

# TRANSITIONAL JUSTICE IN NORTH KOREA

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*This article aims to design a possible transitional justice in North Korea. Because it is difficult to imagine transitional justice for North Korea in the current state of the nation state, the essay is based on the hypothetical setting that transitional justice will be established after the current regime loses its power and after the reunification in the form of South Korea absorbing the North, similar to the case of Germany. The article explores the different types of trials and justice systems to design one that will be optimal for North Korea.*

Throughout history, numerous people have suffered and many lives have been lost due to conflict and large-scale human rights violations. On the other hand, due to these tragic experiences, the international community has learned lessons for the prevention of massive human rights tragedies and how to deal with aftermath effectively for future events. The accumulated knowledge and tools have evolved under the name of “Transitional Justice” or TJ, which is often defined as a “full range of processes and mechanisms associated with a society’s attempts to address past human rights violations following periods of political turmoil, state repression, or armed conflict.”<sup>1</sup> With the goals of transitional justice, “ensuring accountability, serving justice and achieving reconciliation,”<sup>2</sup> different mechanisms and theories have been created according to different categories of transition. In other words, there is no single method or theory of transitional justice that can be applied to all cases. Therefore, the TJ model should be carefully customized for each case of human rights violation in transition.

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- 1 Jon Elster, *Closing the Books: Transitional Justice In Historical Perspective*, (New York: Cambridge University Press, 2004), 7.
  - 2 United Nations, Secretary General, *Guidance Note of the Secretary General: United Nations Approach To Transitional Justice* (March 2010), [http://www.unrol.org/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf) (accessed March 25, 2010).

This paper aims to design a possible transitional justice for North Korea. Serious human rights violations in North Korea have already been acknowledged by the international community.<sup>3</sup> Considering that the North Korean government is heavily involved in massive human rights violations in the country, it is difficult to imagine transitional justice for North Korea given the current status quo. Therefore, this paper is based on the hypothesis that North Korean TJ will be carried out after the Kim family loses its leadership, and following reunification in the form of South Korea absorbing North Korea, similar to the German unification. Under this scenario, North Korean TJ will require high impact decisions under a given time frame and despite limited information about the North Korean regime. Therefore, this preliminary study can be a meaningful preparation for such a case. This paper focuses on the criminal prosecution measurements of TJ, and attempts to answer the following questions: what type of trial should be used?; who will be punished?; how severely should the perpetrators be punished?

In order to answer these questions, this paper discusses the framework of transitional justice, including the role of the United Nations and the International Criminal Court (ICC) in the TJ mechanism, and studies the TJ mechanism of East Germany (post-communist Germany) after German unification. The paper will provide guidelines for designing a transitional justice mechanism for North Korea.

## Framework of Transitional Justice

### *General Framework of Transitional Justice*

The beginning of formal TJ is seen as the Nuremberg Trial, conducted between 1945 and 1949.<sup>4</sup> Yet, the field had not emerged until the late 1980s and early 1990s, when many people called for justice during the political transitions in Latin America and Eastern Europe.<sup>5</sup> These transitions were popularly called “transitions to democracy.” People started referring to the field addressing the systematic abuses of former regimes while reinforcing political transformations as “transitional justice” or “justice in

3 United Nations, General Assembly, Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic Of Korea, A/HRC/25/63, <http://www.ohchr.org/EN/HRBodies/HRC/ColDPRK/Pages/ReportoftheCommissionofInquiryDPRK.aspx>. (accessed February 7, 2014).

4 Jon Elster, 6.

5 Paige Arthur, “How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice,” *Human Rights Quarterly* 31 (2009).

times of transition.”<sup>6</sup>

The general purpose of transitional justice is to change a society from a state of injustice to justice, from an oppressive government to a government with rule of law, from authoritarianism to democracy, and ultimately to bring a stable peace to society. Since transitional justice is largely about human rights violations, both victims and perpetrators are the main objects of the process.

Transitional justice involves judicial and non-judicial mechanisms that fall into the following three broad categories: 1) mechanisms of accountability for past crimes, including trials, and truth commissions; 2) victim-oriented restorative justice mechanisms, reparations, construction of monuments, and public memory projects; and 3) mechanisms of security and peace, amnesties and pardons, constitutional amendments, and institutional reform.<sup>7</sup> There are trade-offs among these mechanisms since harsh punishment and amnesty cannot be practiced at the same time. Therefore the proper combination and balance of TJ mechanisms is a key for successful transitional justice. Also, in order to design an effective TJ mechanism, one must take into account factors such as “the regime’s level of political legitimacy and security, its relationship with human rights violators, the strength of opposition groups, the activities of civil society and the presence of international actors.”<sup>8</sup> This paper primarily focuses on studying the balance between the mechanism of security and peace, since it requires more agile decision-making and action than the restorative justice mechanism.

