

Start Thinking Now About Transitional Justice in a Post-Transition North Korea

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It's not too soon to begin thinking about transitional justice for North Korea. While this "failed state" has managed to muddle through (thanks in large part to Beijing's decision to keep it on life support), the end of one of the world's most repressive regimes could happen sooner, rather than later. Broaching the subject of transitional justice now is central to efforts to prepare for the Pyongyang regime's inevitable collapse. It could even save lives today.

North Korea has committed human rights abuses against its own citizens for more than half a century. North Koreans have even been denied the basic right to food needed for survival, as well as fundamental rights such as the freedoms of expression, political participation, and assembly. The UN established a Commission of Inquiry (COI) on North Korea on March 21, 2013, calling for greater investigation into human rights abuses inside the country. Such efforts have done much to bring the North Korea's human rights abuses into the limelight. Sadly, however, this issue remains overshadowed by North Korea's nuclear weapons program.

Transition in North Korea could be years away. But it is at least equally likely that it could happen in the next few years or even months, given North Korea's economic, political, and social vulnerabilities and its status as a failed state. We need to start thinking now about how we will be attributing responsibility for human rights abuses, preventing the recurrence of such abuses, and promoting the integration of a North Korean society that is in transition.

Ever since Ruth Teitel, a US legal scholar, first coined the term 'transitional justice' in 1991, discourse on 'transitional justice' in academia and in practice has greatly expanded. Establishing transitional justice in countries that have transitioned from authoritarianism to democracy or countries that have experienced civil war has become both a historical and political process, and it has also expanded into a global project with the participation of international organizations, NGOs, and think tanks.

There are two courses for attributing responsibility for human rights abuses in societies in transition: 'retroactive justice' seeks reconciliation for the victims of systematic abuses through official apologies and compensation; 'retributive justice,' seeks justice through attributing responsibility for human rights abuses and giving punishment

to the perpetrators. While the particular type of transitional justice used often depends on the historical context of the society and requests by the victims of abuses or civic groups, above all, it depends on the 'political compromise' reached by domestic political factions. While retributive justice is a more likely outcome in North Korea, several key points merit further attention in establishing transitional justice in North Korea.

First, it must be decided whether perpetrators will be prosecuted in domestic courts under domestic laws, as was the case in East Germany and Romania, or through the International Court of Justice (ICJ), as was the case in Cambodia, former Yugoslavia, and Rwanda. While prosecution through domestic courts has the advantage of being relatively more efficient, there remains a concern that sentences can be influenced by domestic political forces. In the ICJ, unlike domestic courts, prosecuting perpetrators is dealt with more objectively. A disadvantage is that the ICJ can have a Western liberal bias in its sentencing, instead of considering the specific context of each country

Second, the scope in designating who are perpetrators must be considered. Generally, perpetrators range from top commanders, collaborators, sympathizers, and those who actually committed human rights abuses. In most cases, including Cambodia, those who were held accountable were generally the top commanders who ordered abuses to be carried out. In the East German case, however, punishment was given to the border guards who had carried out human rights abuses. Thus, the 'actual abusers' of human rights were given the same punishment as higher-level officials. We would argue that this should be the case with North Korea as well and that this decision should be reached early and broadly disseminated. Kim Jong Un has increased the number of border guards to prevent defections; those guards would think twice about using deadly force against their own countrymen if it was made clear, in advance, that such actions would be tried as acts of murder once the current regime collapses.

Third, there is the application of *ex post facto* law. While applying current laws to prosecute past offenses is not common in normal criminal cases, it does apply when dealing with crimes against humanity, according to international law. This is still subject to debate. With regards to the trials of former East German border guards, for example, shooting and killing 'border crossers' was lawful according to the East German legal system. However, after German unification, the act became classified as a crime against humanity. This case has implications for low-ranking North Korean officials who regularly commit human rights abuses against prisoners and shoot and kill defectors trying to escape the country. Again, clarity about the nature of the crime now will make punishment easier later but could also deter those otherwise

inclined to prevent refugees from escaping or decrease their willingness to send them back to face inhumane punishment.

The fourth point concerns the interpretation of the phrase 'gross human rights violations.' The UN Human Rights Council (UNHRC) stipulates 'gross human rights violations' as large-scale or long-term human rights abuses such as genocide, compulsory detention, or torture. In reality, the standard for the severity of abuses and the interpretation of the term 'gross' can vary by country. If the term 'gross' implies a specific numerical figure, then there must be discussion of whether those dying of starvation fit into this category. The cause of starvation in North Korea cannot only be attributed to the public distribution system, but also natural disasters, and the failures of the centrally-controlled economy. Accordingly, whether victims died from starvation can be considered to be genocide or simply a result of the failure of the North Korean system is still open to debate.

Finally, the period of the human rights abuses must also be considered. For North Korea, did human rights abuses begin with the founding of the regime and its transition, or is the timeframe limited to a particular event?

While no one can predict when transition will take place in North Korea (and this does not necessarily imply Korean unification), we must begin thinking about how to help establish transitional justice in North Korea. Ultimately establishing transitional justice should not bring about social disorder, but must work toward social integration. Transitional justice cannot be successfully established in a short timeframe. Preparing a basic foundation for transitional justice, before the transition actually occurs, is one way to prepare for an uncertain future on the Korean Peninsula.

PacNet commentaries and responses represent the views of the respective authors. Alternative viewpoints are always welcomed.