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The Response to Human Rights Abuses in North Korea: Problematizing Accountability

By Andrew Wolman

Abstract:

In the past few years, one deceptively simple concept has come to dominate the international discourse on human rights in North Korea: accountability. On first glance, this seems entirely appropriate, given the severity of the crimes committed by Kim Jong Un and his associates. In this essay, however, I will take a step back, to problematize the concept of accountability. Specifically, I will address five questions that have to date been largely ignored. First: what does accountability mean? Second: why is it desirable? Third: does the emphasis on accountability have any potentially negative consequences? Fourth: when is the right time to focus on accountability? And fifth: who benefits from the turn to accountability? While I do not intend this essay to imply that accountability is undesirable in any way, I do aim to show that it is a more complex principle than is often assumed, and should be the subject of serious thought and discussion, rather than unthinkingly adopted as the core objective for North Korean human rights advocates.

I. Introduction

The world has been aware of grave atrocities committed by the North Korean regime for at least two decades, and during that period the international community has advanced a series of strategies to address the issue, including engagement, monitoring, investigation, naming and shaming, outcasting, and (most recently) sanctioning.¹ The tenor of this response began to shift with the publication of the 2014 final report of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea (‘CoI’), a three-person investigative body established by the UN Human Rights Council.² This report found that grave human rights abuses and crimes against humanity had been committed by the North Korean leadership, and urged that the situation be referred to the International Criminal Court (‘ICC’).³ In short, the CoI report shifted the discourse from an international human rights law framework to an individual accountability-based international criminal law framework.⁴

In the few years since the CoI’s report on North Korean human rights abuses (and as a result of the shift to an international criminal law framework), the deceptively simple concept of

¹ See generally, Roberta Cohen, *Human Rights in North Korea – Addressing the Challenges*, in TRANSITIONAL JUSTICE IN UNIFIED KOREA 75 (Baek Buhm-Suk & Ruti Teitel, eds., 2015); KINU Center for North Korean Human Rights Studies, *Implementation Strategies for Policies on North Korean Human Rights* (Korea Institute for National Unification, 2015).

² U.N. Human Rights Council, *Comm. of Inquiry on Human Rights in the DPRK, Report of the Detailed Findings of the Comm. of Inquiry on Human Rights in the DPRK*, para. 432, A.HRC/25/CRP.1 (Feb. 7, 2014).

³ *Id.*, para. 1201(1).

⁴ Cohen, *Human Rights in North Korea*, *supra* note 1, at 80 (“the significance of the COI report is that it established the legal foundation for holding the North Korean leadership to account”).

accountability has come to dominate the international response to atrocities in North Korea.⁵ Recent UN Human Rights Council and General Assembly resolutions on North Korean human rights emphasized the concept, as did former UN High Commissioner for Human Rights Navi Pillay.⁶ According to Tomas Ojea Quintana, the current UN Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea, the international community "must be guided by the pursuit of justice and accountability as a core tenet of the United Nations."⁷

Most recently, the concept of accountability was the explicit focus of the Group of Independent Experts on Accountability, which was established by the Human Rights Council in 2016 and issued an advanced version of its final report in March 2017.⁸ Outside of the UN halls, the principle of accountability has likewise becoming the focal point of governmental and non-governmental discourse. The focus on accountability is visible in the work of civil society groups,⁹ and in the statements of government representatives and prominent experts in the field.¹⁰ According to Michael Kirby, the former head of the CoI, "accountability is the name of

⁵ KINU Center for North Korean Human Rights Studies, *supra* note 1, at 8 ("In 2014, North Korean human rights issue emerged as an important political agenda for the international community, going beyond from an issue to merely 'monitor' to one which calls for full 'accountability'"); Veronika Bílková, presentation at European Parliament Workshop, *Human Rights in North Korea: Accountability v. Engagement* (April 20, 2016), [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/578004/EXPO_IDA\(2016\)578004_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/578004/EXPO_IDA(2016)578004_EN.pdf) (last visited on July 17, 2017) ("Accountability issues vis-à-vis North Korea gained a prominent place on the international agenda especially since 2014 when the UN Commission of Inquiry published its report.")

⁶ Open Letter from FIDH – International Federation for Human Rights et al to UN Human Rights Council, *Need for Enhanced Focus on Accountability in the DPRK* (Feb. 17, 2016), <https://www.fidh.org/en/region/asia/north-korea/need-for-enhanced-focus-on-accountability-on-the-dprk> (last visited on July 17, 2017) "In its own resolutions, the UN Human Rights Council has highlighted the need for accountability, a call that was echoed by the UN High Commissioner for Human Rights and many States during the plenary panel discussion at the 30th session of the Council"; G.A. Res. 69/188, U.N. Doc. A/RES/69/188 (Dec. 18, 2014) (calling on the UN Security Council to take "appropriate action to ensure accountability, including through consideration of referral of the situation in the Democratic People's Republic of Korea to the International Criminal Court.")

⁷ John Power, *Bring a Regime to Justice? In Seoul, Rights Groups Play Long Game on N. Korea*, CHRISTIAN SCIENCE MONITOR (Mar. 13, 2017), <https://www.csmonitor.com/World/Asia-Pacific/2017/0313/Bring-a-regime-to-justice-In-Seoul-rights-groups-play-long-game-on-N.-Korea> (last visited on July 17, 2017).

⁸ *See generally*, Group of Independent Experts on Accountability pursuant to Human Rights Council Resolution 31/18 on the situation of human rights in the Democratic People's Republic of Korea, at <http://www.ohchr.org/EN/HRBodies/SP/CountriesMandates/KP/Pages/GroupofIndependentExpertsonAccountability.aspx> (last visited on July 17, 2017).

