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Countries worldwide are increasingly attempting to address issues involving climate change and the environment, and the same phenomenon is occurring in the Korean Peninsula. The Republic of Korea is taking a growing leadership role in the global movement towards green growth. But what if this momentum was directed closer to home? This paper aims to assess the Green Détente as a policy mechanism for trust-building on the Korean Peninsula. It attempts to explore whether opportunities are available for environmental cooperation between the two Koreas as a stepping stone to future bilateral exchange.

After over 60 years of division, the Korean Peninsula still remains a highly polarized geopolitical arena. Issues involving nuclear weapons tests, human rights violations, drug trafficking, and cyber warfare surround the poor, isolated Democratic People's Republic of Korea, while its richer, capitalist southern neighbor, the Republic of Korea, now boasts a full-fledged democracy and is an increasingly important international player in middle power diplomacy. While much of the world has started to view North Korea with keen interest, its seemingly aberrant behavior and a lack of transparent information have made North Korea one of the most complex and difficult diplomatic challenges today. For its immediate neighbors, especially South Korea and Japan, provocative actions from the Kim regime pose an urgent regional security concern.

Peace and stability on the Korean Peninsula and its vicinity, therefore, depend largely on North Korea and its relations with its neighbors. However, due to continued mistrust and political impasse, improvements in diplomacy

seem unlikely. This paper will examine an alternative policy instrument, namely environmental negotiations, as a key means of trust-building on the Korean Peninsula. First, the paper will survey the development of environmentalism in South Korea and its engagement with environmental policy making in the domestic and international spheres. Second, it will describe North Korea's current environmental situation, its underlying causes, and the regime's domestic responses. Last, the paper will explore environmental cooperation as an inter-Korean exercise and discuss future prospects, developments, and challenges. This research serves to enhance the understanding of the role the environment has played in South Korea's recent history and suggests possibilities for its role in the future of South Korea's foreign policy developments, especially in engaging North Korea.

South Korea and the Environment: A Policy Tool

South Korea's efforts for environmental cooperation in Northeast Asia began within the past century when growing public awareness of the consequences of environmental degradation resulted in multiple international regimes on the protection of various environmental issues. While regional environmental cooperation in both Europe and North America has developed into largely functional entities, for countries in Northeast Asia, commonly defined to include China, Japan, Mongolia, North Korea, Russia (the Russian Far East), and South Korea, regional steps to environmental cooperation have materialized only recently within the past two decades.

Environmental issues are numerous in scope and variety, but one key common trait is its trans-boundary nature. Rapid industrialization and urbanization in Northeast Asia, largely driven by energy and resource-intensive industries, have led to remarkable economic growth while simultaneously placing strains on the environment. Air and water pollution, increased carbon emissions, and waste discharge are some of many direct ramifications of industrialization, but deforestation, desertification, water scarcity, land degradation, biodiversity loss, and threats to ecosystem and health are all pressuring Northeast Asia in multidimensional ways. Because such environmental externalities can be unidirectional, multidirectional, or both, there has been an increased awareness of and recognition for the environment as transcending national boundaries and posing risks that incur economic, social, and health costs; with issues such as acid rain, marine pollution, and more recently dust and sandstorms becoming prominent, an increasingly environmentally conscious civil society is taking shape.

Environmental movements in South Korea developed largely in tandem with domestic democratization movements. After the Korean War, South Korea's primary policy goal was two-fold: national security, with unbridled, export-oriented economic growth as the main method of achieving this goal, and a foreign policy that reflected its staunch, anti-Communist world view.¹ The speed of South Korea's economic growth resulted in an equally rapid destruction of the environment. In fact, former President Park Chung-hee, who governed South Korea from 1961 to 1979 under authoritarian rule, was noted to have stated in 1962 at Ulsan, an industrial city housing petrochemical industries and later shipyard and automobile assembly lines, "Dark smoke arising from factories is symbolic of our nation's growth and prosperity."² While small environmental groups, often based in universities, had existed since the 1970s, it was not until the 1980s that environmental movements began to gain a foothold in civil society. Expansions in environmentalism occurred from a convergence of several factors. First, by the late 1980s, South Korea entered phases of democratization, with social movements that placed pressure on the government to introduce domestic policies that focused on overlooked public needs. Among these various issues included the environment, which by this point was noticeably degraded at the expense of rapid economic development. Expanded efforts in environmentalism by a now wealthier society with more political freedom resulted in marked changes in civil society. In 1990, the Environment Administration, formerly a subsidiary of the Ministry of Health and Society, was promoted to the Ministry of Environment, and greater measures were set in place by the judiciary to ensure strengthened environmental protection.³

While democratization in the late 1980s accelerated the mobilization of civil society in environmental issues, it was not without precedent. In 1982, the Korea Pollution Research Institute (KPRI), the first organized environmental group in South Korea, was founded and had since its inception played an important role in raising environmental awareness. Despite its limited political capacity, KPRI was responsible for exposing environmental disasters such as the Onsan Illness, a public health scandal that involved local drinking water being chemically contaminated by the Onsan Industrial Complex. Developments in democratization allowed environmental groups

1 Esook Yoon, "South Korean Environmental Foreign Policy," *Asia-Pacific Review* Vol. 13, no.2 (2006): 76.

2 Su-Hoon Lee, "Environmental Movements in South Korea," in *Asia's Environmental Movements: Comparative Perspectives*, ed. Yok-shiu F. Lee and Alvin Y. So (New York, Routledge: 1999), 90-96.

3 Yoon, 77.

to organize and expand, while increased media coverage on environmental scandals, including tap water contamination in Seoul or phenol pollutants in the upper Nakdong River, transformed these issues to matters of personal concern. By 1992, 8,884 cases of environmental issues received newspaper coverage, a tremendous increase from 479 cases just one decade before.⁴

The 1992 United Nations Conference on Environment and Development, also known as the Earth Summit, in Rio de Janeiro further strengthened South Korea's growing environmental outlook. At Rio, South Korea viewed environmental issues as a strategic niche market for foreign policy and positioned itself as a mediator between developed and developing countries. It urged developed countries to the principle of common but differentiated responsibility while simultaneously offering financial assistance to developing countries.

Soon after the Earth Summit, South Korea focused on establishing a regional architecture for environmental cooperation. In 1992, the South Korea-led environment symposiums with Japan initiated in 1988 was reorganized as the Northeast Asian Conference on Environmental Cooperation (NEAC), a forum that now includes China, Mongolia, and Russia and encourages sharing of environmental information and understanding. In 1993, South Korea partnered with the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), the United Nations Development Programme (UNDP), the United Nations Environment Programme (UNEP), and the Asian Development Bank (ADB) to establish the North-East Asian Subregional Programme for Environmental Cooperation (NEASPEC). With all Northeast Asian countries represented, NEASPEC allows comprehensive multilateral cooperation based on capacity building and information sharing to address environmental challenges in the region. In 1994, as part of the UNEP's Regional Seas Programme, South Korea hosted the first meeting for the Northwest Pacific Action Plan (NOWPAP) with all Northeast Asian countries except Mongolia for collaboration on coastal and marine environments. In 1999, South Korea initiated the Tripartite Environmental Ministers Meeting (TEMM) with China and Japan to promote environmental management among the three countries. TEMM meets on an annual basis and collaborates on multiple areas of the environment including climate change, biodiversity, contamination control, dust and sandstorms, and electronic waste. At present, South Korea cooperates with all countries in Northeast Asia on a bilateral level on environmental issues,

4 Su-Hoon Lee, 105.

except with North Korea.⁵

Segyehwa (Globalization) and the Environment: Integrating with the Global Community

South Korea's explosive engagement in environmental multilateralism (and bilateralism) strongly correlates with its overall policy pursuing globalization in the 1990s. With the end of the Cold War and South Korea's admittance to the United Nations in 1991, *seggyehwa*, or literally globalization, became South Korea's top policy objective. Used as a public slogan by former President Kim Young-sam from 1993 to 1998, *seggyehwa* represented South Korea's first push towards gaining leadership and a greater role in the international community. Recognizing South Korea's dire need for integration with the global community, Kim announced in 1995 six different *seggyehwa* targets that would help South Korea develop into a global player: education, the legal and economic order, politics and the press, public administration, the environment, and culture and attitudes.⁶ This belief translated directly in the administration's foreign policy. Kim's first foreign minister, Han Sung-joo, declared in 1993 the following:

With the advent of the era of globalism, Korea's diplomacy needs to pay more attention to such universal values as freedom, justice, peace and welfare... We will take an active part in international efforts to tackle global issues such as international peace and security, disarmament and arms control, eradication of poverty, protection of environment, and efficient utilization of natural resources. Through such engagement, we will play our due part in making a more just, safe, and prosperous world.⁷

South Korea quickly joined multiple multilateral and intergovernmental organizations following this time. It joined the WTO in 1995, the OECD in 1996, and became a part of 21 different treaties and institutions under the

5 Esook Yoon, 83.

6 B.C. Koh, "Segyehwa, the Republic of Korea, and the United Nations," in *Korea's Globalization*, ed. Samuel S. Kim (Cambridge, Cambridge University Press: 2000), 198.

7 Ibid.

United Nations.⁸

By now, the environment was firmly established as a domestic issue and by recognizing the environment's increasing importance on the global playing field, a large component to *seggyehwa* thus became devoted to mobilizing South Korea's global efforts on the environment. Needless to say, South Korea became involved in most of the major global environmental agreements since then: the Montreal Protocol in 1989, the Convention on International Trade in Endangered Species of Wild Fauna and Flora in 1993, the Basel Convention on International Trade in Hazardous Wastes in 1994, the United Nations Framework Convention on Climate Change (UNFCCC) in 1994, the Ramsar Convention on Wetlands in 1997, the Convention to Combat Desertification in 1999, and the Kyoto Protocol in 2002. Han stated to the United Nations that South Korea, as the world's thirteenth largest economy at the time, planned to "assume responsibilities commensurate with [its] standing in the international community," and Kim Yong-sam's *seggyehwa* policy and South Korea's international commitments both indicate the importance it placed on the environment as an area for Korea to grow its international stature.

These efforts towards multilateralism on the global scale have worked in tandem with South Korea's regional leadership at bolstering environmental cooperation in Northeast Asia. South Korea has played a strategic role in mediating between developed and developing countries in the Earth Summit, and now its emphasis on environmental leadership suggests middle power diplomacy in a regional and international arena that is without clear leaders. In Northeast Asia, juggling between the two regional powers, China and Japan, presents a daunting task, but environmental negotiations offer an opportunity for South Korea to maneuver strategically around pressing issues, especially since environmental issues also touch upon economic growth, energy security, and national security.

