution. All this is in clear violation of the principle of non-*refoulement*.

The ROK officials were slow to react possibly because the Chinese authorities have made exceptions for ROK POWs in the past to allow them passage to the ROK, unlike other escapees from the DPRK. Unfortunately, apparently as a result of ROK complacency and miscommunication within the Chinese officialdom, Mr. Han was repatriated to the DPRK after about 10 days in Chinese custody around 6 January 2005.

Upon his return, Mr. Han was severely tortured by the State Security Department (*bowibu*; currently renamed the Ministry of State Security) before being placed under house arrest at his home in Musan County in mid-February 2005. Because of his renewed escape attempts, Mr. Han Man-Taek was sent to the distant Bukchang *kwanliso* (political prison camp) No. 18, far away from the Chinese border, around April 2005.

Mr. Han Man-Taek’s relatives in the ROK continued to appeal to their government to find ways to repatriate Mr. Han to no avail in the following years. In 2012, they came across news reports that Mr. Han had died of brain damages in the Bukchang *kwanliso* in 2009.

However, the DPRK authorities never publicly confirmed Mr. Han’s alleged death in the Bukchang *kwanliso* or provided an official explanation or cause. Nor did they return Mr. Han’s remains to his family for proper burial.

We therefore submit that, absent contrary evidence from the DPRK authorities, Mr. Han’s continued deprivation of liberty is arbitrary, falling within categories I, II, III and V of the Working Group, as explained below.

*Mr. Han Man-Taek’s post-1953 deprivation of liberty in and by the DPRK until his escape to China in December 2004*

As explained above, there can be no legal basis or justification for his deprivation of liberty and forced labor in and by the DPRK in the post-1953 decades.

The DPRK authorities should have repatriated Mr. Han Man-Taek, a ROK POW, to the ROK side within 60 days of the signing of the Armistice Agreement on 27 July 1953, or 25 September 1953, in accordance with article III, paragraph 51 (a).

The DPRK also agreed to abide by the Geneva Convention (III) relative to the Treatment of Prisoners of War, which provides for the release and repatriation of POWs “without delay after the cessation of active hostilities” in article 118.

However, as the detailed findings of the COI make clear, the DPRK authorities had no intention of returning Mr. Han Man-Taek, as well as tens of thousands of his fellow ROK POWs, whom they viewed as a source of slave or forced labor. This was also in clear violation of article 4 of the Universal Declaration and article 8 of the International Covenant.

Furthermore, Mr. Han Man-Taek has been subjected to enforced disappearance, as his fate and whereabouts were never disclosed to his loved ones in South Korea, for over half a century.

According to the Human Rights Committee’s general comment no. 35 (CCPR/C/GC/35), cited by the Working Group in paragraph 52 of its opinion No. 13/2020, enforced disappearances violate numerous substantive and procedural provisions of the Covenant and constitute a particularly aggravated form of arbitrary detention (paragraph 17).

As the Working Group opined in paragraph 39 of its opinion No. 11/2020, such deprivation of liberty, entailing a refusal to disclose the fate or whereabouts of the persons concerned or to acknowledge their detention, lacks any valid legal basis under any circumstance and is inherently arbitrary as it places the person outside the protection of the law, in violation of article 6 of the Universal Declaration and article 16 of the International Covenant.

For these reasons, Mr. Han Man-Taek’s post-1953 deprivation of liberty in and by the DPRK lacks a legal basis and is thus arbitrary, falling under category I.

*Mr. Han Man-Taek’s arrest and detention in and forced transfer to the DPRK by China in December 2004 – January 2005*

The Working Group has in the past found China’s arrest, detention and forced transfer of DPRK escapees arbitrary, falling within categories I, II, III and V, in paragraphs 45-50 of opinion No. 54/2018 and paragraphs 18-20 of opinion No. 81/2017.

Mr. Han Man-Taek was not presented with an arrest warrant or informed of the reasons for his arrest by the Public Security (公安) agents at the time of arrest on 28 December 2004.

For a deprivation of liberty in and by China to have a legal basis, it is not sufficient for there to be a law authorizing the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant, which was not implemented in the present case.[[16]](#footnote-16)

International law on detention includes the right to be presented with an arrest warrant to ensure the exercise of effective control by a competent, independent and impartial judicial authority, which is procedurally inherent in the right to liberty and security and the prohibition of arbitrary deprivation under articles 3 and 9 of the Universal Declaration of Human Rights and principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[[17]](#footnote-17) There were no valid grounds such as arrest *in flagrante delicto*, to justify exception to this principle.