Trials can take different forms, including domestic, international and mixed courts. Prosecution can have various forms in its targeting of perpetrators, by targeting only commanding ranks of political and military power, being limited to the top echelons, or to reach to the lowest ranks of soldiers and citizens.<sup>9</sup> In any case, these selections should be made to provide the greatest voice to victims and deliver the greatest positive impact to local communities. However, the calculation is very complex considering

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6 United Nations, *What is Transitional Justice? A Backgrounder* February 20, 2008, [http://www.un.org/en/peacebuilding/pdf/doc\\_wgl/justice\\_times\\_transition/26\\_02\\_2008\\_background\\_note.pdf](http://www.un.org/en/peacebuilding/pdf/doc_wgl/justice_times_transition/26_02_2008_background_note.pdf) (accessed May 14, 2015).

7 Tricia D. Olsen, Leigh A. Payne, and Andrew G Reiter, “The Justice Balance: When Transitional Justice Improves Human Rights and Democracy,” *Human Rights Quarterly* 32 (2010).

8 Huma Haider, “Factors Contributing to Transitional Justice Effectiveness,” GSDRC Helpdesk Research Report, Governance and Social Development Research Centre, University of Birmingham, UK (2011), <http://www.gsdrc.org/docs/open/HD762.pdf> (accessed May 14, 2015).

9 Olsen, 2.

the social, political and economic factors involved and the time constraints. Transitional justice designers therefore often face conflicts between short-term and long-term goal and between the realization of justice and social effectiveness. The past experiences of truth and reconciliation commissions (TRCs) have shown that the prosecution process involves many challenges, such as a lack of political will, institutional constraints, lack of capacity, increasing security concerns, and shortages of time and funding.<sup>10</sup> The prosecutors often granted amnesties and mitigated penalties for elites who had contributed to human rights crimes. Compromising justice weakened the justice mechanisms and hindered post-conflict reconciliation.<sup>11</sup>

### **Transitional Justice Mechanism in the UN and the ICC**

Transitional justice deals with systematic and massive human rights abuses committed by states that have recently transformed from non-democratic or brutal systems of governance. Therefore, many states that require TJ often lack the capability to carry out justice and require outside support for the creation of systematic and democratic legal standards. The United Nations and the International Criminal Courts have been two main supporters for the field of transitional justice.

In the 1988 decision of the Inter-American Court of Human Rights in the case of *Velásquez Rodríguez v. Honduras*, the Inter-American Court declared that all states have four fundamental obligations in the area of human rights:

to take reasonable steps to prevent human rights violations; to conduct a serious investigation of violations when they occur; to impose suitable sanctions on those responsible for the violations; and to ensure reparation for the victims of the violations.<sup>12</sup>

This principle influenced the jurisprudence of the European Court of Human Rights and decisions of UN treaty bodies such as the Human

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10 Joanna R. Quinn, "Haiti's Failed Truth Commission: Lessons in Transitional Justice," *Journal of Human Rights* 8, (2009).

11 *Ibid.*

12 *Velásquez Rodríguez Case*, Interpretation of the Compensatory Damages Judgment (ART. 67 American Convention on Human Rights), Inter-American Court of Human Rights Series C No. 2 August 17, 1990, <http://www.internationaljusticeproject.org/pdfs/rodriguez.pdf> (accessed May 14, 2015).

Rights Committee,<sup>13</sup> and has finally been incorporated into numerous UN documents.<sup>14</sup> Now, the UN system serves transitional justice in both judicial and non-judicial processes with prosecution initiatives, by facilitating initiatives, and through institutional reform support.<sup>15</sup> The prosecution initiatives and facilitation of initiatives of the UN TJ programs supports and ensures that trials are carried out in accordance to international standards. These include fair trial and the delivery of reparations, to provide a range of material and symbolic benefits to victims. Also, the programs support states' institutional reform and the development of fair and efficient public institutions to sustain peace, protect human rights, and foster a culture of respect for the rule of law. This is to prevent the recurrence of future human rights violations and can also promote local ownership.<sup>16</sup>