⁹ *See, eg*, Open Letter from FIDH, *supra* note 6 (letter from major involved NGOs urging an "enhanced focus on accountability on the DPRK"; signatories include Human Rights Watch, FIDH, Amnesty International and the Citizens' Alliance for North Korean Human Rights). As its name suggests, the North Korea Accountability Project was recently founded by a group of civil society organizations to aid the UN in its efforts to bring accountability to North Korea. Presentation by Sylvia Caterini, Consultant for North Korea Accountability Project at European Parliament Workshop, *Human Rights in North Korea: Accountability v. Engagement* (April 20, 2016), [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/578004/EXPO_IDA\(2016\)578004_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/578004/EXPO_IDA(2016)578004_EN.pdf) (last visited on July 17, 2017).

¹⁰ For example, Jung-Hoon Lee, the South Korean Ambassador for Human Rights, recently called for a "global campaign on accountability" in North Korea, while Sang Hyun Song, former President of the International Criminal Court (ICC), who similarly stated that countries must work together to "strengthen the global system of accountability" as it applies to North Korea. *See* Lizzie Buehler, *The Future of Accountability in North*

the game in human rights...otherwise it's all rhetoric.”¹¹ For Kirby, the principle of accountability for North Korean human rights violators is simply “non-negotiable”.¹²

This focus appears set to continue: the 2017 U.N. Human Rights Council resolution on North Korean human rights mandated the initiation of a review of information by “experts in legal accountability” in order to develop “possible strategies to be used in any future accountability process”, and decided to strengthen the OHCHR Seoul office to allow it to implement the recommendations of the Group of Independent Experts on Accountability.¹³

At first glance, this emphasis on accountability seems entirely appropriate. The CoI Report showed beyond any doubt that grave human rights abuses and crimes against humanity continue to be committed in North Korea. Who could oppose any move to hold the perpetrators of these crimes to account? We are, after all, living in what has been termed the “age of human rights accountability”.¹⁴ The International Criminal Court, regional human rights courts and the U.N. have all propagated a “global accountability norm”, or at least have tried to do so.¹⁵ In the words of former High Commissioner for Human Rights Navi Pillay, “[a]ccountability for international crimes and gross human rights violations constitutes a central plank of the contemporary human rights agenda. Today, the question is no longer whether to ensure accountability, but when and how this is best achieved.”¹⁶

Accordingly, there has been little questioning this new emphasis on accountability, by either academics or the mainstream NGO community. Rather, the idea of accountability has, by and large, been accepted as an unquestioned objective, with scholars moving on to study the (undoubtedly important) follow-up questions of how North Korean human rights violators can be held accountable, and precisely who should be held accountable. In this essay I will take a step back and problematize the concept of accountability. Specifically, I will question what the concept of ‘accountability’ actually means in the North Korean context, why it may be considered desirable or undesirable, what the implications are of focusing on accountability at this particular point in time, and conclude by discussing which groups benefits from this turn to accountability. In addressing these questions, this essay will draw from the abundant critical literature in transitional justice and international criminal justice that has emerged in recent years,

Korea, DAILY NK (July 4, 2016), <http://dailynk.com/english/m/read.php?num=13973&catId=nk02501> (last visited on July 17, 2017).

¹¹ Power, *supra* note 7.

¹² Michael Kirby, *Overview*, in NORTH KOREAN HUMAN RIGHTS: THE ROAD AHEAD 11 (Victor Cha & Marie DuMond, eds, 2015).

¹³ Hum. Rts. Counc. Res. 34/L.23, U.N. Doc. A/HRC/34/L.23 (Mar. 24, 2017) para. 12.

¹⁴ See FRANCESCA LESSA & LEIGH A. PAYNE, EDS., AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY (2012).

¹⁵ Louise Mallinder, *Amnesties’ Challenge to the Global Accountability Norm*, in AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY 69, 90 (Francesca Lessa & Leigh Payne, eds., 2012); Steven R. Ratner, *After Atrocity: Optimizing UN Action Toward Accountability for Human Rights Abuses*, 36 MICH. J. INT’L L. 541, 542 (2015); Ruti Teitel, *Transitional Justice and Judicial Activism – A Right to Accountability?*, 48 CORNELL INT’L L.J. 385, 388 (2015).

¹⁶ Navanethem Pillay, *Establishing Effective Accountability Mechanisms for Human Rights Violations*, XLIX U.N. Chron. (Dec. 2012), <https://unchronicle.un.org/article/establishing-effective-accountability-mechanisms-human-rights-violations> (last visited on July 17, 2017).

and that have provoked a rethinking of the idea of accountability, as well as virtually every other aspect of the field.¹⁷

II. What does ‘accountability’ mean?

In order to explore the implications of focusing on accountability when addressing North Korean human rights abuses, the first step should be to understand the term’s meaning. This is not a simple task. There is a wealth of literature attempting to define and conceptualize ‘accountability’ in a variety of contexts.¹⁸ Indeed, scholars have argued that there is widespread “fragmentation” in the discourse of accountability, such that different disciplines and interest groups employ the term in quite distinct manners, resulting in a “Byzantine confusion.”¹⁹

When one looks more narrowly at the human rights and transitional justice field, a fundamental split is evident in scholarly views of what the term accountability signifies. Some analysts, especially those with a legal background, have traditionally viewed the term as referring solely to individual criminal prosecution (whether through a domestic, hybrid or international forum).²⁰ Thus, according to the Transitional Justice Working Group, “[a]ccountability’ in transitional justice is a concept often associated with legal remedies applied to situations where atrocities have taken place.”²¹ Other scholars use the term to refer to a much broader range of processes, potentially including lustration, truth commissions, and various restorative justice mechanisms,²² and to refer to measures targeting states, corporations, and

¹⁷ See, e.g., CHRISTINE SCHWÖBEL, *CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION* (2014); Rosemary Nagy, *Transitional Justice as Global Project: Critical Reflections*, 29 *THIRD WORLD Q.* 275 (2008); Jeremy Sarkin, Estelle Zinsstag & Stephan Parmentier, *Critical Issues in Transitional Justice: A Sisyphian Exercise*, 9 *HUM. RTS. & INT’L L. DISC.* 2 (2017); Jeremy Sarkin & Tetevi Davi, *Examining the Criticisms Levelled Against Transitional Justice: Towards an Understanding of the State of the Field*, 9 *HUM. RTS. & INT’L L. DISC.* 7, 7 (2017) (“almost every aspect and every component of every TJ mechanism in every place has been the subject of criticism to varying degrees”).

