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FINDING A FORUM FOR NORTH KOREA

Morse H. Tan*

ABSTRACT

North Korea's gross and systematic violations of human rights violate international law, including contravention of the treaties that North Korea itself has ratified (i.e., the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child; and the Convention on the Elimination of All Forms of Discrimination Against Women). Nevertheless, a surprising dearth of legal scholarship exists with respect to arguably the worst human rights situation in the world. This Article analyzes possible tribunals to provide a measure of redress for the victims of these heinous violations once the international community takes notice.

While contemplating other possibilities, such as the International Criminal Court and South Korean courts after Korean reunification, this Article suggests a hybrid tribunal as the most promising forum for trying the alleged violations of human rights by the Democratic People's Republic of Korea (DPRK). Since the inception of the ICC in July of 2002, which presently has over 100 signatories, certain shortcomings (notwithstanding its strengths) have surfaced. With problems such as insufficient staffing, limited resources, and several jurisdictional hurdles, the ICC may not provide the best forum—although it may provide a rather good one—for addressing the egregious behavior of a rogue state like North Korea. Shortcomings in domestic law, sovereignty issues, and the perception of foreign influence among an ill-informed populace provide additional barriers to the legitimate working of an international court like the ICC. The solution, as articulated by this Article, is the composition of a hybrid tribunal that combines aspects of international and domestic courts in an at-

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tempt to increase legitimacy in pursuing justice and to build the capacity of a renewed domestic system, while providing a workable and less expensive alternative to other, less effective international justice options. By combining the knowledge, expertise, and work of both domestic and international personnel, hybrid tribunals can solve the problems of distance, access to witnesses and evidence, slow prosecution, and the high cost of the ad hoc tribunals of the past, while still achieving a comparable level of deterrence. Hybrids contemplate the concomitant goals of respecting sovereignty, yet resolving to prosecute criminals in situ for violating universal norms.

A comparative analysis of prior precedents around the world also strengthens the case this Article makes. With a destroyed infrastructure and legal system, as well as the lack of a legitimate judiciary, a closer look at the former Yugoslavia provides insight into a possible Korea of tomorrow, one that might be recovering from a highly destructive conflict. A hybrid tribunal in Yugoslavia attempted to correct Kosovo's devastated judiciary by incorporating domestic actors and by aiming to increase legitimacy, decrease bias, and enhance capacity. Cambodia, another East Asian country that suffered under the yoke of oppressive Communist dictators and saw gross, systematic violations of the human rights of its people, provides another analogous situation. Similar to the apathy regarding North Korea presently, the international community and the UN focused on Cambodia's sovereignty, while a farcical trial of the regime's leader provided little redress for the Khmer Rouge's victims. Examples such as these provide the international community with lessons from antecedent hybrid tribunals regarding the most appropriate methods of implementing international justice.

If the tragic climax of Korea's instability results in another full-blown war, then international participation in any sort of redress must avoid the substance and taint of "victor's justice." However, if the Koreas unite peacefully, producing and utilizing any sort of tribunal so as to avoid an accusation of imperialism would remain challenging at best. The end product should be a hybrid tribunal that would ideally combine the strengths of a domestic court with the contributions of an international court to enhance legitimacy, build domestic capacity, reduce costs, and help bring a measure of justice. As a lack of commitment by the international community has stymied the process of providing justice in many previous cases, we must stay committed to adequately providing a remedy that the victims of this rogue state so desperately need.

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I. INTRODUCTION

IN the context of the precedents set in the Nuremberg Trials and Tokyo Trials after World War II; the ad hoc tribunals for Rwanda and the former Yugoslavia; the hybrid tribunals concerning places such as Cambodia, Sierra Leone, East Timor, Bosnia and Herzegovina, and Kosovo; and the establishment of the International Criminal Court through the Rome Treaty, the magnitude, severity, and frequency of human rights violations in North Korea, officially the Democratic People's Republic of

Korea (DPRK), calls for the redress that such courts have sought to bring. This Article analyzes possible judicial redress, suggesting that a hybrid tribunal might best provide a context to bring a measure of justice for the North Korean regime's reprehensible trampling of human rights—especially those of its own populace.¹

II. FINDING A FORUM FOR THE CASE

An analysis of the human rights violations in North Korea, such as in the prior companion article, flows smoothly into a consideration of the best means to prosecute such violations. According to Professor Milena Sterio, “The debate regarding the relative value of international, hybrid and national tribunals mostly centers around theoretical issues, such as deterrence, retribution, and national reconciliation.”² Legal scholars are most concerned with the type of prosecution that would create the strongest deterrence and impact on future leaders who would likely commit atrocities.³ In addition, it is important to consider which type of prosecution would not only provide the local population with the strongest sense of justice, but could also bring healing to a country that has been ravaged by war so that there is national reconciliation.⁴ Sterio cautions us, however, that the practical problems concerning the type of tribunal are just as important as the theoretical problems and need to be considered just as carefully.⁵ As Sterio puts it, “[t]he decision to resort to a particular type of prosecution cannot be examined in purely theoretical terms because practical considerations often dictate a particular outcome.”⁶

In situations such as North Korea's, the choice of forum would depend on a range of factors.⁷ Sterio offers the following asseveration that prosecution should follow particularly horrible international crimes:

[C]ertain heinous crimes, such as genocide and crimes against humanity require that offenders be prosecuted in some forum, be it international or national, and that the prosecution be in accordance with international law, even if the offender's home country refuses to prosecute He should be prosecuted in a forum capable of applying international law, or at least capable of applying national law that is in compliance with international law. Thus, such a defendant could be prosecuted in the ICC [the International Criminal Court], in a

1. In the present Article, I will not go into an extensive analysis of these human rights violations. Put briefly, with its crimes against humanity, such as extermination, torture, and crimes of association as well as collective retribution inside and outside its system of concentration camps, North Korea may very well present the worst human rights situation in the world. See generally Morse H. Tan, *A State of Rightlessness: The Egregious Case of North Korea*, 80 Miss. L.J. 681 (2010).

2. Milena Sterio, *Seeking the Best Forum to Prosecute International War Crimes: Proposed Paradigms and Solutions*, 18 FLA. J. INT'L L. 887, 888 (2006).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 902.

hybrid body, such as the Special Court, or in a country other than his home country capable of conducting a prosecution in accordance with international law.⁸

In addition, Sterio raises critical practical considerations of forum selection.⁹ According to Sterio, the fundamental question is not only whether a country has the will and capacity to prosecute a well-known defendant, but also whether there is practical sense in the country's prosecution of said defendant.¹⁰ The following factors are necessary for the determination of whether a national prosecution is warranted:

[T]he geographic location of the evidence and witnesses needed to testify; the feasibility of a witness protection plan; the competence of the local judiciary; the existence of a national criminal code in compliance with international law; the presence of an appropriate infrastructure, as well as the country's physical capability to exercise jurisdiction over such a defendant.¹¹

Jurisdictional issues related to sovereignty also present caveats for any forum selected for prosecution.¹² Theoretical bases for criminal jurisdiction abound for prosecuting an individual who committed the alleged crimes in his nation of origin where the victims remain, whereas prosecuting the same individual in a neighboring state may prove to be more difficult or impossible, depending on the crime.¹³

How national, regional, and international political pressure all interact together may have a direct impact on how the forum develops as a matter of practical consideration in working toward human rights justice.¹⁴ There are numerous illustrations of this interplay. In the case of Sierra Leone, the national government worked closely with the United Nations Security Council to create the Special Court for Sierra Leone (SCSL), which specially incorporated domestic law into the proceedings.¹⁵ Yet,

8. *Id.* Sterio continues in stating that any national forum that would prosecute such a defendant would need have jurisdiction over him, such as universal jurisdiction. *Id.*

9. *See id.*

10. *Id.* at 903.

11. *Id.*

12. Eric S. Kobrick, Note, *The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes*, 87 COLUM. L. REV. 1515, 1518 (1987).

13. International law generally recognizes five different types of criminal jurisdiction over an individual. Territorial jurisdiction is based on where the crime was committed or where the crime was intended to produce some "detrimental effects within a nation." *Id.* at 1519 (providing a summary of the bases for criminal jurisdiction in international law from federal case law). Nationality jurisdiction arises from the nationality of the alleged offender, while passive personality jurisdiction stems from the nationality of the crime victim. *Id.* Protective jurisdiction entails protecting the interest and integrity of a nation. *Id.* Universal jurisdiction, being quite different from the others, only requires physical custody of an offender and allows for states to prosecute them without any connection of the offender's crime to that state. *Id.* Consequently, without a connection between the offender and the prosecuting state, finding universal jurisdiction typically requires the offender to have committed the most heinous of international crimes. *See id.* at 1519-24.

14. Sterio, *supra* note 2, at 904.

15. *Id.* at 896; STEVEN D. ROPER & LILIAN A. BARRIA, *DESIGNING CRIMINAL TRIBUNALS: SOVEREIGNTY AND INTERNATIONAL CONCERNS IN THE PROTECTION OF HUMAN*

the South African government formed the South African Truth and Reconciliation Commission of South Africa (which was not a court) because it wanted to retain control over its own justice system.¹⁶ The United Nations attempted to negotiate for an “internationally-supported tribunal” in Burundi but failed due to international objections to implementing death penalty provisions.¹⁷ In Cambodia, the government went back on its moves to involve international actors when it became clear that members of the Khmer Rouge regime, who now occupied positions in the newly established government, might be tried for their involvement in atrocities.¹⁸ The former Yugoslavia and Rwanda both openly protested the creation of criminal tribunals, but the proceedings of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were implemented by the United Nations Security Council.¹⁹ The Security Council referred Sudan to the ICC, despite its opposition to the action.²⁰

While an overstatement in regards to North Korea, Chambers’s point about the dearth of effective action by the international community has nonetheless proven largely accurate: “In passing we should realize that nothing the international community has done so far has had the slightest effect on North Korea.”²¹ Interestingly, the international community did respond to apartheid in South Africa via boycotts and sanctions to bring about the cessation of apartheid and human rights abuses.²² Since 1961, the United States has imposed a severe, although ineffective, economic boycott on Cuba.²³ This poses the question of why the international community has not given equal attention to the grave human rights abuses in North Korea.²⁴

RIGHTS 37–38 (2006). However, this process, along with the temporal jurisdiction of the Court, was a substantial challenge for the SCSL. *See* ROPER & BARRIA, *supra*, at 36–37.

16. Sterio, *supra* note 2, at 904–05.

17. *Id.* at 905.

18. *Id.*

19. *Id.* For example, the Rwandan government had a number of objections to the ICTR. It rejected this tribunal because it could not prosecute crimes before 1994, gave no option for the death penalty (as opposed to the domestic judicial system), punished more than just genocide, and was located hundreds of miles away in Tanzania. ROPER & BARRIA, *supra* note 15, at 23–24.

20. Sterio, *supra* note 2, at 905.

21. *Id.* at 18. However, North Korea has expressed concern in the past about possible UN resolutions and actions—so much so that it has threatened war in the event of UN Security Council moves. These threats have not yet been actualized into action.

22. *Id.*

23. *Id.* at 19.

24. Some may claim that China’s position may be a major portion of the answer as the biggest supporter of North Korea. *See generally* *China and North Korea: Comrades Forever?*, INT’L CRISIS GROUP (Feb. 1, 2006), http://www.crisisgroup.org/~media/Files/asia/north-east-asia/north-korea/112_china_and_north_korea_comrades_forever.pdf (detailing the high level of economic support and influence China exerts on North Korea). The relationship between the DPRK and China, however, is complicated, as a number of scholars have pointed out.

A. THE NORTH KOREAN SETTING

Although the creation of a proposed tribunal may be purely speculative at this point in time, an attempt to formulate the conditions under which North Korea may find itself subject to prosecution presents an opportunity to hypothesize a tribunal's structure and responsibilities. An Article such as this cannot escape the question of feasibility and legitimacy concerns that engulf the Korean Peninsula presently, especially with the recent death of Kim Jong-Il. In this attempt to portray a possible setting, three areas must be flushed out: Korean reunification; a physical setting (location and personnel); and applicable domestic and international law.

1. Korean Reunification

Words of reunification have been on the lips of Koreans everywhere since the armistice agreement and the commencement of the Geneva Conference of 1954.²⁵ Korea was a unified country prior to its division against its will along the 38th parallel²⁶—now the most heavily fortified border in the world. What is difficult, however, is bringing these same people together who have diverged dramatically in almost every way over the last sixty years.²⁷ While one may find it difficult to prognosticate about what may take place after over a half-century of separation, a sketch of two general scenarios may help as possible backdrops for a future tribunal.

a. Peaceful Unification

The joint declaration and understanding by North and South Korea in June of 2000 raised hopes for future reunification, a much longed-for outcome by the people of both Koreas.²⁸ Since that time, many commentators have started to outline the possibilities for the reunification of Korea and put forth their own strategies of how to attempt such a restoration.²⁹ Although the precise form of such unification remains uncertain, a peaceful unification would provide the preferable yet politically precarious platform for a tribunal addressing the atrocities of North Korea.

The vast majority of commentators and analysts have proposed the foundation of a feasible unification strategy based on a gradualist ap-

25. See generally Jin Lee, *A Millennium Hope for Korea: Lessons from German Unification*, 9 MSU-DCL J. INT'L L. 453, 456–462 (2000) (outlining unification efforts from the 1950s to the end of the Millennium).

26. See Morse Tan, *The North Korean Nuclear Crisis: Past Failures and Present Solutions*, 50 ST. LOUIS U. L.J. 517, 520–22 (2006).

27. Lee, *supra* note 25, at 505.

28. *Id.* at 453.

29. See e.g., Cecilia Y. Oh, *The Effect of Reunification of North and South Korea on Treaty Status*, 16 EMORY INT'L L. REV. 311, 316–48 (2002) (explaining state succession law and the effects of unification on Korean treaties); Curtis J. Milhaupt, *Privatization and Corporate Governance in a Unified Korea*, 26 J. CORP. L. 199 (2001) (presenting a comprehensive privatization plan for North Korean state-run industries as a means to integrate the two Korean economies).

proach.³⁰ It is estimated that a *gradual* unification of the peninsula as one Korean state could cut government expenditures in half,³¹ a factor to take into account when considering the high cost of international criminal tribunals. It is even easier to recognize that “[n]o viable nation would stand quietly while another state absorbed it” so quickly, especially a rogue nation such as North Korea.³² Such a gradual, peaceful integration of the two states could also allow North Korea to slowly integrate with South Korea’s legal and economic structure,³³ an important possibility for retaining the necessary capital and infrastructure for a hybrid tribunal as outlined below.

