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Speculations on Criminal Justice Mechanisms to Address North Korean Regime's Human Rights Violations: ICC, Ad-hoc tribunals, or something else?

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Abstract

The international community calls for the implementation of criminal justice measures to ensure accountability for human rights violators in North Korea. In 2014, the UN Commission of Inquiry (COI) found a wide range of human rights violations in North Korea and recommended two criminal justice options, a Security Council referral to the ICC or the establishment of an ad-hoc tribunal. However, criticisms of feasibility and efficiency of both options demand broader study of the use of criminal justice options beyond the UN's recommendations. Thus, I evaluate different organizational and institutional choices of criminal justice starting with the ICC and ad-hoc tribunals and expanding the examination to mixed tribunals, domestic courts, and local justice. Each option has different merits and weaknesses, and preferences may be changing at times. Based on examination of each option, I recommend mixed tribunals or complementary court options to deal with the North Korea's transitional justice.

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1. Introduction

The purpose of this paper is to evaluate different criminal accountability options and suggest the measures best suited to Korea in the future. To explore the importance of acknowledging criminal accountability and selecting the best criminal accountability measure fit, this paper will examine the case of North Korea and evaluate its criminal accountability options. In light of North Korea's serious, systematic and egregious human rights violations, one of the essential issues in a post-conflict/transition will be criminal accountability, and this

imperative involves an institutional and organizational choice among different options. Thus, in the first section of this paper, I will discuss criminal accountability and institutional choice. In the second section, I will explain the legal principles of criminal accountability and examine the human rights violations in North Korea to establish the necessity of criminal accountability measures in the post-conflict era. In the third section, I will analyze factors that should be considered to create a basis for selecting appropriate tools among accountability measures: characteristic of each court and context of transition. To analyze each option in the next section, I will provide hypothetical situations of transition as context for envisaging a future criminal justice setting. In the fourth section, I will evaluate different options for implementing criminal accountability measures such as the ICC, ad-hoc tribunals, mixed tribunals, and domestic courts and local justice for North Korea in its post-conflict justice setting. In the last section, I will suggest the best-fit criminal accountability measure for a future Korea to deal with the North Korean regime's extensive human rights violations.

2. Criminal Accountability and Institutional and Organizational Choice

2.1. Criminal Accountability in Transitional Justice

The world is experiencing a rapid increase in the number of societies addressing legacies of massive human rights violations and developing mechanisms to ensure that the violators are held accountable. Granting impunity by political settlement to those who bear responsibility for atrocities is no longer considered acceptable.¹ Transitional justice or post-conflict justice is a set of mechanisms put into place to demand accountability, seek redress for victims, promote human rights, and prevent recurrence of the tragic past. Addressing the accountability issue is at the center of transitional justice because it is the start of seeking justice and confronting problems. Accountability measures fall into three main categories,

¹ See M. C. Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights.*, in POST-CONFLICT JUSTICE 3 (M. C. Bassiouni ed., 2002)

which are the truth, justice, and redress.² In transitional justice, accountability measures include criminal prosecution, criminal investigatory commissions, truth commissions, amnesty, lustration, civil remedies, and reparations for victims.³ To seek accountability, societies select one or a combination of these measures depending on their transitional justice objects and context.

Among the accountability measures, criminal accountability is considered one of the main tools. Criminal accountability is defined as “the process whereby human rights perpetrators are held responsible for their misdeeds through identifying the crime and the perpetrator, holding fair and free trials, and meting out punishment in accordance with the crime committed.”⁴ The international community has defined international crimes and used criminal prosecution to meet the demands of accountability by establishing international criminal tribunals. It is not always necessary to have criminal justice to achieve the transitional justice; however, it is considered as a prerequisite to the rule of law, and it is a beginning of the current consensus on transitional justice implementation.⁵ The aims of international criminal justice are retribution, deterrence, incapacitation, rehabilitation, education, justice for victims, truth-telling, and post-conflict reconciliation.⁶ It expresses the outrage of the community and penalizes the serious human rights violation by imposing retribution.⁷ The prosecution of the responsible individual brings individual deterrence and also prevents reoccurrence.⁸ It allows a chance of rehabilitation to lower level offenders and

² *See id.* at 26.

