Transitional Justice in North Korea: Accountability for Human Rights Atrocities in North Korea

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TRANSITIONAL JUSTICE IN NORTH KOREA: ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN NORTH KOREA

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[1] INTRODUCTION

As the international community had eventually directed its attention to the atrocities in North Korea (NK: hereinafter), around the time of 1990s, when the realities of atrocities in North Korea began to surface, piece by piece, from the live testimonies of slave labor workers in Siberia, former guard and survivors in the concentration camp, and numerous defectors hiding mostly in Chinese and Russian borders.

Human rights (HR: hereinafter) engagement against the NK regime so far has been no different from those that had been directed at other oppressive regimes. Both multilateral interventions at the United Nations setting, and bilateral talks, direct or indirect, among concerned states, have been the main feature of HR protection relating to the NK regime. Unilateral moves by diverse nations have also been at play, which presented enactments of NK human rights legislations, acceptance of NK refugees, and various mobilization of shame against NK, and its oppressors.
The recent attention and debate on the issue of transitional justice in NK derives much from the newly emerging elements of insecurity in NK. Such concerns on the recent dynamics in NK include those on the nuclear development, expected succession of political leadership, and recurring famines and dire situations of inhumanities and atrocities in the lives of the people in NK. Upon the Congressional debate on the making of the Korean NKHR Act, players have been divided on whether a German-modeled public record function on the HR violations in NK could be installed within the ambit of the NKHR Act. The Korean MOJ, and the Korean Human Rights Commission were mentioned as the candidates for the main organ of responsibility.

While the debate on the installation of a public record function deals with the need for accumulation of evidence for future deliberations, this writing is designed to portray a framework of accountability for HR violations in NK in preparation for the political and judicial undertaking in the Post-Korean Integration scenario. The following Part [2] addresses the modes of human rights violation in the North Korea. Part [3] delves on the issue of policy goals and objective in creating the frame of accountability. Part [4] seeks to clarify the scope of individual legal responsibility. Part [5] explores the possible options and their pros and cons in the establishment of a judicial forum that would be in charge of criminal proceedings against the perpetrators of the atrocities in the North Korean territory. In conclusion, this writing proposes for the creation of a national court coupled with the participation of the international community.

[2] HUMAN RIGHTS ATROCITIES IN NORTH KOREA
Despite nominal revisions on its internal laws, North Korea, ever since its inception of the regime, has never departed from its traditional notions on human rights that “NK has its standards of human rights, and persecutions on counter-revolutionaries are legitimate.”

(1) POLITICAL PERSECUTIONS

Basic framework of persecution derives from the classification of the whole residents into 3 main categories and 51 sub-categories, namely, core people, unstable group, and hostile ones. Such classification results in discrimination in the daily affairs of the people, including education, dwellings, distribution of resources, and marriage. Overtime, more than 6,000 members of the hostile group had been subjected to execution through the “people’s court”. Other 70,000 people had been expelled to mountainous areas. Wanton killings, and summary executions are rampant in concentration camps, and other administrative detention centers. In the case of Christians, since 1970s, over 400,000 had been wrongfully executed on charges of espionage in association with the US intelligence agencies. Reportedly over half of the Korean-Japanese returnees have been sent to concentration camps, later to be subjected to arbitrary killings, and slave labor in many cases. Their whereabouts are currently known, and their collective fate has been left for long outside the sight of the concerned governments. Torture, extermination, and enslavement are common features of the ruling method of the repressive NK regime. Concentration camps, a basic tenet of NK’s repressive management tool, hold over 200,000 inmates, of which 90 % are detained in the “complete control” zone, where these detainees have been subjected to slave labor for over 60 years, and down through 4 successive generations, without the possibility of escaping.
(2) **RIGHT TO FOOD**

During the last 20 years since the 1990s, over 1 million people comprising 5 to 10% of the population have starved to death. Instead of requesting full-fledged aid and assistance from the international donors, the NK regime chose to put a restriction on the delivery of food directly onto the hands of the needy people, and another restriction upon the importation of food on commercial terms at the commencement of humanitarian assistance. Suspicions among experts are present that the NK regime deliberately chose to abandon the lives of the people outside Pyongyang in order to divert its resources to the development of weapons.

(3) **NORTH KOREAN DEFECTORS IN CHINA AND ELSEWHERE**

NK defectors in border areas, whose numbers reach between 50,000 to 300,000, are routinely subjected to detention in concentration camps, security facilities, and other torture cells upon their forceful return to NK. Public execution, enforced abortion, slave labor, torture and sexual assault, and cruel and degrading treatment are commonly applied to the defectors upon their repatriation and arrival at the NK territory. China is also complicit in the persecution and forceful return of the defectors, for it contends that these people are merely illegal entrants, and have no qualification as refugees, thereby complying with the China-NK agreement on the forceful repatriation of the NK defectors.