¹⁸ See, e.g., Robert Keohane, *The Concept of Accountability in World Politics and the Use of Force*, 24 *MICH. J. INT’L L.* 1121, 1123-24 (2003); Andreas Schedler, *Conceptualizing Accountability*, in *THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES* 13, 23 (Andreas Schedler et al., eds. 1999). Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 *EUR. L.J.*, 447, 449 (2007).

¹⁹ Staffan Lindberg, *Accountability: the core concept and its subtypes*, Overseas Development Institute, Africa Power and Politics Programme Working Paper No. 1, 15 (2009). See also, Michael Dowdle, *Public accountability: conceptual, historical and epistemic mappings*, in *PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES* (Michael Dowdle, ed., 2006) 1, 10. Jerry Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in *PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES* 115, 117 (Michael Dowdle, ed., 2006).

²⁰ Louise Mallinder & Kierna McEvoy, *Rethinking Amnesties: Atrocity, Accountability and Impunity in Post-Conflict Societies*, 6 *CONTEMP. SOC. SCI.* 107, 108 (2011) (“A key feature of the legalistic debates, which from our perspective tend to prevail in the area, is a narrow deployment of the term ‘accountability’ as synonymous with the prosecutions and punishment of individual perpetrators of serious human rights abuses”); Elin Skaar, Jemima García-Godos & Cath Collins, *The Accountability Challenge*, in *TRANSITIONAL JUSTICE*, 4 (Elin Skaar, Jemima García-Godos & Cath Collins, eds., 2016) (“In the TJ field, accountability is generally associated with criminal accountability”); CHRISTINE BELL, *TRANSITIONAL JUSTICE* 10 (2016) (“Trials are here seen as synonymous with accountability and the rule of law”).

²¹ Transitional Justice Working Group, *Mapping Crimes Against Humanity in North Korea: Mass Graves, Killing Sites and Documentary Evidence* 50 (2017).

²² Carlos Fernandez Torne, *Truth Commissions and the Accountability Relationships they Generate: A New Framework to Evaluate their Impact*, 3 *ASIAN JOURNAL OF PEACEBUILDING* 233, 233 (2015) (“accountability refers

other institutions, as well as natural persons.²³ Among those who employ the term ‘accountability’ in this broader sense, there is sometimes a tendency to view different forms of accountability on a spectrum, with criminal prosecution as the ‘highest’ or ‘ultimate’ form of accountability.²⁴ There is also often an underlying sentiment that assigning accountability to institutional entities leads to an evasion of responsibility by the individuals who make and carry out atrocities in that entity’s name.²⁵

Of course, the meaning of difficult concepts such as ‘accountability’ will naturally tend to be disputed and context-dependent; the more important question is what accountability means to key actors in the context of the current discourse on addressing North Korean human rights abuses. Here too, however, there is some lack of consistency. In some cases, commentators have used the term ‘accountability’ to refer to elements of the North Korean state and institutions (as well as individuals) as subject.²⁶ One analyst has even defined accountability particularly broadly to encompass “helping the victims” and “improving the situation in the country”.²⁷ Others have used the term to signify criminal prosecution. Thus, for example former Special Rapporteur on the Situation of Human Rights in the Democratic People’s Republic of Korea Marzuki Darusman interchangeably used the terms ‘accountability’, ‘judicial accountability’ and ‘criminal accountability’ when discussing the formation of the Group of Independent Experts.²⁸ This also seems to be the stance of major NGOs, who petitioned the UN to draft the Panel of Experts’ mandate to focus on criminal accountability.²⁹

to the process of holding public officials responsible for their actions, with the aim of restraining those who hold power. Truth commissions ... are primarily mechanisms of accountability.”); Colleen Murphy, *Transitional Justice, Retributive Justice and Accountability for Wrongdoing*, in *THEORIZING TRANSITIONAL JUSTICE* 59 (Claudio Corradetti, Nir Eisikovits & Jack Rotondi, eds., 2015); RENÉE JEFFERY, *AMNESTIES, ACCOUNTABILITY, AND HUMAN RIGHTS* 10 (2014) (“restorative justice is not opposed to accountability but, through its practices of truth-telling, apologies, compensation, repentance, and forgiveness, calls the perpetrators of wrongs to account for their actions.”)

²³ See Jann Kleffner, *The Collective Accountability of Organized Armed Groups for System Crimes*, in *SYSTEM CRIMINALITY IN INTERNATIONAL LAW*, (André Nollkaemper & Harmen van der Wilt, eds., 2009) 238; Ratner, *supra* note 15, at 556 (“I am not sure that individual accountability is more important than state accountability”); Carmen Valor, *Corporate Social Responsibility and Corporate Citizenship: Towards Corporate Accountability*, 110 *BUS. & SOC. REV.* 191 (2005).

²⁴ Skaar et al., *supra* note 20 at 4; Simon Robins, *Failing Victims: The Limits of Transitional Justice in Addressing the Needs of Victims of Violations*, 9 *HUM. RTS. & INT’L L. DISC.* 41, 51 (2017) (“despite the rhetoric of restoration that has permeated transitional justice, prosecution remains a mechanism that is privileged above all others”); Bell, *supra* note 20 (noting that the human rights movement “seemed to view criminal justice and punishment as the ultimate gold standard for former human rights abusers.”)