Even peaceful unification, however, comes with additional issues. Dissolving North Korea into South Korea could mean new nuclear problems and a dissolution of the past non-proliferation treaties under the Vienna Convention on Succession of States in Respect of Treaties.³⁴ Combining and reconciling each of the nations’ constitutions, as well as economic, employment, and transportation infrastructures, also remains troubling.³⁵ The costs of reunification look staggering even by lower estimates,³⁶ making the amount of money and capital needed for a criminal tribunal look miniscule in comparison.

Until the actual reunification does occur, and depending on which method brings it to peaceful fruition, it remains difficult to determine how the post-unification process will impact the creation of this new tribunal. Sufficient political will to redress North Korea’s many atrocities against its own people will prove a critical factor.

b. Violent Unification

If the preferred peaceful unification of the Korean peninsula does not transpire, the terrible specter of reunification by war broods over the peninsula. The instigation of such a war would likely emanate from North Korea.³⁷ Under Kim Jong-Il, North Korea built up the fourth largest military in the world, including large stockpiles of biological and chemical weapons as well as up to a dozen nuclear weapons that it could utilize towards its ultimate objective of reunification through force.³⁸ Such a full-blown war would likely result in catastrophic consequences. Rough

30. See, e.g., Lee, *supra* note 25, at 502 (“Ideally, a unification method based on two state’s consensus would be finalized by the result of long negotiations, compromises, and agreements between the two Koreas.”).

31. Oh, *supra* note 29, at 342 (citing MARTIN HART-LANDSBERG, KOREAN DIVISION, REUNIFICATION, AND U.S. FOREIGN POLICY 158 (1998) (stating that a quick reunification could cost up to \$800 billion over ten years)).

32. *Id.* at 342–43.

33. Lisa Blomgren Bingham et al., *Participatory Governance in South Korea: Legal Infrastructure, Economic Development, and Dispute Resolution*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 375, 398–99 (2007).

34. Oh, *supra* note 29, at 337–48.

35. Lee, *supra* note 25, at 508–11, 516–20.

36. See Oh, *supra* note 29, at 342.

37. See Tan, *supra* note 26, at 520–27.

38. See *id.*

estimates put a casualty total at over one million, which would be crippling for any nation involved.³⁹ North Korea's nuclear testing, aggressive military assaults, and abandonment of the Six Party Talks have exacerbated the tensions on the peninsula.⁴⁰

The United States may play a significant role in any successful reunification in the region.⁴¹ The United States' Congress enacted the North Korean Human Rights Act of 2004, seeking to promote human rights in North Korea and move toward peaceful reunification.⁴² It has remained a key player in the regional negotiation processes.

Unification through war might present surmountable yet difficult challenges in establishing a tribunal. Infrastructure, capital (and human capital), and other resources could be scant, possibly meaning a heavy reliance on the United Nations or other international funding. A relatively neutral location outside the war zone—which could be far depending on the extent of the war—would have to be found and agreed upon.

2. *Laying the Foundation*

a. Location

Without knowledge of the method of unification employed or the existence of a legal infrastructure after such unification, it remains speculative to contemplate a particular location for a tribunal. However, based on the preposterous legal system—if it rightfully deserves such an appellation—that facilitates the systematic human rights abuses currently found in North Korea,⁴³ only two likely options for a location surface: South Korea or an external location such as China.

If a peaceful unification emerges for the peninsula, it would be appropriate to pursue justice in a Korean courtroom with, of course, Korean plaintiffs and defendants. While North Koreans might object to the criminal tribunal proceedings taking place south of the 38th Parallel, the DPRK's substandard judicial system and infrastructure make it more suitable to limit such procedures to a more modern courtroom in the South. This conclusion finds its premise not only on the shortcomings of a legal system plagued by injustice and corrupt politicization in the North, but also on the better court facilities in terms of more advanced technology, infrastructure, and the knowledgeable personnel of the South.⁴⁴ In other words, it is likely that the South's facilities would require far less

39. *Id.* at 525–26.

40. *See id.* at 518–19.

41. *See* Albert Suh, *First Steps Are Better than None: Distinguishing the Practical from the Rhetorical in the North Korean Human Rights Act of 2004*, 37 *RUTGERS L.J.* 585, 599 (2006).

42. *Id.* at 591–93.

43. *See generally* Patricia Goedde, *Law “of Our Own Style”: The Evolution and Challenges of the North Korean Legal System*, 27 *FORDHAM INT’L L.J.* 1265 (2004) (presenting a comprehensive analysis of the corrupt North Korean legal system).

44. *See generally* Kuk Cho, *The Ongoing Reconstruction of the Korean Criminal Justice System*, 5 *SANTA CLARA J. INT’L L.* 100 (2006) (outlining South Korea's legal system and highlighting their recent promising legal reforms).

upgrading, thereby conserving resources for impending prosecution. If the Supreme Court of South Korea, for example, remains intact, it would serve as a fitting site for the proposed hybrid tribunal.

On the other hand, a violent unification of the peninsula may eliminate the possibility of the tribunal taking place in Seoul. With both North Korea's and South Korea's infrastructure demolished by large-scale war, an external location would be necessary for a criminal tribunal of this magnitude. The decision for the location of a hybrid tribunal should consider the availability of witnesses, court personnel, judges, and appropriate facilities.⁴⁵ North Korean defendants and the North Korean people in general would find locations like Japan and the United States quite objectionable due to the past colonization by Japan of Korea and the fact that the United States spearheaded UN efforts against North Korea in the Korean War.⁴⁶ A magnanimous choice on behalf of the defendants might be China, North Korea's closest ally and the host of the Six Party Talks. China might also be the only forum to which former North Korean leaders would agree. Although leaders would not necessarily have to come to an agreement in this respect, especially those leaders who may be indicted, a more agreeable location would undoubtedly limit the perception of "victor's justice," bias, or other legitimacy concerns. Finally, China's geographic proximity to Korea via Korea's large northern border could make it a sensible external venue and would diminish the taint of victor's justice.

b. Judges, Attorneys, and Court Personnel

Judges, attorneys, and court personnel constitute the *sine qua non* to make the proposed tribunal operational.⁴⁷ Under a hybrid tribunal system, judges, attorneys, and other court personnel emerge from both the domestic as well as the international contexts.⁴⁸ Domestically, former South Korean judges and prosecutors would be less biased adjudicators of the human rights violations of North Korean leaders against the North Korean people. Similarly to the defendant judges who appeared before the Nuremberg Tribunal in the late 1940s, North Korean judges would likely participate as either witnesses or defendants.⁴⁹ Defense attorneys could possibly be drawn from among North Korean attorneys who are not defendants or witnesses. Even if these attorneys were determined to be unfit for this task, international co-counsel could be assigned to aid and monitor their work. However, North Korean judges serve as mere functionaries of the North Korean dictatorship; virtually all are affiliates

45. See John Dermody, Note, *Beyond Good Intentions: Can Hybrid Tribunals Work After Unilateral Intervention?*, 30 HASTINGS INT'L & COMP. L. REV. 77, 81-82 (2006) (explaining how hybrid tribunals combine domestic and international court personnel).

46. See Tan, *supra* note 26, at 521.

47. See Dermody, *supra* note 45, at 81-82.

48. *Id.*

49. See Douglas O. Linder, *Journeying Through the Valley of Evil*, 71 N.C. L. REV. 1111, 1118 (1993).

in the Worker's Party of Korea (WPK), and thus would likely be too biased to serve as judges. Ideally, excellent judges and attorneys from a wide array of nations, especially from nations that played no role in a Korean conflict to enhance the perception of neutrality, would also emerge from the international community.

3. *Applicable Law*

With the proposed setting in mind, the question of applicable law surfaces. What crimes and serious violations of human rights have been committed, and how do they correspond with applicable law? The international community has numerous legal tools to prosecute Kim Jong-Il's brutal regime in the wake of his very recent demise. One need turn to nothing more than the international law ratified by North Korea as well as the norms enunciated in its own domestic constitution.

a. Domestic Law

Although North Korean law as such may not provide the best basis for addressing the country's own human rights abuses due to massive loopholes contained therein, the human rights norms it articulates can provide a legitimate starting place for constructing a jurisdictional framework for a hybrid tribunal or international court. The Democratic People's Republic of Korea has updated its constitution several times in the past two decades, the latest amendments coming in 2009.⁵⁰ On its face, the constitution appears to provide the nation's populace with numerous political, cultural, and social rights. For example, the document states that the State shall respect and protect the human rights of the people through a long list of provisions.⁵¹ Some of these putative rights of its citizenry include equality; the right to be elected for office; freedoms of speech, press, assembly, demonstration, and association; relaxation; travel; free medical care; and expression of religious beliefs.⁵² The amended constitution further provides that the State is to provide the populace with food, clothing, and housing.⁵³

However, this same constitution allows the dictator and his party to override all the substantive rights enumerated in the constitution. For example, Article 100 pronounces the National Defense Commission (NDC) Chairman (who is now Kim Jong-Il's successor, Kim Jong-Un) the

50. Tan, *supra* note 1, at 684.

51. Many of these rights were those of the "working people" throughout the 1998 Constitution. 1998 DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA SOCIALIST CONSTITUTION (Sept. 5, 1998) (N. Kor.), available at http://www1.korea-np.co.jp/pk/061st_issue/98091708.htm. The latest constitution provides many of these rights in a list in Chapter V. 2009 DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA SOCIALIST CONSTITUTION chap. V (Sept. 23, 2009) (N. Kor.), available at <http://asiamatters.blogspot.com/2009/10/north-korean-constitution-april-2009.html>.

52. 2009 DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA SOCIALIST CONSTITUTION chap. V (Sept. 23, 2009) (N. Kor.), available at <http://asiamatters.blogspot.com/2009/10/north-korean-constitution-april-2009.html>.

53. *Id.* art. 25.

supreme leader of the Democratic People's Republic of Korea.⁵⁴ With this position comes the constitutional authority to "[r]escind the decisions and directives of state organs that run counter to the orders of the chairman of the DPRK."⁵⁵ To further eliminate the rule of law, The Supreme People's Authority (the supposed equivalent of a legislature) and the Cabinet (the supposed equivalent of an executive branch) have the exact same authority to overturn or repeal whatever measures or laws they so please.⁵⁶ The constitution functions as window-dressing to deceive the outside world that rights actually exist for the people of North Korea. Notwithstanding its propagandistic purpose, the substantive rights outlined above do provide a helpful starting point to hold the DPRK accountable.

To date, nearly every one of these provisions has been violated either directly or indirectly. As highlighted in my preceding articles, the North Korean government has consistently restricted freedom of the press as it engineers pervasive propaganda and conducts systematic religious persecution, while flaunting public executions and collective retribution.⁵⁷ Kim Jong-Il's regime further implemented egregious imprisonment methods for political prisoners with horrific torture methods; cruel and unusual punishment for the most minor "crimes" (typically of a political nature); and despicable prison and working conditions for those unfortunate enough to find themselves in the array of concentration camps clandestinely placed throughout the country.⁵⁸ Not only has the nation failed its starving masses with its "Food Supply System," it continues to discriminate against citizens based on political affiliation with other basic necessities, such as clothing and housing.⁵⁹ The regime's disturbing practices extend to refugees and those citizens who have escaped the country; through an understanding with China, North Korea allows for the repatriation of such refugees only to subject them to intense interrogations, numerous forms of torture, and, many times, death.⁶⁰

These violations are significant because North Korea's Penal Code provides for redress for many of these crimes already. For example, the Penal Code criminalizes forced child labor, torture, and inhuman treatment.⁶¹ It also prohibits actions like kidnapping and trafficking, which under a 2007 addendum is now punishable by execution.⁶² Specifically, the DPRK's recently amended constitution and latest penal code

54. *Id.* art. 100.

55. *Id.* art. 109.

56. *Id.* art. 116, 125.

57. *See generally* Tan, *supra* note 1, at 693-95, 701-04, 707; Tan, *supra* note 26, at 543-46.

58. *See generally* Tan, *supra* note 1, at 697-99, 703-07.

59. *See generally id.* at 687-88, 695-96.

60. *See generally id.* at 699-701.

61. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2010, DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA, 3, 20 (2011), available at <http://www.state.gov/documents/organization/186491.pdf>.

62. *Id.* at 2.

may provide the primary applicable domestic law to subject North Korea to its claimed standards of human rights.

On the other hand, there is the possibility that, if the two Koreas unite peacefully and a “clean slate” theory is used to compile a new penal system,⁶³ South Korean domestic law could be applied to future prosecutions of North Korean defendants. This possibility would not hinder, but rather strengthen any case against North Korean leaders because South Korea recently passed the Act on the Punishment of Crimes under the Jurisdiction of the International Criminal Court (The ICC Statute).⁶⁴ This Act, which enunciates the punishment of crimes under the Rome Statute, incorporates major international crimes into South Korea’s domestic legal system (e.g., crimes against humanity, war crimes, etc.) and codifies the concept of universal jurisdiction for these crimes.⁶⁵ In other words, any individual on the Korean Peninsula could be prosecuted under the crimes recognized by the ICC through this domestic law without any jurisdictional hurdles.⁶⁶

b. International Law

Under Article 15 of the newest version of the constitution, the DPRK was to “champion[] the democratic national rights of Koreans overseas and their rights recognized by international law.”⁶⁷ From this language alone it appears that North Korea accepts its obligation to abide by international law, at least regarding citizens abroad. In addition to this provision, however, North Korea has signed major conventions and treaties to reaffirm its supposed commitment to international norms and principles regarding the human rights of its own citizenry.⁶⁸ For example, North Korea is a signatory of four major human rights treaties, all of which could be utilized to adequately provide a framework for applicable international law in any future prosecutions: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child; and the Convention on the Elimination of All Forms of Discrimination Against Women.⁶⁹

Although these major human rights treaties do not specifically provide for criminal sanctions, their provisions still apply to North Korea’s actions. Under principles of international criminal law, applying interna-

63. See Oh, *supra* note 29, at 343.

64. See Tae Hyun Choi & Sangkul Kim, *Nationalized International Criminal Law: Genocidal Intent, Command Responsibility, and an Overview of the South Korean Implementing Legislation of the ICC Statute*, 19 MICH. ST. J. INT’L L. 589, 590 (2011).