³ *See id.* at 27.

⁴ *See* 1 LAVINIA STAN & NADYA NEDELSKY, ENCYCLOPEDIA OF TRANSITIONAL JUSTICE 280 (2013).

⁵ *See id.*

⁶ *Id.* at 71.

⁷ *See generally* W. J. VAN DER WOLF, PROSECUTION AND PUNISHMENT OF INTERNATIONAL CRIMES BY NATIONAL COURTS, ch. 2.10.1. (2011).

⁸ *Id.* at 53-61.

contributes to restorative justice.⁹ By prosecution, it educates society about unacceptable conduct and recovers trust in the rule of law.¹⁰ It brings justice to victims by assisting in their participation and reparation and punishing perpetrators and.¹¹ The court procedure creates a narrative that will help post-conflict society by truth-telling¹² and facilitating reconciliation and durable peace.¹³

Criminal accountability options include international prosecutions, national prosecutions, and a mixed model. International prosecutions are available in a few settings: the ICC is the permanent international criminal court and major international enforcement mechanism of international criminal law, and ad-hoc tribunals are international courts established to deal with specific events or regions. Domestic prosecutions use domestic criminal court systems to deal with past atrocities or other crimes. They may establish a special domestic tribunal to deal with post-conflict issues or allow local justice measures realize justice. Domestic courts of a foreign country may also be a venue for exercising universal jurisdiction. The mixed or hybrid model is a new type of accountability measure entailing cooperation between international and domestic actors to overcome the weakness of one side's involvement and complement the criminal accountability procedure. Among local justice measures, there is increasing recognition of indigenous or informal, tradition-based measures for administering justice.

2.2. Importance of Criminal Justice Institutional and Organizational Choice

⁹ *Id.* at 62-3.

¹⁰ *Id.* at 63-4.

¹¹ *Id.* at 65-7.

¹² *Id.* at 67.

¹³ *Id.* at 71.

The usage of international, domestic, and mixed courts to deal with international crimes is a new phenomenon. The first international criminal court established following the end of the Cold War was the creation of international human rights norms. The design of the international criminal court have changed over time to meet the demands of international justice, and international criminal law and its principles have evolved with this change. The new styles of mixed form, internationalized-domestic courts, and purely domestic courts adopting international norm of justice have emerged as part of international institutional evolution.¹⁴

The State affected by international crimes and severe human rights violations makes critical “choices” with regard to using existing international criminal justice measures and adopting or creating criminal justice institutions. The choice of an institution to deal with serious human rights violations in the past is part of the process called “transitional justice” in international human rights law studies.¹⁵ Transitional justice refers to a full range of mechanisms that respond to systemic and widespread past human rights violations. These include criminal prosecution, truth-seeking, reparation, institutional reform, and memorialization. Transitional justice consists of both judicial and non-judicial mechanisms to deal with past human rights violations, and criminal justice is one of its essential components. Transitional justice aims to establish accountability and realize justice in the society, therefore leading the society to a different trajectory. It responds to the needs and aspirations of a society during the time of transition by playing a significant role in restoring human rights and justice. The outcome of transitional justice is greatly affected by institutional and organizational decisions. Thus, to design or select a suitable transition justice system to carry

¹⁴ Karen J. Alter, *The Evolution of International Law and Courts*, 3 ICOURTS WORKING PAPER SERIES 3 (2013); Karen J. Alter, *The Evolution of International Law and Courts*, in *THE OXFORD HANDBOOK OF HISTORICAL INSTITUTIONALISM* (Karl Orfeo Fioretos, Tulia Gabriela Falleti, & Adam D. Sheingate eds., 2016).

¹⁵ *See generally*, RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000).

out criminal prosecution, truth-seeking, reparation, institutional reform, memorialization and other actions requires comprehensive institutional analysis of each of these components.

To contribute to this institutional analysis, I will analyze the criminal prosecution component and speculate on the best-suited institution and organization for the case of North Korea's transition. Among criminal justice institutions and organizations, each has different characteristics that result in a different outcome. This research does not aim to suggest that criminal prosecution is the only or the best choice to drive North Korea's process of transitional justice; rather it is an effort to visualize one of its essential components as a grounding for speculation.