In the UN system, the Office of the High Commissioner for Human Rights (OHCHR) has been the main body assisting with and developing rule of law tools as well as designing and implementing transitional justice mechanisms.<sup>17</sup> OHCHR support for TJ activities is conducted through its TJ coordinator, part of the Rule of Law and Democracy Unit.<sup>18</sup> The OHCHR field presence and human rights components of peacekeeping missions function to support transitional justice.<sup>19</sup> Specifically, the field presence activities range from providing technical advice and assistance to local legal actors, law societies, universities and NGOs, to assisting governments and civil society in designing and implementing consultative processes and outreach programs.<sup>20</sup> The United Nations' TJ activities include "developing standards and best practices, assisting in the design and implementation of transitional justice mechanisms, providing technical, material and financial support, and promoting the inclusion of human rights and transitional justice considerations in peace agreements."<sup>21</sup>

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13 United Nations, *What is Transitional Justice?*

14 Ibid.

15 United Nations, *United Nations Approach To Transitional Justice*.

16 Ibid.

17 United Nations, *What is Transitional Justice?*

18 Ibid.

19 Ibid.

20 United Nations, Economic and Social Council, *Study by the Office of the United Nations High Commissioner for Human Rights on human rights and transitional justice activities undertaken by the human rights components of the United Nations system*, E/CN.4/2006/93 February 7, 2006, <http://unrol.org/files/E.CN.4.2006.93.pdf> (accessed May 24, 2015).

21 United Nations, Security Council, *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General*, S/2004/616, August 23, 2004, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement> (accessed May 14, 2015).

The brutal conflicts in the former Yugoslavia and the genocide in Rwanda led to the creation of two ad hoc international tribunals: the International Criminal Tribunal for Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR). Through these processes, the international community realized the need for a permanent international court, and this led to the establishment of the International Criminal Court (ICC) in 2002.<sup>22</sup> The roles of the ICC are investigating and prosecuting individuals responsible for genocide, war crimes, and crimes against humanity.

The ICC was established based on the Rome Statute allowing the ICC to deal with crimes committed since July 1, 2002, when the Rome Statute was first enforced.<sup>23</sup> Also, due to the Rome Statute's "complementarity" principle, domestic courts have the primary duty to deliver justice, while the ICC remains a court of last resort in case domestic courts are unwilling or unable to follow through.<sup>24</sup>

The ICC is legally independent from the UN, but the Rome Statute grants the UN Security Council (SC) a certain degree of power to limit the functional independence of the ICC.<sup>25</sup> For example, Rome Statute Article 13 allows the SC to intervene in Court situations that would not otherwise have fallen under the Court's jurisdiction and Article 16 allows the SC to require the Court to defer from investigating a case for a period of 12 months.<sup>26</sup>

### Transitional Justice in East Germany

The characteristics of a specific transition are a key factor in determining the appropriate TJ mechanism. This paper's hypothetical scenario of North Korea's transition through a reunification with South Korea can be partially studied from looking at the East German TJ that was carried out through the German unification. The transition of Germany was endogenous since the East German regime collapsed from within, and the unification treaty

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22 International Criminal Court, *Understanding the International Criminal Court*, ICC-PIDS-BK-05-003/13 (10 May 2011), <http://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> (accessed May 14, 2015).

23 Ibid.

24 Ibid.

25 War Crimes Research Office, *The Relationship Between The International Criminal Court And The United Nations*, International Criminal Court Legal Analysis and Education Project, American University, Washington College of Law, August 2009, [https://www.wcl.american.edu/warcrimes/icc/documents/WCRO\\_Report\\_on\\_ICC\\_and\\_UN\\_August2009.pdf](https://www.wcl.american.edu/warcrimes/icc/documents/WCRO_Report_on_ICC_and_UN_August2009.pdf) (accessed May 14, 2015).

26 Ibid.

was based on a voluntary agreement between two sovereign states.<sup>27</sup> Yet, in practice, the newly unified Germany inherited the legal and constitutional framework of West Germany, and the East Germans perpetrators were judged by West Germans judges. Therefore, the transition is often described as a “democratic takeover.”<sup>28</sup>

Germany followed a dual approach of trying to achieve both justice and reconciliation. This dual approach, in reckoning East Germany’s past, has included prosecution of some human rights violators, disclosing to the public the records of the East German State Security Service (‘Stasi’) under the German Stasi Records Act and the establishment of an Inquiry Commission to document the atrocities of the Communist regime.<sup>29</sup> These mechanisms were successful to some extent, but also had many flaws.