²⁵ As famously stated by the judges at the Nuremberg Tribunal, “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” *Judicial Decisions: International Tribunal (Nuremberg), Judgment and Sentences*, Oct. 1, 1946, 41 *AM. J. INT’L L.* 172 (1947).

²⁶ Buehler, *supra* note 10 (noting that Sung-ho Jhe called for “a combination of institutional responsibility and individual responsibility” for North Korea).

²⁷ Bílková, *supra* note 5, at 7.

²⁸ Marzuki Darusman, Video Presentation, North Korea – Violating its own People’s Human Rights, at <http://www.ohchr.org/EN/NewsEvents/Pages/NorthKoreaHumanRightsReport.aspx> (last visited on July 17, 2017).

²⁹ See Open Letter from FIDH, *supra* note 6.

At the UN level, the Group of Independent Experts on Accountability has most explicitly conceptualized accountability, in its final report.³⁰ According to the Group of Independent Experts, in order to successfully attain ‘accountability’, a number of different measures are necessary. As a starting point (and as a matter of international law), some form of criminal prosecutions is required.³¹ However, that is not all; ensuring accountability also requires “measures towards the realization of the right to know the truth about violations and the right to adequate, effective and prompt reparation.”³² That being said, in practice, the Group of Independent Experts on Accountability devotes the large majority of the analysis of options in its final report to individual criminal accountability, specifically criminal prosecution in North Korea, other countries, or through international or internationalized courts.³³ It then discusses more briefly other approaches to accountability, including data-gathering by the South Korean National Human Rights Commissions, condemnation by the Japanese Federation of Bar Associations, UN mechanisms such as the Working Group on Arbitrary Detentions, and targeted sanctions.³⁴

Is it important to have a single agreed-upon definition for the concept of accountability? Maybe not, if an elastic concept allows for more creative attempts to address the problem. But without an accepted definition, it will be hard to understand what different actors mean, how to measure whether particular policies in fact promote accountability or not, and how to apply research findings from other situations.³⁵ Without passing judgment as to whether a broad or narrow definition of accountability is more appropriate, the remainder of this paper will focus on questions of accountability narrowly conceptualized as criminal prosecution, given that this aspect has so far been the focus of the most powerful international actors in the North Korean human rights field.

III. Why do we want to promote accountability?

Accepting for the moment that the term accountability in the North Korean context refers primarily to individual criminal prosecution, whether at the domestic or international level (or a hybrid of the two), the logical next question is why accountability is desirable?³⁶ Scholars have provided a number of different possible answers. At the most basic level, accountability mechanisms have the potential to sanction the perpetrators of crimes for their actions, through

³⁰ Hum. Rts. Council, *Report of the Group of Independent Experts on Accountability*, U.N. Doc. A/HRC/66/Add.1 (Feb. 24, 2017), paras. 11-17.

³¹ *Id.*, at para. 12.

³² *Id.*, at para. 14.

³³ *Id.*, at paras. 32-45; 50-61.

³⁴ *Id.*, at paras. 46-49; 62-67.

³⁵ When there are multiple definitions for a concept being studied, then the extent to which any particular research findings are generally applicable often remains unclear. CHAVA FRANKFORT-NACHMIAS & DAVID NACHMIAS RESEARCH METHODS IN THE SOCIAL SCIENCES, 27 (5th edn. 1996); John Gerring & Paul Barresi, *Putting Ordinary Language to Work: A Min-Max Strategy of Concept Formation in the Social Sciences*, 15 J. THEOR. POLIT. 201, 202 (2003).

³⁶ Jeff King, *The Instrumental Value of Legal Accountability*, in ACCOUNTABILITY IN THE CONTEMPORARY CONSTITUTION 124, 124 (Nicholas Bamforth & Peter Leyland, eds., 2013) (“Any proposal to extend the domain of adjudication can reasonably be met with the following good faith question: why? What is valuable about doing that, and about legal accountability more generally?”)

imprisonment or other forms of punishment, which is a form of retributive justice. Retribution “conveys a society’s condemnation of the criminal act in question and of the perpetrator found responsible.”³⁷ It helps individualize guilt and focuses attention on the objective act committed by the perpetrator.

In the context of widespread and grave state crimes (whether in North Korea or elsewhere), however, relatively few people would consider retribution to be the sole legitimate objective.³⁸ Deterrence of human rights abuses is also important, as is incentivizing good human rights behavior, and alleviating the suffering of those whose rights have already been violated. Exposing human rights abuses (and improvements, where they occur) is desirable. Preventing war is undoubtedly a fundamental human rights goal. Many would also add unification and regime change to the list of objectives in the North Korean context, along with societal reconciliation. Even aside from its direct link to retribution, one might also plausibly want to focus on accountability as a way to instrumentally further these other goals. According to Jeff King, legal accountability is “a means for achieving ends, and not something to be addressed primarily in terms of its intrinsic value.”³⁹

This instrumental role of accountability has indeed been lauded by some commentators both in the North Korean context and more generally in the context of transitional justice situations. Certainly, if defined as criminal prosecution (domestic or international), accountability would be likely to involve the compilation of information and testimony on human rights abuses, thus furthering the search for truth (although perhaps not as effectively as other transitional justice mechanisms).⁴⁰ Criminal trials could be expected to provide at least some comfort for victims, whether in the form of reparations, apologies, or simply by fulfilling an expectation of justice.⁴¹ Some researchers argue that the use of prosecutions as a tool of transitional justice also helps bring peace to conflict-prone societies,⁴² because it improves respect for the rule of law (either domestically or internationally),⁴³ or because it leads to

³⁷ Brianna McGonicle Leyh, *Failing Victims: The Socialisation of Transitional Justice: Expanding Justice Theories Within the Field*, 9 HUM. RTS. & INT’L L. DISC. 83 (2017).