(4) **POWs OF THE KOREAN WAR**
Ever since the conclusion of the armistice agreement in July 27, 1953, the issue of POWs in the Korean war has remained virtually unnoticed. At the time of negotiation between the contesting parties, ROK submitted a list of 16,243 POWs in contrast to the DPRK’s estimation of 7,142. The returnees were mostly those who had been damaged, or incapacitated from military operations. The remainder of those POWs had been subjected to imprisonment, and slave labor, mostly in mines, and other concentration camps. They were also put to social discrimination, and continued surveillance, while being labeled as the No. 43 personnel in the hierarchy of DPRK’s social classification. From 1994 to 2009, 79 POWs in total have found their way to South Korea, and presumably over 560 POWs are still alive in the North Korean territory.

(5) ABDUCTEES

Since 1953, over 3,790 South Koreans had been abducted by the hands of the NK regime, with at least 22 among them detained in the concentration camps. In the case of the Japanese abductees, Kim Jongil had once admitted that 13 Japanese had been kidnapped by the NK regime, in his summit talk with the former Japanese Prime Minister Koizumi. Abduction had also been employed against the human rights defenders, most South Koreans.

[3] HOW TO FRAME THE ACCOUNTABILITY: CLARIFICATION OF POLICY GOALS AND OBJECTIVES

Two pillar ideas in the actual management of transitional justice are the administration of stern justice to persecutors of injustice, and the social integration, and rehabilitation. The
urgent need for peace and social stability in a given transitional society is often at odds with the calls of justice. It is not unusual in a transitional society, where the transformation of political and social power from a repressive regime to a democratic one is not complete, and satisfactory, there is a virtual danger that the cause of justice can be compromised. Legacy of military dictatorship and the rule of terror, coupled with the underdevelopment of the replacing democracy, present sometimes insurmountable obstacles in the establishment of a sound justice system in the post-transition society.

Likewise, in the Korean context, some of the humanitarian workers and organizations have often submitted that a blanket amnesty for all the breaches of human rights norms in NK is required to alleviate the anxiety of prosecution on the part of the NK regime participants. Presuming, however, that the integration of two Koreas is not susceptible to forceful actions, and would eventually come true from a scenario of internal collapse inside NK, South Korea, unlike other transitional societies, would not face much difficulty in the administration of justice in the post-integration NK.

Despite difficulties in making plausible estimations, the resistance of the NK regime and its collaborators would not be greater than the urge and wish for justice of the informed and enlightened ordinary people in NK in the post-integration posture. There is also a great risk that the failure to secure soundness in deliberation of justice would result in the pervasive undertaking of private vengeance, hence another element of substantial social unrest and instability.

The issue of accountability and social integration also rest much upon the actual administration of justice, i.e., rules on punishable conducts, scope of responsibility, and its holders, severity of punishment, and the overall quality of justice administration.
The task of clarifying policy goals and objective should include paying due attention to the following concerns:

1) Realization of retributive justice to the law breakers and the victims;

2) Meting out stern justice to the oppressors, and effectively preventing the recurrence of atrocities in the future;

3) Creating public factual records on past atrocities, and accompanying judicial deliberations;

4) Facilitating social integration through invigorating social discourse upon how the society should embrace past wounds, and create future plans;

5) Education and adaptation program for the convicted, and the general public as well;

6) Filling the gap at the consciousness level between NK residents and South Koreans.

[4] **How to Frame the Accountability: Clarification of Legal Responsibility upon Punishable Conducts and Holders of Responsibility**

(1) **Time**

All the international courts and national tribunals have had their specific time span of existence. The **ICTY (Yugoslavia)** dealt with the breaches of international humanitarian norms perpetrated from January 1, 1991 (UNSC Res. 827). **ICTR (Rwanda)** punished those Rwandan nationals who committed genocide, and violations of humanitarian norms between January 1, and December 31, 1994 (UNSC Res. 955, Nov. 1994). The **Special Court for Sierra Leone** prosecuted the persons who bear the greatest responsibility for the atrocity
The South African Truth and Reconciliation Commission focused on criminal activities including murder, kidnapping, and torture committed within and outside the South African territory from March 1, 1960 until its designated cut-off date, which was later extended to May 11, 1994 based upon the Promotion of National Unity and Reconciliation Act No 34 of 1995. In the East Timorese Special Panels of Serious Crimes established by the United Nations Transitional Authority in East Timor, the Serious Crimes Unit prosecuted the perpetrators of war crimes, crimes against humanity, and HR violations that had occurred from January 1, 1999 to October 25, 1999. The Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea dealt with the crimes under national and international law committed between April 27, 1975, and January 6, 1979, in accordance with Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea effectuated on October 27, 2004. The Iraqi Special Tribunal exercised jurisdiction over crimes done by Iraqi nationals and residents in both Iraq and elsewhere between July 17, 1968, and May 1, 2003.