Above all, the prosecution of East Germany was executed chiefly by West Germany. When most East German courts were replaced by the West German system of specialized courts, nearly all the judges were West Germans.<sup>30</sup> Initially, East German judges who remained in service were not able to preside over trials in unified Germany because they had to undergo retraining in West German law.<sup>31</sup> With the West Germans in control of the de-communization process and the search for accountability, East Germans felt that they lacked a voice in shaping the whole process, and some of them expressed that they were being “colonized by the West.”<sup>32</sup>

Critics of German TJ argue that the trials were not vigorous according to transitional standards. Many prominent Western leaders confessed that they feared punitive measures could hinder reconciliation and potentially poison the political atmosphere after reunification.<sup>33</sup> In addition to that, many of the worst offenders of the former regime had been very old; many trials were subsequently cut short and ended without definite judgment. Western judges from the majority of cases admitted that due to a legal culture in which “value of human life outweighed the public clamor for

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27 Claus Offe and Poppe Ulrike, “Transitional Justice in the German Democratic Republic and in Unified Germany” in *Retribution and Reparation in the Transition to Democracy*, ed. Jon Elster (New York: Cambridge University Press, 2006), 5.

28 *Ibid.*

29 *Ibid.*, 9.

30 Maryam Kamali, “Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa,” *Columbia Journal of Transnational Law* 40 (2001): 109.

31 *Ibid.*

32 *Ibid.*

33 Mike Dennis and Eva Kolinsky, ed., *United And Divided: Germany since 1990* (New York: Berghahn Books, 2004), 18.

retribution,”<sup>34</sup> they could not provide the kind of justice which would have been served by stricter sentences. In practice, most of the convicted former East German border guards and officials received sentences of suspension or parole.<sup>35</sup> These prosecutions thus became occasions for condemnation, rather than real punishments. As a result, the sanctions executed were not satisfactory to many Easterners, and indeed, later studies have suggested that the victims under the SED regime were often deeply offended by the mild sanctions implemented.<sup>36</sup>

Furthermore, the outcome of border guard trials became controversial because the prosecutions mainly targeted lower-rank or peripheral officials, while many former leaders of the communist regime remained free.<sup>37</sup> East German public viewed that the trial was selective to the border guards in search of scapegoat, and therefore unjust.<sup>38</sup>

The unsuccessful and inconsistent attempts at prosecuting the perpetrators gave way to a greater emphasis on other reconciliation and rehabilitation measures, mainly the Stasi Records Act and the establishment of an Inquiry Commission.<sup>39</sup> These led to an array of controversial problems in the society, because many sensitive archives were smuggled away before the transfer of power to the new regime.<sup>40</sup> Former East Germans could easily access the Stasi files to find out who had spied on them, which revealed that friends and family members were often among the informers cited in one’s file.<sup>41</sup> In the short-term, this process of discovering the truth about the past and reckoning with its implications made the process of reconciliation much harder, creating internal tensions between truth and reconciliation. The outcome of the Inquiry Commission was not very effective because few Germans took heed of their efforts, and its final conclusions were so contentious that the commissioners themselves could not agree on them.<sup>42</sup> The final outcome was that Germany built a strong ‘rule of law’ and stabilized the integrated society in a democratic way. However, there was

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34 Sarah Glatte, “Judging the (East) German Past - A Critical Review of Transitional Justice in Post-Communist Germany,” Oxford Transitional Justice Research (2011), 14.

35 Neil J. Kritz, ed., *Transitional Justice - How Emerging democracies Reckon with Former Regimes, Volume I: General Considerations* (Washington: United States Institute of Peace, 1995), 599.

36 Offe and Poppe, 261.

37 Maryam, 107.

38 Ibid.

39 Glatte, 16.

40 John Hooper, “Khol Struggles to Protect Stasi Files,” *The Guardian*, July15, 2002, <http://www.theguardian.com/world/2002/jul/15/germany.johnhooper> (accessed May 14, 2015).

41 Kamali, 115.

42 Ibid. 89.



disappointment surrounding transitional justice in East Germany.

## **Transitional Justice for North Korea**

### *Insights from Transitional Justice in Germany for TJ in North Korea*

Germany's experience in transitional justice presents some insightful input for TJ in North Korea. First, in a transitional period, the South Korean government should seize documentary evidence in North Korea as quickly as possible before North Korean officials can smuggle it away. And after collecting the documents, the government will have to decide how to handle the records. Germany's hasty opening of records to the public resulted in a social shattering effect, and in this sense, a progressive disclosure to the public is recommended for South Korea. However, it should be coordinated in such a way that it does not infringe on the people's right to know. Therefore, South Korea's inner cabinet should set a code of conduct regarding the issue. Second, regarding the targeted level of perpetrators and the severity of punishment, South Korea will have the same fear as West Germany—that punitive measures can hinder reconciliation and poison the political atmosphere after reunification. This is a key point to be considered in the design of a TJ mechanism for North Korea. There are additional factors to be considered for the Korean case. The severity of penalty for the leadership—especially the Kim family—is the toughest aspect of prosecution. The former heads of North Korea, Kim Il-sung and Kim Jung-il, committed extensive human rights violations, and created a state of terror. Therefore, it could be challenging to define the degree of accountability of the leader who handed over the political system. Furthermore, North Korean civilization has been exposed to propaganda, which invokes strong patriotism, racial pride, and a strong loyalty toward the Kim regime.<sup>43</sup> As such, harsh punishment toward the Kim family will not necessarily satisfy North Korean civilians but will possibly infuriate them. Considering that successful accountability reflects the voice of the local population, the approach and outcome of verdicts will be affected by the North Korean civilian perception of the Kim leadership. However, it is difficult to know their true opinions before being freed by the government. Additionally, in North Korea, it is mandatory for men to be in the military service for ten years, and North Korean soldiers are reported