³⁸ See, e.g., Sarkin & Davi, *supra* note 17, at 6 (“long-term goals of transitional justice focus on the attainment of peace, stability and the rule of law in transitional societies”); UN Sec. Gen., *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/16 (Aug. 23, 2004) (“The challenges of post-conflict environments necessitate an approach that balances a variety of goals, including the pursuit of accountability, truth and reparation, the preservation of peace and the building of democracy and the rule of law.”)

³⁹ King, *supra* note 36, at 124.

⁴⁰ Jane Stromseth, *Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT’L L. 251, 259 (2007) (“The selective, focused nature of criminal trials after massive atrocities also limits them as mechanisms for achieving a number of broad goals, such as a comprehensive account of a conflict and its causes.”)

⁴¹ *Id.* at 258 (“Holding individual perpetrators legally accountable can also provide some sense of justice and relief to victims and their families and potentially help to defuse grievances and curtail cycles of vengeance. by setting an example and making clear that wrong-doers will be held”). *But see*, Robins, *supra* note 24, at 47 (“It is almost universally presumed that prosecutions benefit victims and that impunity is in itself traumatic for survivors. Despite these claims, there has been little empirical work on the issue of whether prosecutions of violators are of benefit to the victims of those tried.”)

⁴² Ratner, *supra* note 15, at 544.

⁴³ Sarkin & Davi, *supra* note 17, at 12 (“Those in favour of retributive justice...argue that [without punishment] respect for the rule of law, which is often already weak where transitional justice is at issue, will continue to atrophy,

reparations or national reconciliation.⁴⁴ Still others have claimed that criminal trials can have a demonstration effect.⁴⁵ According to Jane Stromseth, “by removing perpetrators of atrocities from positions in which they can control and abuse others, criminal trials (and processes such as rigorous vetting) can have a cathartic impact by assuring the population that old patterns of impunity and exploitation are no longer tolerated.”⁴⁶ In the North Korean context, NGOs have highlighted the benefits of accountability for bringing redress to victims of human rights abuses.⁴⁷

Given the ongoing nature of North Korean abuses, one particularly important goal for many people would be deterrence, which has indeed been stressed by the Group of Independent Experts in its discussions of accountability.⁴⁸ Some observers have argued that the focus on accountability could also have (and indeed may already be having) a deterrence effect.⁴⁹ According to anecdotal reports, North Korean officials have already modified certain practices out of a fear of being held accountable, for example by ceasing forced abortions in detention centers and the use of torture in long term labor facilities, and by ending policies of imprisoning entire families to punish a single family member.⁵⁰ In addition to potential local effects, the international community may be incrementally acting to deter crimes by abusive regimes elsewhere in the world by strengthening a global accountability norm. This would make some sense under deterrence theory, which holds that a perceived increase in the likelihood of punishment leads to a decreased expected net value of engaging in criminal activities, and (assuming rational actors) less crime.⁵¹

leading to further abuses in future.”); Stromseth, *supra* note 40, at 258 (“Prosecuting and punishing major offenders affirms and reinforces the core international legal rules prohibiting genocide, crimes against humanity, and war crimes.”).

⁴⁴ Ratner, *supra* note 15, at 544 (“what is the point of individual accountability at all? We hear so many answers, from the UN High Commissioner for Human Rights, from victims, from NGOs: it’s about meting out criminal justice to the perpetrators; it’s about so-called closure for the victims; it’s about reparations; it’s about national reconciliation.”)

⁴⁵ Stromseth, *supra* note 40, at 258 (“Bringing major perpetrators to justice demonstrating that their conduct is wrong and unacceptable-is an immediate and fundamental goal.”)

⁴⁶ *Id.* at 262.

⁴⁷ See, e.g., Open Letter from FIDH, *supra* note 6 (“North Korea’s countless victims deserve redress. Justice remains critical to end the pervasive impunity for the worst abuses in North Korea.”)

⁴⁸ Lisa Schlein, *Experts: N. Korea Must be Held Accountable for Crimes Against Humanity*, VOA NEWS (Mar. 13, 2017), <https://www.voanews.com/a/experts-say-north-korea-must-be-held-accountable-for-crimes-against-humanity/3763130.html> (last visited Sep. 12, 2017) (recommending the establishment of an ad hoc international tribunal, “which could act as a deterrent for future crimes.”)

⁴⁹ Cohen, *Human Rights in North Korea*, *supra* note 1, at 83 (“the more the COI report is seen as the basis for holding North Koreans accountable at eventual trials, the more it might work as a deterrent.”); Oknam Yi & David Sungjae Hong, *Start Thinking Now About Transitional Justice in a Post-Transition North Korea*, PACNET: 51 (July 11, 2013).

⁵⁰ Roberta Cohen, *Human Rights and Humanitarian Planning for Crisis in North Korea*, XIX INTL. J. KOR. STUD. 1 (2015).

⁵¹ Daniel Nagin, *Deterrence*, in CORRECTIONAL THEORY: CONTEXT AND CONSEQUENCES 72 (Francis Culle & Cheryl Lero Jonson, eds., 2012).