To invoke a legal basis for deprivation of liberty, the Chinese authorities also should have informed Mr. Han of the reasons for his arrest, at the time of arrest, and of the charges against him promptly.[[18]](#footnote-18) Their failure to do so violates article 9 of the Universal Declaration of Human Rights, as well as principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and renders his arrest devoid of any legal basis.

While under the custody of the Public Security (公安) agents for about 10 days from 28 December 2004 to around 6 January 2005, Mr. Han Man-Taek has been subjected to enforced disappearance and *incommunicado* detention.

As the Human Rights Committee has held in paragraph 17 of its general comment No. 35 with respect to article 9 of the Covenant, which is equally applicable to article 9 of the Universal Declaration, enforced disappearance constitutes a particularly aggravated form of arbitrary detention.[[19]](#footnote-19) Such deprivation of liberty, entailing a refusal to disclose the fate or whereabouts of the persons concerned or to acknowledge their detention, lacks any valid legal basis under any circumstance and is inherently arbitrary as it places the person outside the protection of the law, in violation of article 6 of the Universal Declaration of Human Rights.[[20]](#footnote-20)

Thereupon, Mr. Han Man-Taek was not brought promptly before a judge, within 48 hours of the arrest barring absolutely exceptional circumstances, as per the international standard set out in the Working Group’s jurisprudence.[[21]](#footnote-21)

Furthermore, Mr. Han’s pretrial detention, which should be the exception rather than the rule, lacked a legal basis as it was not based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as specified in law to prevent flight, interference with evidence or the recurrence of crime, accompanied by consideration of alternatives, such as bail, electronic bracelets or other conditions, rendering detention unnecessary in the particular case.[[22]](#footnote-22)

Therefore, China has violated article 9 of the Universal Declaration of Human Rights as well as principles 11, 37 and 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

Mr. Han Man-Taek was also not afforded the right to take proceedings before a court so that it might decide without delay on the lawfulness of his detention in accordance with articles 3, 8 and 9 of the Universal Declaration of Human Rights and principles 11, 32 and 37 of the Body of Principles.[[23]](#footnote-23)

Under the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37, annex), the right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation, and is essential to preserve legality in a democratic society (A/HRC/30/37, paras. 2–3).[[24]](#footnote-24)

Judicial oversight of the deprivation of liberty is a fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis.[[25]](#footnote-25)

Last but not least, Mr. Han Man-Taek was effectively deprived of his right to legal counsel and representation in and by China which is procedurally inherent in the right to liberty and security and the prohibition of arbitrary detention in violation of articles 3 and 9 of the Universal Declaration of Human rights and principles 15, 17 and 18 of the Body of Principles.

According to principle 9 and guideline 8 of the Basic Principles and Guidelines (A/HRC/30/37), persons deprived of their liberty have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension, and must be promptly informed of this right upon apprehension; nor should access to legal counsel be unlawfully or unreasonably restricted (Annex, paras. 12-15 and 67-71).

There can be no legal basis for deprivation of liberty without effective guarantee of legal representation, in particular as the ability to challenge the lawfulness of detention becomes moot.

We also note that the Chinese People’s “Volunteers”, who initially captured Mr. Han Man-Taek during the Korean War, were a party to the 1953 Armistice Agreement and that, as such, China’s detention and forced transfer to the DPRK of a ROK POW, Mr. Han Man-Taek, in violation thereof lacks a legal basis.

For these reasons, Mr. Han Man-Taek’s arrest and detention in and forced transfer to the DPRK by China lacked a legal basis and were thus arbitrary, falling under category I.

In addition, Mr. Han Man-Taek’s arrest and detention in and by China, as it resulted from his legitimate exercise of his right to seek asylum under article 14 (1) of the Universal Declaration, was arbitrary, falling within category II, in accordance with paragraph 20 of opinion No. 81/2017.

We also note that Mr. Han Man-Taek was transferred to the DPRK by the Chinese authorities without the benefit of a fair and public hearing by an independent and impartial tribunal. The Working Group has held in paragraph 62 of opinion No. 33/2020 that involuntary expulsion to a foreign State without a hearing by judicial authorities cannot be in conformity with the due process of the law.

As the Working Group has previously observed,[[26]](#footnote-26) international law regarding extradition provides procedures that must be observed by countries in arresting, detaining and returning individuals to face criminal proceedings in another country in order to ensure that their right to a fair trial is protected. Those procedures have not been observed in the present case. Furthermore, it is disturbing that Mr. Han never had any access to legal counsel.

