

## **Concern Over ICC North Korea Probe**

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Investigating alleged war crimes could further isolate Pyongyang and complicate any peace settlement, experts say.

Legal experts have expressed concern that a probe by the International Criminal Court, ICC, into alleged war crimes by North Korea will only serve to drive the state further away from the international community.

The ICC's preliminary investigation into whether actions by North Korea's military last year constituted war crimes, announced on December 6, is taking place at a time of heightened instability in the region.

On March 8, the International Institute for Strategic Studies, a London-based think tank, published a report arguing that the Korean peninsula was now as dangerous as at the end of the 1950-53 war.

The report based its view on uncertainty about leadership succession in North Korea, and on reports that South Korea has been stockpiling arms in response to the north's aggressive stance.

Investigators are currently looking into two incidents. One is the sinking of the Cheonan, a South Korean warship, on March 26, 2010, which killed 46 people. The other is a North Korean artillery attack on the island of Yeonpyang island on November 23, which resulted in four deaths.

Although the court has jurisdiction over crimes committed in South Korea, which signed up to the ICC in 2002, it remains unclear exactly what action the ICC could take if it indicted North Korean citizens on war crimes charges, since the country remains outside the ICC and the court lacks any powers of enforcement.

This has led some experts to suggest that the decision by ICC's decision to launch an investigation is less about bringing justice to victims, and more about stepping up international pressure on the country.

There is also some speculation about why the ICC chose to publicise its actions, given that it is not obliged to announce initial investigations, and that many others now under way are being conducted in a more discreet manner.

Some view the announcement as a way for the court to assert its legitimacy, and to demonstrate that it is prepared to protect member states from alleged abuses.

"One of the ideas behind the court is that they want to persuade [countries] to join the Rome Statute," Robert Heinsch, assistant professor of public international law at Leiden University, said. "Becoming a member of the ICC [means it] is also there to protect you."

Others say publicising the investigation could be an attempt to prod the two states into resolving the situation by themselves.

"Certainly, from a soft power standpoint, the simple fact that the ICC has expressed interest in this situation may spur either North Korea or South Korea to start making their own plans for the prosecution," Kevin Heller, law professor at the University of Melbourne and a blogger on *Opinio Juris*, an international law forum, said. "That's kind of how the positive complementarity of the ICC gives an incentive to states to go ahead and do these things themselves."

Such tactics have worked before, notably in 2009, when the ICC opened a preliminary investigation into war crimes allegedly committed by rebels of the Revolutionary Armed Forces of Columbia, FARC. The Columbian courts went on to investigate the situation themselves, although there has been little movement on prosecutions.

Doubts remain, however, as to whether the ICC's investigation will be effective in curbing aggression in the Korean region.

"I question the deterrent value of the OTP [Office of the Prosecutor] announcing this investigation," Heller said. "If North Korea knows anything about the ICC, they're not exactly going to be shaking in their boots."

Others point out that the investigation will change little, since North Korea is already an outcast in much of the world.

"They have a somewhat paranoid and xenophobic mentality to begin with, so all this does is confirm their world view," Tom Ginsburg, a law professor at the University of Chicago, said. "President Kim Jong-Il [is] already prevented from travelling to many countries of the world, so an arrest warrant... wouldn't make a

difference for him.”

Ginsburg suggested that a confrontational approach might not go down well in this part of Asia, where states generally avoid interfering in one another’s affairs.

“The ICC is essentially a western liberal project, and east Asian states haven’t really signed on,” he added.

For its part, the ICC rejects the notion that any action taken against North Korea will be ineffective.

“The arrest warrant by the ICC Office of the Prosecutor is not limited by either statute of limitations or immunity,” ICC president Song Sang-Hyun said shortly after the investigation was announced. “Because it stays effective until the person dies, it could impose enormous stress on the person, despite lack of force to execute the warrant.”

The ICC declined to comment on the specifics of the North Korea investigation, or why it decided to launch a probe.

Some legal experts are unconvinced that the incidents under investigation qualify as war crimes.

In the first incident, a torpedo allegedly fired from a North Korean submarine at a South Korean naval vessel caused 46 deaths, but none were civilians. The shelling of Yeonpyeong may be easier to classify as a war crime, since it happened in an area where civilians lived. Two of the four people killed were civilians.

Overall, it remains uncertain whether or not the two incidents are grave enough to warrant a formal investigation.

“Even given the strongest reading of what actually happened, to open a formal investigation into a situation that involved one attack that led to a very small number of deaths – I just can’t see that ever happening,” Heller said.

The biggest fear is that the investigation could exacerbate North Korea’s hostile relationship with the rest of the world.

There is speculation that the more aggressive behaviour displayed by North Korea is linked to plans to transfer power to the current president’s son, Kim Jong-Un.

Some say the younger Kim wants to prove he is tough and able to stand up to the West. Others say the attacks are a reflection of intense political competition for the succession, which has made North Korea unresponsive to external influence.

Although President Kim Jong-Il has been stubbornly anti-western, there are hopes that his son might seek to improve relations. If that is true, an ICC indictment could make it harder for the country to open up to the West in the future.

“If there is an outstanding arrest warrant that has been issued many years before by the ICC... that might deter him [Kim Jong-Un],” Ginsburg said.

The law professor also fears that the ICC’s intervention may be premature.

“I’m just very sceptical of this particular situation,” he said. “In my view, the role of international criminal law is to come in after the conflict is over, and to try to provide some accountability for the worst offenses. Extending the jurisdiction of a fledgling court to relatively minor incidents which are part of an ongoing armed conflict may actually worsen the conflicts and prevent them from being resolved.”

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