65. *Id.*

66. *Id.*

67. 2009 DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA SOCIALIST CONSTITUTION art. 15 (Sept. 23, 2009) (N. Kor.), available at http://www.servat.unibe.ch/icl/kn00000_.html. An alternative English translation is available at <http://asiamatters.blogspot.com/2009/10/north-korean-constitution-april-2009.html>.

68. See Tan, *supra* note 1, at 686–87.

69. *Id.* at 686.

tional law concepts and treaties to domestic prosecutions depends on their integration into a state's domestic legal system through legislation.⁷⁰ The DPRK has expressly stated in Articles 15 and 16 of its latest constitution that it would protect Koreans' rights under international law as well as "guarantee the legitimate rights and interests of foreigners in its territory,"⁷¹ and has incorporated into its penal code punishments for important human rights crimes (e.g., child labor and torture, which the DPRK has itself violated).⁷² There is a clear argument that North Korea has integrated at least some human rights concepts into its domestic legal system. Additionally, South Korea has made similar attempts other than the ICC Statute given above to integrate human rights concepts under Article 6 in its own constitution: "Treaties duly concluded and promulgated under the constitution and the generally recognized rule of international law have the same effect as the domestic laws of the Republic of Korea."⁷³ This too is significant because South Korea has also ratified the four major human rights treaties above,⁷⁴ which could again play a role in any prosecutions of North Korean defendants if South Korean law is utilized.

North Korea's massive campaign to rid the country of political dissent, censure speech, and subject its citizens to labor camps and cruel punishment clearly violates most of the provisions of the International Covenant on Civil and Political Rights.⁷⁵ Under Part IV of the agreement, the nation could be subjected to investigation and other measures by the Human Rights Committee, which would have the power to prescribe solutions to such violations.⁷⁶ Similarly, with North Korea's widespread religious persecution of Christians; withholding of basic necessities such as food; and horrendous working conditions for many, it would be violating a majority of articles under the International Covenant on Economic, So-

70. Dapo Akande, *Sources of International Criminal Law*, in THE OXFORD COMPANION TO INT'L CRIMINAL JUSTICE 41-42 (Antonio Cassese et al. eds., 2009).

71. 2009 DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA SOCIALIST CONSTITUTION (Sept. 23, 2009) art. 15-16 (N. Kor.), available at <http://asiamatters.blogspot.com/2009/10/north-korean-constitution-april-2009.html>.

72. U.S. DEP'T OF STATE, *supra* note 61, at 3-4, 25-26, 28.

73. 1987 DAEHAN MINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 6 (S. Kor.), available at http://www.servat.unibe.ch/icl/ks00000_.html.

74. *Status of Ratification: International Covenant on Civil and Political Rights*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/law/ccpr-ratify.htm>; *Status of Ratification: International Covenant on Economic, Social, and Cultural Rights*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/law/cescr-ratify.htm>; *Status as at: Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en; *Status as at: Convention on the Elimination of All Forms of Discrimination Against Women*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

75. See generally International Convention on Civil and Political Rights art. 1-3, 5-7, 10-13, Mar. 23, 1976, 999 U.N.T.S. 171; Tan, *supra* note 1, at 697-98, 702-07; Tan, *supra* note 26, at 543-46.

76. See generally International Convention on Civil and Political Rights, *supra* note 75, at 179-84.

cial and Cultural Rights.⁷⁷ As with the Covenant on Civil and Political Rights, under Part IV of this agreement the country would be subject to investigation and recommendations from the Economic and Social Council.⁷⁸ North Korea's brutal treatment of many individuals, use of collective retribution, and cultural oppression, much of which includes children and newborns, would violate nearly every article of the Convention on the Rights of the Child, which provides special protections to those under the age of eighteen.⁷⁹ The Committee on the Rights of the Child, under Part II of the Convention, would likely find it necessary to investigate and report measures for the redress of these violations to the UN General Assembly.⁸⁰ North Korea's horrendous treatment of pregnant women and allowance of rampant human trafficking between China and Korea, the vast majority of which includes women and the sex trade, would violate substantial parts of the Convention on the Elimination of All Forms of Discrimination Against Women.⁸¹ Part V of that treaty created the Committee on the Elimination of Discrimination Against Women, and this Committee would have a veritable plethora of violations to report and recommendations for the UN Secretary-General to consider about these problems.⁸²

To humanize these violations and how they transgress international law, a few stark examples suffice. What about the horror of a family sent to a concentration camp because their small child scribbled with a crayon on a portrait of Kim Jong-Il?⁸³ Or the young woman imprisoned, beaten, and sexually abused for teaching other North Korean citizens a popular South Korean song?⁸⁴ Or even the principal of the Pyongyang Light Engineering College who was sent to a camp for five years for merely suggesting that students should have more study time instead of more labor responsibilities?⁸⁵ These examples not only implicate violations of *jus cogens* norms (with the torture and abuse of children and adults alike), but also implicate violating several articles of the above treaties regarding

77. See International Covenant on Economic, Social, and Cultural Rights art. 1-2, 5-12, 14-15, 19-27, Jan. 3, 1976, 993 U.N.T.S. 3; Tan, *supra* note 1, at 687-88, 694, 697-99, 701-02.

78. International Covenant on Economic, Social, and Cultural Rights, *supra* note 77, at 9-10.

79. See Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3; Tan, *supra* note 1, at 685, 699, 703; see also Convention on the Rights of the Child, art. 2, 3, 5-7, 9, 10, 12-17, 19-22, 24-32, 35-37, 39-40.

80. Convention on the Rights of the Child, *supra* note 79, at 172.

81. See Convention on the Elimination of All Forms of Discrimination Against Women, art. 2, 5-12, 14-16, Dec. 18, 1979, 1249 U.N.T.S. 13; Tan, *supra* note 1, at 699-701, 703-04.

82. See Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 81, at 21-22.

83. Tan, *supra* note 1, at 685.

84. DAVID HAWK, THE HIDDEN GULAG: EXPOSING NORTH KOREA'S PRISON CAMPS 46 (Jennifer Fiore & Debra Liang-Fenton eds., 2003), available at <http://www.davidhawk.com/HiddenGulag.pdf>.

85. N. Korea: Humanitarian and Human Rights Concerns: Hearing Before the Subcomm. on E. Asia and the Pac. of the H. Comm. on Int'l Relations, 107th Cong. 62 (2002) (statement of So Lee).

free expression of adults (e.g., Article 19 of the International Covenant on Civil and Political Rights)⁸⁶ and children (e.g., Article 13 of the Convention on the Rights of the Child).⁸⁷

As stated above, the press has no freedom to criticize the DPRK's regime and citizens are even required to place a seal on their radios so that only the government's channels can be accessed; if the seal is broken, the owners of the radio are then treated as criminals.⁸⁸ Citizens are only allowed to worship the dictator and all other religions are discouraged or discriminated against.⁸⁹ One first-hand account related that eight women were burned alive for refusing to give up their religious beliefs.⁹⁰ Policies and practices like these easily implicate the above treaties regarding freedom of religion and thought (e.g., Articles 18 and 22 of the International Covenant on Civil and Political Rights),⁹¹ and citizens' rights to "freely determine their political status and freely pursue their economic, social and cultural development" (e.g., Article 1 of the International Covenant on Economic, Social and Cultural Rights).⁹²

As an individual digs deeper into the atrocities happening presently in North Korea, it becomes clear that such government actions require some form of redress. As another example, consider a woman being forced to bury alive her own infants to comply with the DPRK's policy of killing infants of Chinese ancestry.⁹³ Or the account of a political prisoner forced to administer poison to a group of fifty women in a gymnasium for a summary execution.⁹⁴ Or the eyewitness reports that between 150 and 200 individuals who escaped these prisons and camps across the North are repatriated each week to be beaten, tortured, and killed in the same prisons.⁹⁵ These examples again demonstrate North Korea's numerous treaty and convention violations by ignoring the special rights and protections of pregnant women (Articles 11 and 12 of the Convention on the Elimination of All Forms of Discrimination Against Women),⁹⁶ the rights of child refugees (Article 22 of the Convention on the Rights of the

86. International Convention on Civil and Political Rights, *supra* note 75, at 178.

87. Convention on the Rights of the Child, *supra* note 79, at 168.

88. Sung-Chul Choi, *Human Rights in N. Korea in the Light of Int'l Covenants*, in INTERNATIONAL COMMUNITY AND HUMAN RIGHTS IN NORTH KOREA 126-27 (Sung-Chul Choi ed., 1996).

89. See HAWK, *supra* note 84, at 83.

90. *Examining the Plight of Refugees: The Case of N. Korea: Hearing Before the Subcomm. on Immigration, Comm. on the Judiciary*, 107th Cong. 28 (2002) (statement of Sun-ook Lee), available at <http://www.access.gpo.gov/congress/senate/pdf/107hrg/86829.pdf>.

91. International Convention on Civil and Political Rights, *supra* note 75, at 178.

92. International Covenant on Economic, Social, and Cultural Rights, *supra* note 77, at 5.

93. HAWK, *supra* note 84, at 61-62.

94. *N. Korea: Human Rights, Refugees, and Humanitarian Challenges: Joint Hearing Before the Subcomm. on Asia and the Pac. and the Subcomm. on Int'l Terrorism, Non-proliferation and Human Rights of the H. Comm. on Int'l Relations*, 108th Cong. 111 (2004), available at <http://www.internationalrelations.house.gov/archives/108/93390.pdf>.

95. *Id.* at 101-02.

96. See Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 81, at 18-19.

Child),⁹⁷ and the rights of all its citizens to life and liberty (Articles 6 and 9 of the International Covenant on Civil and Political Rights).⁹⁸ Unfortunately, these examples merely highlight everyday occurrences in North Korea and do not come close to constituting an exhaustive list.

Even absent the above conventions signed by North Korea and the country's constitution, the international community would still have recourse to customary international law and *jus cogens*.⁹⁹ For example, the preamble of every convention mentioned above includes a sentence or paragraph that notes that the agreements are in accordance with and recognize the Universal Declaration of Human Rights.¹⁰⁰ Consonant with the view that such rights under this Declaration are already customary in international law, this further shows that in signing these agreements North Korea cannot escape the conclusion that its ratification recognizes these principles as law and gives substantial evidence of *opinio juris*.¹⁰¹ With its oppressive state action expressed above, North Korea would again be violating nearly every article of the Declaration.¹⁰² Moreover, this state action would defy established *jus cogens* (peremptory) norms.¹⁰³ The pervasive cruel and unusual punishment methods used on countless citizens for any number of "offenses" or ideologies would fall under torture, not to mention that the labor camps likely qualify as institutions of slavery.¹⁰⁴ North Korea's systematic persecution, imprisonment, torture, and murder of religious dissidents (most commonly Christians) and infants of Chinese descent also amount to mass genocide.¹⁰⁵

Furthermore, North Korea remains open to liability and prosecution under numerous other international treaties and conventions that it has signed and later breached.¹⁰⁶ Its creation and stockpiling of biological

97. See Convention on the Rights of the Child, *supra* note 79, at 169.

98. See International Convention on Civil and Political Rights, *supra* note 75, at 174–76.

99. Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 81, at 14; International Convention on Civil and Political Rights, *supra* note 75, at 173; International Covenant on Economic, Social, and Cultural Rights, *supra* note 77, at 5; Convention on the Rights of the Child, *supra* note 79, at 167.

100. See *supra* note 99 and accompanying sources.

101. For a general discussion regarding *opinio juris* as an element of customary international law, see Jo Lynn Slama, Note, *Opinio Juris in Customary International Law*, 15 OKLA. CITY U. L. REV. 603 (1990).

102. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). See, for example, Articles 2–15 and 17–29 of the Declaration.

103. For an interesting discussion on *jus cogens* as peremptory norms in international law, see Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR. J. INT'L L. 491 (2008).

104. Torture in this context is clearly a *jus cogens* violation as many scholars point out. See, e.g., Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*, 15 EUR. J. INT'L L. 97 (2004).

105. Slavery and genocide are also undoubtedly *jus cogens* violations. See, e.g., Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Duty of Jus Cogens*, 34 YALE J. INT'L L. 331, 343 (2009) (“[S]ome peremptory norms such as the prohibitions against genocide and slavery are relatively uncontroversial across the international community of states.”).

106. See Tan, *supra* note 26, at 524, 532–33, 552.

weapons violate Articles 1–4 of the Biological Weapons Convention.¹⁰⁷ Due to North Korea's continued aggression towards South Korea and its harboring of nuclear weaponry, the DPRK is also violating the Agreement of Reconciliation, Non-Aggression and Exchanges and Cooperation between North and South of 1991; the Joint Declaration by South and North Korea of the Denuclearization of the Korean Peninsula of 1992; the Nonproliferation Treaty (NPT); and the 1994 Agreed Framework.¹⁰⁸

North Korea consistently and brazenly breaks the applicable treaties, conventions, and international principles and norms that apply to it. For example, its judicial system is plainly atrocious, allowing for the infringement of an individual's due process rights on many different levels, which collides with general principles of international law.¹⁰⁹ As will be discussed below, many of these problems will be highlighted in our discussion regarding a proper forum and tribunal for redress, but an extensive discussion involving further violations of international law is beyond the scope of this particular Article. However, keeping the many sources of international law in mind that North Korea continues to blatantly defy helps to erect a plausible arrangement for possible redress.

B. THE ICC

After the intervening period between the Nuremberg and Tokyo war crimes tribunals and the ad hoc tribunals in the former Yugoslavia and Rwanda, enough countries ratified the Rome Treaty to establish the International Criminal Court (ICC), which is the first permanent treaty-based international criminal court.¹¹⁰

The negotiations for the ICC Statute, which entered into force on July 1, 2002, first began in Rome in 1998.¹¹¹ Many state parties to the Rome Statute are home to perpetrators of horrible human rights violations and could be possible defendants of the ICC.¹¹² For example, Nigeria, Sierra Leone, and all former Yugoslav republics are state parties.¹¹³

As of April 27, 2012, 118 countries, including Canada and a number of western European countries,¹¹⁴ have ratified the Rome Treaty, while eight have acceded, one has accepted, and one has even seceded.¹¹⁵ However, even those countries that have not ratified the Rome Treaty,

107. *Id.* at 524–25; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction art. 1–4, Apr. 10, 1972, 26 U.S.T. 585, 1974 U.N.T.S. 317.