China’s forced transfer of escapees to the DPRK has the veneer of legality in the form of the following four treaties:[[27]](#footnote-27)

* the Mutual Cooperation Agreement for the Extradition of Defectors and Criminals (Democratic People’s Republic of Korea–People’s Republic of China Agreement on Repatriation of Illegal Entrants) (c. 1966);
* the Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order in the Border Areas (c. 1986);
* the Bilateral Agreement on Mutual Cooperation for the Maintenance of State Safety and Social Order (July 1998)[[28]](#footnote-28); and
* the Democratic People’s Republic of Korea–People’s Republic of China Civil and Criminal Law Cooperation Treaty (2003)[[29]](#footnote-29)

However, the first two of these four treaties are “secret treaties”, whose date of signature/ratification, official text and their very existence, are shrouded in mystery. Furthermore, even assuming *arguendo* that all four treaties qualify as valid, binding legal documents, they may facilitate the forced transfer of escapees in violation of the international obligation to respect the right to asylum under article 14 of the Universal Declaration, the right to leave one’s own country under article 12 (2) of the Covenant, and the principle of non-*refoulement* under article 3 (1) of the Torture Convention.

Mr. Marzuki Darusman, then-Special Rapporteur on the situation of human rights in the Democratic People’s Republic of Korea, expressed precisely this concern with respect to the treaty reportedly signed between the DPRK and Russia on 2 February 2016, that calls for “transferring and readmitting individuals who have illegally left and are illegally present” on the territory of either country” in OL RUS 1/2016[[30]](#footnote-30) and OL PRK 1/2016[[31]](#footnote-31) of 15 February 2016.

Individuals should not be expelled to another country when there are substantial grounds for believing that their life or freedom would be at risk, or they would be in danger of being subjected to torture or ill-treatment (see Report of the Working Group on Arbitrary Detention, 9 January 2007, A/HRC/4/40, paras. 44–45). In addition, the risk of arbitrary detention in the receiving State must also be among the elements taken into consideration before individuals are expelled. In this case, the Chinese government did not avail itself of the option of resorting to the regular extradition procedure, or obtaining credible assurances from the DPRK on due process and fair trial guarantees or on prevention of torture and enforced disappearance.[[32]](#footnote-32)

Therefore, China’s forced transfer of Mr. Han Man-Taek to the DPRK violated the principle of non-*refoulement*, especially its obligation under article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Report of the Special Rapporteur on the situation of human rights in the Democratic People’s Republic of Korea, 1 May 2020, A/HRC/43/58, para. 18).

Given the above, the violations of the right to a fair trial and due process, as set out in articles 9 and 10 (1) of the Universal Declaration, are of such gravity as to give Mr. Han Man-Taek’s deprivation of liberty in and by China an arbitrary character, falling within category III.

Lastly, the Committee against Torture has expressed its concern at China’s rigorous policy of forcibly repatriating all nationals of the Democratic People’s Republic of Korea on the ground that they have illegally crossed the border solely for economic reasons (Concluding observations on the fifth periodic report of China, 3 February 2016, CAT/C/CHN/CO/5, para. 46), which was cited by the Working Group in paragraph 50 of opinion No. 54/2018.

Unfortunately, the Special Rapporteur on the situation of human rights in the Democratic People’s Republic of Korea has continued to receive reports of individuals from the Democratic People’s Republic of Korea being repatriated (Report of the Special Rapporteur on the situation of human rights in the Democratic People’s Republic of Korea, 1 May 2020, A/HRC/43/58, para. 18).[[33]](#footnote-33)

The Chinese authorities apparently transferred Mr. Han Man-Taek to the DPRK like other escapees from the DPRK, under the assumption that he was a national of the DPRK, ignorant of the fact that he is a ROK POW. As the Working Group has held in opinion No. 54/2018, his detention and forced transfer to the DPRK due to his presumed nationality is discriminatory in nature, in violation of articles 2 and 7 of the Universal Declaration, and therefore fall within category V.

*Mr. Han Man-Taek’s arrest and detention in and by the DPRK following his forced transfer from China in January 2005*

The Working Group has in the past found the DPRK’s arrest and detention of DPRK escapees following their forced transfer from China arbitrary, falling within categories I, II and III, in paragraphs 18-22 of opinion No. 32/2015, paragraphs 51-56 of opinion No. 54/2018 and paragraphs 21-31 of opinion No. 81/2017.[[34]](#footnote-34)

Mr. Han Man-Taek was not presented with an arrest warrant or informed of the reasons for his arrest by the State Security agents at the time of his forced transfer to the DPRK in January 2005.

