

North Korea, International Law and the Dual Crises

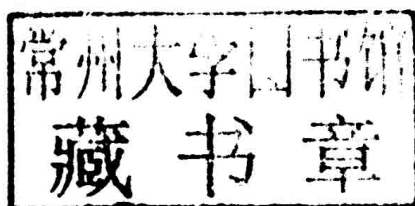
Narrative and Constructive Engagement

Morse Tan

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North Korea, International Law and the Dual Crises

The Democratic People's Republic of Korea (DPRK) has a reputation as one of the worst human rights situations in the world. This book utilizes a unique international law perspective to examine the actions and inactions of North Korea with regard to international security and human rights.

Adopting political, military, historical, and legal perspectives, the book explores how the two issues of nuclear weapons and the human rights abuses in North Korea are interconnected, and why the international community should apply the same international law framework to find a solution for both. Drawing on eyewitness accounts, such as refugee and defector testimony, Morse Tan offers a real-life story of North Korea that covers the pertinent law, and constructive approaches of its regime. Tan examines the specific objectives and actions of the North Korean government, and measures these according to international legal obligations such as applicable treaty law, *jus cogens* norms, and customary international law.

The book concludes by offering solutions for dealing with international security surrounding the Korean Peninsula, and forwards a proposal for the creation of a tribunal to prosecute those at the top of the regime for international crimes and human rights abuses.

As a project exploring the extremes of international law violation, this book will be of great interest and use to readers interested in the history, and political and legal implications of the strategies employed by the North Korean government.

Morse Tan is Associate Professor of Law at Northern Illinois University, USA.

“Professor Tan’s research is impressive, given the dearth, if not inaccessibility, of even basic information from such a hermetically closed system ... Professor Tan’s analysis in Section 2 of applicable international law, especially human rights treaties, is accurate and comprehensive ... Professor Tan’s book offer[s] a wealth of information and analysis of the world’s sovereign outlier ... with a straightforward exposition and analysis ... His command of the governing international law is clear, as is his ability to marshal cogent facts and political insights ... Along with his other writings and public appearances, [the book] clearly establishes his credentials as a well-informed critic of an opaque and puzzling country whose deliberate isolation greatly inhibits useful research of the sort he has admirably undertaken. As a legal scholar, Professor Tan is truly a pioneer.”

James A.R. Nafziger, Thomas B. Stoel Professor of Law, Director of
International Programs, Wilamette University College of Law

“Prof. Tan has written a thoroughly documented treatment of the North Korean situation in all of its many dimensions. This is the most comprehensive scholarly book on the subject now and Prof. Tan undoubtedly will gain considerable exposure and prominence ... in both the legal and political science academies and in diplomatic and media circles once the book is published ... It reminds me of a scholar at the University of Oklahoma who has great expertise on Syria and projected OU into the headlines during the first year of the Syrian civil war as he was interviewed regularly by major media. That will happen to Prof. Tan as well because the North Korean story will only grow in the years ahead ... I have to honestly conclude that Prof. Tan covered all of the bases. In fact, I kept anticipating my criticism of his text by wondering whether he would include one point or another, and then within pages he did so. That was extremely pleasing to see him accomplish time and again throughout the text ... I looked through the relevant endnotes as well and found them quite impressive ... This is a very readable book and it will lead to numerous high-profile opportunities for Prof. Tan, including Congressional testimony and interaction with the United Nations. I strongly endorse the value of its scholarship, its sourcing, and its role in building the foundation...”

David Scheffer, Mayer Brown/Robert A. Helman Professor, Director
of the Center for International Human Rights, Northwestern University
School of Law, and the 1st War Crimes Ambassador in U.S. history

*For the longsuffering people of North Korea: may they live
in justice, peace, security, and freedom to flourish!*

Preface

David Scheffer

On 22 December 2014 the United Nations Security Council met for the first time for a briefing about the human rights debacle that has plagued the people of North Korea for decades. The fifteen member states of the Council were driven to this moment because of the United Nations Human Rights Council's *Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, a set of findings so devastating in their content that the Commission of Inquiry recommended the Security Council refer the human rights situation in North Korea to the International Criminal Court. Not surprisingly, China and Russia sought to prevent the Security Council meeting from being convened, but this time they lost that procedural bid. Ivan Šimonović, the U.N. Assistant Secretary-General for Human Rights, aptly noted during the briefing, "Rarely has such an extensive charge-sheet of international crimes been brought to this Council's attention."