108. *See generally* Tan, *supra* note 26, at 531–33, 552.

109. *See* Tan, *supra* note 1, at 686.

110. Sterio, *supra* note 2, at 895.

111. *Id.*

112. *Id.*

113. *Id.*

114. *ICC at a Glance*, INT'L CRIMINAL COURT, <http://www.icc-opi.int/menus/About+the+Court/ICC+at+a+glance> (last visited Nov. 11, 2012).

115. *Rome Statute of the Int'l Criminal Court*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (last visited Feb. 28, 2010).

like North Korea, may find themselves within the reach of the ICC.¹¹⁶ For example, Omar al-Bashir, the President of Sudan, has been indicted by the ICC despite Sudan's refusal to ratify the Rome Treaty.¹¹⁷

1. Advantages

a. International Resonance

Notwithstanding a country's willingness to engage in domestic prosecution, ICC prosecution can carry the advantage of an enhanced deterrent effect internationally.¹¹⁸ Prosecuting cases in the ICC is especially important when it is necessary to send a strong message to the rest of the world that certain types of behaviors "will not be condoned and the international community will act to stop such behavior."¹¹⁹ This is particularly important when the cases pertain to heinous behavior by well-known offenders, or when the cases involve countries such as Sudan or North Korea where there are well-documented instances of terrible human rights violations.¹²⁰ Therefore, Professor Sterio has argued that prosecution at the ICC would result in a greater deterrent effect than prosecution in other tribunals.¹²¹

Professor Grace Kang wrote the definitive legal academic article on the hypothetical ICC case against the now-deceased Kim Jong-Il.¹²² In this article, she systematically and persuasively analyzed North Korean violations within the categorical rubric pertaining to the ICC.¹²³ However, the case for the prosecution of Kim Jong-Il in the ICC would have faced the considerable difficulty of his extradition. Similarly, an attempt to extradite Kim Jong-Il's successor and son, Kim Jong-Un, might ignite another Korean conflagration.

2. Disadvantages

The ICC has limitations too:

[T]he ICC cannot handle more than a tiny percentage of genocide, war crimes, and crimes against humanity cases as it faces many problems, including lack of necessary budget and staff, jurisdictional hurdles, and lack of political support from powerful countries such as the United States.¹²⁴

116. See Jaya Ramji-Nogales, *Designing Bespoke Transnational Justice: A Pluralistic Process Approach*, 32 MICH. J. INT'L L. 1, 45–46 (2010).

117. *Id.*

118. See Sterio, *supra* note 2, at 903.

119. *Id.*

120. *Id.*

121. See *id.*

122. See generally Grace M. Kang, *A Case for the Prosecution of Kim Jong Il for Crimes Against Humanity, Genocide, and War Crimes*, 38 COLUM. HUM. RTS. L. REV. 51 (2006).

123. *Id.*

124. Sterio, *supra* note 2, at 895–96. The United States has not ratified the Rome Statute, has been an outspoken opponent of the ICC, and has preferred regional tribunals like that of the Special Court for Sierra Leone. *Id.* at 896.

In fact, the United States has been quite outspoken about its preference for regional, country-specific tribunals, such as the Special Court for Sierra Leone.¹²⁵ In addition, the ICC has faced and still faces problems such as insufficient staffing, budgetary deficiencies, and jurisdictional hurdles.¹²⁶ Consequently, the ICC can generally only prosecute a few of the top indicted individuals, which remains a serious limitation for the court.¹²⁷ The limited resources of the ICC might not stretch to cover North Korean atrocities, although a strong case can be made that it merits a place of priority among possible choices for ICC prosecution. The author made this case to ICC prosecutors.¹²⁸ Shortly thereafter, the ICC opened an investigation of North Korea.¹²⁹ It remains to be seen, though, how far this investigation will proceed.

In part because of such limited resources, the ICC's principle of complementarity articulates the ICC's support of domestic primacy as well as its role in bolstering domestic law and legal systems:

The design of the ICC, with the principle of complementarity as a key feature, recognizes that member states have the primary right and responsibility to prosecute crimes that fall under their jurisdiction, whether typical national offenses or grave violations of international criminal law. The hope was that the ICC would be "a catalyst for beefing up local systems to meet minimal international standards." The ICC would also strengthen international law generally by encouraging states to implement their ICC obligations through domestic legislation. Indeed, "a major success for the Court and the international community as a whole" would be a system where national institutions would respond so effectively so as to "obviate the need for trials before the ICC" altogether.¹³⁰

Unfortunately, the world persists in a condition far removed from obviating the ICC.

The complementarity principle of the ICC could be invoked regarding North Korea if South Korea has sufficient means and abilities to provide the platform for North Korean prosecution. However, South Korea may not have the capacity to carry out the prosecution of North Korean human rights violators if North Korea attacked and devastated it.

As alluded to above, there is also the issue of bias or perceived bias if South Korean judges and prosecutors engage in the prosecution. This issue could tilt in either direction: for or against North Korean defend-

125. *Id.* at 896.

126. *Id.* at 895-96.

127. *Id.* at 903-04.

128. Morse Tan, Address at the American Soc'y of Int'l Law Mid-Year Meeting, in Miami, Fla. (Nov. 11-13, 2010).

129. Interview with Fatou Bensouda, Deputy Prosecutor, Int'l Criminal Court, in Washington, D.C. (Mar. 23-26, 2011).

130. Tanaz Moghadam, Comment, *Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals Applied to the Case of Hissene Habre*, 39 COLUM. HUM. RTS. L. REV. 471, 515-17 (2008) (quoting OFFICE OF THE PROSECUTOR, INT'L CRIM. CT., INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE 3 (2003)).

ants. Sympathetic judges who identify strongly with North Koreans as fellow Koreans might be inclined towards North Korean defendants. South Korean judges with memories of the Korean War and related hostilities might be all too eager to convict North Korean defendants.

In this respect, the participation of international judges and attorneys could help defuse either actual or perceived bias. Although such international participants may bring biases of their own, there is at least a higher probability of impartiality given their comparative lack of involvement with the Korean peninsula, unlike its domestic participants.

a. Lack of Legitimacy

Additional criticisms have been leveled at the ICC, notwithstanding the important place it holds in the world.¹³¹ The major criticisms have been that the ICC is limited in its jurisdiction, and as it is removed from the *situs* of the violations, it is also unable to develop local legal facilities.¹³² Moreover, the ICC has the severe temporal restriction that it cannot address any violations that occurred before 2002.¹³³

Each of these criticisms may be contemplated with respect to North Korea. While a case may have been made for the ICC's jurisdiction over Kim Jong-Il, it would have been difficult at best to extradite him. Attempting to extradite Kim Jong-Un at this point would likely be considered premature. It is hard to imagine the ICC contributing greatly to the development of local legal capacity in Korea, and it is manifestly distant from the location of the transgressions. Finally, many of North Korea's gross, systematic violations took place prior to 2002, a period that the ICC cannot adjudicate.¹³⁴

b. Domestic Challenges

Domestic prosecution presents another option. However, several complications may hinder efforts along this route. As one commentator put it, "[L]imitations on the structure and legitimacy of the domestic systems often preclude any transitional justice efforts."¹³⁵ Many times, a recent conflict destroys the physical and legal infrastructure of the nation, including the personnel needed for legal proceedings.¹³⁶ The nation may even lack applicable domestic law or experience to prosecute such "egregious offenses" regardless of any legal infrastructure.¹³⁷ This legal system may also lack any legitimacy:

The legitimacy of the domestic legal system is vital to any attempt at accountability, but may be absent either because it was employed as

131. See generally Dermody, *supra* note 45, at 81.

132. *Id.*

133. *Id.*

134. See generally Tan, *supra* note 1, at 693–707.

135. Dermody, *supra* note 45, at 82.

136. *Id.*

137. *Id.*

a mechanism for repression or because its personnel were complicit in the offenses committed. Transitional justice inherently implicates divisive political interests. Left to its own devices, a domestic legal system may not have the impetus to undertake such a daunting task. The temptation to forgive and forget, an often counter-productive strategy, is particularly strong when a widespread portion of the society was complicit in the atrocities.¹³⁸

Allowing domestic prosecution also opens the door for a nation to purposely downplay its prosecutorial powers and limit its purported capability to address atrocities within its own ranks; this was the case in the Indonesian Human Rights Courts.¹³⁹

Applying these considerations, another Korean war would likely obliterate the physical infrastructure of the legal system and possibly take the lives of too many civilian members of the legal profession.¹⁴⁰ If enough survive, there would be a core of attorneys and judges who may adequately try the alleged violations. How to handle the North Korean issue has proven divisive in South Korea because of the efficacy of North Korean propaganda in South Korea, the South Korean media's neglect in reporting on North Korea's human rights violations, a common ethnic identity, and partisan politics in South Korea.¹⁴¹ A portion of the South Korean populace would likely try to condone or ignore North Korean atrocities.¹⁴² All of these factors could militate against domestic proceedings.

i. Institutional Void

North Korean domestic institutions, such as its judiciary, leave much to be desired in terms of political independence, the rule of law, due process, and many other concerns.¹⁴³ In a future unified Korea, the legitimacy of the former South Korean institutions, such as the courts, would be stronger. Dickinson argues that even though the legitimacy of domestic institutions is often questionable in a post-conflict situation, the "precise nature of the legitimacy crisis varies and is inseparable from the unique history and culture of a given society."¹⁴⁴ Dickinson is also concerned that the judiciary would not only have suffered damage to its physical infrastructure, but also that the available personnel would be severely compromised:

138. *Id.*

139. ROPER & BARRIA, *supra* note 15, at 52. For example, the Attorney General of Indonesia argued that he could not prosecute crimes against humanity because these crimes were not found in the domestic legal system and in turn severely limited his own human rights investigations. *Id.*

140. *See generally* Tan, *supra* note 26, at 525–27.

141. *See id.* at 543–46.

142. *Id.*

143. *See, e.g.,* Goedde, *supra* note 43, at 1287–88 (“The current predicament concerns the creation of a viable legal regime for foreign investors, one that is reliable, fair, and transparent, without intrusive State involvement.”).

144. Laura Dickinson, *The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, 37 NEW ENG. L. REV. 1059, 1064–65 (2003).

Judges and prosecutors from the prior regime—who failed to prosecute or convict murderers, torturers, or ethnic cleansers—may remain in place, or alternatively, the new regime may have replaced the old personnel almost completely, resulting in an enormous skills and experience deficit, as well as the danger of show trials and overly zealous prosecution for past crimes.¹⁴⁵

In the instance of Korea, South Korean legal personnel would not have the problem of association with the prior regime. The dramatic divergence and resulting contrast between South Korea and North Korea should clearly disassociate the two Koreas in most regards. The concern about show trials and overly zealous prosecution may still exist, but neither is an insurmountable problem. Nonetheless, these concerns would yet remain in a solely domestic process.

c. International Challenges

Another potential problem is that international courts may appear to be foreign impositions to the local populace.¹⁴⁶ Like the problem of a body's immune system rejecting an organ transplant, a foreign court may find that it is subject to a sense that it is "other," and therefore faces rejection on these grounds. As Dickinson states: "[I]nternational courts such as the ICTY do face greater obstacles in establishing local legitimacy in the places from which the accused perpetrators come than they do in establishing legitimacy within broader international communities."¹⁴⁷

If the self-interested machinations of powerful states use human rights as a mere pretext, then they are inherently deficient in meriting the mantle of legitimacy. As Dermody explains:

[H]umanitarian intervention carries with it the fear that powerful states will use the language of human rights to justify actions motivated primarily by self-interest. . . . Despite the normative value of humanitarian intervention, the increased prevalence of human rights in international relations ensures that unilateral interventions will include the rhetoric of human rights even in actions motivated solely by narrow state interests. The recent interventions in Kosovo, Afghanistan and Iraq demonstrate that unilateral intervention is likely motivated by some combination of humanitarian and strategic interests.¹⁴⁸

145. *Id.* at 1065.

146. *Id.* at 1067.

147. *Id.* at 1068. The government of Rwanda actually rejected the creation of the ICTR for several reasons, one of which was the distant location of the tribunal in Arusha, Tanzania; the Rwandan government claimed that this distant location would contribute to the loss of the tribunal's deterrent effect on the local populace. ROPER & BARRIA, *supra* note 15, at 23–24.

148. Dermody, *supra* note 45, at 79.

i. Jurisdiction Without Consent

Professor Diane Orentlicher states: "U.S. officials and other critics of the ICC assert that the Rome Statute violates basic tenets of international law regarding state sovereignty by allowing an international court to exercise jurisdiction over nationals of states that have not adhered to the court's statute."¹⁴⁹ Not only do critics feel that the ICC lacks democratic legitimacy in this way, they contend that the ICC does not maintain the checks and balances that are found in democratic states.¹⁵⁰ Further, many think "that ICC judges will engage in expansive lawmaking from the bench by necessity [since] international crimes are defined with less precision than most national crimes."¹⁵¹ This problem is furthered by the fact that the tribunals created prior to the ICC were established under Chapter VII of the UN Charter through the UN Security Council and were held to have authority to try defendants.¹⁵²

Some scholars have also argued that the hybrid tribunals of Sierra Leone, Cambodia, and East Timor established just prior to the ICC "re-present[ed] an attempt by states to reinsert themselves into the post-conflict legal process and reassert their sovereignty."¹⁵³ On the other hand, it can be argued that the crimes pertaining to the ICC and other international courts frequently fall within *jus cogens* norms, which can be used to implement universal jurisdiction over many defendants and therefore such courts do not require any assent to apply.¹⁵⁴ A recent empirical study of the perceptions of the ICTY within Bosnia and Herzegovina provides an applicable analogy to the ICC.¹⁵⁵ The study showed that "a wide cross-section of lawyers and judges from all ethnic groups . . . were . . . ill-informed" regarding the efforts of the ICTY and were actually suspicious of the court's motive and results.¹⁵⁶ The reasons for this lack of trust and legitimacy may have involved a variety of factors, including:

[T]he location of the tribunal in the Netherlands, far from the local population, the failure of the ICTY to publicize its work within Bosnia, particularly within the legal community, the lack of participation of local actors, even as observers, and the use of predominantly common-law approaches to criminal justice that were unfamiliar to local

149. Diane Orentlicher, *Judging Global Justice: Assessing the International Criminal Court*, 21 WIS. INT'L L.J. 495, 509 (2003).

150. *Id.* at 510-11.