Using the Environment to Fuel Economic Growth

On February 2008, former President Lee Myung-bak revealed his Low-Carbon and Green Growth Strategy, a set of plans for South Korea's long-term development that Lee claimed to be a "new national development paradigm." Lee's strategy offered to tackle the impact of the worsening global recession on the domestic economy with an economic stimulus package of

8 Yoon, 79.

US\$ 38.1 billion, 80 percent of which was allocated to “more efficient use of resources such as fresh-water, waste, energy-efficient buildings, renewable energies, low-carbon vehicles, and the rail network.”⁹

Less than one year later, South Korea officially announced its National Green Growth Strategy, which included the Five-Year Plan for Green Growth (2009-2013) that aimed to implement Lee’s vision of sustainable growth through a set of three strategies and ten policy directions.

*Table 1: Five-Year Plan for Green Growth (2009-2013),
Strategies and Policy Directions¹⁰*

Strategies	Policy Directions
1. Measures for climate change and securing energy independence	1. Reduce carbon emissions
	2. Decrease energy dependence and enhance energy self-sufficiency
	3. Support adaptation to climate change impacts
2. Creation of new growth engines	1. Develop green technologies as future growth engines
	2. Greening of industry
	3. Develop cutting-edge industries
	4. Set up policy infrastructure for green growth
3. Improving quality of life and strengthening the status of South Korea	1. Green city and green transport
	2. Green revolution in lifestyle
	3. Enhance global cooperation on green growth

Source: UNEP Overview of the Republic of Korea’s National Strategy for Green Growth (2010)

While the environment has always been a key policy mechanism for South Korea’s foreign diplomacy as seen thus far, the National Green Growth

9 United Nations Environmental Programme (UNEP), *Overview of the Republic of Korea’s National Strategy for Green Growth* (Geneva, 2010), 6.

10 UNEP, 17.

Strategy represents a significant change in national understanding of the country's priorities. Some experts, such as Esook Yoon, have criticized South Korea for cherry-picking international environmental agreements based on its economic priorities. More specifically, while South Korea has often led regional environmental initiatives and adopted most global frameworks governing environmental issues since *seggyehwa*, Yoon claims economic interests more than the environment," especially in relation to climate change negotiations and sewage discharge into coastal waters, two environmental challenges that pose a significant economic cost to South Korea.¹¹ Although this may have been true as of Yoon's publication, South Korea has since then stepped up its environmental governance in the international arena. In 2009, South Korea became the first non-Annex I Party to the Kyoto Protocol to voluntarily reduce its carbon emissions by 30 percent by 2020, the highest reduction level recommended by the Intergovernmental Panel on Climate Change to developing countries.¹² From 2012 to 2014, the Ministry of Land, Transport and Maritime Affairs (MLTM) has tightened enforcement on dumping wastewater into the ocean in multiple phases, banning the disposal of livestock manure and sewage sludge into the ocean in 2012, food wastewater in 2013, and industrial wastewater and sludge in 2014.¹³ South Korea's petition to expand the Global Green Growth Institute from a nongovernmental organization to an intergovernmental body, as well as its attempts to host the Green Climate Fund, both of which were successful, show its dedication to match words with action. These developments in the international front coincide greatly with a revised domestic understanding of the importance of the environment as a policy instrument.

Critics of the National Green Growth Strategy claim that the government has merely green-washed existing industries by placing uneven emphasis on large construction projects that inherently create carbon emissions or nuclear and hydropower projects whose environmental friendliness are questionable.¹⁴ Whether South Korea's green growth paradigm will allow economic growth by addressing root sources of

11 Yoon, 80.

12 UNEP, 9.

13 Sayuri Umeda, "South Korea: Ban on Dumping of Food Wastewater in the Ocean Comes to Force," *Library of Congress*, February 7, 2013, http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403482_text (accessed April 27, 2015).

14 For more information, refer to Maggie Mazzetti, "Assessing South Korea's National Strategy for Green Economic Growth," *SAIS US-Korea Institute 2011 Yearbook* (2011): 71-74.

environmental problems or present merely a rebranded “business-as-usual” approach remains to be seen. Nonetheless, domestic dialogue on the environment and its nontraditional roles in policymaking has undoubtedly made its mark.

North Korea’s Environmental Crisis

Ideology and North Korea’s Environment

While South Korea honed its environmental diplomacy, North Korea has led a different approach to environmental decision-making. Central to North Korea’s political worldview is its *juche* ideology of self-reliance. While *juche* has been studied to grasp a better understanding of North Korea’s political economy, it also presents an opportunity to comprehend the nature of environmental discourse in North Korea and how that may come to change in the future.

In understanding environmental discourse in North Korea, Atkins et al. (1998) underscore the need to place North Korea in the context of modern Korean history. Repressed under Japanese occupation and severely debilitated by the Korean War, North Korea has viewed itself as an embattled state, “with few friends [and] a hostile natural environment with a mountainous topography that restricts the amount of arable land and climate extremes swinging from severe floods one year to drought the next.”¹⁵ For Kim Il-sung, the environment represented a natural challenge, one that was “but another enemy to be defeated by socialist ingenuity.” In 1981, Kim declared, “It is the duty of communists to master and remake nature.”¹⁶

With *juche*, a central tenet to self-reliance is the concept of human domination over nature and technological optimism. Humans are able to modify nature through modern technology so that social benefit is maximized, and this concept was sustained through the implicit assumption that natural resources are effectively limitless. With this ideological outlook, North Korea carried on numerous environmental projects, including the irrigation of 1.4 million hectares of cultivable land that included 1,700 reservoirs fed by

15 Peter Atkins, Ian Simmons and Brian Roberts, *People, Land and Time* (Oxford, UK: Hodder Education, 1998), 228.

16 Peter Atkins, “The Dialectics of Environment and Culture: Kimilsungism and the North Korean Landscape,” in *Environment and Development: Views from the East and the West*, ed. Amitava Mukherjee and V.K. Agnihotri (New Delhi, Concept: 1993): 309-32.

25,800 pumping stations, 40,000 kilometers of irrigation canals, and an interconnected system of hydropower plants.¹⁷ Massive land reclamation projects also ensued: the Nampo West Sea Barrage, 300,000 hectares of new arable land by 1987, 100,000 hectares of tideland reclamation, and the damming of multiple rivers and bays.¹⁸

These major infrastructure projects altered the North Korean landscape, giving what Atkins claims is a “human meaning of landscape.”¹⁹ North Korea’s top-down approach in unilaterally transforming nature to fit its political and economic needs further became apparent at the onset of its economic collapse with the demise of Communism in Eastern Europe in 1989 and the fall of the Soviet Union in 1991. To date, studies by the UNEP show that North Korea suffers immense challenges in deforestation, water quality degradation, air pollution, and land degradation.²⁰ According to Byun, systemic problems plagued North Korea as well: a focus on heavy industries that prioritized quantitative growth, competition for legitimacy with South Korea, unsustainable dependence on low-grade coal especially after the fall of the Soviet Union, inability to invest in protection facilities and infrastructure, and the absolute absence of civil society groups.²¹

Perhaps recognizing the severity of its state of the environment, North Korea has also begun to initiate internal projects aimed at improving the environment, namely the “National action plan for land degradation/desertification and drought protection (2006-2010)” or the “Ten-Year Plan for Afforestation/Reforestation (2003).”²² However, these policies have not yet shown profound impact in recovering the environment.

State of the Environment

In 2003, UNEP, in partnership with UNDP and the National Coordinating Committee for Environment, published the first (and only) state of the environment report on North Korea, providing a comprehensive survey of environmental problems faced by North Korea at that time. Without much improvement in North Korea’s economy, it is highly unlikely that the

17 Ibid.

18 Ibid.

19 Ibid.

20 United Nations Environment Programme (UNEP), *DPR Korea: State of the Environment* (Bangkok, 2003).

21 Jinsuk Byun, “The Environmental Issues of a Unified Korea,” (paper presented at the 1st Annual Conference of the CSIS-USC Korea Project, Los Angeles, California, August 20-21, 2010).

22 UNEP, 14.

environmental challenges detailed by UNEP have improved in recent times; it is much more likely that environmental issues have worsened. These issues are summarized below to provide a contextual background for discussions to follow:

Table 2: Summary of Environmental Challenges in North Korea

Environmental Issue	Cause	Effect
1. Deforestation	Conversion to low-grade agricultural land	More than 40 percent of forested lands lost since 1985
		Increased vulnerability to extreme climate events (e.g. severe floods, landslides, and mud flows)
	Source of firewood to meet energy demand	Production of firewood for heating increased from 300 million m ³ in 1990 to 720 million m ³ in 2000
2. Land Degradation	Very high levels of fertilizer and pesticide use	Unstable agricultural systems
		Soil acidification
		Increased water degradation from runoffs
3. Water Quality Degradation	Around 70 percent of industrial sites not properly installed with industrial wastewater treatment facilities	Severe industrial pollution in waterways. For example, more than 50 percent of sewage is dumped into the Taedong River without treatment.
4. Air Pollution	Heavy dependence on coal for primary energy.	High levels of air pollution (specific data unavailable)
	Heavy industrial dependence on mining and manufacturing	High levels of air pollution (specific data unavailable)

Information adapted from UNEP DPR Korea: State of the Environment (2003)²³

23 The energy sector in North Korea is comprised of 70 percent coal, 15 percent hydropower, and the

Recent Developments

While official data on the state of North Korea's environment still remain elusive, several recent developments allow room for optimism, especially in agricultural reform and increased desire for external assistance.

Lankov (2015) states that a policy of agricultural reforms in 2013, also known as the "6.28 Measures," has helped increase agriculture in North Korea to around 5.1 million tons of grain, which is above the recent average of 4.5 million tons.²⁴ The 6.28 Measures allow for one or two neighboring families to register as a "small work team" and retain 30 percent of their annual harvest. Similar to policies implemented in China in 1978 when agricultural production jumped by 50 percent within seven years, these reforms, Lankov claims, will bring "easy economic improvement, both in the countryside and in major cities." This has also had a considerable impact on stabilizing North Korea's market rice prices, which are often used as proxies to gauge inflation in the country.²⁵

North Korea has also increasingly invited foreign experts to assess its environment in the hopes of obtaining strategies on restoration and improving food security. For instance, in March 2012, North Korea partnered with the American Association for the Advancement of Science and the Chinese Environmental Education Media Project to host a conference that brought together 14 scientists from eight different countries with 75 local scientists and officials.²⁶ On a related note, Habib (2013) has found that North Korea is increasingly a willing participant of the UNFCCC in the international dialogue on climate change, despite its confrontational nuclear diplomacy. Habib attributes this change in stance to four possibilities: 1) using the UNFCCC as a means to address climate change vulnerabilities, 2) using the UNFCCC to address vulnerabilities in agriculture via capacity-building provisions, 3) using the UNFCCC to modernize the energy sector, and 4) using the Clean

rest on timber, which is used disproportionately for cooking and heating by those living away from North Korea's industrial centers. Refer to Byun (2010).

24 Andrei Lankov, "North Korea Farm Policy Changes Point to Better Harvests," *Radio Free Asia*, February 4, 2015, <http://www.rfa.org/english/commentaries/parallelt-thoughts/lankov-farm-03042015120240.html> (accessed April 27, 2015).