For a deprivation of liberty in and by the DPRK to have a legal basis, it is not sufficient for there to be a law authorizing the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant, which was not implemented in the present case.[[35]](#footnote-35)

International law on detention includes the right to be presented with an arrest warrant to ensure the exercise of effective control by a competent, independent and impartial judicial authority, which is procedurally inherent in the right to liberty and security and the prohibition of arbitrary deprivation under articles 3 and 9 of the Universal Declaration of Human Rights, article 9 (1) of the Covenant, and principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[[36]](#footnote-36) There were no valid grounds such as arrest *in flagrante delicto*, to justify exception to this principle in the present case.

To invoke a legal basis for deprivation of liberty, the DPRK authorities also should have informed Mr. Han Man-Taek of the reasons for his arrest, at the time of arrest, and of the charges against him promptly.[[37]](#footnote-37) Their failure to do so violates article 9 of the Universal Declaration of Human Rights article 9 (2) of the Covenant, as well as principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and renders his arrest devoid of any legal basis.

Since around April 2005, Mr. Han Man-Taek has been subjected to enforced disappearance and *incommunicado* detention in Bukchang *kwanliso* (political prison camp) No. 18.

As the Human Rights Committee has held in paragraph 17 of its general comment No. 35, enforced disappearance constitutes a particularly aggravated form of arbitrary detention.[[38]](#footnote-38) Such deprivation of liberty, entailing a refusal to disclose the fate or whereabouts of the persons concerned or to acknowledge their detention, lacks any valid legal basis under any circumstance and is inherently arbitrary as it places the person outside the protection of the law, in violation of article 6 of the Universal Declaration of Human Rights and article 16 of the Covenant.[[39]](#footnote-39)

We note that the General Assembly in paragraph 17 (b) of its resolution 74/166 of 18 December 2019 strongly urged the DPRK government “to immediately close the political prison camps and to release all political prisoners unconditionally and without any delay”. The Human Rights Council repeated the same demand in paragraph 1 (e) of its resolution 43/25.

Thereupon, Mr. Han Man-Taek was not brought promptly before a judge, within 48 hours of the arrest barring absolutely exceptional circumstances, which is the international standard.[[40]](#footnote-40)

Furthermore, Mr. Han Man-Taek’s pretrial detention, which should be the exception rather than the rule, lacked a legal basis as it was not based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes specified in law as to prevent flight, interference with evidence or the recurrence of crime, accompanied by consideration of alternatives, such as bail, electronic bracelets or other conditions, rendering detention unnecessary in the particular case.[[41]](#footnote-41)

Therefore, the DPRK has violated article 9 of the Universal Declaration of Human Rights and article 9 (3) of the Covenant, as well as principles 11, 37 and 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

Mr. Han Man-Taek was also not afforded the right to take proceedings before a court so that it might decide without delay on the lawfulness of his detention in accordance with articles 3, 8 and 9 of the Universal Declaration of Human Rights and articles 2 (3) and 9 (1) and (4) of the Covenant, as well as principles 11, 32 and 37 of the Body of Principles.[[42]](#footnote-42)

Under the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37, annex), the right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation, and is essential to preserve legality in a democratic society (A/HRC/30/37, paras. 2–3).[[43]](#footnote-43)

Judicial oversight of the deprivation of liberty is a fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis.[[44]](#footnote-44)

Lastly, Mr. Han Man-Taek was effectively deprived of his right to legal counsel and representation in and by the DPRK which is procedurally inherent in the right to liberty and security and the prohibition of arbitrary detention in violation of articles 3 and 9 of the Universal Declaration of Human rights and article 9 (1) of the Covenant, as well as principles 15, 17 and 18 of the Body of Principles.

According to principle 9 and guideline 8 of the Basic Principles and Guidelines (A/HRC/30/37), persons deprived of their liberty have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension, and must be promptly informed of this right upon apprehension; nor should access to legal counsel be unlawfully or unreasonably restricted (Annex, paras. 12-15 and 67-71).

There can be no legal basis for deprivation of liberty without effective guarantee of legal representation, in particular as the ability to challenge the lawfulness of detention becomes moot.

For these reasons, Mr. Han Man-Taek’s arrest and detention in and by the DPRK following his forced transfer by China lacked a legal basis and were thus arbitrary, falling under category I.