151. *Id.* at 511.

152. ROPER & BARRIA, *supra* note 15, at 25. The *Tadic* case was the first trial under the ICTY and expressly held "that the ICTY's establishment under Chapter VII was legal and . . . had the legal authority to try defendants." *Id.* However, acquiring defendants from neighboring countries remains a challenge for hybrid tribunals like the SCSL. *Id.* at 41.

153. *Id.* at 30.

154. See Moghadam, *supra* note 130, at 477 ("Universal jurisdiction now covers the narrow range of *jus cogens* crimes that are at the core of customary international law, such as torture, genocide, war crimes, and crimes against humanity." (Latin words in plain text in original)).

155. Dickinson, *supra* note 144, at 1067.

156. *Id.*

legal professionals, trained in a civil law tradition.¹⁵⁷

The ICC and other international courts are often located far away from the countries involved in their cases, do not involve local actors, and must overcome suspicions about their work.¹⁵⁸

d. Capacity Building

Dickinson asserts that: “Purely domestic and purely international institutions also often fail to promote local capacity-building. In post-conflict situations, the need to develop local capacity in the justice sector is often an urgent problem.”¹⁵⁹ Such a problem would rise to acute levels if the country experienced the devastation of war. In Korea, a peaceful reunification would greatly diminish the need for local capacity building due to the existing capacity, especially in the former South Korea. Even in a peaceful reunification, however, a large infusion of capacity building would be needed in the North to lay the groundwork for a successful transitional justice system.

i. Short-Term Measures

International courts, such as the ICTY, can have limited effects of brief duration: “For example, the efficacy of the Yugoslavia war crimes tribunal has frequently been called into question on the ground that the court has had little discernible impact on public attitudes in the former Yugoslavia relating to war crimes.”¹⁶⁰ While such an assessment only looks at one aspect of effectiveness, it does raise particular concerns with international courts’ lack of impact on public attitudes. In fairness to the ICTY, longer-term effects may germinate and blossom over time.

This concern materialized with respect to the Nuremberg trials as well as those of the ICTY. The impact of the Nuremberg trials was not seen on the German public until almost a generation later, when Germany began to prosecute Nazi criminals on its initiative in the 1960s.¹⁶¹ It is just as likely that many citizens of the former Yugoslavia will initially resist the “ICTY’s lessons in individual responsibility,” but the passage of time might bring about a different opinion.¹⁶² Already there is some evidence that the public in Serbia was influenced by the Slobodan Milosevic trial.¹⁶³ Bogdan Ivanisevic, a Serbian staff member of Human Rights Watch, made the following observation one year after the trial of Milosevic began:

Even though they have resistance to hearing non-Serb witnesses, people do take into consideration what they hear. The trial has

157. *Id.*

158. *Id.*

159. *Id.* at 1068.

160. Orentlicher, *supra* note 149, at 501.

161. *Id.* at 502.

162. *Id.*

163. *Id.* at 502–03.

caused reduced myth-making in Serbia. You don't hear, as you did prior to the trial, . . . that [the massacre at] Srebrenica didn't happen or that the Muslims killed themselves. I wouldn't minimize this reduced space for rewriting history. As for acknowledgment of our side's crimes, it's a psychological barrier too difficult [to cross] that the policy we supported was criminal. It will take time. It may take a new generation that was not implicated.¹⁶⁴

Decreasing the amount of revisionist history, as modest as this gain may seem, represents progress in a positive direction that can grow and mature over time. Reversing and ameliorating the effects of the totalitarian society in North Korea will also take time—such grievous wounds do not heal overnight. An appropriate tribunal can take some important steps in that direction that can substantially boost the process. As an Asian proverb attributed to Lao Tzu states, “A journey of a thousand miles begins with a single step.”¹⁶⁵

3. *Adverse Impacts*

a. Prosecution Interferes with Peace

There is also a concern that prosecutions are an obstacle to peace.¹⁶⁶ Proponents of punishment do not take into account that “[l]eaders with blood on their hands may cling more tenaciously to power if they cannot secure an airtight amnesty.”¹⁶⁷ Instead of promoting reconciliation, prosecutions might incite further grievances—or so the objection runs.¹⁶⁸

With respect to North Korea, such prosecutions would have a higher likelihood of taking place after Korea becomes reunited. Raising the prospect of prosecution *post* reunification in official interactions would decrease the danger embedded in this objection. Whether raised with the leadership of North Korea or not, such a fear of prosecution may already exist due to other prosecutions around the world. Also, given that North Korea already has designs upon reunifying the peninsula by force and has already engaged in various types of belligerent behavior, it would be all too facile to scapegoat a possible tribunal for hostile actions that North Korea would have committed in any case.¹⁶⁹

In another vein, greater justice deepens a more full-orbed peace. Ignoring issues of justice cheapens the blood of those who have already experienced extreme violence at the hands of North Korean despotism. For victims of such horrendous suffering, it is the totalitarian regime that has already been anything but peaceful.¹⁷⁰ The difficulties and possible peril involved in a tribunal do not mean that it should not be attempted.

164. *Id.*

165. *Lao Tzu Quotes*, THINKEXIST.COM, http://thinkexist.com/quotation/the_journey_of_a_thousand_miles_begins_with_one/214527.htm (last visited Nov. 11, 2012).

166. Orentlicher, *supra* note 149, at 500.

167. *Id.*

168. *Id.*

169. Tan, *supra* note 26, at 527.

170. Tan, *supra* note 1, at 704–07.

At the same time, the specifics of what, when, where, and how call for careful wisdom.

4. *Hard Lessons from History*

a. Kosovo Case

i. *First Attempt—Under UN Management*

Another instance from which lessons may be drawn for North Korea is the extreme case of Kosovo. The mass atrocities committed in Kosovo did not leave any fully-functioning domestic institutions standing after the conflict ended.¹⁷¹ It was this dearth of domestic institutions that led the international community and large segments of the local population “to establish an interim transitional administration, run by the United Nations.”¹⁷² Its purpose “was to restore peace and stability and to develop the democratic institutions, including a fully-functioning judiciary, necessary to pave the way for self-governance.”¹⁷³ When there is no functioning court system and no other political institution with the capacity or will to establish this kind of system, it is extremely difficult to legitimize institutions.¹⁷⁴ “Moreover, if the lack of formal institutional legitimacy is difficult to confer on a fledgling justice system, the establishment of informal legitimacy—broad societal acceptance of institutions—is even more difficult to establish.”¹⁷⁵

The conflict in Kosovo severely damaged more than the physical infrastructure of the legal system.¹⁷⁶ The legitimacy of the system was also in question because it bore the taint of the former oppressive regime.¹⁷⁷ The legal system did not have the confidence of the public, partly due to the prior systematic exclusion of the ethnic Albanians by the Serbs, who were the former administrators of the justice system.¹⁷⁸ Not only were court buildings, prisons, and equipment destroyed, the need for human resources was immense.¹⁷⁹ This is because:

In Kosovo, only Serbs had the experience and training to work as judges and prosecutors, yet these Serbs often refused to work in the new system because doing so would constitute a betrayal of their ethnic heritage. Albanians had some training but little experience, as they had been excluded from the system for many years.¹⁸⁰

With respect to North Korea, the similarities with Kosovo would vary depending on the conditions on the Korean peninsula when such a tribunal might be attempted. Another Korean war could wreak mass destruc-

171. Dickinson, *supra* note 144, at 1065.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 1068.

180. *Id.*

tion on not just the physical infrastructure,¹⁸¹ but could also decimate judges and attorneys in South Korea, who would be the best prospects domestically for stepping into a tribunal regarding North Korea.¹⁸² North Korea has threatened before to turn Seoul, which is located not far from the 38th Parallel, into a “sea of fire” or lake of fire,¹⁸³ and has the military means to do so;¹⁸⁴ thus, the possibility of widespread destruction presents itself as a valid concern.

On the other hand, if the two Koreas reunite peacefully, the physical infrastructure and members of the legal profession would remain. In such an instance, a united Korea would have much more ample resources to hold a tribunal.¹⁸⁵ However, it is uncertain whether sufficient political will to have such a tribunal would exist. A peacefully united Korea may not require as much international support, and it is conceivable that a substantial portion of such legal proceedings could move forward domestically. Choice of law and domestic fora for such proceedings would prove challenging to resolve. If the tribunal utilized international law, it would likely require more international support and involvement.

ii. Second Attempt—A Hybrid Tribunal

Bias and legitimacy remain important problems to consider in creating a tribunal.¹⁸⁶ Sometimes local systems carry so much “baggage” of bias and illegitimacy that more international involvement can help to relieve this baggage of the domestic system. Turning again to Kosovo, there is evidence that the establishment of a new local system and the over-correction of the imbalances create new problems instead of solving old ones.¹⁸⁷ For instance,

it was initially easier to appoint ethnic Albanian judges than ethnic Serb judges. Only a few Serb judges were willing to serve, and even those who were appointed subsequently stepped down, in response to pressure from Belgrade. Yet without representation of Serbs within the judiciary, the independence of the decision-making, key to legitimacy among the entire local population, was severely in question. . . . Under these circumstances, there was little ability for the local justice system to deliver verdicts perceived to be legitimate in trials of those suspected of committing mass atrocities.¹⁸⁸

As discussed above, North Korean judges would similarly be suscepti-

181. See generally Tan, *supra* note 26, at 525–27.

182. See *supra* Part II.A.2.b.

183. Paul Richter, *Two-War Strategy Faces Test*, L.A. TIMES (Feb. 13, 2003), <http://articles.latimes.com/2003/Feb/13/World/fg-twowar13>; Tan, *supra* note 26, at 526.

184. Tan, *supra* note 26, at 527–28.

185. See *supra* Part II.A.1.a.

186. See Dickinson, *supra* note 144, at 1066–67.

187. *Id.* at 1066.

188. *Id.* “In fact, due to concerns about lack of due process and insufficient evidence, several judgments imposed against Serb defendants by panels of ethnic Albanian judges were later thrown out by panels that included international judges.” *Id.*

ble to claims of illegitimacy and bias.¹⁸⁹ Given the already-existing lack of judicial independence from political control, judges in North Korea should be disqualified from judging.¹⁹⁰ As members of the few in North Korea who have reaped benefits from the regime, their potential biases also disqualify them.

In this type of situation involving an atmosphere of domestic bias and illegitimacy, hybrid tribunals, as Kosovo has shown, can prove to be helpful alternatives to either purely domestic or purely international courts by increasing legitimacy, decreasing bias, and enhancing capacity.¹⁹¹ “The sharing of responsibilities among international and local actors in the administration of justice, particularly with respect to accountability for serious human rights crimes, helps to establish the legitimacy of the process as well as strengthen the capacity of local actors.”¹⁹² Such amelioration in regards to impartiality, legitimacy, and expertise enhanced matters in Kosovo and can potentially aid in bringing a measure of justice to the people of North Korea.¹⁹³ In Korea, however, there would likely be pronounced sensitivity towards anything that smacked of foreign imperialism. Additionally, a hybrid tribunal must try to save the face of Koreans as much as possible throughout such a process. Such considerations would be critical to the success of a hybrid tribunal in North Korea.

Furthermore, it would be best if there was a broad international effort rather than, for example, an exclusively American one.¹⁹⁴ A solely American effort would play into the propaganda of North Korea regarding American “imperialism” on the peninsula.

b. Cambodian Case

From a historical perspective, Cambodia provides an appropriate analogy to North Korea in a number of ways. Both have been Communist regimes under oppressive dictators; both have taken place in Asia; and both have resorted to gross, systematic violations of human rights of their own people. Contemplating the Cambodian experience can provide lessons applicable to North Korea.

The Communist Party of Kampuchea (CPK), commonly known as the Khmer Rouge (KR), took control of Cambodia in 1975 and remained in power until Vietnamese forces drove most of the regime to the Cambodian–Thai border and largely out of power.¹⁹⁵ Under the leadership of Pol Pot, the KR “strove to build a socially and ethnically homogeneous society by abolishing all preexisting economic, social, and cultural

189. See *supra* Part II.A.2.b.

190. See, e.g., Goedde, *supra* note 43, at 1271–72 (explaining how state coercion in the “rule of law” is legitimized in North Korea and other socialist countries).

191. See Dickinson, *supra* note 144, at 1068–69.

192. *Id.*

193. *Id.* at 1068–69.

194. See generally Tan, *supra* note 26, at 547–53.

195. Brian Tittmore, *Khmer Rouge Crimes: The Elusive Search for Justice*, 7 HUM. RTS. BRIEF 3, 3 (1999).

institutions, and transforming the population of Cambodia into a collective workforce.”¹⁹⁶ In the process, the regime displaced millions of Cambodians by subjecting them “to forced labor and inhumane living conditions, including physical exhaustion, starvation, and disease.”¹⁹⁷ In an effort to “purge perceived ideological enemies” throughout the country, the KR targeted “particular ethnic minorities, religious leaders, teachers, students, and other educated groups” for torture and subjected them to “extra-judicial executions.”¹⁹⁸

After its overthrow in 1979, the KR continued to fight the newly-established People’s Republic of Kampuchea in certain parts of Cambodia and even retained enough power over sections of the country to obtain Cambodia’s seat in the United Nations.¹⁹⁹ This struggle continued until the 1990s:

It was not until approximately 1993 that the Khmer Rouge ceased to be an active fighting force. Since that time, many Khmer Rouge members have returned to civilian life and now live freely in parts of Cambodia. The Cambodian government has integrated other members into the Cambodian national army and granted them immunity from prosecution under a 1994 Cambodian law that criminalized membership in the Khmer Rouge.²⁰⁰

Although it seems that international attention to human rights in North Korea is waxing rather than waning, sometimes it has been submerged under important geopolitical and strategic concerns. In this way, the situation in North Korea is analogous to the Cambodian situation. “The decades following the overthrow of the Khmer Rouge (KR) were marked by international apathy towards Cambodia, and the limited attention given was concentrated on the establishment of a non-communist government rather than the adjudication of potential crimes.”²⁰¹ Indeed, “[o]nly in 1997, after nearly two decades of relative inaction by the international community on the matter, did the United Nations [] and the Royal Government of Cambodia [] begin to discuss establishing a tribunal to try the alleged perpetrators.”²⁰² Regarding North Korea, much more attention comes from the international community regarding its nuclear weapons than the devastation already wrought through its extensive trampling upon the human rights of its own people.