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43 David Owen, "The Cleanest Race: How North Koreans See Themselves-And Why It Matters," *Asian Politics & Policy* 3, (2011): 477-478.

to be involved in many inhumane actions due to state regulations. For that reason, setting a broad target for perpetrators will result in high economic and social costs. These aspects indicate the hardships of balancing justice and reconciliation.

Third, selecting the nature of trials is a critical part of the transitional justice mechanism. West Germany's domination of TJ in East Germany has led many East Germans to feel that German feeling that they were being "colonized by the West," which slowed down the reconciliation process. The two Koreas fought in the bloody Korean War from 1950 to 1953, and they have been separated for more than 60 years. Meanwhile, the regimes in the two states have often invoked an animosity for each other's political interests. This context can result in serious controversies regarding verdicts and can have negative effects on social integration. Thus, these aspects must be considered when choosing the nature of trials for transitional justice in North Korea. The latter part of this paper further discusses trials for North Korea.

### *Human Rights Violation in North Korea*

Starting from around the 1990s, the international community became aware of the realities of human rights violations in North Korea, piece by piece, from the live testimonies of slave labor workers, defectors hiding within Chinese and Russian borders, and North Korean defectors that had settled in democratic countries, mostly in South Korea. Accordingly, the international community began to investigate and address the problems, though the human rights issues often remained overshadowed by concerns with North Korea's nuclear weapons program. In 2004, the UN Commission on Human Rights assigned a Special Rapporteur to investigate both the human rights situation in North Korea and the government's compliance with its obligations under international human rights law.<sup>44</sup> Then, in order to call for a greater investigation into human rights abuses inside the country, the UN established a Commission of Inquiry (COI) on North Korea on March 21, 2013. Even though neither the Special Rapporteur nor the COI had access to investigate inside North Korea and China, their efforts have done much to bring North Korea's human rights abuses into the limelight. The COI panel's 372 page report details a wide range of crimes against humanity,

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44 The United Nations, *Human Rights Situations that Require the Council's Attention* (General Assembly, 2013)

including extermination, murder, enslavement, torture, imprisonment, rape, forced abortion, and other forms of sexual violence.<sup>45</sup> In addition, war crimes have been reported, especially regarding the vast majority of abductions and enforced disappearances linked to the Korean War, of which most victims were nationals of South Korea and Japan.<sup>46</sup> The report concluded that “systematic, widespread and gross human rights violations have been and are being committed by the Democratic People’s Republic of Korea, its institutions and officials.”<sup>47</sup>

## **Designing a Transitional Justice Mechanism for North Korea**

To account for the extensive human rights crimes committed by North Korea, a broad transitional justice mechanism must be employed with great care, with consideration of both the short-term and long-term affects to society. The following part will explore the possible prosecution style for North Korea’s TJ, specifically the type of trial to use. Also, additional matters requiring attention in designing a TJ mechanism for North Korea will be discussed.

Possible trial options for North Korea’s TJ are the International Criminal Court (ICC), an Ad hoc tribunal, the Court of Korea, or a mixed court. This section explores each option. The following points are factors to be addressed prior to the establishment of a court:

revelation of truth and collection of credible evidence; distinction between active and passive participants and those condoned in the perpetration of the atrocities in question; legal basis for the applicable laws and the institution of a special court; the scope of participation of international judges, prosecutors, and legal counsels; the coverage of intervention of international organizations and human rights institutions; the venue for the judicial deliberation; the practical enforceability of judicial decisions; and 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.

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45 The United Nations, *Report of the Commission of Inquiry on Human*.