25 Kang Mi Jin, "Trade and Rations Behind Stable Prices," *Daily NK*, February 3, 2015, <http://www.dailynk.com/english/read.php?catId=nk01500&num=12938> (accessed April 27, 2015).

26 Joanna M. Foster, "North Korea's Choked Environment," *New York Times*, March 30, 2012, <http://green.blogs.nytimes.com/2012/03/30/q-and-a-north-koreas-choked-environment/> (accessed April 27, 2015).

Development Mechanism (CDM) to obtain foreign currency revenue.²⁷ In fact, North Korea is currently home to seven hydropower projects that may generate up to 241,000 Certified Emission Reductions (CERs) that are valued at US\$ 1.3 million.²⁸ These developments show that North Korea is now voluntarily participating with the outside world on issues related to the environment as long as such participation caters to the interests of the regime.

Environmental Negotiations: Future Prospects, Developments, and Challenges

Green Détente: The Environment and the Final Frontier

As established thus far, South Korea has had a history of mobilizing environmental dialogue for strategic purposes (integrating with the international community, initiating regional middle power diplomacy, or utilizing green industries to propel economic growth). President Park Geun-hye's Green Détente is a continuation of this trend. Park's Green Détente aims to direct South Korea's expertise in environmental negotiations to the Korean Peninsula and engagement with North Korea.

Historically, previous attempts at inter-Korean reconciliation have occurred mostly from unilateral humanitarian and food aid from South Korea. The Green Détente instead recognizes that unilateral aid alone can neither reduce political and military anxiety nor lead to sustainable practices in restoring the environment. At the core of the Green Détente is the understanding that environmental cooperation is a symbolic venture that will allow a platform for apolitical, non-military dialogue that can help restore the environment in North Korea while also providing an opportunity for economic growth throughout the peninsula. It assumes that South Korea will be the net giver of environmental services through technology transfers, financial assistance, facility and equipment support, and sharing of research and know-how. The Academy of DMZ Sciences lists multiple areas of industry that are potential candidates for cooperation: reforestation, CDM projects,

27 Benjamin Habib, "DPRK Meets UNFCCC: An Introduction to North Korea's Interactions with the International Climate Change Regime," *International Review of Korean Studies* 10, no.1 (2013): 65-83.

28 Ladka Bauerova and Alessandro Vitelli, "North Korea, Eco State?" *Bloomberg Business*, May 31, 2012, <http://www.bloomberg.com/bw/articles/2012-05-31/north-korea-eco-state> (accessed April 27, 2015).

agriculture, renewable energy, biodiversity protection and the DMZ Peace Park.²⁹

While the Green Détente, as a North Korea-oriented foreign policy tool, is necessarily politicized, South Korea's rationale for environmental engagement is much broader than just diplomatic rapprochement and "trust-building." Rather, environmental cooperation with North Korea satisfies five of 10 policy directions in South Korea's Green Growth Plan; of the five, all four policy directives in Strategy 2: Creation of New Growth Engines are included (see Table 1). With Japan already a global leader in cutting-edge green technologies and China exhibiting economies of scale from unbridled investments in renewable energy, the danger of being squeezed out of the market for South Korea is high. Providing assistance to North Korea in the environmental sector presents an untouched market and an opportune moment for South Korea to develop and export green technologies.

There are several ways to evaluate whether the Green Détente will be a feasible policy option. First, South Korea has an obvious advantage in capital and technology that can be mobilized to develop guidance and partnership in the environment, an area in which North Korea is currently seeking assistance. Second, as noted previously, North Korea is interested in hosting CDM projects, and the Green Détente presents an opportunity for both Koreas to engage in positive UNFCCC-based initiatives. Third, by partnering with UNDP and UNEP, both of which have field experience working in North Korea, the Green Détente presents a greater opportunity to develop a legitimate environmental community throughout the peninsula. However, significant challenges threaten the successful implementation of the policy. First, there is a disconnect in the scientific research, technological development, and cultural awareness between the two Koreas. More importantly, there lacks a framework within South Korea for these expert communities to converge and attain a mutual understanding of North Korea. For instance, in a survey of South Korean experts on how to best install renewable energy capacity in North Korea, Sul-Ki Yi has found that differences between the perspectives and positions of engineers, security experts, and foreign policy experts are difficult to bridge, given their distinctly different priorities and viewpoints.³⁰ Second, South Korea's May

29 The Academy of DMZ Sciences, *Geurindaetang teureultonghan hwangyeong gongdong chaeuchujin banghyang* [Policy Directions for an Environmental Community through Green Détente] (Seoul: The Academy of DMZ Sciences, 2013), 38-132.

30 Sul-Ki Yi, Hwa-Young Sin and Eunnyeong Heo, "Selecting sustainable renewable energy source for energy assistance to North Korea," *Renewable and Sustainable Energy Reviews* (2011), 562.

24 Measures, which ban most trade between North and South Korea, trips to the North, and aid to North Korea, make it difficult for any component of the Green Détente to actually materialize. Before the May 24 Measures were implemented, environmental NGOs in South Korea routinely provided North Korea with supplies to construct nurseries and greenhouse infrastructure as an effort to aid reforestation. In the current political environment, such exchanges are banned. However, as of April 27, 2015, the Ministry of Unification approved the shipment of 15 tons of fertilizer to North Korea by a South Korean charity group, showing signs that the May 24 Measures may be gradually easing to allow room for cooperation.³¹

North Korea and the Green Détente

Implicit in the Green Détente is North Korea's willingness to cooperate. Recent examples of North Korea's openness in dealing with environmental issues show that the regime is willing to be flexible as long as its own policy objectives are met. Most experts view regime stability as North Korea's primary objective. Yet, as can be seen with the 6.28 Measures, top decision-makers in North Korea who were once afraid to implement small (but necessary) agricultural reforms in the event that they would trigger political crises are now relaxing control. Likewise, increased eagerness in participating with the UNFCCC comes at least at some level with an implicit acknowledgment of North Korea's vulnerability to climate change and the ramifications this susceptibility has on regime stability.³² While North Korea undoubtedly shows greater flexibility in the environmental arena, there is no guarantee that North Korea will cooperate with South Korea on constructing an environmental community throughout the peninsula despite the Green Détente's potentially positive sum results. Furthermore, South Korea also lacks the leverage to coerce North Korea into cooperation other than simple goodwill diplomacy.

Whether the Green Détente will truly lead to a sustainable environmental paradigm in North Korea is another point of debate. Kihl and Hayes (1997) emphasize that the key to solving North Korea's environmental problems are four-fold: 1) institutional reforms are needed to internalize

31 Reuters, "South Korea allows first fertilizer aid to the North since 2010 sanctions," April 27, 2015, <http://www.reuters.com/article/2015/04/27/northkorea-southkorea-fertilizers-idUSL4N0XO1FV20150427> (accessed April 27, 2015).

32 Benjamin Habib, "Climate Change and the Terminal Decay of the North Korean Regime," (paper presented at the Oceanic Conference on International Studies, Brisbane, Australia, July 2-4, 2008).

currently ignored environmental externalities; 2) new technologies must be adopted in sectors such as forestry and mining; 3) pragmatic economic reforms, such as opening North Korea to foreign investment and introducing market-based pricing, should be adopted; and 4) building institutional capacities to monitor and enforce environmental regulations.³³ Not included in Kihl and Hayes' list, however, is the need for civil society to be included in the policy-making process. As seen in South Korea's experience with environmental movements, environmental management can only be sustained in the presence of an active civil society with access to political freedoms and symmetric information. It is no coincidence that environmental movements in South Korea occurred concurrently with increased democratization.

North Korea's political context obviously bars most of the five requirements mentioned above, and thus it remains to be seen if the Green Détente will just be a replay of South Korea's unilateral, aid-reliant engagement policies with its neighbor. However, the Green Détente presents an opportunity to provide technical assistance, supply badly needed green equipment, and transfer scientific know-how – channels that ultimately can lead to sustainable capacity-building. With environmental scientists from multiple countries already taking the initiative to create a more informed scientific community in North Korea,³⁴ it makes sense for South Korea to pursue its Green Détente policy despite the potential setbacks and uncertainties of feasibility.

Conclusion

Looking at South Korea's history of environmental engagement, it becomes clear that its recent announcement of a Green Détente is an extension of traditional policy. Since democratization, South Korea has refined its environmental discourse, and the leadership roles it has played in both the regional and international spheres on environmental issues have distinct political inextricability. That South Korea has announced two major environment - themed policies in recent years – the National Green Growth

33 Young Whan Kihl and Peter Hayes, *Peace and Security in Northeast Asia* (New York: M. E. Sharpe, 1997), 116-117.

34 Delegation members of the March 2012 environment convention hosted by Pyongyang have been aiming to create ongoing collaborations among scientists present at the meeting. For instance, one scientist is working with the Society of Ecological Restoration to set up a chapter in China to exchange technological information with North Korean scientists.

Strategy and the Green Détente – may seem odd to some, but in essence those two policies work in tandem to bring policy instruments in both domestic and foreign affairs under the guise of soft power diplomacy.

North Korea's stance is critical to the success of President Park's Green Détente. While numerous documented (and undocumented) uncertainties exist for the successful implementation of the Green Détente, the greatest possibility for failure rests simply in North Korea's unwillingness to comply. That North Korea's environment is in a severe state of deterioration is no recent revelation, but it is interesting to note that the Kim regime has become increasingly flexible in dealing with environmental challenges, whether by implementing small but unprecedented agricultural reforms, complying with climate change frameworks, or openly soliciting foreign researchers and environmental scientists. These new developments tend to suggest that North Korean leaders are starting to find the environment to be a venue for furthering their own policy objectives, namely regime stability and longevity, and with that comes a tacit acknowledgment of North Korea's vulnerabilities to climate change and environmental security.

While certain regulatory frameworks in South Korea, especially the May 24 Measures, currently hinder progress on the Green Détente, it remains to be seen whether the environment will ultimately play a greater role in building trust on the Korean Peninsula and hopefully become a common space for the two Koreas to cooperate in the hopes of sharing a united future. Y

CHALLENGE TO THE NATION-STATE'S SOVEREIGNTY: THE INFLUENCE OF INTERNATIONAL AND EUROPEAN LAW IN TODAY'S GLOBALIZED WORLD

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This essay aims to investigate the relationship between nation-state sovereignty and law in today's globalized world. It will do so by bringing about two specific examples: the influence of international and human rights law on national legal order in Libya and Syria and secondly, the European Union (EU) and its new legal order which prevails over the national law of the member states. The first part will be addressed by bringing about examples from Libya and Syria. In Libya, international law has prevailed in breaking the right of Khadafi to use force against civilians. On the other hand, in Syria, international law has failed to protect civilians because of the deadlock at the UN Security Council. Moreover, international law did not prevent Syria from enacting emergency laws which resulted in the arbitrary arrest or detention of people.