One can only barely forgive the Security Council for its evasion of the issue for so long as it grappled with the nuclear arms threat posed by North Korea since the early 1990s. U.S. Permanent Representative to the United Nations Samantha Power finally seemed to cast aside that trade-off as a "false choice" during her remarks at the Security Council briefing. Perhaps the turning point on North Korea's human rights record occurred that day; there is no longer any plausible means of denying the reality of what horrors exist in that country.

Long before the Commission of Inquiry commenced its investigative work in 2013, scholars and non-governmental organizations had been researching, publishing, and sounding the alarm on the abhorrent human rights conditions in North Korea. They were joined by the voices of refugees who have had the courage to speak out through interviews and their own publications. Twice in the last decade I joined the analysts seeking to bring to the world's attention the atrocity crimes that were enveloping North Korea. Each time I recall the wall of silence these efforts confronted from major governments and from the United Nations. During the years (1993–1997) when I was senior counsel to the U.S. Permanent Representative to the United Nations, Dr. Madeleine Albright, and while I was the U.S. Ambassador at Large for War Crimes Issues (1997–2001), the nuclear arms threat growing inside North Korea and the persistent waves of starvation there prevented any serious effort on the human rights agenda in Washington or

at the United Nations in New York from gaining traction with bureaucrats, politicians, diplomats, and even to a large extent the media.

Professor Morse Tan now steps forward with this book, which provides a compelling and fulsome account of what has transpired in North Korea since the Korean War on several interconnected fronts: political repression, nuclear defiance, human rights violations across the spectrum of human endeavor, and the commission of crimes against humanity against significant numbers of its people. He also examines the diplomatic history of China's unique role in facilitating, but also failing to influence at times, North Korea's foreign policy.

Tan's ten years of research, including interviews and research into both known and previously undiscovered sources of information, has resulted in a meticulously documented account that shocks the conscience and educates the international community of the realities that can no longer be cast into the "deep fog" Tan describes. He has achieved his goal magnificently, which is "a readable and accessible book that introduces readers to the astonishing realities of North Korea, the relevant law, and some constructive approaches." But this book also will propel further into the public realm the situation that is now before the Security Council as a continuing agenda item and shame any government that ignores or undermines the hard facts set forth on the following pages.

Tan paints a dark and foreboding landscape of North Korea. His recordings of refugee accounts about the sheer horror endured daily are the opening snapshots of reality in modern-day North Korea. The most obvious candidate in the world for implementation of the responsibility to protect principle is North Korea, a political and legal mandate that Tan explores. While the Security Council has approved non-military measures sanctioning the North Korean leadership, any suggestion of military intervention under the responsibility to protect principle almost certainly would be blocked by at least China and Russia in the Council.

Tan examines the judicial options that should be considered by the international community in the years ahead. There will be a day of reckoning for North Korea's leaders, Tan infers, and there must be credible judicial forums in which to investigate and prosecute them. One would hope that some day national courts in a reunified Korea or in a North Korea liberated from brutally repressive governance and from criminal assaults against its own citizens will be enforcing justice against the North Korean political and military leaders responsible for such egregious conduct.

Joined with national justice may be the prospect some day of an international effort, particularly at the International Criminal Court. The latter probably will depend on a Security Council referral, as recommended by the Commission of Inquiry, or through creation of a hybrid tribunal that has a narrowly drawn jurisdiction over atrocity crimes committed on North Korean territory beginning on a particular date in the past. Tan, who prefers the hybrid tribunal, examines these and other options from a comparative perspective with judicial initiatives elsewhere in the world.