In addition, Mr. Han Man-Taek’s arrest and detention in and by the DPRK, as it resulted from his legitimate exercise of his right to leave and return to his country under article 13 (2) of the Universal Declaration and article 12 (2) and (4) of the Covenant and his right to seek asylum under article 14 (1) of the Universal Declaration, was arbitrary, falling within category II.

Mr. Han Man-Taek has been subjected to brutal torture by the DPRK authorities to extract information to establish his “guilt” in violation of article 5 of the Universal Declaration and article 7 of the Covenant, as well as article 15 of the Torture Convention.

Once this was done, Mr. Han Man-Taek was sent to a political prison camp, Bukchang *kwanliso* (political prison camp) No. 18, without a trial, as is customary for the political prisoners sent to such camps.

This clearly violated his right to a fair and public hearing by a competent, independent and impartial tribunal established by law, where he has the right to be presumed innocent until proved guilty according to law at which he has had all the guarantees necessary for his defence in accordance with articles 9 and 10 (1) of the Universal Declaration and article 14 (1), (2) and (3) of the Covenant.

Given the above, the violations of the right to a fair trial and due process are of such gravity as to give Mr. Han Man-Taek’s deprivation of liberty in and by China an arbitrary character, falling within category III.

The DPRK authorities treated Mr. Han Man-Taek more harshly than other escapees because of his status as a ROK POW and sent him to a political prison camp, Bukchang *kwanliso* (political prison camp) No. 18, a punishment reserved for those deemed particularly subversive.

Mr. Han Man-Taek’s detention, due to his status as a ROK POW is discriminatory in nature, in violation of articles 2 and 7 of the Universal Declaration and articles 2 (1) and 26 of the Covenant, and therefore falls within category V.

*Remedies and reparations*

We ask the Working Group to:

* Find that Mr. Han Man-Taek’s deprivation of liberty by the DPRK, being in contravention of articles 2, 3, 5, 7, 8, 9 and 10 (1), 13 (2), 14 (1) of the Universal Declaration of Human Rights; articles 2 (1) and (3); 7; 9 (1), (2), (3) and (4); 12 (2) and (4); 14 (1), (2) and (3); 26 of the Covenant; and article 15 of the Torture Convention, is arbitrary and falls within categories I, II, III and V;
* Find that Mr. Han Man-Taek’s deprivation of liberty by China, being in contravention of articles 2, 3, 6, 7, 9, 10 (1), 11, 14 (1) of the Universal Declaration and article 3 of the Torture Convention, is arbitrary and falls within categories I, II, III and V;
* Remind the DPRK and China that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the fundamental rules of international law may constitute crimes against humanity and that the duty to comply with international human rights that are peremptory and *erga omnes* norms such as the prohibition of arbitrary detention, lies with all bodies and representatives of the State, including judges and prosecutors, police and security officers, prison officers with relevant responsibilities, and on all other individuals;[[45]](#footnote-45)
* Urge the DPRK to repatriate the ROK POWs who were not repatriated after 1953 in accordance with the provisions of the Armistice Agreement and the Geneva Convention (III) relative to the Treatment of Prisoners of War;
* Urge China or the DPRK to make public all treaties concerning extradition or cross-border of transfer of DPRK escapees and to make the necessary revisions to conform to international law, including the international obligation to respect the right to asylum under article 14 of the Universal Declaration, the right to leave one’s own country under article 12 (2) of the Covenant, and the principle of non-*refoulement* under article 3 (1) of the Torture Convention;
* Urge the DPRK government to allow all Republic of Korea nationals held in the DPRK to communicate freely with their families in the Republic of Korea and to let an independent third party ascertain their free will without fear of reprisals against them or their acquaintances under guilt by association;
* Urge the DPRK to immediately close the political prison camps and to release all political prisoners unconditionally and without any delay in accordance with General Assembly resolution 74/166 of 18 December 2019 (paragraph 17 (b)) and Human Rights Council resolution 43/25 (paragraph 1 (e));
* Request the Governments of the DPRK and China to disseminate the present opinion in Korean and Chinese through all available means and as widely as possible;
* Transmit the opinion to the Government of the Republic of Korea for its consideration and possible dissemination in Korean through all available means and as widely as possible.