Scholars have extensively argued both in favor of and against the concept of the nation-state sovereignty, especially in today's globalized world.¹ It is now widely accepted that globalization has influenced and changed the conventional notion and structure of sovereignty.² Sovereignty is an expression of power within the territory of the state, as defined during the 1648 Peace of Westphalia. This essay aims to investigate the relationship

1 Eric J. Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality* (Cambridge: Cambridge University Press, 1992); Samuel P. Huntington, "The Clash of Civilizations?" *Foreign Affairs* (1993): 22-49; Ali Khan, "The Extinction of Nation-States," *Am. UJ Int'l L. & Pol'y* 7 (1991): 197.

2 Kanishka Jayasuriya, "Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance," *Indiana Journal of Global Legal Studies* (1999): 425.

between nation-state sovereignty and law in today's globalized world. It will do so by bringing about two specific examples: the influence of international and human rights law on national legal order in Libya and Syria and secondly, the European Union (EU) and its new legal order which prevails over the national law of the member states.

The scope is to prove that although states are still the main players in the international arena, globalization has changed their notion of sovereignty, especially in light of the existing body of international and European law.

Background: Globalization, the Nation-state and the Law

Amongst the many definitions of globalization, the one that serves the purpose of this essay is given by Ulrich Beck. He depicts globalization as "the processes through which sovereign national states are crisscrossed and undermined by transnational actors with varying prospects of power, orientations, identities and networks."³

Although the term transnational actors commonly refers to multinational corporations, media, and non-governmental organizations (NGOs) for the purpose of this essay I also include intergovernmental organizations (IGOs), as argued by Kegley.⁴ IGOs, such as the UN and the EU, have been provided with the capacity to make laws, and in this essay I wish to address the body of law created by those organizations.

Globalization has facilitated the flux of goods, services, capital and knowledge, and to some extent- the exchange of people; overall enabling the interlaced nature of today's markets.⁵ Nevertheless globalization has also increased problems: the global spread of HIV/AIDS, environmental pollution, human rights abuses, drugs, arms, human trafficking and the spread of terrorism. These problems require an international solution, one which a sovereign state cannot find alone. They require regulations which will be binding upon the actors. To date, these problems have given rise to hundreds of treaties, mostly driven by transnational actors. International regulations have shifted the rights of the individual to the global arena. Human rights, for example, are today internationally established and not

3 Ulrich Beck, *What is Globalization?* (Cambridge: Polity Press, 2000), 11.

4 Charles Kegley and Shannon Blanton, *World Politics: Trend and Transformation, 2012-2013 Edition* (Cengage Learning, 2012): 148-149.

5 Joseph Stiglitz, "Globalization and Development," in *Taming Globalization: Frontiers of Governance*, ed. David Held and Matthias Koenig-Archibugi (Cambridge: Polity Press, 2003): 47.

rooted within the state.

According to Max Weber, the state is “a human community that claims the monopoly of the legitimate use of physical force within a given territory.”⁶ Such a definition accepts the unilateral use of force by the leadership of every state. However, Stanley Hoffmann explains that the state is a form of social organization and a factor of international non-integration.⁷ The latter point is an interesting one because even though the state might be a form of non-integration, in today’s globalized world, leaders are bound in their choices by the extensive body of international law.

Therefore, the law has an important role in the fate of state’s sovereignty. Michael Kirby said that “law represents the ultimate authority and expression of power of the nation-state.”⁸ Yet, states are not the only sources of law. In fact, today more than ever, there are numerous legal systems, which are influencing the sovereignty of the nation-states.

Challenges to Sovereignty: International and Human Rights Law

Breaking the Territorial Sovereignty of the Nation-State

International law prohibits the free use of force, and it is only justifiable by the UN in instances of self-defense.⁹ Even when this occurs, it “shall be immediately reported to the Security Council.”¹⁰ The power to use force or to authorize the use of force under Article 42, UN Charter, by the UN Security Council (UNSC) is “the heart of the collective security system,”¹¹ hence the power of states to use force within their territories is very limited, and consequentially, it also undermines the core findings of Weber’s definition of the state.

In the case of Libya, the UN Human Rights Council determined that Khadafy and his entourage had breached not only human rights but also civil and political rights.¹² The UNSC, in the first instance, adopted

6 Daniel Warner, *An Ethic of Responsibility in International Relations* (Lynne Rienner Publishers, 1991): 9.

7 Stanley Hoffmann, “Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe,” *Daedalus* 95, (1966): 862.

8 Michael Kirby, “Globalizing the Rule of Law? Global Challenges to the Traditional Idea of the Rule of Law,” in *Globalisation and the Rule of Law*, ed. Spencer Zifcak (Routledge, 2005): 65.

9 Charter of the United Nations Article 51.

10 Ibid.

11 Martin Dixon, *Textbook on International Law* (Oxford: Oxford University Press, 2007): 330.

12 HRC, *Report of the Human Rights Council on its Fifteenth Special Session*, February 25, 2011, A/

Resolution 1970 (2011) demanding the immediate end of the violence via peaceful means. It also invited the authority of Libya to respect human rights and humanitarian law, to permit the entrance of foreign observers, and to “lift restrictions on all forms of media.”¹³ However, the Libyan authority did not comply with the resolution, and the UNSC was obliged to take further measures under Article 42 authorizing all necessary measures - hence the use of force - to protect civilians.¹⁴

In terms of human rights obligations, in 1989, the Libyan government ratified the First Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR).¹⁵ Therefore, any individual who suffered a violation of their rights by the Libyan authority may bring a case before the Human Rights Committee (HRC) established by the covenant.

By becoming a party to the ICCPR, Libya has bound itself and is required to present regular reports to the HRC on the measures adopted to implement the covenant.¹⁶ Additionally, the Libyan government must comply with any external legal obligations under the covenant. Since the ICCPR entered into force, “individual complaints under the Optional Protocol (ICCPR) have helped people obtain passports, seek asylum, be released from detention and exercise their internationally recognized human rights.”¹⁷

Limits of the Globalized Legal Order

States accept international and human rights law on a voluntary basis. This is the weakness of international law, which only binds those states that have ratified international treaties and conventions. Only a few gave their approval to be judicially bound in human rights disputes.¹⁸ In the case of Syria, its government did not ratify the Optional Protocol (ICCPR), and thus it does not recognize the jurisdiction of the HRC. Therefore, it would be difficult for an individual to make a claim against Syria regarding their right to freedom

HRC/S-15/1 (2011).

13 UN Security Council, Security Council Resolution 1970, February 26, 2011, S/RES/1970 (2011).

14 UN Security Council, Security Council resolution 1973 [on the situation in the Libyan Arab Jamahiriya], March 17 2011, S/RES/1973 (2011).

15 Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford: Oxford University Press, 2013), 671-676.

16 International Covenant on Civil and Political Rights, opened for signature December 16, 1966, 999 UNTS 171, art 40 (entered into force 23 March 1976).

17 Siân Lewis-Anthony, *Treaty Based Procedures for Making Human Rights Complaints Within the UN System* (Brill Transnational Publishers inc., 2004), 57.

18 Richard Bilder, “An Overview of International Human Rights Law,” in *Guide to International Human Rights Practice*, ed., Hurst Hannum (Boston: Transnational Publisher: 2004), 3, 12.

of expression, for example. Syria lacks integration in the global society, and since 1963 has established a form of social organization based on emergency law, which gives the security forces freedom to arbitrarily arrest and detain people, therefore suspending any constitutional rights for Syrian citizens.¹⁹ Although this may be contentious from a Western perspective, it is the right of the sovereign nation to enforce such a law.

Unfortunately, states' individual perceptions of human rights can be very different. Society has a very broad mixture of cultural, political, social, and religious systems, adding to the unity dilemma regarding which rights should be protected through international law. Priorities are indefinitely different. Although, this apparently seems to undermine the point in support of the dismantlement of the nation-state's sovereignty, by signing most international treaties many countries have committed themselves to finding a point of convergence on the importance of implementing human rights.

Challenges for the Global Role of the UN Security Council

Although the UNSC resolutions have a crucial role in limiting the sovereignty of nation-states, the Security Council has been highly criticized for appearing to be the "play thing of a few Western Powers."²⁰ Geoffrey Granville-Wood came about with such a statement after the UNSC issued sanctions on Libya in 1992 for the Lockerbie bombing, while the same treatment was not reserved for France following the bombing of Greenpeace's "Rainbow Warrior" in New Zealand.²¹ The double standards of the UNSC put into question its accountability to establish a global rule of law. The two cases are unquestionably terrorist attacks, although the Lockerbie bomb caused hundreds of deaths, while in the Rainbow Warrior case, French secret agents "only" destroyed a ship.

Unfortunately, within the UNSC, clashes between the two ideals of respect for territorial sovereignty and human rights may arise in many international disputes. The UNSC deadlock has been a problem, especially in the case of Syria where the economic interests of China and Russia have prevented the implementation of a resolution to stop human rights abuses.

19 "Syria," Freedom House, <http://www.freedomhouse.org/report/freedom-world/2009/syria?page=22&year=2009&country=7713> (accessed October 5, 2012).

20 Geoffrey Grenville-Wood, "Sanctions against Libya Set a Questionable Precedent," *Bulletin of the UN Association of Canada* (1993), <http://plane-truth.com/Aoude/geocities/grenwood.html> (accessed October 6, 2014).

21 Ibid.

However, even though this seems to point out the unilateralism of the five permanent members of the UNSC, “countries like-minded should continue to work for an international system and put in place the fabric and structures that are needed.”²² Clearly, unilateralism within the UNSC is not helping the process of creating an accountable body of international and human rights law. However, although the relationship between states is still the founding stone of the current international system, “without an accepted and binding international order with the United Nations at its center we are destined to a future where the powerful nations of the world make the rules but are not necessarily bound by them.”²³

Reshaping the Notion of Sovereignty: the New European legal Order

European integration is a successful example of regional globalization. It arose as a consequence of the incapacity of the European nation-states to solve two basic problems: to avoid expensive, devastating wars, and to manage economic competition.²⁴

Since 1951, the European Community of Defence, the predecessor of the European Union (EU), has stunningly evolved. Today, the EU has legal personality, and the awarded Nobel Prize for Peace is recognition that “the EU is a unique project that works for the benefit of its citizens; the project that allowed us to unite in peace after devastating wars.”²⁵

European integration is therefore the result of a technical supranational institution, which has gradually taken charge over some competencies of the single nation-states.²⁶ The supranational approach puts forward the idea that sovereignty should shift outside the boundaries of the nation-state.²⁷ This somewhat limits the nation-states’ capacities to

22 Malcolm Fraser, “Sovereignty, International Law and Global Cooperation,” in *Globalisation and the Rule of Law*, ed. Spencer Zifcak (Routledge, 2005), 163-182.

23 Ibid.

24 Stefano Bartolini, *Restructuring Europe: Centre Formation, System Building and Political Structuring Between the Nation-State and the European Union* (Oxford University Press, 2005).