The International Criminal Court will have sitting on the bench from 2015 through 2024 Judge Chang-ho Chung, a citizen of South Korea. (He was preceded from 2003 to 2015 by the South Korean jurist, Judge Sang-Hyun Song, who also served as the president of the Court from 2009 to 2015.) Chang-ho Chung served from 2011 to 2015 as an international judge on the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC), before which the atrocity crimes of the Pol Pot regime in Cambodia from 1975 to 1979 are being investigated and prosecuted. I have long viewed Judge Chung's service at the ECCC as, in part, preparation to confront the judicial challenge presented by North Korean atrocity crimes. If the North Korean human rights situation falls within the jurisdiction of the International Criminal Court by Security Council referral or otherwise, then Judge Chung may play a critical role in adjudicating the cases emerging from such an opportunity. If, in the alternative, a hybrid tribunal is created, then he may also serve a critical role on that tribunal following his International Criminal Court tenure.

One could imagine a hybrid tribunal arising from an explicit grant of extraterritorial jurisdiction under South Korean law for the atrocity crimes that have been committed in North Korea. This could be done on the grounds that under the Constitution of the Republic of Korea, there exists a basis for determining that residents of North Korea in fact are nationals of the Republic of Korea. Indeed, the enabling legislation of the hybrid tribunal could so classify the people of North Korea as nationals of the Republic of Korea for this particular purpose. The commission of atrocity crimes against such nationals would trigger the jurisdiction of South Korean courts in a manner similar to how counterterrorism laws of many nations today invoke extraterritorial jurisdiction to prosecute terrorist acts against a country's nationals located anywhere in the world. There could be negotiated a treaty between the United Nations and South Korea whereby that extraterritorial jurisdiction is embodied within the treaty.

Under such a treaty, foreign judges and a foreign prosecutor could be joined with perhaps a majority of South Korean judges and a South Korean co-prosecutor. The atrocity crimes would be drawn from those already embedded in South Korean law by virtue of that country's membership in the International Criminal Court. The grant of extraterritorial jurisdiction, in the context of extending the reach of the tribunal over atrocity crimes committed on North Korean territory, would be explicitly established under both the enabling legislation of the tribunal in South Korea and within the treaty with the United Nations. The hybrid tribunal, no less than the International Criminal Court, may find it exceptionally difficult, if not impossible in the short term, to gain custody of any North Korean political or military leader charged with atrocity crimes. But that is a reality that should not defeat the pursuit of justice on the Korean peninsula any more than it should in Africa or the Americas or Europe or elsewhere in Asia.

International criminal justice is a long game and that reality may prove no less real for North Koreans as it has for other victims globally. But the hand of justice ultimately must rest firmly over the defiant masters of atrocity crimes and human

rights abuses in North Korea, whose people are entitled to the simple joy of living healthy, safe, and prosperous lives. Morse Tan admirably explains why in this book.

David Scheffer
Chicago, January 2015

Foreword

by Jasper Becker

It is shameful that so little has been done to free the people of North Korea from the dictatorship of the Kim family. The North Koreans have lived for over a century in one or another kind of brutal rule. Japan annexed Korea in the early part of the nineteenth century and immediately set out to destroy the Korean identity and enslave the Koreans as colonial subjects of a Japanese empire. After Japan's unconditional surrender, Stalin seized half the country and installed a puppet leader, Kim Il Sung, a member of the Chinese Communist Party, who barely spoke Korean. With the support of Stalin and Mao Zedong, Kim Il Sung invaded the South. He conducted a savage war which devastated the country and caused immense suffering. Three or four million Koreans died and millions of others became refugees. The invasion became an international conflict which ended in stalemate after a combined military death toll estimated at 1.2 million.

Kim Il Sung stayed in power and installed a state faithful to the ideas of Lenin and Stalin. He died in 1994 after witnessing the disintegration of the Soviet Union in 1990. His son, Kim Jong-Il, took over as the country endured a devastating famine. Yet he remained in power too and rejected any substantial change. When he died in 2011, his son Kim Jong-Eun was installed as his successor and soon launched an internal purge, which saw the swift arrest and summary execution of his uncle, Jang Song Thaek, his former tutor to groom him for the Supreme Ruler position and second in the ruling hierarchy.