On the other hand, another school of thought has downplayed the likelihood of accountability proceedings having a significant deterrent effect for future abuses.⁵² Criminological research has long highlighted the importance of certainty of punishment to any deterrence effect, and at the current time there seems to be relatively little chance of North Korean leaders ever facing punishment (at least absent a change of power through war or rebellion that they would in any case be unlikely to survive unscathed).⁵³ Even if North Korea's leaders do perceive a likelihood of future prosecution, top figures such as Kim Jong Un have, one suspects, already committed severe enough crimes to receive harsh sentences regardless of future actions, thus diminishing the influence that any deterrence effect might have for them to change future behavior.⁵⁴

IV. Are there any potential downsides to focusing on accountability?

While accountability is oftentimes accepted as an unquestionably beneficial principle, it is also worth considering whether there are any downsides to the current emphasis on accountability in the North Korean context. Potentially, there could be two types of disadvantages. First, the emphasis on accountability could take the focus away from other potentially desirable objectives, and the techniques and strategies needed to attain them. As Sarkin and Davi have noted, while different transitional justice methods may be used at the same time, more frequently, a society “will have one dominant type of justice at the heart of its endeavours and this will be reflected in one dominant transitional justice mechanism.”⁵⁵ If this is the case, and if the more important objective is ‘peace’, ‘security’, ‘unification’, ‘regime change’ or any of a number of other plausible end goals, would it not make sense to think creatively about achieving those goals by all possible means, rather than just hoping that they will be furthered indirectly by promoting accountability? This was the approach of the UN Human Rights Council in its initial reports on Syria and Libya, which prioritized termination of abuses rather than accountability.⁵⁶ The counter-argument, however, is that engagement (along with other routes to attempt to influence North Korean behavior) has been attempted for years by the U.N., European countries, and others, with little if any result. To the extent that North Korea shows an interest in greater engagement in the future, then these other tracks can be re-invigorated.

Second, focusing on accountability could actually be counter-productive in terms of attaining the other desirable objectives discussed in the previous section, such as peace,

⁵² Stromseth, *supra* note 40, at 258-59.

⁵³ Kevin Kennedy, *A Critical Appraisal of Criminal Deterrence Theory*, 88 DICKINSON L. REV. 1, 4-5 (1984); Daniel Nagin, *Deterrence*, in CORRECTIONAL THEORY: CONTEXT AND CONSEQUENCES 84 (Francis Culle & Cheryl Lero Jonson, eds., 2012).

⁵⁴ Of course, accountability could be used as a negotiating tool, with threats of prosecution pulled off the table in exchange for better future behavior, and indeed North Korea has shown some willingness to negotiate on this point, but such a strategy would run counter to basic notions of justice and has not been embraced to date by other states. Cohen, *Human Rights in North Korea*, *supra* note 1, at 81-82.

⁵⁵ Sarkin and Davi, *supra* note 17, at 13.

⁵⁶ Ratner, *supra* note 15, at 553 (“in situations where atrocities are ongoing, termination is more important than accountability. Thus, the Human Rights Council’s commission on Syria focused on cessation first, barely mentioning accountability. And the report of the commission on Libya is also very guarded in this respect.”)

deterrence, the rule of law, finding out the truth about the past, etc. Researchers have long argued that there are tensions and contradictions inherent in the transitional justice process, and pressing for accountability may not be the optimal strategy for achieving other worthwhile objectives.⁵⁷ For example, the use of accountability mechanisms has been seen in some cases as producing more violence in unstable countries, a situation that few would find desirable.⁵⁸ Advocates of restorative justice also argue that retributive justice measures are not good for bringing about healing for victims, and argue that such mechanisms “have a tendency to exacerbate tensions and pressures already heightened with a society.”⁵⁹ Numerous scholars have challenged the reliability of histories revealed through criminal court proceedings, and outlined their limited scope for providing thorough explanations of past events.⁶⁰

Most significant, of course, is the question of whether Kim Jong Un and his associates might (at some point) be discouraged from voluntarily stepping down or initiating peaceful unification due to a fear that they would immediately be held accountable – and thrown in jail – once they gave up power. Snyder and Vinjamuri, for example, argue that accountability mechanisms can encourage human rights abusers to disrupt democratization processes to avoid the prospect of prosecution.⁶¹ This, of course, is a variant of the peace versus justice argument that has plagued transitional justice debates for the past two decades. While fear of accountability would certainly seem to add to the incentive to stay in power, as has arguably been the case with Assad in Syria and Bashir in Sudan, to name perhaps the only two current leaders to approach the Kim regime’s brutality, it must be noted that Kim and his confederates have shown no apparent interest in stepping down or unification to date, so it seems unlikely that they would be tempted into doing so through, for example, the provision of a comfortable exile or amnesty.

Do these potential downsides outweigh the advantages of focusing on accountability? The answer to this question will depend on one’s ethical framework, evaluation of the situation, and position in society. As will be discussed later, the effects of focusing on accountability are felt differently by different actors. The question, however, should not be ignored, or dismissed as illegitimate. It is not unreasonable to prioritize prevention and termination of human rights violations (or other objectives) as a greater priority than accountability, as indeed many observers have stated as much over the years.⁶²

⁵⁷ Mirjan Damaska, *What is the Point of International Criminal Justice*, 83 CHI-KENT L. REV. 329, 331 (“the professed goals do not constitute a harmonious whole; rather, they pull in different directions, diminishing each other’s power and creating tensions”)

⁵⁸ Stromseth, *supra* note 40, at 252 (“In some situations, accountability mechanisms may actually trigger further violence”)

⁵⁹ Sarkin and Davi, *supra* note 17, at 13.

⁶⁰ See, e.g., HENRY ROUSSO, *THE HAUNTING PAST: HISTORY, MEMORY AND JUSTICE IN CONTEMPORARY FRANCE* (2002); Richard Evans, *History, Memory and the Law: The Historian as Expert Witness*, 41 HIS. & THEORY 326 (2002); IAN BURUMA, *THE WAGES OF GUILT: MEMOIRS OF WAR IN GERMANY AND JAPAN* 142 (1995).

⁶¹ Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT’L. SEC. 5, 5 (2003/2004).

⁶² Ratner, *supra* note 15, at 543 (“even as I’ve written about and participated in UN accountability processes, I have always been pulled toward seeing prevention and termination of human rights violations as a far greater priority.”)