1. Le Comité international de la Croix-Rouge, *La Comité International de la Croix Rouge and le Conflit de Corée, Recueil de Documents: Recueil de Documents*, vol. I, pp. 13, 15 and 16 cited in Howard S. Levie, “How It All Started - And How It Ended: A Legal Study of the Korean War”, *Akron Law Review* Vol. 35, p. 205 (2015), p. 217, FN 44, 46 and 47. [↑](#footnote-ref-1)
2. Text of the Korean War Armistice Agreement, <<https://2001-2009.state.gov/t/ac/rls/or/2004/31006.htm>>. [↑](#footnote-ref-2)
3. Report of the detailed findings of the commission of inquiry on human rights in the Democratic People’s Republic of Korea, A/HRC/25/CRP.1 (7 February 2014), paras. 861-862. [↑](#footnote-ref-3)
4. Id., para. 866. [↑](#footnote-ref-4)
5. Id., paras. 863 and 867. [↑](#footnote-ref-5)
6. Id., paras. 864-865. [↑](#footnote-ref-6)
7. Id., paras. 870-871. [↑](#footnote-ref-7)
8. Id., paras. 872-873. [↑](#footnote-ref-8)
9. Id., para. 874. [↑](#footnote-ref-9)
10. Id., para. 878. [↑](#footnote-ref-10)
11. Id., para. 1138. [↑](#footnote-ref-11)
12. We respectfully ask the Working Group to retain the military service number in the event that an Opinion is adopted in this case for the record. [↑](#footnote-ref-12)
13. Report of the Working Group on Arbitrary Detention, E/CN.4/1993/24 (12 January 1993), para. 20. [↑](#footnote-ref-13)
14. Report of the Working Group on Arbitrary Detention, A/HRC/22/44, (24 December 2012), para. 59. [↑](#footnote-ref-14)
15. WGAD Opinions No. 54/2015, para. 87; No. 69/2019, para. 48. [↑](#footnote-ref-15)
16. See, for example, opinions No. 93/2017, para. 44; No. 10/2018, par. 45-46; No. 36/2018, paras. 40; No. 46/2018, par. 48; No. 9/2019, para. 29; No. 32/2019, para. 29; No. 33/2019, para. 48; No. 44/2019, para. 52; No. 45/2019, para. 51; No. 46/2019, para. 51; 6/2020, para. 39 and No. 11/2020, para. 37. [↑](#footnote-ref-16)
17. The Working Group has maintained from its early years that the practice of arresting persons without a warrant renders their detention arbitrary. See, for example, decisions No. 1/1993, paras. 6-7; No. 3/1993, paras. 6 and 7; No. 4/1993, para. 6; No. 5/1993, paras. 6, 8 and 9; No. 27/1993, para. 6; No. 30/1993, paras. 14 and 17 (a); No. 36/1993, para. 8; No. 43/1993, para. 6; No. 44/1993, paras. 6-7. For more recent jurisprudence, see opinions No. 38/2013, para. 23; No. 48/2016, para. 48; No. 21/2017, para. 46; No. 63/2017, para. 66; No. 76/2017, para. 55; No. 83/2017, para. 65; No. 88/2017, para. 27; No. 93/2017, para. 44; No. 3/2018, para. 43; No. 10/2018, para. 46; No. 26/2018, para. 54; No. 30/2018, para. 39; No. 38/2018, para. 63; No. 47/2018, para. 56; No. 51/2018, para. 80; No. 63/2018, para. 27; No. 68/2018, para. 39; No. 82/2018, para. 29; No. 6/2020, para. 40; and No. 11/2020, para. 38. [↑](#footnote-ref-17)
18. See, for example, Opinion No. 10/2015, para. 34; No. 32/2019, para. 29; No. 33/2019, para. 48; No. 44/2019, para. 52; No. 45/2019, para. 51; No. 46/2019, para. 51; No. 6/2020, para. 41; No. 13/2020, para. 48; No. 31/2020, para. 42; and No. 33/2020, para. 55. [↑](#footnote-ref-18)
19. The Working Group has also classified secret detention, which entails elements of *incommunicado* detention and enforced disappearance, as being per se arbitrary, falling within category I, in its opinion No. 14/2009, cited in paragraph 20 of the joint study on global practices in relation to secret detention in the context of countering terrorism (A/HRC/13/42). See also paragraphs 8, 9 and 16 of Human Rights Council resolution 37/3 of 22 March 2018. [↑](#footnote-ref-19)