In this paper, I describe selecting criminal justice option as both an organizational choice, because it involves creating courts or choosing a venue, and an institutional choice, because choice of law is a matter of institution, and the criminal justice option requires determining jurisdictions by adopting, selecting, or creating an institution.

Jurisdiction refers to the “power of a court to adjudicate cases and issue orders.”¹⁶ Jurisdictions are broken down into personal jurisdiction, subject matter jurisdiction, territorial jurisdiction, and temporal jurisdiction. Personal jurisdiction is a court's power of adjudicating cases involving a particular person, which includes *in personam* jurisdiction, power directed against a party, and *in rem* jurisdiction, power over a property dispute. Subject matter jurisdiction refers to the type of crimes that a court will adjudicate, which in the case of criminal law requires adopting an already existing criminal law or creating a new institution defining crimes and penalties. Territorial jurisdiction and temporal jurisdiction refer to the territory and time over which the court may exercise its jurisdiction. Thus, jurisdictions of courts not only decide the scope of the courts' power but also the rights of related individuals. They affect the determination of the victims' rights to claim and the deprivation of the

¹⁶ 95 U.S. 714, 5 Otto 714, 24 L. Ed. 565 (1878).

accused's personal rights and property, sometimes entailing substantial socioeconomic reconstitution, therefore greatly affecting material property rights. The choice of jurisdiction varies among courts. For example, the ICC has temporal jurisdiction over crimes committed after 2002 and subject matter jurisdiction over the four categories of crimes in the Rome Statute: genocide, crimes against humanity, war crimes, and crimes of aggression. Ad hoc tribunals and mixed courts establish separate jurisdictions to deal with crimes committed in specific contexts. Mixed courts comprise international and domestic jurisdictions and often try crimes under their domestic law.¹⁷ There is no consistency of jurisdictional choice even among same level courts, and these differences determine the scope of the power of a particular court and the rights of individuals involved, and therefore they affect society.

3. Necessity of Criminal Justice for Future Korea

In the first section, I would like to examine whether criminal prosecution is necessary to seek accountability for human rights violations in North Korea. To do that, I will examine legal principles and then weigh the seriousness of the violations. Based on this analysis, I will determine whether criminal prosecution is necessary to deal with North Korea's human rights violations, which will provide the basis for further searching for the best suited criminal accountability measures for future Korea.

3.1. Criminal Accountability for *Jus Cogens* Crimes

International human rights law and international criminal law decree that *jus cogens* international crimes and the most responsible perpetrators must be prosecuted through criminal courts. Article 53 of the Vienna Convention of the Law of Treaties of 1969 explains

¹⁷ Michael P. Scharf, *The Special Court for Sierra Leone*, 5 ASIL INSIGHTS (2000).

jus cogens as “a peremptory norm of general international law,” and it is accepted and recognized “by the international community of states as a whole.”¹⁸ *Jus cogens* in international law are inderogatable. The legal obligation and duty of states to prosecute or extradite arise from the status of such crimes,¹⁹ and states are proscribed from granting impunity to the perpetrators of crimes that have the character of *jus cogens*, which include at least four international crimes: genocide, crimes against humanity, war crimes, and torture. The statute of limitation is not applicable to such crimes, immunity for leaders cannot be granted, and the defense of following orders is not acceptable. Thus, according to international legal principle, seeking accountability for those crimes by a criminal court is necessary. Pursuing accountability by the prosecution of those most responsible for large or organized crimes is the state’s responsibility along with truth-seeking.²⁰ Basic human rights treaties in international law, including the Convention on the Prevention and Punishment of Crimes against Humanity and the Convention on the Prevention of Torture, obligate the state to impose sentence and punish such offenses. Seeking accountability for past crimes through criminal punishment plays an important role in preventing future crimes which is also the state’s obligation to its people. Bassiouni argues that impunity in international crimes is “a betrayal of our human solidarity with the victims” and emphasizes redress for victims through criminal accountability measures.²¹

While pursuing criminal accountability is significant, however, criminal accountability measures are not always necessary to address every level of human rights

¹⁸ See Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U.N. Doc. A/CONF.39/27. Art 53.