V. When is the Right Time to Address Accountability?

Assuming one accepts the importance of accountability for North Korean human rights violations, it is still important to question whether now is the right time to focus on the issue. As a practical matter, there seems little chance of successfully trying and punishing North Korean leaders prior to a transition.⁶³ However, important decisions about future trials can be made at a pre-transition stage, and indeed the Special Rapporteur on the Situation of Human Rights in the DPRK has emphasized that “issues around accountability should be addressed at an early stage, and with long-term strategies in mind [and] should not be done [...] at the last minute of a change process.”⁶⁴ Thus one, important issue is whether accountability should be demanded immediately, immediately after transition, or at some later time. The question is controversial, but there is widespread agreement that it is a meaningful one; to put it concisely, timing matters in transitional justice.⁶⁵ Some scholars argue that an early focus on reconciliation followed by later moves towards accountability leads to more stable transitions.⁶⁶ Others disagree, and argue that rapid justice is necessary to build confidence in democracy or deter extraconstitutional actions.⁶⁷ In any case, the optimal timing is likely to depend on important unknown factors, such as whether unification will quickly succeed the Kim regime’s fall, whether the current regime leaves power voluntarily, and what role China will play in the process.⁶⁸ Given these uncertainties, hasty decision-making may be counter-productive.

One factor that mitigates against choosing to rely on accountability mechanisms at this time is that North Koreans themselves – the primary victims of the regime’s abuses – are not yet in the position to influence decisions that are being made about their future, for the simple reason that outside observers have no way to survey public opinion in North Korea, and even if they did, North Koreans lack the freedom to speak their minds.⁶⁹ However, many scholars have

⁶³ *Id.* at 549-50 (“Where, at the other extreme, the government that committed the abuses is still in power—where, in a word, there is no transition—as with Sri Lanka since 2009, the obstacles to accountability are enormous, maybe even insurmountable for as long as that regime is in power.”)

⁶⁴ U.N. Gen. Ass., Report of the Special Rapporteur on the Situation of Human Rights in the Democratic People’s Republic of Korea, A/70/362 (Sep. 8, 2015) ¶ 50.

⁶⁵ PAUL GREADY, *THE ERA OF TRANSITIONAL JUSTICE* 18 (2011); Pierre Hazan, *Measuring the Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional Justice*, 88 INT. REV. RED CROSS, 19, 27-8 (2006); Constantin Goschler, *German Reunification and the Challenge of Transitional Justice*, in TRANSITIONAL JUSTICE IN UNIFIED KOREA 132 (Baek Buhm-Suk & Ruti Teitel, eds., 2015) (“the feasibility of transitional justice in the case of North Korea will very much depend on the if and when of reunification.”)

⁶⁶ Laurel Fletcher, Harvey Weinstein & Jamie Rowen, *Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective*, 31 HUM. RTS. Q. 163, 165 (2009); TRICIA OLSEN, LEIGH PAYNE & ANDREW REITER, *TRANSITIONAL JUSTICE IN BALANCE* (2010).

⁶⁷ Kathryn Sikkink & Carrie Booth Walling, *The Impact of Human Rights Trials in Latin America*, 44 J. PEACE RES. 427 (2007); Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, 54 INT. STUD. Q. 939 (2010).

⁶⁸ Baek Buhm-Suk, Lisa Collins & Kim Yuri, *Transitional Justice in Post-Unification Korea: Challenges and Prospects*, in TRANSITIONAL JUSTICE IN UNIFIED KOREA 12 (Baek Buhm-Suk & Ruti Teitel, eds., 2015) (“the manner in which unification occurs will certainly determine if and how transitional justice will be implemented and what mechanisms will be employed.”)

⁶⁹ *Id.*, at 18 (“currently surveying North Koreans in North Korea about transitional justice and unification is impossible.”)

emphasized the importance of ensuring that victims have input into transitional justice decisions in North Korea and elsewhere.⁷⁰ According to Robins, transitional justice “gains its moral legitimacy from the fact that victims are deserving and the claim and the practice of transitional justice has the aim of acknowledging victims and providing redress.”⁷¹ Indeed the UN itself advocates for the “centrality of victims” to the design and implementation of transitional justice programs.⁷²

Of course, one can ask North Korean escapees who have made it to South Korea about their views on transitional justice, and this has been done: the majority of those surveyed supported prosecutions in court.⁷³ However, as is often the case with exile communities, the escapees are not representative (in terms of geographic origin, gender, or political views), they are not as invested in the future of North Korea as those that still live there, and they are influenced by the different groups and governments which have assisted them after their escape. Thus, their views should not be taken as proxies for those of the millions of other victims still in the country. Research in other transitional contexts has shown that prosecution is often not the foremost concern of victims (or at least not the only concern).⁷⁴

If in practice the focus on accountability simply involves the documentation of abuses so that at some point in the future perpetrators can be held accountable, then the more difficult questions of whether, when, where and how to engage in prosecutions can be addressed later. However, recording North Korean human rights violations has been undertaken for well over a decade by governments, non-governmental organizations, and international organizations.⁷⁵ It appears clear that many in the international community consider ‘accountability’ to also involve

⁷⁰ Laurel Fletcher, Harvey Weinstein & Jamie Rowen, *Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective*, 31 HUM. RTS. Q. 163, 165 (2009); Robins, *supra* note 24, at 54 (it is “crucial that victims themselves have agency and voice in the process”); “Victim exclusion and marginalization can lead to processes that do not achieve their full potential”; Sarkin & Davi, *supra* note 17, at 15; Baek, Collins & Kim, *supra* note 68, at 12 (it is “necessary to ensure that North Koreans feel a sense of ownership of the transitional justice process so that they do not question its legitimacy.”); Goschler, *supra* note 65, at 132 (“the sentiments of the North Korean population should be taken seriously to avoid a situation where transitional justice might be considered as a foreign imposition”).

⁷¹ Robins, *supra* note 24, at 44.