46 Ibid.

47 Ibid.

*The International Criminal Court*

In the event that the ICC seizes jurisdiction over North Korea, rules on crimes against humanity and war crimes can be applied. The Prosecutor Office of the ICC has already received communications alleging that North Korean forces committed war crimes in the territory of South Korea, and they opened a preliminary examination to evaluate if certain incidents constitute war crimes under the jurisdiction of the Court. They are: a) the shelling of Yeonpyeong Island on the November 23 2010 which resulted in the killing of South Korean marines and civilians and the injury of many others; and b) the sinking of a South Korean warship, the Cheonan, hit by a torpedo allegedly fired from a North Korean submarine on March 26 2010, which resulted in the death of 46 persons.<sup>48</sup>

Although the ICC can have jurisdiction over these relatively recent events, it is that will still limited to meet the Court. First of all, North Korea is not a party to the Rome Statute of the ICC. The only possible way to send North Korea before the ICC is if the UN Security Council refers the case to the ICC. However, two members of the Security Council, China and Russia, already expressed their unwillingness to do so. Chinese representatives to the UNSC told the council that “the Security Council is not the forum to get involved in human rights issues” and that it “should refrain from doing anything that might cause an escalation.” Similarly, Russian representatives told the press, “I think it [referring to placing North Korea before the ICC] is improper to do it at the Security Council.”<sup>49</sup>

Even if the political obstacles are removed, the ICC can deal with only crimes perpetrated after July 1, 2002, when the Rome Statutes of the ICC entered into force,<sup>50</sup> and therefore cannot consider pre-2002 crimes occurred in North Korea. Thus, the war crimes that happened during the Korean War cannot be brought before the ICC, and neither can the crimes committed in the territory of North Korea. Furthermore, considering the reunification of the Korean Peninsula, this paper’s hypothetical scenario, South Korea

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48 International Criminal Court, *Office of the Prosecutor, ICC Prosecutor: Alleged War Crimes in the Territory of the Republic of Korea Under Preliminary Examination*, ICC-CPI-20101206-PR608, December 6, 2010, <http://www.icc-cpi.int/NR/rdonlyres/46A212DA-6CDC-48F7-8F9A-DF5FB5B8BBD5/282744/KoreaEng1.pdf> (accessed May 14, 2015).

49 Ankit Panda, “North Korean Human Rights Abuses on the Agenda at UN Security Council,” *The Diplomat*, December 23, 2014, <http://thediplomat.com/2014/12/north-korean-human-rights-abuses-on-the-agenda-at-un-security-council> (accessed May 14, 2015).

50 International Criminal Court, *Rome Statute, A/CONF.183/9*, July 17 1998, [http://legal.un.org/icc/statute/english/rome\\_statute%28e%29.pdf](http://legal.un.org/icc/statute/english/rome_statute%28e%29.pdf) (accessed May 14, 2015).

would utilize the ICC for the prosecution of North Korean perpetrators after integration. However, considering the principle of complementarity of the ICC, the South Korean judiciary is perceived to be well-qualified to perform an independent administration of justice. Due to this, South Korea is more likely to exercise its jurisdictional competence, especially as the holder of the main responsibility of establishing justice in North Korea. Also, even if the ICC trial is adopted after the unification, the ICC's jurisdiction over North Korea's crimes is limited to the pre-2002 crimes.

Also, because the ICC's jurisdiction is limited and can only deal with crimes perpetrated after July 1, 2002, in the case that the ICC is used as the legal venue, separate consideration should be given to those crimes committed before July 1, 2002.

### *A Korean Court*

If a unified Korea were to execute a national trial as Germany did, the prosecution would be based on South Korean legality. Though most of the crimes that happened on North Korean territory would be punishable under South Korean laws, prosecution by solely domestic law would be ineffectual.

First, the long-lived animosity and political factors between South and North Korea can limit the perception of trials as being fair and stable, especially in the case of jurisdiction by the South Korean Court. Also, as the German case suggests, trials by solely South Korean judges would intrude upon the proper reconciliation of citizens from the South and the North. Secondly, given the lack of ample experience of South Korea in dealing with international crimes, including genocide, crimes against humanity, and war crimes, the South Korean Court may not have sufficient competence to deal with North Korea's systematic, grave, state-sponsored, and internationally-concerned crimes. This vulnerability exemplifies the need for international judges. But from a long-term perspective, it is advisable that the Korean court make reforms that meet international law standards, by securing transparency in view of the need to guarantee fairness, legitimacy, and promote the practical cause of social integration and education.