North Korea, or to give its official name, the Democratic People's Republic of Korea (DPRK), now remains as the last country left on earth which can be truly called Stalinist. That means no commerce, massive military spending, Gulags, wastefully poor investment, perennial food shortages, a pampered elite and a division of the population according to their political loyalty. It stands as the only hereditary Communist state. The populace must worship its ruling family as deities. The state has remained committed to one overriding goal – the unification of the Korean peninsula under the rule of the Kim family by military force. The 'military first' policies means that the country's resources have been concentrated on maintaining the largest military threat possible, which now includes long range missiles and nuclear weapons. As there are no legal markets, no real money, and no trade, economic statistics from the State become as rare as hen's teeth:

Pyongyang has not released any data for decades. We do not even know precisely how many people live there. We can surmise that at least a third of the economy is devoted to defence, that some four million have perished in the North Korean labor camps, and that three million died in the 1990s famine. The total number of deaths that can be laid at the door of the Kim family is now in the region of 15 million, a staggering figure given that North Korea's population may not be much more than 20 million.

Western thinking about North Korea has changed over the years. Some used to regard it sympathetically, as a socialist developing nation standing up to American imperialism. Prominent American historians have attempted to excuse its record as the tortured response of a scarred victim fighting back and have argued for more understanding for its paranoia.

The nature of the North Korean question has also changed over time. In the 1970s, it became notorious as a sponsor of international terrorism after a series of violent attacks, such as the 1987 destruction in mid-air of Korean Air flight 858 after North Korean agents planted a bomb.

Then in the 1980s, a belief sprang up that North Korea was willing to undertake reforms and should be encouraged to do so. This line of thinking led the Clinton administration in the early 1990s to engage North Korea by promising to build nuclear light water reactors for it. It also led the South Korean government to pursue a fruitless Sunshine policy of engagement, which included secretly transferring huge sums of cash to Pyongyang in the conviction that a sudden unification would be a costly mistake.

During President George W. Bush's first term, Washington tried a much tougher line by naming North Korea as a part of an axis of evil building nuclear weapons. Bush invaded one member, Iraq, and spoke out against the other members, Iran and North Korea. North Korea was the only member which was able to shrug off this tougher stance and continued with its program, culminating in several nuclear tests. It demands to be treated as a *de facto* nuclear power.

As it did so, North Korea's main ally, China, claimed that it was sponsoring diplomatic solutions to the North Korean crisis, such as by hosting the Six Party Talks. It claimed it was restraining North Korea, fostering economic reforms, and finding a solution. As a result, international pressure on North Korea has been weak despite some economic sanctions. Few now believe China has the will to change anything in North Korea.

In the media, North Korea is often treated as a joke rather than a real threat or a pressing human rights issue. The *Economist*, for instance, ran a jokey cover in 2000 showing Kim Jong Il with the caption 'Greetings Earthlings'. Hollywood ignored the famine and the death camps in favour of comedies like *Team America: World Police* (2004) or *The Interview* (2014). In response to the latter, North Korea hacked the computer system of Sony Pictures Entertainment and made threats to intimidate the distributors, who initially delayed and then pulled the film's release in theatres. After a storm of protest, Sony reversed its decision by making the film available online, through which they have raked in massive revenues through an extensive viewership.

As hopes of change from within have dimmed, and efforts to engage North Korea in negotiations have been abandoned, the United Nations has taken a new tack. In November 2014, the United Nations General Assembly passed a groundbreaking resolution that calls on North Korea's leaders to be prosecuted at the International Criminal Court. The resolution was the strongest ever taken against the country and follows the presentation of 400 pages of investigation by the UN Human Rights Council's Commission of Inquiry. It described that the gravity and nature of abuses is "without parallel in the contemporary world."

Although China is expected to continue protecting its client state to ensure its survival, the willingness of so many UN member states to challenge both Beijing and Pyongyang on its human rights record opens a fresh and potentially significant front. For the first time, North Korea's leaders are not being treated with respect because they are no longer seen as the vehicle that will bring change but as the chief obstacle to positive change. The possibility that members of the Kim dynasty could be put on trial like Slobodan Milošević of Yugoslavia and Liberia's Charles Taylor creates a new situation.

Finally, the notion firmly held by diplomats for many years that the Kim family's crimes should be forgotten as the price for ensuring peaceful change has been dropped. This means that for the first time, the law can become a profoundly important tool.