25 “Nobel Peace Prize for the EU is also recognition of our work outside the EU (2012),” Blog of Commissioner Andris Piebalgs, <http://blogs.ec.europa.eu/piebalgs/nobel-peace-prize-for-the-eu-is-a-also-a-recognition-of-our-work-outside-the-eu/print> (accessed October 15, 2014).

26 Sergio Pistone, *L'integrazione Europea* (1999), 17-19. See, “The EU, therefore, is based on a pact between sovereign nations that have resolved to share a common destiny and to transfer an increasing share of their sovereignty to the Community” from “Europe in 12 Lessons,” Official Publications of the European Communities, http://ec.europa.eu/publications/booklets/eu_glance/60/en.doc (accessed March 12, 2015).

27 Richard Bellamy and Dario Castiglione, “Building the Union: The Nature of Sovereignty in the Political Architecture of Europe,” *Law and Philosophy* 16, (1997): 421.

act unilaterally, and can undoubtedly be seen today with the supremacy of EU law over national law.

Although some scholars²⁸ have supported the view of an inter-governmental EU where the decision-making process is still in the power of the member states, they seem to underestimate the achievements of the European Court of Justice (ECJ), which established by means of court judgments the incorporation of the EU law within the national law of the states and its supremacy.²⁹

Supremacy of European Law over Domestic Law

Three specific legal cases brought before the ECJ formally established the supremacy of European Law over national law: Case 26/62 Van Genden Loos, Case 6/64 Costa v ENEL and Case 106/77 Simmenthal. Since then any clash of national law with European law has obliged the member state to change their legal system or disregard the national law in lieu of EU law. In Case 26/62, a Dutch company imported a chemical from West Germany to the Netherlands. The Dutch authorities charged a tariff on imports. The company then brought a case before the national court claiming that such tariffs were against Article 12 of the Treaty of Rome (the founding treaty of the European Economic Community). The national court referred the question to the ECJ for a preliminary ruling. The national court asked whether Article 12 granted rights to the citizens of a member state that could be implemented in national courts.

The court upheld that “the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, and the subjects of which comprise not only member states, but also their nationals.”³⁰ The judgment is innovative because it recognizes that a new legal order has been established within the Community, and this influences the national legal order of member states who have limited their sovereignty. This completely reshapes the relation between law and the nation-state’s power proposed by Kirby.

The notion of the new legal order set-out in Case 26/62, has been further developed by Case 6/64, Mr. Costa refused to pay a bill of €1 imposed

28 See Alan Milward, *The European Rescue of the Nation State* (1992); Michael Mann, “Nation-States in Europe and Other Countries: Diversifying, Developing, Not Dying,” *Daedalus* 122 (1993): 127.

29 Neil MacCormick, “Beyond the Sovereign State,” *The Modern Law Review* 56(1993): 8.

30 NV. Algemene Transporten Expeditie Onderneming van Genden Loos v. Nederlandse Administratie der Belastingen (C-26/62) [1963] ECR 1.

by ENEL, the newly nationalized Italian energy company. Costa claimed that such action by the Italian government was against Article 37 of the Treaty of Rome concerning state monopolies.³¹ The case raised the question of whether a national court should refer to the ECJ when a provision of EU law could be directly applied, even when such provision was precedent to a national law. The court ruled that “the Treaty makes it impossible for the states...to accord precedence to a unilateral and subsequent measure over a legal system accepted by them... Such a measure cannot therefore be inconsistent with that legal system.”³² The court further affirmed that the law of the treaty is an independent source of law that could not be overridden by domestic legal provisions. From this follows that a provision of EU law would be fairly pointless if a state could unilaterally quash it by means of national legislation, even when provisions are precedents.

The court once again, as in Case 26/62, observed that the Treaty of Rome has created an independent legal order within a community of “unlimited duration, with its own institutions, its own personality and legal capacity on the international plane.”³³ Such legal order is strictly binding on states and their nationals.

Case 106/77 completes the picture of the supremacy of the EU law. It is a case of illegal application of duties within the community in which the ECJ upheld that any national court has to set aside any national law which may conflict with the EU law, whether prior or subsequent to the Community rule. Furthermore, national courts are under a duty to give full effect to those provisions, applying them directly without requesting or awaiting the prior setting aside of conflicting provisions.³⁴ This means that the European legal order so created is a monist legal order. According to monism, European law and national law form one single system of law, hence states, by accepting EU law, do not require its formal incorporation by legislative transformation. Any treaty would be self-executing upon ratification, and so directly applicable within the state.³⁵

By and large, any provision of EU law is directly applicable to the member states and when a conflict arises, such provision always supersedes a provision of national law, even when the former was introduced before the latter. Although the supremacy of EU law is not clearly stated within

31 Nigel Foster, *EU Law Directions* (Oxford: Oxford University Press, 2012), 120.

32 *Flaminio Costa v ENEL* (C-6/64) [1964] ECR 585.

33 *Ibid.*

34 *Amministrazione delle Finanze dello Stato v Simmenthal* (C-106/77) [1978] ECR 629.

35 Foster, 124.

any treaty, the ECJ, through these three rulings, declared the principle of supremacy which is now widely accepted by the member states.³⁶ The EU, therefore, through its institutions, is a successful transnational actor that reshaped the old notion of sovereignty - strictly related to the legal power of the state within its territory - in favor of a collective form of sovereignty. It did so by establishing a supranational court, and a new European legal order that binds all member states.

Conclusion

In conclusion, the notion of state, as created by the Peace of Westphalia, is not a stagnant concept. However, it does need to be updated alongside the challenges of globalization. The old idea of the rule of law, where a state controls the use of force within its territory, has been thoroughly challenged by transnational actors. Also, the most powerful states, including the US, cannot avoid assisting in finding global solutions to global problems.³⁷ In the specific case of international and human rights law, we have seen the whole international legal body strongly influence the sovereignty of the state, which is no longer the holder of the physical use of force within its territory. Moreover, economics, trade, climate change, migration are strongly intertwined with the international context. Although most of the jurisdiction of international treaties and conventions on human rights is on a voluntary basis, hundreds of states have committed themselves to a global civil society where law-making functions are at the international level, rather than based at the domestic.

The presence of multiple legal systems, the rise of transnational actors, and all the international bodies constituted to defend human rights are progressively more challenging on the nation-states' sovereignty. States cannot impede such external influences in today's globalized world. "Lawmakers of the nation-state are no longer fully able to control the legal destiny affecting the persons living, within the borders of the nation-state," said Kirby.³⁸ Furthermore, in today's world some challenges cannot be faced individually by one state. Human rights abuses require a collective solution.

36 Bruno De Witte, "Direct Effect, Primacy, and the Nature of the Legal Order," in *The Evolution of EU Law*, ed. Graig Paul and Grainne De Burca (Oxford: Oxford University Press, 2011), 323.

37 Harold Hongju Koh, "International Law as Part of Our Law," *American Journal of International Law* (2004): 43-44.

38 Kirby, "Globalizing the Rule of Law? Global Challenges to the Traditional Idea of the Rule of Law," :66-67.

Therefore, the way in which sovereignty is understood today is much different than at the time of Westphalia. Territorial jurisdiction is not anymore one of the characteristics of national sovereignty, and since the UN Charter was introduced, the Weberian notion of a state holding the monopoly of the use of force, is not acceptable. As the case of Libya has shown, international law provides the basis to counteract Khadafy's illegitimate choice to use force against Libya's population. In the other contexts, international law has failed, such as in Syria, where the economic interests of a few members of the UNSC prevented a resolution to stop the use of force against civilians. Overall, what can be said is that globalization has definitely changed the way states make and perceive the law.

The EU, a successful example of regional globalization, has prepared its member states to share the burden of legislation, which can also have a contrary impact on their national interests, hence, their sovereignty. They know that overall the supranational system created a whole array of rewards for its members, peace and stability first, but also free trade, free movements of goods and services, labor mobility, and legal guarantees. This has been achieved by establishing a supranational court for the EU. The ECJ, by having authority over the whole EU, had a crucial role in harnessing the acceptance by member states of the supremacy of EU law. European states, by giving away some of their national sovereignty to the EU, have contributed to establish a common legal order, respected and acclaimed by the whole community. Y

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.”¹ With the goals of transitional justice, “ensuring accountability, serving justice and achieving reconciliation,”² 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 (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.³ 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 Nuremburg Trial, conducted between 1945 and 1949.⁴ 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.⁵ 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.”⁶

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.⁷ 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.”⁸ 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 for 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.⁹ 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

6 United Nations, *What is Transitional Justice? A Backgrounder* February 20, 2008, http://www.un.org/en/peacebuilding/pdf/doc_wgli/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.¹⁰ 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.¹¹

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.¹²

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

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

11 Ibid.

12 Velasquez Rodriguez 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,¹³ and has finally been incorporated into numerous UN documents.¹⁴ 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.¹⁵ 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.¹⁶

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.¹⁷ OHCHR support for TJ activities is conducted through its TJ coordinator, part of the Rule of Law and Democracy Unit.¹⁸ The OHCHR field presence and human rights components of peacekeeping missions function to support transitional justice.¹⁹ 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.²⁰ 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."²¹

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 2002.²² 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.²³ 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.²⁴

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.²⁵ 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.²⁶

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

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 (accessed May 14, 2015).

26 Ibid.

was based on a voluntary agreement between two sovereign states.²⁷ 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.”²⁸

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.²⁹ 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.³⁰ 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.³¹ 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.”³²

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.³³ 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

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,”³⁴ 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.³⁵ 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.³⁶

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.³⁷ East German public viewed that the trial was selective to the border guards in search of scapegoat, and therefore unjust.³⁸

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.³⁹ 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.⁴⁰ 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.⁴¹ 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.⁴² The final outcome was that Germany built a strong 'rule of law' and stabilized the integrated society in a democratic way. However, there was

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.⁴³ 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

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.⁴⁴ 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,

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.⁴⁵ 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.⁴⁶ 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.”⁴⁷

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.

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.⁴⁸

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.”⁴⁹

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,⁵⁰ 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

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 (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.⁵¹

One of the characteristics of Ad Hoc Tribunals is that they usually try individuals rather than states.⁵² 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.⁵³ 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.⁵⁴ 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."⁵⁵ 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.⁵⁶ In the case of North Korea, many

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.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.⁵⁷ 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."⁵⁸ 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.⁵⁹ This smaller political influence from the UN Security Council may assist in prosecuting crimes that happened in China.

Justice Reform," *Yale Law School Student Scholarship Papers*, Paper 6, March 2005, 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.⁶⁰

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

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**

A PARADOXICAL AMERICAN FOREIGN POLICY: PIVOT TO ASIA

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Since Obama assumed office, his foreign policy aim was to reinvigorate Asia under the title of “Pivot to Asia”. Obama and his cabinet members unequivocally articulated that the strategy is designed not to agitate China, but to build more amicable ambience for further economic-relations. However, U.S.-Japan security ties check China’s ambition in the Southeast China Sea and Washington-Beijing diplomatic discord is inevitable. The Obama’s Asia strategy illustrates a paradox that exists between economic and security realms. This paper analyzes Obama’s foreign policy in Asia and its implications for the region.