⁷² U.N. Sec. Gen., Guidance Note: *United Nations Approach to Transitional Justice* 6 (Mar. 2010) (“Successful transitional justice programmes recognize the centrality of victims and their special status in the design and implementation of such processes”).

⁷³ Transitional Justice Working Group, *supra* note 21, at 51.

⁷⁴ Stromseth, *supra* note 40, at 252 (“Although some victims demand trial and punishment of perpetrators, others place greater emphasis on public acknowledgement of their suffering and on reparations or some tangible form of assistance”); Robins, *supra* note 24, at 52 (“a desire for prosecution is often only one of many demands, and frequently not the first priority of victims of violations, at least in states where other needs remain urgent.”); Ratner, *supra* note 15, at 544.

⁷⁵ See, e.g., DATABASE CENTER FOR NORTH KOREAN HUMAN RIGHTS, 2016 WHITE PAPER ON NORTH KOREAN HUMAN RIGHTS (2016); U.N. General Assembly, Resolution on the Situation of Human Rights in the Democratic People’s Republic of Korea, A/RES/69/188 (December 18, 2014); U.N. Human Rights Council, Report of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, A/HRC/25/63 (2014); REPUBLIC OF KOREA MINISTRY OF UNIFICATION, 2015 WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA (2015).

a commitment to engage in an imminent start to prosecutions, if and when a venue becomes available.⁷⁶

VI. Conclusion: who benefits from the push for accountability?

In light of the preceding discussion, this essay will conclude with a brief examination of which groups most benefit from the push for accountability. I would argue that for different reasons three discreet communities most noticeably benefit from pressing for accountability: the international justice community; the South Korean human rights establishment, and conservative anti-North Korean actors. Accordingly these three groups lie at the center of the international community's current move to emphasize accountability.

First, and most significantly, there is the international justice community, made up of (mainly) UN representatives, representatives of certain Western states, and activists at human rights NGOs or in academia.⁷⁷ For this community, accountability is a cardinal principle of 21st century international society. The quest for accountability is of particular importance because achieving accountability in North Korea would have (the theory goes) a general deterrence effect for dictatorial regimes all around the world.⁷⁸ It would show that criminal justice is not simply reserved for weak African rebels and deposed leaders, but rather is a serious threat for everyone in the world who commits atrocities, regardless of their current level of power, geographical location, or the presence of alliances with major countries such as China.⁷⁹ In short, the hope is that the non-impunity norm will become so well ingrained in international practice that potential human rights abusers will reasonably fear that they will, at some point, be held accountable for their crimes. This is a worthwhile (if, some would argue, quixotic) goal, but is not one likely to be held strongly by North Korean themselves, who would likely care more about the future stability of their country, promoting regime change, and specific deterrence (that is, deterrence within North Korea itself).⁸⁰

The second group is made up of establishment human rights figures from South Korea, such as Ambassador Lee Jung-Hoon, Judge Sang Hyun Song, and groups such as the North Korean Database for Human Rights and the Citizens' Alliance for North Korean Human Rights.⁸¹ For South Korean establishment figures, there is an underlying assumption that North-South reunification will occur with the fall of the Kim regime.⁸² Thus, certain objectives that

⁷⁶ This is most evident in the final report of the Group of Independent Experts on Accountability, which mentioned documentation but focused primarily on the current availability of trial venues. Hum. Rts. Council, *Report of the Group of Independent Experts on Accountability*, *supra* note 30.

⁷⁷ Some have noted the existence of a "transitional justice industry". Leyh, *supra* note 37, at 84.

⁷⁸ See, Baek, Collins & Kim, *supra* note 68, at 19 (North Korea remains "an affront to the international accountability norm").

⁷⁹ See Open Letter from FIDH, *supra* note 5 ("the [Human Rights] Council's own credibility demands a focus on accountability").

⁸⁰ Stromseth, *supra* note 40, at 261 ("Domestic leaders often perceive international leaders and donors as more concerned about sending a general deterrent message regarding atrocities than about the specific, long-term needs of the particular post-conflict society directly involved.")

⁸¹ See, Buehler, *supra* note 10.

⁸² See, e.g., BAEK BUHM-SUK & RUTI TEITEL, EDS., TRANSITIONAL JUSTICE IN UNIFIED KOREA (2015).

usually inform transitional justice processes – such as promoting democracy, stability, human rights, and the rule of law – are often overlooked, the belief being that a unified (and Seoul-dominated) Korea will automatically be democratic, stable, rights-respecting and follow the rule of law. Of course, from a South Korean perspective it makes sense to plan for a potential unification, which is a constitutionally mandated national goal, in order to ensure that the process goes smoothly if this eventuality ever does come to pass. There is, however, no guarantee that unification will come after the Kim regime falls. If not, then it might make sense to prioritize some of these other objectives.

The third group that benefits from the push for accountability can loosely be categorized as those conservative (or neo-conservative) elements in South Korea, the United States and Japan who are mainly interested in promoting regime change in North Korea, including through the use of force. For these actors, the push for accountability helps to delegitimize the North Korean regime and focus attention on the punishment of its major figures, which can only take place after they are overthrown. In this respect, the push for accountability in North Korea can be seen as mirroring the campaigns to hold Sadaam Hussein or Muammar Qadaffi responsible for their horrific crimes, each of which preceded (and helped justify, at least to a certain segment of liberal Western opinion) armed intervention in Iraq and Libya.

None of this is to say that accountability is undesirable. Any observer with a sense of justice would wish to see Kim and his henchmen in prison. But accountability is not necessarily an uncomplicated objective, nor the sole appropriate focus for the international community. The timing of accountability matters, and the effects of accountability are felt differently by different actors. Thus, it is a concept that should be debated and justified, and not accepted uncritically. In doing so, the international community should recall that the needs and wishes of North Korean victims of the regime should come first, as they have suffered most directly from the Kim regime, and have the most to gain or lose from a successful or unsuccessful transitional justice experience.