Returning to the Cambodia example, once order was established, both the Cambodian government and the international community began to

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. Scott Luftglass, Note, *Crossroads in Cambodia: The United Nation’s Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge*, 90 VA. L. REV. 893, 901–02 (2004).

202. Kelly Whitley, *History of the Khmer Rouge Tribunal: Origins, Negotiations, and Establishment*, in THE KHMER ROUGE TRIBUNAL 29 (John D. Ciociari ed., 2006).

respond to the overthrow of the KR.²⁰³ Unfortunately, the Cambodian people did not derive a benefit from either of the responses, which only produced more difficulties in bringing the former leaders of the Khmer Rouge to justice.²⁰⁴

Cambodia responded in 1979 with what is widely regarded as a farcical trial of both Pol Pot, the former dictator, and Ieng Sary, the Standing Committee Member and Deputy Prime Minister for Foreign Affairs.²⁰⁵ The two leaders were tried in absentia without the ability to present a defense, found guilty of the commission of genocide, and sentenced to death by a domestic tribunal.²⁰⁶

Many of the officers responsible for the KR atrocities were not and could not be punished because they died before the establishment of a proper tribunal, which emphasizes why a tribunal should be established as soon as possible after the fall of the *ancien regime*.²⁰⁷ As urgent as a tribunal for North Korea would be, it would not enhance the rule of law to engage in a hypocritical breach of due process in trying Kim Jong-Un and his top officials. Any such trial should be full and fair, with built-in protections for the criminal defendants. Otherwise, it would stoop to the sort of truncated mockery of a process that North Korea itself inflicts upon its own people.

North Korea's judiciary, as a mere tool for the ruling regime, lacks po-

203. *See id.* at 30.

204. *Id.* at 31.

205. Luftglass, *supra* note 201, at 902; *see also* Whitley, *supra* note 202, at 31.

206. *Id.* These trials emerged as problematic and procedurally unfair:

The international community refuses to recognize these trials as legitimate for several reasons. First, the two leaders were tried in absentia, a violation of the International Covenant on Civil and Political Rights (ICCPR). Second, the Decree Law establishing the "People's Revolutionary Tribunal" contained language denouncing the two defendants, functionally assuming their guilt, a violation of the international norm of the "presumption of innocence." Third, the definition of genocide used at the trial did not comport with the internationally accepted definition, and it was crafted to virtually ensure the guilt of the defendants. The definition of genocide included:

planned massacres of groups of innocent people; expulsion of inhabitants of cities and villages in order to concentrate them and force them to do hard labor in conditions leading to their physical and mental destruction; wiping out religion; [and] destroying political, cultural and social structures and family and social relations. On balance, the People's Revolutionary Tribunal was neither normatively fair nor in conformity with prevailing international law.

The international community was predominantly focused on ensuring Cambodian territorial sovereignty and stability, at the expense of a thorough and adequate investigation and prosecution of those responsible for the atrocities. The U.N. was involved in the settlement agreements terminating the Khmer Rouge leadership and establishing transitional Vietnamese occupation.

Luftglass, *supra* note 201, at 902–03 (quoting GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND TENG SARY (Howard J. De Nike et al. eds., 2000)) (footnotes omitted); *see also* ROPER & BARRIA, *supra* note 15, at 38.

207. Whitley, *supra* note 202, at 12–13.

litical independence and strength.²⁰⁸ It certainly does not uphold human rights. Similarly, “the weakened state of the Cambodian judiciary from years of civil war and the international nature of the crimes to be prosecuted led the government to believe that international participation was necessary to ensure that the trials met international standards of justice.”²⁰⁹ As in Cambodia, international participation would greatly enhance the chances that the gross, systematic violations of human rights in North Korea will be addressed.

The description of the Cambodian human rights crisis may readily be analogized with North Korea in its severity and gravity, as well as in the lack of response by the international community. For example, the UN’s Human Rights Commission’s Sub-Commission on Prevention of Discrimination and Protection of Minorities issued a report on human rights issues in Cambodia in March 1979.²¹⁰ The Sub-Commission labeled the abuses that it recorded from the last four years as “‘the most serious [human rights violations] that had occurred anywhere in the world since nazism,’ concluding that they ‘constituted nothing less than autogenocide.’”²¹¹ However, after the Vietnamese occupied Cambodia that same year, the UN ended its efforts to investigate the widespread atrocities.²¹² Even the International Conference on Kampuchea that met in 1981 in New York soon after the report focused not on the human rights issues but “almost entirely on the Vietnamese involvement.”²¹³ Other facts about the international community’s reaction (or lack thereof) are even more startling:

During the entire period of its rule the Khmer Rouge occupied the Cambodian seat in the U.N., without even a single Western country voting against its retention. Perhaps more alarmingly, no country has invoked the Genocide Convention on behalf of the victims, brought a claim against Cambodia before the International Court of Justice, or extradited Khmer Rouge leaders for trial via universal jurisdiction.²¹⁴

On the other hand, the international community did “take a prominent role in the multilateral Paris Peace Accords of 1991, which reinstated the Cambodian government’s full independence from Vietnam,” and “on

208. See, e.g., Goedde, *supra* note 43, at 1287. (“Creating an independent judiciary, devolving power to the people, applying civil liberties fairly—these are all counterintuitive processes in the Party-conscious hierarchy of North Korea.”).

209. Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 N.Y.U. J. INT’L L. & POL. 1013, 1033 (2009). The experts that assessed the human rights abuses in Cambodia suggested a tribunal similar to the ICTR and ICTY because of the various independency problems in local judiciary. ROPER & BARRIA, *supra* note 15, at 39. But after a Sen-staged coup, the Cambodian government rejected the assessment and wanted instead to construct a hybrid tribunal. *Id.*

210. Luftglass, *supra* note 201, at 903.

211. *Id.* (quoting U.N. ESCOR, Hum. Rts. Comm., 35th Sess., 1510th mtg. at 7, U.N. Doc. E/CN.4/SR. 1510 (1979)) (alteration in original).

212. *Id.*

213. *Id.*

214. *Id.* at 904.

October 23, 1991, the Paris Conference on Cambodia signed a complex set of settlement accords.”²¹⁵ Surprisingly though, the mandate that originally established the conference did not even reference concepts like justice, human rights, or criminal tribunals.²¹⁶ It appeared that Cambodian sovereignty was a higher priority for the international community than the blatant human rights issues, which were effectively cordoned off to the side.²¹⁷ “[T]he international community prioritized Cambodian sovereignty and control, but would later need to undermine that control in order to lobby for an international tribunal.”²¹⁸ Unfortunately for many Cambodians, the UN subsequently rejected both an international criminal tribunal and a possible case before the International Court of Justice (ICJ).²¹⁹

The North Korean situation could run into future challenges involving the international community akin to those experienced in Cambodia. To help avoid similar complications, human rights redress should be high on the agenda of any post-reunification powerbroker from the outset. If such redress is allowed to take a back seat early in the process, it will become that much more challenging for it to come to the foreground later.

The international community’s approach toward Cambodia, emphasizing the Cambodian government’s duty to human rights treaties and standards, includes an attempt to find an indirect route by addressing the human rights concerns in Articles 15 and 17 of the Paris Peace Accords.²²⁰ The approach contains implications that might apply to North Korea:

Article 15 included several major human rights provisions: it stated that all Cambodians shall enjoy the rights and freedoms enumerated in the Universal Declaration of Human Rights and other international instruments; it imposed on Cambodia an affirmative duty to protect human rights and institute preventive measures to ensure that the policies and practices of the Khmer Rouge era do not return; in an effort to eliminate the international neglect that prevailed during the Khmer Rouge era, Article 15 imposed corresponding obligations on other signatories; and Article 17 imposed on the U.N. Commission on Human Rights the obligation to monitor the human rights conditions in Cambodia. Professor Ratner best characterized the provisions as “viewed as best tackl[ing the problem] by

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* “Professor Steven R. Ratner, who represented the United States during the negotiations at the Paris Conference, stated: ‘Although all the participants believed that human rights should be mentioned, it was harder to reach consensus on how to . . . punish Khmer Rouge officials responsible for the atrocities and to prevent the repetition of these acts. As a result, the human rights obligations at times appear opaque.’” *Id.* at 904–05 (quoting Steven R. Ratner, *The Cambodia Settlement Agreements*, 87 AM. J. INT’L L. 1, 25–26 (1993)).

220. *Id.* at 905.

obligating Cambodia to meet its commitments under the pertinent human rights instruments, especially the Genocide Convention.”²²¹

Given North Korea’s ratification of a number of major human rights treaties,²²² we may similarly apply these treaties to North Korea. Simply holding North Korea to its already-existing commitments to international law can greatly help address the heinous crushing of its own people.

As in Cambodia, the international community has not paid sufficient attention to North Korea’s human rights situation, although the tide may be turning in this regard. The experiences in Cambodia have taught the international community that its neglect over several decades has decreased the international community’s ability to influence present attempts to create a tribunal.²²³ Luftglass stated that:

As Cambodian scholar Brian D. Tittlemore observed: “[T]he absence of timely intervention by the international community to prevent or punish Khmer Rouge atrocities significantly limited the United Nation’s present-day ability to influence the creation of a Khmer Rouge tribunal or to ensure that any such tribunal is competent, impartial, and effective.”²²⁴

Luftglass went on to emphasize that past neglect creates concerns that the international community is not acting in the best interest of Cambodia, and international action may end up doing more harm than good.²²⁵

As has been the case in Cambodia (by way of a negative lesson), the sooner North Korea’s human rights situation can receive greater attention and care from the international community the better. Delay damages the prospects of timely and effective intervention, similarly to how delaying surgery in certain instances can harm a patient and damage the prognosis.

What may be learned from the Cambodian experience for North Korea? First of all, the more aware and educated the international community becomes about the grave human rights situation, the more support there may be for an eventual tribunal. NGOs, international organizations, and concerned individuals would likely continue to play leading roles in this regard, as the bulk of national governments are unlikely to lead in such an effort.

A tribunal that would take place as soon as possible following reunification would seem to be the most feasible approach. The ICC option, as attractive as it appears in some regards, would likely face difficulty in extraditing the newly appointed Kim Jong-Un, and such an attempt might

221. *Id.* (quoting Ratner, *supra* note 219, at 40) (alteration in original).

222. North Korea has signed onto both the International Covenant on Economic, Social and Cultural Rights, and the Covenant on Civil and Political Rights. Tan, *supra* note 1, at 689.

223. Luftglass, *supra* note 201, at 905.

224. *Id.* at 905–06 (quoting Brian D. Tittlemore, *Securing Accountability for Gross Violations of Human Rights and the Implications of Non-Intervention: The Lessons of Cambodia*, 7 ILSA J. INT’L & COMP. L. 447, 451–52 (2002)) (alteration in original).

225. *Id.* at 906.

provoke a war. However, extradition of the inexperienced and untested Kim Jong-Un might prove much easier than it would have been to try to extradite his late father, Kim Jong-Il. If domestic prosecution does not or cannot provide satisfactory resolution, a hybrid tribunal appears to be the best option. In such a tribunal, corruption must be avoided and bias must be reduced as much as possible. In addition, the tribunal must communicate well with the general public, and a sensible blend of domestic and international resources should be utilized with an eye towards aiding the domestic system long term. This Article now culminates in considering the prospects of such a hybrid tribunal.

C. A HYBRID TRIBUNAL

1. Characteristics (Factors for Consideration)

a. Transitional Justice

A “third generation” of courts—hybrid courts—has emerged to address the challenges faced by purely international or domestic tribunals.²²⁶ Hybrid courts, which combine aspects of international and domestic courts, attempt to increase legitimacy in pursuing justice and to build the capacity of a renewed domestic system, while providing a workable and less expensive alternative to other less effective international justice options.²²⁷ Not only does the hybrid tribunal provide legitimacy, which is crucial in itself, but a hybrid tribunal also provides expertise in the form of international judges.²²⁸

Hybrid tribunals join international judges with local judges to apply amalgamated procedures and law that incorporate intrinsic domestic values as well as established international norms.²²⁹ Local lawyers also work alongside their international counterparts in the process.²³⁰ This hybridized tribunal acknowledges the importance of ideologically distancing the criminal court process from the perceptions of impropriety inherent in the local judicial system.²³¹ Similarly, the hybrid court engages local stakeholders and incorporates them into the process.²³²

Hybrid tribunals have risen in response to the view that “solution[s] should be carefully tailored to the conflict and the needs and interests of the parties through an inclusive design process” instead of the assumption “that internationalized criminal courts are the best mechanism for resolving every dispute.”²³³ Hybrids are a recent innovation in international

226. Etelle Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, 352–56 (2006).

227. Dermody, *supra* note 45, at 83.

228. *Id.* at 84–85.

229. Moghadam, *supra* note 130, at 490–91; *see also* ROPER & BARRIA, *supra* note 15, at 36 (“The legal basis of the SCSL and the ECC provided the governments much more involvement and control over the final institution.”).

230. Dermody, *supra* note 45, at 82.

231. *See* Monaghan, *supra* note 130, at 511–14.

232. Higonnet, *supra* note 226, at 361–62.

233. Ramji-Nogales, *supra* note 116, at 4.

justice, a next generation alternative that responds to specific criticisms of its ad hoc international tribunal predecessors (i.e., the 1993 ICTY and the 1994 ICTR).²³⁴ These criticisms include the courts' vast distance from the countries in which violations took place, which disconnects the courts from the populace.²³⁵ The generally more proximate locations of hybrid tribunals provide readier access to testimony and evidence. The ad hoc tribunals have also received criticism for the slow pace of the trials and the massive expense of trying even a handful of perpetrators.²³⁶ In hybrids, by contrast, the dual goals of legitimacy and capacity building have fewer obstacles towards accomplishing their goals while operating in a more cost-effective manner.²³⁷ International participation in the prosecution also puts other dictators on notice that such egregious crimes against humanity can be met with accountability.²³⁸

In 2000, the Special Court for Sierra Leone (SCSL)²³⁹ was created as an autonomous court separate from the local court system through an agreement with the UN.²⁴⁰ The SCSL coordinated its efforts with the Sierra Leone Truth Commission.²⁴¹ International judges held a majority against a minority of local judges in the tribunal.²⁴² In 2003, the Extraordinary Chambers in the Courts of Cambodia (ECCC) was formed through protracted negotiations with the UN.²⁴³ The ECCC differs from the Special Court because it is part of the Cambodian court system, applies both Cambodian and international law, and consists of a narrow majority of local judges and a minority of international judges.²⁴⁴ In 2000, East Timor and Kosovo tribunals were formed by domestic regulations, which created panels of international and national judges.²⁴⁵ In 2005, the War Crimes Chamber (WCC) of Bosnia and Herzegovina was created as a domestic institution functioning under national law.²⁴⁶ It was designed to facilitate the ICTY's exit strategy by prosecuting cases that the tribunal referred for adjudication.²⁴⁷ Such prior hybrid tribunals provide predi-

234. Moghadam, *supra* note 130, at 490–91.

235. *Id.* at 491. The tribunals were plagued with other issues as well. For example, “[t]he ICTY’s greatest difficulty early on was securing the apprehension of indictees,” especially that of high ranking officials. ROPER & BARRIA, *supra* note 15, at 24–25. The ICTR experienced problems with the concurrent jurisdiction of the national court and the international tribunal. *Id.* at 25–26.