US foreign policy under the Obama Administration has refocused toward the Asia-Pacific region under the term coined, “Pivot to Asia”, later entitled “Rebalance to Asia”. The new US policy toward Asia, according to former Secretary of State Hillary Clinton, is defined as “strengthening bilateral security alliance, deepening working relationships with emerging powers including China, engaging with regional multilateral institutions, expanding trade and investment, forging a broad-based military presence, and advancing democracy and human rights.”¹ Kurt Campbell, Assistant Secretary of State for East Asian and Pacific Affairs, also articulates that the policy is not for constraining China’s growth but to enhance the Sino-US relationship.²

There is much strategic and practical importance to strengthening Sino-US relations. Given China’s strength in the international community,

1 With regard to containing China, Clinton argues that “Some in our country see China’s progress as a threat to the United States; some in China worry that America seeks to constrain China’s growth. We reject both those views.” Referring to Hillary Clinton, “America’s Pacific Century: The Future of Geopolitics Will be Decided in Asia, Not in Afghanistan Or Iraq, and the United States should be Right at the Center of the Action.” *Foreign Policy* October 11, 2011.

2 Kurt Campbell and Brian Andrews, *Explaining the US ‘Pivot’ to Asia* (London: Chatham House, 2013).

US would do well to maintain friendly and stable relations. To illustrate, while US (and much of the world) suffered from the global financial crisis in 2008, China's Gross Domestic Product (GDP) rapidly grew. The Chinese economy even surpassed Japan's in 2010 to become the world's second-largest economy.³ Although many analysts speculated that the rise of China would pose a threat to US security because of disparate political ideologies and approaches such as a divergent policy on denuclearizing North Korea, US has never treated China as it did the Soviet Union. Yet, US remains ambivalent toward China. Unlike Japan or South Korea, China has never been a traditional ally. Even as US appears to desire cordial relations, it continues to display strategic ambiguity toward China. Given the tensions of the Asia-Pacific region, along with US's multifaceted ambitions in the region, this is probably inevitable. Ambiguity exists in various channels, including official support for Japan's collective self-defense rights, and maintaining the US Missile Defense (MD) system in the Asia-Pacific region. However, Japan's collective self-defense can also be a pathway to re-militarization and is a potentially serious threat to Chinese security. The presence of US MD in Asia-Pacific can be viewed as a China containment strategy. Not surprisingly, China strongly opposed the US's advocacy for Japan's defense ambitions, and also criticized the US MD.

While the Pivot to Asia is implemented to vitalize a relationship with the emerging powers, specifically China, there are actions that may be interpreted as 'encircling China'. This is a paradox that exists in American foreign policy that must be explained. US and China always had a discrepancy in security issues, such as the reinvigoration of the US-Japan alliance and China's Air Defense Identification Zone (CADIZ). However, beyond the Sino-US security confrontation, Washington has exerted great effort to ameliorate its ties with Beijing to substantiate its Pivot to Asia's aim, deepening relations with China. The outline of the paper is as follows. First, a brief look at the Obama-Xi summits will examine the Pivot to Asia policy and China's rise on a level of the heads of state. Second, America's participation in multilateral initiatives will examine the effects and reactions to the policy on the level of international entities. Next, the paper will discuss potential destabilizing weak points in US-China relations: Taiwan, Japanese self-defense, and America's missile defense (MD) in the region. The main argument of the paper is that there exists an ambiguity and paradox of the

3 Kevin Hamlin and Li Yanping, "China Overtakes Japan as World's Second-Biggest Economy," *Bloomberg*, August 16, 2010.

America's foreign policy posture in the region.

Obama-Xi Summits: Friend or Foe?

As to show for the two goals of America's Pivot to Asia, strengthening bilateral alliances with extant regional allies in Asia Pacific and enhancing relations with China, Obama and Xi held three summits since Xi came to office. If Washington and Beijing maintain antagonistic relation because US policy toward Asia is designed to encircle China, then two head of states would not have convened a summit. For example, after President Park Geun-Hye presumed office, she has not held any official summit with the Japanese Prime Minister. This is unprecedented in South Korean foreign policy. Tokyo used to be a second stopover, followed by Washington, for the head of South Korean administration's state-visit. Due to greater historical animosity that derived from Japanese ultra-nationalistic policies and remarks such as implementation of rights of collective self-defense or not recognizing comfort women, Seoul and Tokyo are not able to host a summit because of domestic opposition. Therefore, if Washington's Asia policy is set to contain the rise of China or Beijing's perception on US policy aim is targeted to undermine its growth then two states will trigger a new Cold War and preserve hostility toward each other.

Xi Jinping visited the White House on February 2012 as Vice President and exchanged thoughts on Pivot to Asia with Obama. Obama said,

"We are a strong and effective partner with the Asia Pacific region... in order to do that it is absolutely vital that we have a strong relationship with China...I have always emphasized that we welcome China's peaceful rise, that we believe that a strong and prosperous China is one that can help to bring stability and prosperity to the region and to the world."⁴

Then Xi replied, "China welcomes a constructive role by the United States in promoting peace, stability and prosperity in the Asia-Pacific."⁵ Based on this

4 Office of the Press Secretary, "Remarks by President Obama and Vice President Xi of the People's Republic of China before Bilateral Meeting," The White House, February 2, 2012, <http://www.whitehouse.gov/the-press-office/2012/02/14/remarks-president-obama-and-vice-president-xi-peoples-republic-china-bil> (accessed December 9, 2014).

5 "Remarks by Chinese Vice President Xi Jinping at a Luncheon Co-Hosted by the US-China Business

mutual understanding between Xi and Obama, the first summit convened in Sunnylands. Although the Sunnylands summit was an unofficial summit, the two head of states were able to build an intimate relationship and created a more effective platform through eight hours of conversations in two days. Tom Donilon, a national security advisor to Obama, analyzed that a meeting that was “positive and constructive, wide-ranging and quite successful in achieving the goals that we set forth for this meeting.”⁶ According to observers, both Obama and Xi candidly asked and answered each state’s concerns. For example, China raised an issue regarding US arm sales to Taiwan and US conveyed anxiety in regards to Chinese cyber-theft.⁷ Even though the Sunnylands summit did not produce a immediate resolution for ongoing issues in between Sino-US relations, the positive ambience created by the two leaders hints to future possibilities of addressing issues more effectively in the future.

Obama and Xi had a reunion in 2014 at the Nuclear Security Summit in Hague. Xi mentioned that, “China will adopt a more positive attitude and more vigorous actions to strengthen cooperation with the United States.”⁸ Through the meeting, both states have concluded, on the issue of North Korean nuclear program, that neither China nor US would tolerate Pyongyang’s nuclear arms and both states would commit to promote denuclearization of the Korean Peninsula.⁹ Although Beijing and US could not finalize a decision on the resumption of the Six Party Talks (SPT) because China urged US to return to the negotiation table whereas US insisted that North Korea must show its willingness to resume the talks by eliminating its Uranium Enrichment Program (UEP), China confirmed that North Korean nuclear weapons can stimulate instability in Northeast Asia region. After Xi became president, China has shifted its North Korean policy to cooperate with other parties to circumscribe North Korea’s financial transactions. The Bank of China closed all dealings with the North Korean bank on May 2013 and Beijing has complied with international sanction

Council and the National Committee on US-China Relations,” *Federal News Service*, February 15, 2012.

6 Office of the Press Secretary, “Press Briefing by National Security Advisor Tom Donilon,” The White House, June 8, 2013, <http://www.whitehouse.gov/the-press-office/2013/06/08/press-briefing-national-security-advisor-tom-donilon> (accessed December 10, 2014).

7 Richard C. Bush, “Obama and Xi at Sunnylands: A Good Start,” Brookings, <http://www.brookings.edu/blogs/up-front/posts/2013/06/10-obama-xi-sunnylands-bush> (accessed December 10, 2014).

8 Shannon Tiezzi, “Obama, Xi Meet at Nuclear Security Summit,” *The Diplomat*, March 25, 2014.

9 “Xi-Obama Talks Frank, Constructive: Chinese FM Spokesman,” *Xinhuanet*, March 25, 2014.

by tightening restrictions on goods banned for export to North Korea on September 2013.¹⁰ Since the Bank of China is state-controlled, the bank cannot autonomously decide to sever the transactions with North Korea. China has started to encourage denuclearization of North Korea by utilizing its leverage, which is extraordinary in Sino-North Korean relations. In the aftermath of UN resolutions on sanctioning North Korean economy for condemning Pyongyang's unilateral nuclear and missile tests, China provided economic assistance to sustain the Kim's regime in spite of other state's criticism and concern. Therefore, China's shifting tides on North Korea can possibly induce changes in Pyongyang's military posture. The Hague summit reassured China's position toward the North Korean nuclear issue, which substantiated deepening Sino-US relations.

The most recent US-China summit was held in the midst of Asia Pacific Economic Cooperation (APEC). In Obama's remarks, he signified the importance in building cooperative setting in between Beijing and Washington by saying, "if China and the United States can work together, the world benefits."¹¹ The outcomes of the summit validated prospective Sino-US collaboration. Xi promised China's CO₂ emissions would peak in 2030 and be responsible in terms of climate change by cutting CO₂ emissions for the first time.¹² Since industrial production is one of the main resources in the Chinese economy, increments of CO₂ emissions is seen as inevitable.¹³ However, Xi setting a specific year in order to recognize the climate change issue is salient for the world in the near future. Other than the climate change deal, two states established rules pertaining to military relations. For instance, each state needs to notify its military exercise to the other in advance. Also, the two established norms for maritime and air encounters in the western Pacific.¹⁴ In terms of cultural exchange and economic

10 Chinese Commerce Ministry posted a list of restricted goods that has potential "dual-use" products that can be used either for weapons or non-military nuclear purposes. Retrieved from Keith Bradsher and Nick Cumming-Bruce, "China Cuts Ties with Key North Korean Bank," *The New York Times*, May 7, 2013; "China Tightens Nuclear Sanctions Against North Korea," *Voice of America*, September 24, 2013.

11 Office of the Press Secretary, "Remarks by President Obama at APEC CEO Summit," The White House, November 10, 2011, <http://www.whitehouse.gov/the-press-office/2014/11/10/remarks-president-obama-apec-ceo-summit> (accessed December 11, 2014).

12 Elizabeth C. Economy, "Obama's Big China Win at APEC: Not what You Think," *The Diplomat*, November 15, 2014.

13 From the data, China's CO₂ emissions rate is the highest in the world. Retrieved from "Data: CO₂ Emissions (Metric Tons Per Capita)," The World Bank, <http://data.worldbank.org/indicator/EN.ATM.CO2E.PC/countries/CN-4E-X?display=graph> (accessed December 11, 2014).