In the Korean context, the time frame of accountability may commence from the 1948, the birth year of the NK regime, or the year of 1956 when the NK regime began to establish the concentration camps to crack down upon the counter-revolutionaries of “August divisionist unrest”, and may extend to the time of the eventual Korean integration. Special deliberations on such specific issues of grave nature as the atrocities inside the concentration camps, the massacre of the Christian believers, cruelties in numerous detention centers could be considered in separation.
(2) PLACE, AND PEOPLE

The territorial jurisdiction may also cover the atrocities committed in North Korea, Manchuria, Siberian areas, and other border areas and Asian states, where the North Korean security forces extended their forceful pursuit of defectors routinely employing torture and cruel treatment against them.

Individual criminal responsibility should apply to all of those responsible for given atrocities, regardless of their rank, position, or mandate in the chain of command, and operation. The scheme of liability should start right from the top-leader Kim Jongil and his high-rank collaborators, down to those who actually pulled the triggers, or held control over torture cells. International law negates the notion of immunity for the head, or superiors of a state, and for the inferiors as well who habitually contend that orders were compulsory. In the actual computation of the scope of personal liability, however, it is not unusual to consider relatively lenient treatment to those low in rank in the chain of command for a variety of practical reasons, including the facilitation of fact-finding, or the capacity of the court vis-à-vis the expected numbers of the convicted.

[5] ESTABLISHMENT OF A JUDICIAL FUNCTION

(1) CREATION OR UTILIZATION OF INTERNATIONAL COURTS

The international criminal court (ICC) may be an option for the judicial deliberation of the atrocities in North Korea. Currently, however, NK is not a party to the Rome statute of the ICC, and is likely to remain so for an unlimited time. China would not consent to the
jurisdiction of ICC, in case when atrocities occur inside its own land. South Korea may assert jurisdiction based upon its Constitution that includes NK as part of its territory, yet without clear possibility of international approval. One possible way for the ICC to exercise jurisdiction over crimes in NK is to secure passage of a Security Council’s resolution, as was in the case of the Sudanese Dafur. In the event when the ICC is seized of the NK issue, rules on such crimes as crimes against humanity, and genocide will be applied. North Korea is also a party to the 1984 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which allows for persecution on those crimes without the constraint of the time factor. One limitation of the ICC is that it deals with only the crimes perpetrated after July 1, 2002. Thus, in case when the ICC is used as the legal venue, separate consideration should be given to those crimes committed after the time of July 1, 2002.

In the post-integration scenario, South Korea would find no difficulty in utilizing the ICC as an international venue for the prosecution of the North Korean perpetrators. Given the principle of complementarity of the ICC that shows deference to the national deliberation, however, South Korea is better positioned, and is more likely to exercise its jurisdictional competence as the holder of the main responsibility to establish justice in the North Korean territory.

International courts of ad hoc nature as witnessed in the cases of ICTY, and ICTR can be other options, yet on the condition that requirements are met in terms of time, expense, and international consent.

(2) MIXED TRIALS: SIERRA LEONE, EAST TIMOR, AND CAMBODIA
In the cases of Sierra Leone, East Timor, Kosovo, and Cambodia, the national authorities cooperated with the international community, mainly for reasons of cost and expense, in the establishment of mixed trials. In the Cambodian case specifically, the idea of establishing an international court, in June, 1996, for the prosecution of the crimes of the Khmer Rouge regime that massacred over 2 million people in the late 1970s, was not brought to fruition because of the lingering political insecurity in the Cambodia, and the disagreement among the member of the Security Council. After years of negotiation, the Cambodian government established Extraordinary Chambers in the Courts of Cambodia, based upon its national law, yet with the participation of international judges and prosecutors dispatched by the United Nations.

_Sierra Leone_, a society critically torn by the civil war of the 1990s, in June, 2000, asked for the creation of an UN-based international court. Yet the result was a national “Special Court for Sierra Leone” formed by the agreement between SL and the UN that was particularly concerned about the financial aspect. Of such was _the East Timor_, where “Special Panels for Serious Crimes” were set up, in June, 2000, by the initiative of a group of international judges within the scheme of national judiciary. The Panes prosecuted 87 criminals with granting guilty sentences on 84 of them through 55 times of deliberations, until May, 2005.

Applicable laws included both national laws, and international norms. In Cambodia, for example, statutes of limitation were revised to extend the application of its criminal law over 20 years. In the Korean context, it would be undisputed that both Korean laws, possibly including some of North Korean laws effective from prior to the integration, and international norms on war crimes, genocide, and crimes against humanity should apply.