### *An Ad hoc Tribunal*

An Ad Hoc Tribunal refers to a kind of international court held on an ad hoc basis to prosecute severe human rights violations and violations of

humanitarian law that are considered international crimes, such as crimes against humanity, genocide and certain severe war crimes. The former Yugoslavia (ICTY) and Rwanda (ICTR) Ad Hoc Tribunals were created by the UN Security Council to address violations of international law during the Yugoslavia conflict and the Rwanda genocide of the 1990s, and the judges were experts in international law who did not represent any particular country.<sup>51</sup>

One of the characteristics of Ad Hoc Tribunals is that they usually try individuals rather than states.<sup>52</sup> The former Serbian president Slobodan Milosevic, charged with genocide, war crimes, and crimes against humanity, was one of the highest profiles tried in an ad hoc tribunal.<sup>53</sup> In this sense, the Kim family members and related officials in North Korea can be tried before the Ad Hoc Tribunal. The COI report also discusses the option of creating an Ad Hoc Tribunal for North Korea because the COI believes that North Korea's ongoing criminal acts were initiated decades ago. Since the ICC can only consider crimes occurring after mid-2002, an Ad Hoc Tribunal would involve a more comprehensive accountability.<sup>54</sup> Such a suggestion by the COI is based on the condition of the maintenance of the status quo in which North Korea's domestic law cannot be accepted and utilized for prosecuting crimes in North Korea, requiring instead an international court. However, when considering transitional justice after an integration of the two Koreas, an Ad Hoc Tribunal is not necessarily the best selection.

The past experiences of ad hoc tribunals in Rwanda and the former Yugoslavia have been evaluated as cost-inefficient. The rule of law report of the UN in 2004 expressed this issue by stating that "the two ad hoc tribunals have grown into large institutions, with...a combined annual budget exceeding a quarter of a billion dollars – equivalent to more than 15 percent of the Organization's total regular budget... the stark differential between cost and number of cases processed does raise important questions."<sup>55</sup> Furthermore, the UN Security Council creates ad hoc tribunals, and the past tribunals in Rwanda and former Yugoslavia only tried crimes in those territories over a specific period of time.<sup>56</sup> In the case of North Korea, many

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51 University of Nebraska-Lincoln, "Ad Hoc Criminal Courts and Hybrid Criminal Courts," *Human Rights & Humanitarian Affairs*, [http://www.unhumanrights.org/01/0106/0106\\_08.htm](http://www.unhumanrights.org/01/0106/0106_08.htm).[http://www.unhumanrights.org/01/0106/0106\\_08.html](http://www.unhumanrights.org/01/0106/0106_08.html) (accessed May 14, 2015).

52 Ibid.

53 Ibid.

54 United Nations, *Report of the Commission of Inquiry on Human Rights*.

55 United Nations, *The Rule of Law and Transitional Justice*.

56 Ethel Higonnet, "Restructuring Hybrid Courts: Local Empowerment and National Criminal

human rights violations and crimes happened not only on North Korean territory, but also to a high degree in China and Russia. Consequently, an ad hoc tribunal for North Korea might place limitations on justice.

### *Mixed Trials*

Hybrid courts are very similar to ad hoc courts in pursuing criminal justice for individual perpetrators of gross human rights violations in a specific country. However, the difference is that hybrid courts apply both international law and domestic law, and judges and rules are also a mixture of international and national.<sup>57</sup> This characteristic is the most attractive aspect of the hybrid court for North Korean transitional justice. As stated above, the South Korean domestic court lacks experiences in dealing with international crimes and thus requires the support of international judges. However, the ICC and the ad hoc tribunals have many limitations, as previously stated. Meanwhile, if South Korean judges and domestic law were to be blended with international legal support, this would allow for better communication with the local population and reflect local consciousness and culture more thoroughly. Prosecution based on these surroundings would be accepted by local populations more easily and would promote stronger accountability. Domestic involvement also endorses values of local ownership in the transitional process.

Additionally, compared to the Security Council's domination of the ICTY and ICTR, a hybrid court is more separated from the UN. A hybrid court can be established with several states acting in concert and without any UN involvement at all. And even if the UN is involved, they mainly support the courts in obtaining "funding, resources, judges, and prosecutors through 'voluntary' contributions from other national donors."<sup>58</sup> In the cases of Sierra Leone, East Timor, Kosovo, and Cambodia, the domestic authorities cooperated with the international community, mainly for reasons of cost and expense, in the establishment of mixed trials.<sup>59</sup> This smaller political influence from the UN Security Council may assist in prosecuting crimes that happened in China.

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Justice Reform," *Yale Law School Student Scholarship Papers*, Paper 6, March 2005, [http://digitalcommons.law.yale.edu/student\\_papers/6](http://digitalcommons.law.yale.edu/student_papers/6) (accessed May 14, 2015).