236. Moghadam, *supra* note 130, at 490–91.

237. Higonet, *supra* note 226, at 349.

238. Sterio, *supra* note 2, at 903–04.

239. There is a discussion of how the SCSL is better than its predecessors in Raub, *supra* note 209, at 1037.

240. Moghadam, *supra* note 130, at 492.

241. *Id.*

242. *Id.* at 493.

243. *Id.*

244. *Id.*; ROPER & BARRIA, *supra* note 15, at 42–43. The court also maintains investigating judges, co-prosecutors, and an expansive jurisdiction, but it still has had the problem of finding and effectively prosecuting high ranking officials. *Id.*

245. Moghadam, *supra* note 130, at 493.

246. *Id.*

247. *Id.* at 493–94.

cate examples for contemplating a hybrid tribunal for North Korea's gross and systematic violations of human rights.

b. Advantages

Even with only a handful of modern hybrid attempts under our collective and figurative "belts," advantages to their employment appear to be greater legitimacy with the participants than other options; capacity building of the local legal systems; and infusion with international norms.²⁴⁸ Experience also tends to show that these tribunals are quicker to indict individuals and bring them to trial.²⁴⁹

Hybrids contemplate the concomitant goals of respecting sovereignty while upholding universal standards, making it possible to prosecute criminals domestically for violating universal norms.²⁵⁰ As a result, the hybrid system represents the interests of all in the context of international justice.²⁵¹

i. Legitimacy

Hybrid courts have the potential to claim a stronger overall basis of legitimacy than the previous generations of either pure international or domestic processes.²⁵² The tribunal team linking national and international lawyers, judges, and other experts helps disarm challenges to legitimacy on grounds of imperialism or domestic biases.²⁵³ Collaboration between international actors and regional partners further mitigates the possible perception that developed powers are merely intervening to exact some arbitrary form of revenge on dictators.²⁵⁴ Overall, involving the local citizenry and its legal institutions may also increase the likelihood that hybrid tribunals "will bring a greater sense of reconciliation."²⁵⁵

Legitimacy concerns are a major hurdle for international judges in transitional justice proceedings where marginalized groups have been violently oppressed by the dominant group.²⁵⁶ A residual lack of faith in legal processes may be borne into the post-conflict system, and special attention is needed to "resolve prior imbalances and recalibrate the equities" so as to craft a solid foundation for the new legal system.²⁵⁷ A process that is not perceived as legitimate tends to alienate the local population and call into question the international community's commit-

248. Dermody, *supra* note 45, at 83.

249. ROPER & BARRIA, *supra* note 15, at 93.

250. One advantage is that the hybrid tribunal is located in the *locus delicti*. Therefore, "[t]hrough public stigmatization and just retribution, local trials are able to expose those responsible for atrocities to the local population, leading to gradual reconciliation and a cathartic process for victims." See Raub, *supra* note 209, at 1042.

251. Moghadam, *supra* note 130, at 491-92.

252. Dickinson, *supra* note 144, at 1064.

253. *Id.* at 1069-70.

254. *Id.* at 1069.

255. ROPER & BARRIA, *supra* note 15, at 93.

256. See Moghadam, *supra* note 130, at 513.

257. *Id.* at 513-14.

ment to genuine justice.²⁵⁸ With respect to this factor in North Korea, it would depend on what circumstances exist when the tribunal is created. Pertinent factors would include whether Korea was unified or still divided; whether the resources of South Korea would be available or unavailable due to wartime devastation or another reason; and whether qualified and sufficiently unbiased personnel could be drawn from North Korea (which, as demonstrated above, presently appears to be a dubious possibility).²⁵⁹

Presumably, less biased and more disinterested international judges who consult with their local partners in joint decision-making processes can do much to increase public belief in and acceptance of the results.²⁶⁰ The result of judicial collaboration can be a standard of shared values defined by the integrated international and regional partnership.²⁶¹

International judges benefit from their proximity to the local population in hybrid models. The sensitivity to local issues, local culture, and local approaches to justice is more readily accessible when making decisions “on the ground” and in the conscious presence of the affected population.²⁶² The presence of these international actors may also enhance perceptions of judicial independence that are especially important in transitional nations which have a recent tradition of interference or overt control over the judiciary.²⁶³ In North Korea, no politically independent judiciary exists.²⁶⁴ However, South Korea does have both judicial infrastructure and personnel who can contribute.²⁶⁵ National judges involved in the process receive the benefit of training, exposure to norms of international law, and skills useful for the long-term capacity building of the national judiciary for use at the termination of the tribunal’s work.²⁶⁶

Similarly, international judges bring a level of impartiality in an environment that risks being highly politicized.²⁶⁷ The inclusion of international judges provides a layer of insulation against intimidation from local judges’ own governments or other interference with the rule of law.²⁶⁸ When this hedge against improper interference is absent, the specter of illegitimacy may manifest itself and obstruct the process in some way.²⁶⁹

258. ROPER & BARRIA, *supra* note 15, at 94.

259. *See generally supra* Parts II.A.1. & II.A.2.

260. Moghadam, *supra* note 130, at 514.

261. *Id.* at 519–21.

262. “The incorporation of local perspectives through population surveys, studies of traditions, and participation of moral authorities should increase the legitimacy of the source from, and process through, which [hybrid courts] are created.” Ramji-Nogales, *supra* note 116, at 66.

263. *See Moghadam, supra* note 130, at 511.

264. Goedde, *supra* note 43, at 1287.

265. *Id.* at 1285.

266. Moghadam, *supra* note 130, at 491–92. Roper and Barria agree with Ramji-Nogales in that hybrid tribunals have created greater educational and training programs than international tribunals. ROPER & BARRIA, *supra* note 15, at 93.

267. Moghadam, *supra* note 130, at 511.

268. *Id.*

269. *Id.* at 511–12.

Moghadam gives this example: the Iraqi High Tribunal (IHT), a pure domestic tribunal with foreign supervision, barred international judges from participation and consequently lacked a sufficient level of quality in the proceedings.²⁷⁰ As a result, the trial of the ruthless Iraqi dictator Saddam Hussein was widely viewed as “lacking in legitimacy and fairness,” including vulnerability to political interference and government manipulation.²⁷¹

However, one issue regarding international participation in Korea involves language. If international personnel take part and the Korean community is to perceive the proceedings as legitimate, the tribunal would have to address the issue of language. Similar to tribunals in the past, a Korean hybrid tribunal would have to utilize both Korean, the native language of the peninsula, and English, the *de facto* international language. Although this could be seen as a challenge to any Korean hybrid tribunal, successfully integrating both languages into the proceedings would strengthen the institution’s legitimacy and acceptance with the local population.²⁷² For example, the Inter-American Court of Human Rights utilizes both Spanish and English.²⁷³

Edmundo Hendler suggests that permitting a newly-awakened nation access to the results of the judicial process is not a matter of simple interest: “Apart from its socializing function through the education of the people, there is the legitimating function that comes from the acceptance of the law as a body of rules to be followed.”²⁷⁴ In fact, he continues, it is a necessary first step for ensuring that the rule of law is adopted by a transitional community or else it will supplant its own formal mechanisms of justice—like an overflowing river pouring over its banks:

Societal opinion will always find a channel; it may be chaotic, as is the case with lynching, assemblies cheering and hooting judges, or street demonstrations calling for television broadcasts, or it may be in the form of institutionalized answers, like juries, lay magistrates, popular councils of advisers or any similar variation. . . . There is no need to explain how uncontrollable the pressure of public opinion can become in cases of spontaneous response like the one described above.²⁷⁵

Community participation begins with community awareness. To cultivate community awareness, intervening actors must ensure the public has access to recordings and court declarations of the proceedings.²⁷⁶ Such materials can then be broadcasted to the entire nation through the news outlets. As a collection of records comes to light throughout the process,

270. *Id.*

271. *Id.* at 512.

272. Dermody, *supra* note 45, at 100–01.

273. INTER-AM. CT. H.R. RULES OF PROCEDURE art. 22 R.1–2.

274. Edmundo Hendler, *Lay Participation in Argentina: Old History, Recent Experience*, 15 SW. J. L. & TRADE AM. 1, 18–19 (2008).

275. *Id.* at 4.

276. Dermody, *supra* note 45, at 80.

the documentation of the previous regime's actions may help alleviate the tension surrounding what may be thought of by some as international intrusion and further justify the grounds for collaboration by local legal experts.²⁷⁷

The diffusion of norms into societies afflicted by institutionalized atrocities may be accomplished to an extent by integrating international standards of justice and human rights into domestic law.²⁷⁸ This takes place in the hybrid tribunal environment through uniformly applying just legal principles in practice and by showcasing the interaction between elite actors throughout the process.²⁷⁹ Judges, law experts, secretaries, police officers, local news outlets, and anyone from the community who has contact with the hybrid court may adopt the normative values. This is especially important when there is an opportunity for domestic or international interference in the national reconstruction process by individuals or groups that supported the abuses of the previous regime. Individuals who view the fruits of the tribunals first-hand can resist accusations of impropriety and assist in the establishment of the post-regime judicial system.

ii. Capacity Building

National institutions in post-conflict countries are often physically destroyed through years of civil warfare and political neglect or through judicial corruption and intervention by the former regimes.²⁸⁰ The judicial systems themselves may lack physical infrastructure, competent personnel, and public confidence. Entire groups may have been denied access to education or professional choice under the old regime.²⁸¹ "In the wake of mass violence, there may be very few trustworthy leaders left in the afflicted society, not to mention the society's physical infrastructure, which may have been completely destroyed."²⁸² Sharing the responsibilities of administration of justice between local and international actors is one way of establishing the legitimacy of the judicial process while simultaneously strengthening the domestic capacity for administering justice in a post-regime environment.²⁸³

The hybrid judicial process allows society to transition toward stability and security in the new system, while acknowledging the atrocities committed by the former regime.²⁸⁴ It has also been characterized as a tool to rebuild domestic judicial systems by providing judicial training for these systems, while serving as an institution of justice.²⁸⁵ There are in-

277. *Id.* at 80–81.

278. *Id.* at 100.

279. *Id.*

280. See Moghadam, *supra* note 130, at 521–25.

281. *Id.*

282. Ramji-Nogales, *supra* note 116, at 67.

283. Dickinson, *supra* note 144, at 1068–69.

284. Dermody, *supra* note 45, at 80–81.

285. ROPER & BARRIA, *supra* note 15, at 93.

stances when local judiciaries may be ready, willing, and potentially able to prosecute atrocities, namely: when the local judicial institution is still active and the country is willing to prosecute; when the offender occupied a lower status in the perpetration hierarchy; or when lesser offenses were committed. The ICC explicitly incorporates a spirit of “complementarity” into its own statute, accepting that member states may receive jurisdiction to prosecute criminal cases on their own.²⁸⁶ Reasons for this include the fact that international tribunals require a large amount of resources and veteran judges to try individuals higher up on the chain of command who are more directly responsible for causing atrocities.²⁸⁷

[I]t is important to let national courts prosecute lesser offenders. National jurisdictions, especially in war-torn countries, have to grow, so that allowing them to prosecute offenders of important crimes might help them rebuild their criminal codes and their judiciary. Prosecutions might also be necessary as part of the country’s healing process, and prosecutions in the country that suffered a civil war are going to be a lot more effective than ICC prosecutions taking place at [T]he Hague . . . [T]he advantages of prosecution in the home country include: the proximity of the evidence and the witnesses; the judges’ awareness of the nature of the conflict that occurred; the government’s cooperation; as well as the fact that such national prosecutions might be part of the home country’s healing process.²⁸⁸

A hybrid tribunal for North Korea can try the most responsible defendants, leaving the prosecution of those less responsible to the reconstituted domestic system.

The effectiveness of norm diffusion also depends on the availability of a legal system that is willing to accept international norms.²⁸⁹ While tribunals may play a part in holding accountable those who grossly violate and abuse their citizenry, international standards and practices alone may not be enough to overcome normative beliefs cultivated throughout decades of brutal oppression and propaganda, such as in North Korea.²⁹⁰

Regardless, Professor Moghadam posits that the hybrid methodology can be adapted for any state.²⁹¹ He states that hybrid tribunals help enhance the interpretation of national law by helping it to conform to international standards.²⁹² This assumes of course that the international standards would actually be an improvement over the domestic ones—a likely scenario in the context of gross, systematic violations of human rights as in the DPRK.

Hybrid tribunals also have the effect of strengthening the network of normative accountability across domestic and international borders.²⁹³

286. Sterio, *supra* note 2, at 903–04.

287. *Id.* at 904.

288. *Id.*

289. Dermody, *supra* note 45, at 100–01.

290. *Id.*

291. Moghadam, *supra* note 130, at 523.

292. *Id.* at 523–24.