Since the South Korean judiciary is perceived to be well qualified to perform independent administration of justice, it will probably assume the main responsibility of transitional
justice in North Korea. Yet the input and participation of both regional, and international community would be an essential factor in terms of legitimacy, expertise, and social integration not only within the post-integration Korean peninsula, but for the surrounding Asian region, and the international community as well. Presumably, the USA would be interested in raising the issue of war crimes during the Korean War, while Japan would like to see that justice be done to the perpetrators of abduction. Another potentially crucial issue is how to deal with non-Korean perpetrators who conspired on, collaborated with, or actively engaged in the human rights infringements, in China, Russia, and elsewhere.

(3) A TRUTH AND RECONCILIATION COMMISSION (TRC)?

In a transitional society, the idea of establishing a TRC may gain popularity as a way of satisfying the need of doing justice to the part violations, and of bonding and rebuilding the already harmed society torn by the hostilities among its constituents as well. Many arguments may be submitted in support of its creation. It may be practically improbable to bring every law breakers to the call of justice. In the cases of the inferiors in the chain of command, non-volitional participants, and those who committed crimes of light nature, TRC may sound as a better forum for the resolution of lighter breaches.

In the North Korean context, such crimes and law breakers reaching presumably over 50,000 may be subjected to the decision of a TRC, while crimes of grave nature are put to the scrutiny of a court proceeding. Amnesty for lighter crimes is more often than not granted in return for their full-fledged revelation of truth. In the South African TRC, amnesty was selectively granted to those who revealed the truth in full scale, and, otherwise, they were not protected from the ensuing criminal proceedings.
(4) A KOREAN COURT

In view of the above-mentioned overall assessment of the modes of judicial deliberation, establishing a Korean national court would be the desirable course of action, since the absolute majority of the victims, and the perpetrators are North Korean residents, and the Korean judiciary is practically best suited to conduct criminal proceedings upon crimes committed within the Korean peninsula. ICC has the jurisdictional obstacles in dealing with the crimes that had been committed prior to July, 1, 2002, and also by the application of the “complementarity principle”

The Korean NKHR court could be established within the Korean national judicial structure for a given time frame based upon a specific national statute. Given the lack of ample experience in dealing with international crimes, including genocide, crimes against humanity, and war crimes, the participation of international judges should be encouraged for reasons of expertise and enhanced legitimacy as well.

Most of the crimes in the NK territory would be punishable under Korean laws, and, even North Korean laws holding prior to the time of integration. However, general crimes such as murder, and torture, would not be accurate enough to cover crimes that are systematic, grave, state-sponsored, and internationally concerned. In this context, it is advisable that a specific legislation should be made with provisions on punishable crimes encompassing internationally acknowledged criminal acts, and specific provisions on the statute of limitation that has the effect of extending the time limit of applicable laws, or even negating the notion of limitation upon crimes of grave nature. In Germany, the time toll was declared to be suspended to the point of the German unification relating to the human rights violations that had occurred inside the East-German territory.
Considering the historicity of the trials, their proceedings should secure opaqueness, and transparency in view of the need to guarantee fairness, and legitimacy, and the practical cause of social integration and education. The participation of the victims should also be allowed to a proper scale as a process of social healing and rehabilitation.

In practical terms, the following points should be addressed in the establishment of a court:

1) Revelation of truth, and collection of credible evidence;
2) Distinction between active and passive participants, and those condoned in the perpetration of the atrocities in question;
3) Legal basis for the applicable laws, and the institution of a special court;
4) The scope of participation of international judges, prosecutors, and legal counsels;
5) The coverage of intervention of international organizations, and human rights institutions;
6) The venue for the judicial deliberation;
7) The practical enforceability of judicial decisions;
8) In the case of creating both TRC and a court system, the legal basis for those institutions, and the need to weigh the pros and cons of utilizing dual-track proceedings.

[6] CONCLUDING REMARKS

The issue of transitional justice in the context of the post-integration Korean peninsula will be handled in the direction of both meeting the need to mete out stern justice to the perpetrators
of historic atrocities, and securing the reconciliation of the Korean society, possibly shaken to the root, by the impact of the whole integration process.

Proper and professional administration of justice is imperative. Otherwise, there is a danger that the Korean society, already challenged by the end of years of hostility, may enter into another phase of troubled process of social disintegration. Public justice should be able to prevent the emergence of private vengeance, and a disregard for the rule of law.

Criminal persecutions also bear great importance upon the nature, and scope of civil reparation. Specific measures should also be undertaken on, whether and to what extent, the method of compensation should be utilized by both public hands, and private parties.
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