20. See the Declaration on the Protection of All Persons from Enforced Disappearance; and Working Group opinions No. 82/2018, para. 28; No. 18/2019, para. 33; No. 22/2019, para. 67; No. 26/2019, para. 88; No. 28/2019, para. 61; No. 29/2019, para. 54; No. 36/2019, para. 35; No. 41/2019, para. 32; No. 42/2019, para. 48; No. 51/2019, para. 58; No. 56/2019, para. 79; and 11/2020, para. 39. [↑](#footnote-ref-20)
21. See opinions No. 57/2016, paras. 110–111; No. 2/2018, para. 49; No. 83/2018, para. 47; No. 11/2019, para. 63; No. 20/2019, para. 66; No. 26/2019, para. 89; No. 30/2019, para. 30; No. 36/2019, para. 36; No. 42/2019, para. 49; No. 51/2019, para. 59; No. 56/2019, para. 80; No. 76/2019, para. 38; No. 82/2019, para. 76; No. 31/2020, para. 45; and No. 33/2020, para. 75. [↑](#footnote-ref-21)
22. See Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 38; and Report of the Working Group on Arbitrary Detention, A/HRC/19/57, (26 December 2011), paras. 48-58. See also opinions No. 31/2020, para. 45 and No. 33/2020, para. 75. [↑](#footnote-ref-22)
23. See opinions No. 31/2020, para. 46 and No. 33/2020, para. 77. [↑](#footnote-ref-23)
24. See opinion No. 31/2020, para. 46. [↑](#footnote-ref-24)
25. Opinions No. 35/2018, para. 27; No. 83/2018, para. 47; No. 32/2019, para. 30; No. 33/2019, para. 50; No. 44/2019, para. 54; No. 45/2019, para. 53; No. 59/2019, para. 51; No. 65/2019, para. 64; No. 31/2020, para. 46; and No. 33/2020, para. 77. [↑](#footnote-ref-25)
26. See opinions No. 11/2018, para. 53; No. 68/2018, para. 58; No. 10/2019, para. 71; and No. 33/2020, para. 63. [↑](#footnote-ref-26)
27. See opinions No. 34/2013, para. 15; No. 35/2013, para. 16; No. 81/2017, para. 6; and No. 54/2018, para. 31. [↑](#footnote-ref-27)
28. Ministry of Foreign Affairs of the People's Republic of China, [中华人民共和国公安部 朝鲜民主主义人民共和国国家安全保卫部 关于在边境地区维护国家安全和社会秩序的工作中相互合作的议定书], <http://treaty.mfa.gov.cn/Treaty/web/detail1.jsp?objid=1531876990894> [↑](#footnote-ref-28)
29. Ministry of Foreign Affairs of the People's Republic of China, [中华人民共和国和朝鲜民主主义人民共和国关于民事和刑事司法协助的条约], <http://treaty.mfa.gov.cn/Treaty/web/detail1.jsp?objid=1531876855012> [↑](#footnote-ref-29)
30. <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=17335> [↑](#footnote-ref-30)
31. <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=17685> [↑](#footnote-ref-31)
32. See opinion No. 33/2020, para. 64. [↑](#footnote-ref-32)
33. See also urgent appeals CHN 4/2017 of 13 April 2017; CHN 6/2017 of 15 June 2017; CHN 6/2018 of 6 March 2018; CHN 19/2018 of 26 September 2018; CHN 20/2018 of 10 October 2018; CHN 23/2018 of 30 November 2018; CHN 7/2019 of 30 April 2019; CHN 11/2019 of 27 May 2019; CHN 10/2019 of 28 May 2019; CHN 13/2019 of 17 July 2019; CHN 19/2019 of 23 September 2019; CHN 20/2019 of 27 September 2019; and CHN 4/2020 of 21 February 2020. [↑](#footnote-ref-33)
34. See also opinions No. 34/2013, No. 35/2013, No. 36/2013 and No. 29/2015. The Working Group in fact considered the case of a ROK POW and his son, Mr. Choi Sang Soo and Mr. Choi Seong Il, who escaped to China but was forcibly transferred back to China in case No. 36/2013. [↑](#footnote-ref-34)
35. See, for example, opinions No. 93/2017, para. 44; No. 10/2018, par. 45-46; No. 36/2018, paras. 40; No. 46/2018, par. 48; No. 9/2019, para. 29; No. 32/2019, para. 29; No. 33/2019, para. 48; No. 44/2019, para. 52; No. 45/2019, para. 51; No. 46/2019, para. 51; 6/2020, para. 39 and No. 11/2020, para. 37. [↑](#footnote-ref-35)