293. *Id.*

Fair conduct of tribunals can also demonstrate the principle of uniform application of law that is reasonably independent from political intrusion.²⁹⁴ This role plays a large part in regenerating faith in legal institutions, which were previously tools of oppression.²⁹⁵ Other scholars have also indicated the positive impact hybrids can have on building regional capacities that reinforce international norms and local traditions.²⁹⁶ Each of these benefits would immensely benefit a society such as North Korea, which has suffered too long from pernicious injustice.

iii. Flexibility

The complexity of post-regime systems requires a flexible approach to rebuilding that seeks to repair the nation.²⁹⁷ Flexibility is a keystone of the hybrid model, as evidenced by the varying approaches and contexts in which hybrids have previously been employed.²⁹⁸ The system must be tailored to meet the needs and particularities of each participating society.²⁹⁹ While such flexibility can constitute a major advantage of hybrid tribunals, it requires careful analysis and application to the local circumstances that emerge. The specifics regarding North Korea must be considered during the creation of the tribunal, rather than utilizing a cookie-cutter hybrid mold which stuffs the Korean scenario into its pre-existing dimensions. Many of these specifics will have to be analyzed at the time when a hybrid tribunal is being established.

iv. Cost

Ad hoc tribunals have proven costly to administer.³⁰⁰ The hybrid courts implemented in Kosovo, East Timor, and Sierra Leone function as less expensive alternatives.³⁰¹ Simply put, hybrid tribunals usually have a lower economic cost.³⁰² Promoting speedier case resolution not only diminishes financial costs, it lowers the psychological costs that people pay when they must wait years for slowly-emerging verdicts.³⁰³

Although hybrid tribunals are less expensive to operate relative to

294. *Id.* at 524.

295. *Id.*

296. *Id.* at 521–25.

297. Dermody, *supra* note 45, at 102.

298. Moghadam, *supra* note 130, at 492–94.

299. *Id.* at 492.

300. Dermody, *supra* note 45, at 82.

301. *Id.* This may be partly attributed to the fact that many countries that maintain hybrid tribunals, like Cambodia, also contribute to their operating and other costs. ROPER & BARRIA, *supra* note 15, at 40; *see also id.* at 61–62 (stating that “the evidence is clear that for some states, the creation of hybrid tribunals and the termination of Chapter VII tribunals is a cost saving measure” and presenting tables with contribution amounts for each tribunal).

302. Raub, *supra* note 209, at 1045.

303. Richard Lempert, *Citizen Participation in Judicial Decision Making: Juries, Lay Judges and Japan*, 2001 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1, 7 (2001–2002).

their ad hoc predecessors,³⁰⁴ the cost of running a potentially multi-year judicial proceeding requires continued support from international actors.³⁰⁵ Where this income is unsustainable, the ability of the court to produce uniform justice and accountability may dwindle.³⁰⁶ The result is a decrease in legitimacy, capacity building, and norm diffusion.³⁰⁷

The Special Court of Sierra Leone ran decreasing budgets as the project went on. Fiscal year 2003–2004 had \$34 million, and 2004–2005 had \$29.9 million.³⁰⁸ At the time, experts recognized the decreasing funds as a natural function of the process and projected the amounts to further decrease to \$25.5 million in the following fiscal cycle.³⁰⁹

D. CHALLENGES

On paper, it sounds simple enough to combine the expertise of the international actors with the legitimacy of the local community but, unsurprisingly, the devil is in the details. Hybrid tribunals, at their worst, run the risk of unleashing the disadvantages of both worlds with the external interference of international actors and the weakness of local institutions that facilitated the atrocities to begin with.³¹⁰ Another challenge is that hybrid tribunals need to establish a body of both substantive and procedural law.³¹¹

Conflict and tension between the old political, economic, and ethnic systems and the new ones will likely persist despite any success by the tribunal.³¹² Long-term commitment of investment and political capital is critical to prevent backsliding.³¹³ Fatigue and the resulting erosion in commitment can contribute to deterioration of the nascent, reformed domestic system.

Despite the choice of a hybrid tribunal, problems may persist. Witness protection; evidence gathering; persistent bias in local judges; lack of training; uncooperative national government entities; coercion or corruption through bribery or other means; perceptions of victor's justice against "heroes" of the nation; and the visible discrepancy between the treatment of perpetrators of atrocities who are held in air-conditioned buildings and receive better food and medical treatment than the local population may all be challenges to achieving the desired goals of transi-

304. Hybrid tribunals located in the *locus delicti* provide proximity to witnesses and immediate access to evidence, which could reduce the cost. See Raub, *supra* note 209, at 1042.

305. Dermody, *supra* note 45, at 92.

306. See *id.* at 92–93.

307. *Id.* at 83.

308. *Id.* at 92.

309. See *id.* at 92–93.

310. *Id.* at 82.

311. Raub, *supra* note 209, at 1044.

312. Dermody, *supra* note 45, at 102.

313. See Raub, *supra* note 209, at 1045.

tional justice.³¹⁴

Transitional justice through a hybrid court is inherently complex and difficult. No amount of expertise, effort, and good intentions in the courtroom can ultimately resolve all the difficulties facing the injured populace. We must remember that there is no one model that fits all, and consideration must be given to the rule of law in a particular “state as well as the sincerity of the government in creating a free and fair process.”³¹⁵ The best that a model can seek to do is craft the most effective approach at mitigating and providing redress for the damage done by the atrocities.³¹⁶ The hybrid model offers one mechanism for boosting local legal development, but the process of holding atrocity perpetrators accountable and incorporating domestic experts may not be enough to expect the post-regime legal system to take flight on its own. Other mechanisms will be necessary to effect a reconstruction of the legal system. A lack of time and sustained resources may even limit the ability of hybrids to assist in domestic legal development.³¹⁷ Personnel and infrastructure difficulties in East Timor and Kosovo and funding and delay in Sierra Leone are just a few examples of this phenomenon.³¹⁸ “A lack of commitment by the international community has stymied the process of providing justice”³¹⁹ in many of these cases.

Certainly, transitional nations lacking basic public infrastructure, economic venues, political mechanisms, and medicine³²⁰ would also benefit from international assistance in their own right and by the appropriate contributing agency, but that is not the role of a legal accountability system. However, without these other necessary institutions and an established legal culture to support a “rule of law,” hybrid tribunals are even more difficult to use successfully.³²¹

Milena Sterio argues that educational programs for local judges through training by international experts, learning tools, and logistical help to conflict-stricken nations can serve as alternatives to the creation of hybrid tribunals: “[I]nstead of creating a hybrid tribunal with western judges and ‘international’ statutes, developed countries can help set up purely domestic tribunals, that would function under international super-

314. Sterio, *supra* note 2, at 897–98. Because most hybrid tribunals are not established under the authority of Chapter VII of the U.N. charter, jurisdiction over many defendants is another problem. See ROPER & BARRIA, *supra* note 15, at 93–94.

315. ROPER & BARRIA, *supra* note 15, at 94.

316. See Dermody, *supra* note 45, at 100.

317. *Id.*; see also ROPER & BARRIA, *supra* note 15, at 94.

318. Dermody, *supra* note 45, at 83. For example, the Serious Crimes Panel for East Timor had a collection of personnel and logistical problems that led to questions of legitimacy and impartiality, including a shortage of court personnel, management inefficiency leading to longer trials, inexperienced judges, immense language barriers, and the inability to retrieve defendants from Indonesia. ROPER & BARRIA, *supra* note 15, at 55.

319. ROPER & BARRIA, *supra* note 15, at 94.

320. See Sterio, *supra* note 2, at 902.

321. ROPER & BARRIA, *supra* note 15, at 93. Cambodia is the perfect example of this problem considering that the rule of law is being addressed in part by the former perpetrators under the old Khmer Rouge regime. *Id.*

vision and that would possibly report to an international organ.”³²² Sterio’s suggestion, however, need not be taken as a necessary dichotomy. In other words, it is possible to have a hybrid tribunal *together* with training and logistical help.

Sterio also mentions the UN judicial panels set up in Kosovo to try war criminals and suggests that the mixed panel may be a starting point for Kosovar capacity building.³²³ Eventually, the international judges would not be needed once the local judges receive field training and education.³²⁴ Sterio is correct in pointing out that international judges will not be needed for a hybrid criminal tribunal indefinitely. As a model for local judges steering the helm of a domestic criminal tribunal, local authorities in Croatia report to the ICTY prosecutor per Rule 11*bis* of the ICTY Rules of Procedure and Evidence.³²⁵ To the extent matters may be tilted toward the domestic side of the spectrum without unduly sacrificing important objectives, such an approach has potential advantages in terms of domestic ownership, longer-term sustainability, and cost.

Yet Tanaz Moghadam maintains that the very presence of the international judges with experience working in tandem with domestic judges in applying international standards serves as a better approach by demonstrating the efficacy of “reviving faith in rule of law” where such consistency has been the exception, not the norm.³²⁶ In a place that does not have rule of law such as North Korea, a revival of faith in, and the actual practice of, the rule of law are precious purposes indeed.

E. FRAMEWORK FOR A NORTH KOREAN CRIMINAL HYBRID TRIBUNAL

The precise contours of what would constitute the most legitimate hybrid tribunal would depend on the context from which it emerges. If it emerges on the heels of a war, then legitimacy would be burnished by the participation of international judges and prosecutors from nations other than the victorious powers.³²⁷ Otherwise, the stench of “victor’s justice” could vitiate the process.³²⁸ Such a tribunal would be more likely to be the subject of the attack that it is merely a vindictive instrument rather than a means of attaining a greater measure of justice. It would be more vulnerable to the claim of being an imposed, imperialistic institution rather than an aid to the emerging domestic system. These caveats do not imply that there may not be *any* participation from those on the victorious side, but that such participation, if it exists, should be mingled with

322. Sterio, *supra* note 2, at 901–02.

323. *Id.*

324. *Id.*

325. *Id.* at 891–92 (citing INT’L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA R. P. & EVID. R. 11*bis*).

326. Moghadam, *supra* note 130, at 521–25.

327. See generally *supra* Part II.A.1.b.; see also *supra* Part II.C.1.b.i.

328. See generally William A. Schabas, *Victor’s Justice: Selecting “Situations” at the International Criminal Court*, 43 J. MARSHALL L. REV. 535 (2010).

participation from those who might be considered less biased, more impartial, and therefore more legitimate.

If such a tribunal emerges after a peaceful reunification, the aforementioned issues would be less pronounced.³²⁹ However, the concern exists that the possibility of such a tribunal might be taken as a perverse incentive for those in North Korea *not* to relinquish power peacefully and to fight to the bitter end. Such diplomatic concerns must be handled with great sensitivity and skill. At the same time, these concerns should not entirely overshadow the overwhelming call for justice in light of the horrific violations of human rights.

The local people and many of the opposing parties which survive the collapse of the previous regime may “suddenly find themselves in a war zone” of conflicting and confusing ideologies.³³⁰ International actors seeking to inject themselves into the judicial process may be seen as the natural outlet for the expression of turmoil and frustration by the domestic population.³³¹ Indeed, the weight of domestic North Korean ideology is geared toward rejecting the validity of other nationals, with the partial exception of their sibling state South Korea, which North Korean propaganda claims is under the imperialistic yoke of the United States.³³² For this reason, South Koreans must play a genuine role in the hybrid tribunal or it runs the risk of its delegitimization as a tool of “foreign devils.”

Recognizing the critical fusion of domestic and international elements, it is thus conceivable that at some point in the process a hybrid tribunal could be structured to slowly merge with a domestic tribunal at the achievement of a series of pre-conceived milestones in the criminal trials. A former Sierra Leonean prosecutor suggests that the ideal length of a hybrid tribunal is five years.³³³ In that way, a majority of international judges can be gradually replaced by a majority of domestic judges as judicial capacity is built on the ground.³³⁴ These characteristics begin to outline a potential timeline around which to build this framework.

As the availability of skilled North Korean judges eventually grows out of the partnership between South Korean and international judges, a hybrid tribunal may serve to pool judicial development resources while simultaneously trying the criminals who destroyed or neglected this capacity to begin with. A well-calibrated hybrid tribunal may make major progress in bringing a greater respect for human rights, and justice for

329. See *supra* Part II.A.1.a.

330. Dermody, *supra* note 45, at 88.

331. *Id.*

332. See Tan, *supra* note 26, at 543–46.

333. Dermody, *supra* note 45, at 92.

334. However, the international community must be wary in leaving such matters solely to domestic judges. For example, the Indonesian Human Rights Courts appointed both career and ad hoc judges (typically highly inexperienced lawyers) that contributed greatly to a lack of convictions, a flawed appeals process, a lack of professionalism in the judiciary, incompetent prosecutors, and a lack of coordination and political will overall. ROPER & BARRIA, *supra* note 15, at 54, 56–58.

those who have suffered egregiously at the hands of the North Korean government.

III. CONCLUSION

Building off a prior companion publication,³³⁵ this Article offers a possible means to address the egregious lack of respect for basic human rights of North Korea: a hybrid tribunal that would ideally combine the strengths of a domestic court with the contributions of an international court to enhance legitimacy, build domestic capacity, reduce costs, and help bring a measure of justice. Such a court must carefully contextualize itself to the particulars of Korea and avoid the pitfalls of imperialism, corruption, and bias.

Such a hybrid tribunal can also contribute momentum towards the eventual formation of an Asian system of human rights.³³⁶ Drawing from the lessons of already-existing regional systems of human rights in Europe, the Americas, and Africa, such a system could serve as a more permanent bulwark to fortify respect for human rights in Asia.³³⁷ It could in time obviate the need for the sorts of hybrid tribunals discussed herein.

Until there is an establishment of such a system of human rights for the most populous continent in the world, a hybrid tribunal can serve as a stopgap measure to address the hemorrhaging in places such as North Korea. The unspeakable suffering of so many under Pyongyang's steel boot should not be met with passive indifference. Whether through the ICC, domestic prosecution, or a hybrid tribunal, impunity and oppression should not be allowed to reign unchecked. The healing of the Hermit Kingdom, the stability of the region, and the sizable ramifications that affect our deeply interconnected world all hang in the balance. If a threat to justice anywhere is a threat to justice everywhere (with due credit to Martin Luther King, Jr.), this state of rightlessness, this egregious case of gross, systematic violations of human rights in North Korea, simply demands redress. A hybrid tribunal may provide the best path forward.

335. See generally Tan, *supra* note 1, at 683, 708.

336. One effort may well be under way with the formation of the Asian Human Rights Commission. For a discussion on the Commission and its potential future problems, see Bina D'Costa, *Challenges for an Independent Asian Human Rights Commission*, 4 ILSA J INT'L & COMP. L. 615 (1998). See also *Asian Human Rights Charter-Draft Document*, ASIAN HUMAN RIGHTS COMM., http://material.ahrchk.net/charter/mainfile.php/draft_charter/ (last visited Nov. 9, 2012).

337. For a general discussion on the human rights systems in Europe, Africa, and especially the Inter-American Human Rights Commission, see Richard J. Wilson, *Researching the Jurisprudence of the Inter-American Commission on Human Rights: A Litigator's Perspective*, AM. U. J. INT'L L. & POL'Y 1 (1994).