14 Elizabeth C. Economy, "Obama's Big China Win at APEC: Not what You Think," *The Diplomat*, November 15, 2014.

relations, the two sides completed negotiations to issue a ten-year tourist and business visa and to decrease tariffs on semiconductors and other information-technology products.¹⁵ In the last summit, more productive and effective results were delivered as proof that both states were inclined to forging intimate relations.

America's Pivot through Multilateralism

Over the past decade, China has tried to exclude US from the Asian multilateralism in order to preserve its own version of the 'Monroe Doctrine.' China has invested its resources in the Association of Southeast Asian Nations (ASEAN), ASEAN+3, and the ASEAN Regional Forum (ARF). She has even provided economic incentives to ASEAN through ratifying a Free Trade Agreement (FTA).¹⁶ Also, China perceives the ARF as a vital Asian security forum. Obama has shown active engagement in Asian multilateral organizations in accordance to the Pivot to Asia. The Trans-Pacific Partnership (TPP) is one example of this. The TPP was established by an agreement between New Zealand, Chile, Brunei Darussalam, and Singapore in 2005. US, Canada, Australia, Peru, Vietnam, Mexico and Malaysia have joined following this initial agreement. Japan and South Korea have shown a positive signal toward joining the TPP.¹⁷ The countries that have joined TPP negotiate on issues such as "trade in goods and services, investment, labor, financial services, technical barriers and other regulatory issues."¹⁸ In stark contrast to the TPP, Beijing launched a contending economic integration, Regional Comprehensive Economic Partnership (RCEP). The origin of RCEP differs from the TPP. The participant states are ASEAN, subsuming Brunei, Myanmar, Cambodia, Indonesia, Laos, Malaysia, Philippine, Singapore, Thailand, Vietnam, which have already ratified FTAs with each six non-ASEAN states such as China, South Korea, Japan, India, Australia and New Zealand. Through RCEP, separate FTAs between ASEAN and non-ASEAN states can integrate into one regional economic agreement. RCEP argued, "it will establish deeper economic cooperation than the existing FTA agreements."¹⁹ If two forms of economic integration compete in the Asia-

15 Carol E. Lee, Jeremy Page and William Mauldin, "US, China Reach New Climate, Military Deals," *The Wall Street Journal*, November 12, 2014.

16 Kenneth Lieberthal, "The American Pivot to Asia," *Foreign Policy* 21 (2011): 3-4.

17 Beginda Pakpahan, "Will RCEP Compete with the TPP?" *East Asia Forum*, November 28, 2012.

18 Ibid.

19 Ibid.

Pacific arena, then one may argue that a diverse approach of economic engagement can trigger a deeper rivalry between Beijing and Washington. But through TPP and RCEP, quasi-multilateral economic cooperation can be fostered. Some member states such as Australia and New Zealand have joined both economic partnerships.

Quasi-economic integration is derived from Victor Cha's quasi-alliance concept in which he brings two unallied members to form a strategic alliance through common ally.²⁰ Since US has not concluded FTA agreements with ASEAN, this quasi-economic integration can act as a catalyst in bringing the Asian economy into a form of deeper integration. On the other hand, China officially announced that it is open to TPP and considers integrating with the global trade system.²¹ In other words, TPP and RCEP is not a form of economic containment to exclude either party but can be a mechanism to converge economic and trade relationships. Therefore, Obama's approach of economic integration, which originated from Pivot to Asia, can foster cooperative setting for the means of deepening relations in between Beijing and Washington.

Moreover, in the security aspect, US has presented its effort to bring an intimate relation with China through multilateral organizations. In the aftermath of Pivot to Asia, US Secretary of State attended the ARF and addressed security issues in the Southeast China Sea such as territorial disputes. Also, by signing Treaty of Amity and Cooperation (TAC) with ASEAN, the US provided an institutional framework for regional cooperation. The US was able to accede to the East Asia Summit (EAS) and Obama has been attending the EAS since 2011 with an exception of the eighth annual summit in 2013. China has advocated for the ARF to be an important security forum and through US participation in ARF, the forum could be a more effective and practical platform in dealing with security issues.

If America's Pivot to Asia was designed to contain China's rise, then US should provide security guarantees for those states that are in territorial disputes with China. However, the US is pursuing to settle security issues in the Southeast China Sea through diplomacy and multilateral dialogues. US engagement in multilateral organizations in the Asia-Pacific demonstrates that US commitment to the region is not to contain but to build constructive relations with China. Even in times when China acts unilaterally and sparks

20 Victor Cha, "The Argument: Quasi Alliances," in *Alignment Despite Antagonism: The United States-Korea-Japan Security Triangle* (Stanford: Stanford University Press, 1999), 36-58.

21 Shannon Tiezzi, "Will China Join the Trans-Pacific Partnership?" *The Diplomat*, October 10, 2014.

tension by acts such as declaring a CADIZ or asserting sovereignty over what is disputed territory, the US has maintained the door to dialogue open. If Obama's Pacific Policy were meant to encircle or restrain China's rise in Asia, then multilateral security cooperation such as Southeast Asia Treaty Organization (SEATO) should be revisited. Thus, Obama administration's reconciliation policy toward China rather than coercive diplomacy has confirmed that US interests in Asia-Pacific is to have a tighten linkage with China to avoid the escalation of security confrontation that can instigate a security dilemma in Northeast Asia.

Taiwan Relations and China's reaction to Pivot to Asia

Obama reiterating the one-China policy indicated that US would not interfere with China's domestic issues, especially pertaining to Beijing-Taipei relations. In the aftermath of diplomatic normalization between Washington and Beijing in 1979, US severed the diplomatic ties with Taiwan to give recognition to mainland China as the sole legitimate state. Based on Joint Communiqués that were issued in 1972, 1978, and 1982 and the US-Taiwan Relations Act, the US was able to continue to preserve cultural, commercial, and other unofficial relations with Taiwan.²² US respected the Taiwan issue as an internal affair of China and concurred to not to intervene into Chinese domestic matter unless Beijing wages a war against Taipei in which case would affect the peace and stability in the region. Following the agreements and the subsequent US-Taiwan policy, US has established *de facto* embassy, American Institute in Taiwan (AIT), to manage its unofficial relations in order to comply to China's demands. If US and China had hostile relations, then Washington may employ the Taiwan card and pressure China militarily. For instance, by providing expanded military capabilities such as Bush administration's approval for possible selling of offensive-purpose

22 Regarding to US policy toward Taiwan, refer to "Joint Communiqué of the People's Republic of China and the United States of America," Embassy of the People's Republic of China in the United States of America, February 28, 1972, <http://www.china-embassy.org/eng/zmgx/doc/ctc/t36255.htm> (accessed December 11, 2014); "Joint Communiqué on the Establishment of Diplomatic Relations between the People's Republic of China and the United States of America," Embassy of the People's Republic of China in the United States of America, December 16, 1978, <http://www.china-embassy.org/eng/zmgx/doc/ctc/t36256.htm> (accessed December 11, 2014); "Joint Communiqué of the People's Republic of China and the United States of America," Embassy of the People's Republic of China in the United States of America, August 17, 1982, <http://www.china-embassy.org/eng/zmgx/doc/ctc/t946664.htm> (accessed December 11, 2014); Bureau of East Asian and Pacific Affairs, "Fact Sheet: US Relations with Taiwan," US Department of State, <http://www.state.gov/r/pa/ei/bgn/35855.htm> (accessed December 11, 2014).

arms (i.e. diesel-electric submarines, P-3 anti-submarine warfare (ASW) aircraft, and four decommissioned US Kidd-class destroyers), US can use its both diplomatic and military leverage on Taiwan to encircle China.²³ But Obama officially reaffirmed that US does not support Taiwan's independence and favors cross-strait relations with Taiwan.²⁴ The implication of Obama's stance on the Taiwan issue is that US will preserve the past traditions in terms of its relationship with Taiwan and be able to create a cooperative ambience with China.

One residual concern is US arms sales to Taiwan. Since the 1990s, Taiwan has been a major US arms buyers and China conveyed serious concern to US.²⁵ But, in accordance to the US-Taiwan Relations Act, US is committed to assist Taiwan in sustaining its defense capabilities. China's missile launches in 1995-1996 triggered US to expand military ties with Taiwan. However, the US Congress restrained Bush's arms sales by freezing two submitted pending programs, a submarine design program and new F16C/D fighters.²⁶ Obama still has not made a decision regarding this issue in fear that US selling arms to Taiwan may be interpreted by China as US providing offensive capabilities to Taiwan. During the most recent APEC summit, Xi and Obama candidly discussed the arms-sales issue. When Xi raised his concern on US military ties with Taiwan, Obama simply reiterated the one-China policy and elucidated the purpose of selling arms as offering a defensive capability, which originated from the Taiwan Relations Act. Obama's position in arms-sales and his deferral of spending programs should be appreciated in that it is a sign that the US does not want to aggravate China's regarding Taiwan.

In deepening relations, cooperation is a key in between counterparts, as a marriage cannot be realized by only one side's willingness. If this concept is applied to the Sino-US relations based on America's Pivot to Asia, not only US intention but also China's reactions must be assessed to define whether two states are in the process of developing relations. In other words,

23 Shirley A. Kan, *Taiwan: Major US Arms Sales since 1990* (Washington DC: Congressional Research Service, 2014): 7-8.

24 "Obama: US does Not Support "Independence" of Taiwan,Tibet," *Xinhuanet*, November 12, 2014.

25 During Bush administration, six of the eight pending programs (not a "package") had a combined value of \$6.5 billion. Despite those concerns, President Obama repeated that cycle to wait to submit formal notifications for congressional review all on one day (on January 29, 2010) of five major programs with a total value of \$6.4 billion and again (on September 21, 2011) of three major programs with a total value of \$5.9 billion, including upgrades for Taiwan's existing F-16A/B fighters. Retrieved from Kan, *Taiwan: Major US Arms Sales since 1990*. 44-45.

26 Ibid.

the resulting consequences of Pivot to Asia must be examined to confirm the Beijing-Washington's tightened ties.