36. The Working Group has maintained from its early years that the practice of arresting persons without a warrant renders their detention arbitrary. See, for example, decisions No. 1/1993, paras. 6-7; No. 3/1993, paras. 6 and 7; No. 4/1993, para. 6; No. 5/1993, paras. 6, 8 and 9; No. 27/1993, para. 6; No. 30/1993, paras. 14 and 17 (a); No. 36/1993, para. 8; No. 43/1993, para. 6; No. 44/1993, paras. 6-7. For more recent jurisprudence, see opinions No. 38/2013, para. 23; No. 48/2016, para. 48; No. 21/2017, para. 46; No. 63/2017, para. 66; No. 76/2017, para. 55; No. 83/2017, para. 65; No. 88/2017, para. 27; No. 93/2017, para. 44; No. 3/2018, para. 43; No. 10/2018, para. 46; No. 26/2018, para. 54; No. 30/2018, para. 39; No. 38/2018, para. 63; No. 47/2018, para. 56; No. 51/2018, para. 80; No. 63/2018, para. 27; No. 68/2018, para. 39; No. 82/2018, para. 29; No. 6/2020, para. 40; and No. 11/2020, para. 38. [↑](#footnote-ref-36)
37. See, for example, Opinion No. 10/2015, para. 34; No. 32/2019, para. 29; No. 33/2019, para. 48; No. 44/2019, para. 52; No. 45/2019, para. 51; No. 46/2019, para. 51; No. 6/2020, para. 41; No. 13/2020, para. 48; No. 31/2020, para. 42; and No. 33/2020, para. 55. [↑](#footnote-ref-37)
38. The Working Group has also classified secret detention, which entails elements of *incommunicado* detention and enforced disappearance, as being per se arbitrary, falling within category I, in its opinion No. 14/2009, cited in paragraph 20 of the joint study on global practices in relation to secret detention in the context of countering terrorism (A/HRC/13/42). See also paragraphs 8, 9 and 16 of Human Rights Council resolution 37/3 of 22 March 2018. [↑](#footnote-ref-38)
39. See the Declaration on the Protection of All Persons from Enforced Disappearance; and Working Group opinions No. 82/2018, para. 28; No. 18/2019, para. 33; No. 22/2019, para. 67; No. 26/2019, para. 88; No. 28/2019, para. 61; No. 29/2019, para. 54; No. 36/2019, para. 35; No. 41/2019, para. 32; No. 42/2019, para. 48; No. 51/2019, para. 58; No. 56/2019, para. 79; and 11/2020, para. 39. [↑](#footnote-ref-39)
40. See Human Rights Committee, general comment No. 35, para. 33, citing *Kovsh v. Belarus* (CCPR/C/107/D/1787/2008), paras. 7.3–7.5. See also CCPR/C/79/Add.89, para. 17; CCPR/C/SLV/CO/6, para. 14; and CCPR/CO/70/GAB, para. 13. See, for example, opinions No. 57/2016, paras. 110–111; No. 76/2019, para. 38; and No. 82/2019, para. 76. [↑](#footnote-ref-40)
41. See Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 38; and Report of the Working Group on Arbitrary Detention, A/HRC/19/57, (26 December 2011), paras. 48-58. See also opinions No. 31/2020, para. 45 and No. 33/2020, para. 75. [↑](#footnote-ref-41)
42. See opinions No. 31/2020, para. 46 and No. 33/2020, para. 77. [↑](#footnote-ref-42)
43. See opinion No. 31/2020, para. 46. [↑](#footnote-ref-43)
44. Opinions No. 35/2018, para. 27; No. 83/2018, para. 47; No. 32/2019, para. 30; No. 33/2019, para. 50; No. 44/2019, para. 54; No. 45/2019, para. 53; No. 59/2019, para. 51; No. 65/2019, para. 64; No. 31/2020, para. 46; and No. 33/2020, para. 77. [↑](#footnote-ref-44)
45. See Opinion No. 4/2012 concerning Shin Sook Ja, Oh Hae Won and Oh Kyu Won, para. 26; Opinion No. 47/2012 concerning Kang Mi-ho, Kim Jeong-nam and Shin Kyung-seop, paras. 19 and 22; Opinion No. 34/2013 concerning Kim Im Bok, Kim Bok Shil, Ann Gyung Shin, Ann Jung Chul, Ann Soon Hee, and Kwon Young Guen, paras. 31 and 33; Opinion No. 35/2013 concerning Choi Seong Jai, Hong Won Ok, Kim Seong Do, Kim Seong Il, Lee Hak Cheol, Lee Gook Cheol, Kim Mi Rae and Lee Jee Hoon, paras. 33 and 35; Opinion No. 36/2013 concerning Choi Sang Soo, Choi Seong II, Kim Hyeon Sun, Kim Gyeong II and Park Sung Ok, paras. 32, 34 and 36. [↑](#footnote-ref-45)