For these reasons, it is immensely helpful that Professor Tan has written a book that will help arm and inform all those dealing with North Korea. By doing so, he powerfully augments the legal scholarship on North Korea, which is scarce relative to its importance. As Professor Tan makes clear, the DPRK government acts in violation of both its domestic laws and the numerous international treaties to which it is a signatory and a party to as member of the United Nations. He also details the ways in which China, as the chief ally of North Korea, is also acting in violation of such treaties as the Convention Relating to the Status of Refugees.

The first section of the book describes how North Korea has broken laws relating to human rights before moving on to breaches of laws relating to nuclear non-proliferation and the Geneva Convention. He presents the history of the DPRK, its history of provocations and attacks against other states, and the theory behind its strategy of brinkmanship. He then delves into North Korea's persistent violations of the human rights of its own citizens, such as the system of penal colonies and arbitrary executions, the treatment of returning refugees and religious believers. He specifically explains how routinely the DPRK government breaches both its own domestic laws and many international laws, such as the International Covenant on Civil and Political Rights or the Convention on the Rights of the Child.

In the third section Professor Tan examines the many issues to be considered when deciding on the best way of dealing with North Korea under international law. Among the interesting questions it discusses is that of prosecuting the North Korean leadership under the terms of the Genocide Convention.

"North Korea stands next in line among the precedents set in the Nuremberg Trials and Tokyo Trials after World War II, the ad hoc tribunals for Rwanda and

the former Yugoslavia, the hybrid tribunals concerning places such as Cambodia, Sierra Leone, East Timor, Bosnia and Herzegovina, and Kosovo, and the establishment of the International Criminal Court through the Rome Treaty," he writes.

"The magnitude, severity, and frequency of human rights violations in North Korea calls for the redress that such courts have sought to bring. Sufficient ratification of the Rome Treaty by enough countries established the International Criminal Court, the first permanent international criminal court based on a treaty, and the start of analyzing possible redress options for the Korean peninsula," he says.

He also considers whether it is practical to start organizing a prosecution now or to wait until the regime falls, which he believes is inevitable. If the North Korean regime was suddenly swept from power, then it is almost inevitable that a sudden unification would follow. That would mean that the North Korean leaders could be tried by South Korean courts or an international tribunal.

So Professor Tan discusses the merits of creating a hybrid tribunal, which brings together local judges and international jurists so that violations of both international and domestic law could be dealt with in a fair way that does not smack of victor's justice. Although dealing with any rogue regime is by definition profoundly difficult in any situation, it is not an abstract or theoretical issue. One day even China may weary of defending North Korea or its own people may tire of living in an economic failure. Its leaders and officials will then have to face justice, and it is imperative that we are prepared.

Jasper Becker
January 2015

Becker authored *Rogue Regime: The Looming Threat of North Korea* (Oxford University Press)

Acknowledgments

I am grateful that as well-regarded a publisher as Routledge has given me this opportunity to publish my first book.

My wife Sarah and four children (Hope, Enoch, Isaiah, and Moses) have sacrificed considerable time with her husband and their dad to make this book possible. My parents-in-law and parents freed up critical portions of time for me to work on and finish this volume.

I want to thank all the authors who have contributed, directly and indirectly, to this book.

My current and former research assistants helped make this book a reality. Among them, attorney Kevin Zickterman deserves the most applause. Kevin, as my right-hand man, did far more than anyone else in aiding me with this whole project—starting from the book proposal, extending to the endnotes, and much in between. In sequential order starting from the one who contributed most, I acknowledge the work of Weston Sedgwick, Sonya Chung, Jeremy McCabe, Michael Nealis, Dino Delic, Amanda Beveroth, Sarah Walsh, Matt Palucki, Christian Hall, and Ryan Leibforth. As appropriate, I recognize their work also in the first footnotes of chapters.

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Allow me to add the customary statement of my authorial responsibility for any errors that made their way into this book. As I told my assistants, the buck stops with me as the one with overall responsibility for the entire project. Any faults and flaws that may remain fall upon my figurative shoulders. Much of whatever positive aspects may exist in the book usually involved people other than myself, whether other authors, the publisher, or my assistants.

Most of all, I want to acknowledge and honor the One who received much worship in Pyongyang before the Kim cult entered the scene. Before anyone on the horizontal plane of mortal relationships, I want to consecrate this work to the Rock of Ages, faithful and steadfast without fail, the greatest Lover of the people of North Korea and the world.

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