For the Iranian nuclear task, P5+1 (the United States, China, France, Russia, the United Kingdom, and Germany) agreed to a Joint Plan of Action (JPOA). JPOA is an interim agreement, issued in November 2013, to provide initial steps for multiple states that are involved in Iranian nuclear issue to ensure a peaceful Iran nuclear program.²⁷ Prior to promulgation of JPOA, US had consistently imposed a tightened economic sanction on Iran to prevent illicit nuclear developments. But China was exempted from the financial penalties that a state that maintains trade with Iran must pay.²⁸ China's exemption implies that US respects Chinese national interests, which derive from trading with Iran. However, despite Sino-Iranian relations, China cooperatively operated with other parties to promote the peaceful development of the Iranian nuclear program. China has been a sponsor state of Iran in building nuclear reactors and programs since 1980s. Xi's association with other P4 member states and Germany suggests that if nuclear development is prone to produce Weapons of Mass Destruction (WMD) then China will not support such a program. There has been a shift in the position taken by China on the Iranian nuclear program. This shift in China's Iranian policy indicates that Beijing also shares the view with US and its allies that Iranian nuclear programs can pose a threat to the world. Furthermore, China also allocates its interests on transnational issues with US. China shared a consensus on counterterrorism against ISIS, maritime piracy on the Gulf of Aden, epidemic such as Ebola, and pledged that China will commit to be responsible on those tasks. Thus, China immerses itself with the international community to foster peace and stability. China has shown its commitment to international security, which US has always demanded. Therefore, it can be concluded that China's positive reaction to US' request on Iran and transnational issues can be measured as positive forces in deepening its bilateral relations. Particularly, if US Pivot to Asia is a signal from Washington to Beijing for the purpose of intimate kinship, China welcomes and accepts the US initiative to expand the ties through commitment on international security and shares her aim on resolving Iranian nuclear issue. China is a sovereign state that can autonomously

27 European Union External Action, *Joint Plan of Action* (Geneva: European Union External Action, 2013).

28 Singapore and India were also exempted along with China. Referring to Keith Johnson, "Beijing Gets a Pass on Iran Sanctions," *The Wall Street Journal*, June 5, 2013; Rick Gladstone, "US Exempts Singapore and China on Iran Oil," *The New York Times*, June 28, 2012.

set its foreign policy and does not necessarily need to cooperate with other countries by default. Chinese cooperation and participation in US initiatives is a sign that America's relations with China are improving. This means that American foreign policy towards the Asia Pacific has been successful. Pivot to Asia's aim lies in strengthening ties with the emerging powers not containing them.

US-Japan Relations: Japanese Collective-Self Defense

Despite Japan's expressed will to exercise the rights of collective self-defense, the Chinese state-run Xinhua published an editorial dismissing Japan's allegedly peaceful ambitions, stating that Japan has no interest in preserving the peace by implementing the rights.

"To conceal Japan's wild ambition of becoming a military power, Abe tailored for his security scheme a phony coat in describing his plan as becoming a 'proactive contributor to peace.'"²⁹

The editorial also implied that Japan would use false premises to push its military development past strict Constitutional limitations: "Japan may use 'assisting the US army' as an excuse to break the limitations on its activities under its collective self-defense right."³⁰ Due to lingering historical animosity and Japanese imperialism in the early twentieth century, there remains significant mistrust between the East Asian nations. It is thus not surprising that China perceives collective self-defense as a pretext for a re-militarizing Japan. Abe Shinzo's ultra-nationalistic policies such as a firm stance on the Senkaku/Diaoyu island dispute, and failure to acknowledge the Japanese Imperial Army's misconduct during the Occupation years have remained issues for dispute. Thus, China's suspicions over Japan's collective self-defense as a pathway to re-militarization will likely never dissipate.

In the Joint Statement of the Security Consultative Committee issued after the 2013 '2+2 meeting, "The United States welcomed Japan's efforts in re-examining the legal basis for its security including the matter of exercising its right of collective self-defense... and US will commit to

29 Shannon Tiezzi, "China Responds to Japan's Defense Package," *The Diplomat*, December 18, 2013.

30 Ibid.

collaborate closely with Japan.”³¹ When President Obama made a state visit to Japan in April 2014, he expressed a firm stance on the US-Japan alliance: “Our commitment to Japan’s security is absolute and article five of the security treaty covers all territories under Japan’s administration, including the Senkaku islands.”³²

In the context of Pivot to Asia, what motivates US to officially support Japan’s collective self-defense rights, and sovereignty over Senkaku? Since the 2008 financial crisis, US has maintained heavy defense cuts to reduce the financial burden created by US bases abroad. US support for Japan’s collective self-defense is due to these restrictions on forward deployed capabilities in terms of military expenditure. If Japan employs collective self-defense, the national defense budget for Japan will inevitably increase, lessening the burden shared by the US. However, this move may be destabilizing for the region. Re-militarizing Japan as opposed to maintaining the status quo runs the risk of provoking contiguous states and sparking a regional security dilemma.

The former Secretary of State has rejected claims that its policy is designed to restrict the rise of China, and Kerry has not shifted or amended to balance against China. The ambiguity of the Pivot to Asia policy is in that on one hand, US articulates the significance of building a mutually beneficial relationship with China, yet US maintains a security policy that in effect contains China’s influence in the Asia-Pacific region by strengthening its own alliance with Japan. This signals that America’s priority is to deepen bilateral relations with an existing ally – or more insidiously, to indeed check Chinese influence in the region, and not to cooperate with China. If the priority of Pivot to Asia were indeed “deepening working relationship with emerging powers,” US should not have taken a stance on Japan’s collective self-defense and the territorial disputes over Senkaku.

America’s Missile Defense

China’s response to the US MD is twofold: 1) neglect US’s deployment of MD and focus on its economic development as long as the MD does not involve Taiwan; 2) China should be prepared and must employ a campaign

31 “Joint Statement of Consultative Committee: Toward a Robust Alliance and Greater Shared Responsibilities.” US Department of State, <http://www.state.gov/r/pa/prs/ps/2013/10/215070.htm> (accessed October 8, 2014).

32 Justin McCurry, “Obama Says US Will Defend Japan in Island Dispute with China,” *The Guardian*, April 24, 2014.

against the MD.³³ Through the assessment of China's security policy on the US MD, China strongly opposes the deployment of US MD in Northeast Asia. According to Ambassador Sha Zukang, Director-General of the Chinese Foreign Ministry's Department of Arms Control and Disarmament from 1997 to 2001, "what the US wants is absolute security, because it is only from a position of absolute security that it can enjoy complete freedom of action in dealing with other countries. The US government and Congress have found MD the best means to deliver this."³⁴ Chinese analysts suggest that US MD developments could seriously affect China's security interests, and that one of the conditions for Beijing to participate in nuclear disarmament should be a US commitment to suspend ballistic missile defense efforts. China recognizes the broader implications since the US MD posture both reflects the threat perceptions and strategic intentions of the state adopting it, and inevitably will affect the existing international strategic environment and the perceptions and interests of other major powers.³⁵ China argues that the US MD would have long-term negative effects on the international security environment and progress in arms control and nonproliferation. First, MD disrupts global strategic balance and stability, harming mutual trust and cooperation between major powers. Second, the US MD will induce an arms race, especially in outer space.³⁶ Despite the China's apprehension and uncertainties toward the US MD, the Obama administration has never intended to remove the MD as it did in Europe. After Obama assumed office, North Korea has conducted two nuclear tests, two ICBM tests, and various missile tests, evoking instability in the region. North Korea became a pretext for Washington's continuing deployment of MD in Northeast Asia. However, China claims that the North Korean threat is greatly exaggerated, and that America's real intentions are to undermine Chinese security by neutralizing its nuclear deterrence.³⁷ Nonetheless, US ignores China's criticism, even requesting South Korea to join the MD. Under the US security policy in the Northeast Asia, MD clearly depicts Washington's containment policy on China. Therefore the US sends unequivocal message to China in terms of security.

33 Jing-Dong Yuan, "Chinese Responses to US Missile Defenses: Implications for Arms Control and Regional Security," *The Nonproliferation Review* 10, no. 1 (Spring 2003).

34 Sha Zukang, "US Missile Defense Plans: China's View," *Disarmament Diplomacy*, no. 43 (January-February, 2000). <http://www.acronym.org.uk/43usnmd.htm> (accessed October 13, 2014).

35 Yuan, *Chinese Responses to US Missile Defenses: Implications for Arms Control and Regional Security*.

36 Ibid.

37 Ibid.

China does not share similar democratic ideologies with the US and instead elects to pursue somewhat clandestine security policies, such as the nine-dotted line/island chain to expand its territory at sea. Chinese policies have not only increased the tensions with the countries who have claim to the disputed territory but has alarmed the Japanese self-defense forces. Literature tells us of the difficulty in cooperative relationships between countries with different political systems and between countries that are not allies. Pivot to Asia cannot enhance the US' relationship with China if it does not ensure trust between the two countries. The possibility of the removal of US MD is relatively low, as long as North Korea pursues its nuclear program. Thus, 'how' is a big question in Pivot to Asia in terms of revitalizing the US relationship with China. In a hypothetical world, denuclearizing North Korea is the best solution to settle disputes over the US MD. If China uses full leverage to compel North Korea give up its only bargaining chip, US will lose the only pretext of deploying MD. However, this scenario is less likely due to China's buffer zone mentality and the pursuit of stability in the region.

Conclusion

While the Obama Administration argues that the Pivot to Asia policy will be a cornerstone for a 'deepening working relationship' with China, the ambiguity of this foreign policy will create uncertainty towards emerging powers. such ambiguity can lead to miscalculations and mistrust. According to Hillary Clinton's *America's Pacific Century* in Foreign Policy, Beijing and Washington has been involved in the Strategic and Economic Dialogue and Strategic Security Dialogue to bring both states towards cohesion on economic and security issues.³⁸ Notwithstanding high-ranking officials' dialogues and summit meetings, Pivot to Asia has duplicity in terms of security objectives of the US. US has become a patron state for Japan in exercising collective self-defense that can lead to a normal, re-militarized Japan. Moreover, the presence of the US MD in the region and ongoing MD research depicts a containment strategy against China. Even as China tries to assimilate into the international community and abide by international norms, it will not be able to share the consensus on security objectives that can be interpreted as containing China. The Chinese state, retaining its Communist ideology, implements policies and actions that are contrary to existing international

38 Clinton, *America's Pacific Century: The Future of Geopolitics Will be Decided in Asia, Not in Afghanistan Or Iraq, and the United States should be Right at the Center of the Action.*

norms such as declaring the CADIZ.

This paper criticizes the US commitment to the region which does neither of the two: fully cooperate with China or contain the rise of China. The means with which America is implementing Pivot to Asia, and the purpose of stronger military commitments are both problematic. It is unlikely that Obama will declare or issue a bill to contain China as Harry Truman did after the World War II. By analyzing Obama's behavior since inauguration, such as strengthening the hub-and-spokes alliance system especially with Japan, Obama shows that the US is containing China at least in regards to security matters. One of the major concerns with Pivot to Asia is a priority in US foreign policy: whether to strengthen existing bilateral relations with the 'spokes' or to build a working relationship with China. Since the Northeast Asian states have unsettled disputes over territorial claims and historical issues with China's influence, US allies have been threatened by the rise of China. The US has two options to resolve this issue: 1) build mutual consensus with China as a mechanism; and 2) strengthen the hub-and-spokes system to restrain China's arbitrary actions that induce instability in the region. US cannot implement two options simultaneously. However, Pivot to Asia attempts to subsume two contradictory options, thus nullifying its effect. For example, in order to build mutual consensus or to produce an effective agreement, US must abandon its advocacy on Japan's collective self-defense as a trade-off, which will instigate the less cohesive US-Japan alliance. Therefore, strategic ambiguity or a paradox lies in Obama's foreign policy towards Asia. **Y**