57 Ibid.

58 University of Nebraska-Lincoln, "Ad Hoc Criminal Courts and Hybrid Criminal Courts."

59 Hong, 6.

*Additional Matters Requiring Attention in Designing TJ for North Korea*

Prior to any transition in North Korea, South Korea must be ready for such a transition. Developing a basic foundation for transitional justice before the transition actually occurs is one way to prepare for an uncertain future on the Korean Peninsula. The South Korean government should strengthen education on the conception of North Korea in terms of human rights issues and unification to help prevent the formation of a hierarchical society and reduce discrimination after unification. Currently, there are high levels of mistrust and animosity not only toward the North Korean regime, but also toward North Korean civilians. The South Korean government should educate South Koreans in a way that approaches regime and people separately, and educate North Korean defectors so that they can play a mediating role in bridging differences in the coming future. The South Korean government should also begin building legislation in preparation for unification, especially regarding transitional justice for North Korea, the installation of a public record function, and policies to dismiss the misunderstandings and animosity toward North Korea. Lastly, South Korea should avoid politicizing the North Korean human rights issues by passing the North Korean Human Rights Law, as the United States, Japan and the European Union have done.

In the long run, after the transition occurs along with prosecutions, the establishment of a Truth and Reconciliation Commission (TRC) will further contribute to a transitional justice that promotes proper justice and the rebuilding of society. The proceeding court can examine and punish crimes of a grave nature, but there are presumably over 50,000 minor offense criminals who may be subjected to the decisions of the TRC. However, the judgment will again require experts in the field of international court law since the challenging tasks of balancing law and morality are being dealt with. For instance, judging North Korean brokers, who sold North Korean women to Chinese men but at the same time helped those women escape from North Korea, will be a challenging task. Amnesty for lighter crimes is more often than not granted in return for full-fledged confessions of the truth. Amnesty can therefore be selectively granted to those who reveal the whole truth scale, as was witnessed in the South African TRC.<sup>60</sup>

Lastly, in the case of North Korean transitional justice under the

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60 Truth and Reconciliation Commission, *Volume 1: Truth and Reconciliation Commission of South Africa Report*, October 29, 1998, 267, <http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf> (accessed May 14, 2015).



unification scenario, South Korea will inevitably engage in the process. South Korea must realize that transitional justice in the integration of these two societies demands the establishment of new systems, not merely copying what existed before. In order to build strong reconciliation for the future, South Korea must respect North Korea and its former systems to the extent of meeting the standard of international law. In other words, universal standards need to meet local circumstances and meet the expectations of the North Korean populace. But a change among the ranks of the elite seems inevitable because replacement of elites by import is easier than purification through rebuilding or the construction of a new elite class. Most of the current elites in North Korea show a great loyalty to the Kim family, and it will take time until they can accept unbiased views and international norms. Until that time comes, fortunately, there are many good candidates for elites in the transition period, namely the more than 25,000 North Korean defectors who have settled down in South Korea. Even though they are severely criticized by North Korean people as traitors, and even though many North Korean defectors struggle to adjust in South Korea, their experiences in both North and South Korea will fill the vacuum, and further assist reconciliation of people for a more peaceful Korea.

## **Conclusion**

Broaching the subject of transitional justice is central to preparing for the possibility of a sudden transition in North Korea. As soon as such an event occurs, undertaking a fair and transparent process of transitional justice will be one of the key elements in creating a bright future for a reunified Korea. However, few discussions exist regarding North Korean transitional justice in South Korea and in the international community, so this paper aims to bring the issue to the forefront by discussing a possible transitional justice mechanism for North Korea.

This paper was based on the hypothetical scenario that North Korean TJ will be carried out through reunification in which South Korea absorbs North Korea, similar to the German unification. This hypothesis itself implies this paper's limitations in dealing with the unforeseeable future. However, North Korean TJ cannot be made under the current Kim family system, and even if another leader were to rise in North Korea, it is difficult to imagine that the new leader would be totally free from facing justice. Therefore, it is not groundless to set the conditions for TJ under a scenario of reunification led by South Korea.

Designing a TJ mechanism for North Korea prior to the transition is challenging since information about North Korea is so limited. The assertions of North Korean defectors and of North Korean regimes are contradictory, and North Korean civilian perception of leadership is also unclear. These factors complicate the precise considerations regarding a transitional justice mechanism for North Korea. Nevertheless, by studying the framework of transitional justice, the transitional justice experiences of East Germany, and possible TJ prosecution options for North Korea, this paper concludes that a hybrid court should be the mechanism for a full range of accountability in North Korean transitional justice. Transitional justice is a long process requiring many measurements, including prosecutions, reparations, truth commissions and institutional reform. The preparation for North Korea's transitional justice requires extensive work. There will be no hope of a bright future for a unified Korea without careful preparation in the present day. **Y**