¹⁹ See M. C. Bassiouni, *International crimes: jus cogens and obligatio erga omnes*, 59 LAW & CONTEMP. PROBS. 63, 65 (1996).

²⁰ The Chicago Principles on Post-Conflict Justice, Principle 1 and 2 states respectively, “States shall prosecute alleged perpetrators of gross violations of human rights and humanitarian law”, and “States shall respect the right to truth and encourage formal investigations of past violations by truth commissions or other bodies.”

²¹ See Bassiouni, *supra* note 1, at 54.

violation. Except for the four *jus cogens* international crimes, a domestic court has the discretion to prosecute and punish by means other than the deprivation of liberty, as long as it is not granting blanket amnesty. To pursue reconciliation, the court can order a substitute punishment such as community service. Bassiouni explains that, as long as it is not a *de facto* impunity, it is not necessary to prosecute every possible accused person, as was the people's decision to move forward in the case of South Africa. The people's will to put a past traumatic event behind by not prosecuting perpetrators at every level should be a consideration in selecting a transitional justice mechanism. Nevertheless, truth commissions should not be considered as a substitute for a prosecution of perpetrators at higher levels of responsibility for serious international crimes.²² For at least the four *jus cogens* crimes, impunity is not acceptable, and criminal accountability must be pursued.

3.2. Human Rights Violations in North Korea and the Necessity of Criminal Justice

The long-lasting and massive human rights violations in North Korea compel the necessity of transitional justice. The grave human rights violations in North Korea have been drawing serious attention from international society in recent decades. In 2013, UNHRC adopted a resolution and decided to establish the UN Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (COI) to investigate the systematic, widespread, and grave violations of human rights in North Korea.²³ Inasmuch as North Korea is not in a wartime situation, establishing the COI to investigate its human rights situation is a rare case, and it explains how urgent the investigation into North Korea's

²² In such cases, the findings from the truth commission can rather be a precursor to criminal prosecution. Truth commissions' work can reduce the burden of the criminal prosecution to provide the broader context of an atrocity or other abhorrent crime. *See* Bassiouni, *supra* note 1, at 32.

²³ *See* U.N. Human Rights Council, Comm. of Inquiry on Human Rights in the DPRK, Report of the Detailed Findings of the Comm. of Inquiry on Human Rights in the DPRK, para. 1, A.HRC/25/CRP.1 (Feb. 7, 2014). [hereinafter Detailed Findings]

human rights abuses was considered. In March 2014, the Commission submitted its report with findings and recommendations on North Korea's human rights condition to the UNHRC. The report of COI includes the testimony of around 200 North Korean refugees as witnesses, 80 of whom testified in the public hearings.

The 2014 COI reports provide sufficient reasonable grounds to support rampant general human rights violations and crimes against humanity in North Korea. The Commission found a wide range of violations of human rights in North Korea, including deprivation of religious freedom, restriction of movement, torture, executions, and enforced disappearances, and it found that some of those violations constitute crimes against humanity.²⁴ Two criteria for determining a crime against humanity are inhumane acts and systematic or widespread commission.²⁵ One of the crimes against humanity that the COI has revealed is the operation of political prisons where more than 80,000 to 120,000 political prisoners are currently detained.²⁶ The commission also specifies the main perpetrators, those who have accountability for human rights violations, as “the officials of the State Security Department, the Ministry of People's Security, the Korean People's Army, the Office of the Public Prosecutor, the judiciary and the Workers' Party of Korea, who are acting under the effective control of the central organs of the Workers' Party of Korea, the National Defence Commission and the Supreme Leader of the Democratic People's Republic of Korea.”²⁷ The finding of crimes against humanity, which are *jus cogens* crimes, clarifies the necessity of accountability measures and transitional justice mechanisms to deal with this issue.

The commission considered the finding of the crimes against humanity as well enough established to merit soliciting criminal investigation using both domestic and international

²⁴ See generally *id.* Section IV and V.

²⁵ See *id.* para. 1025.

²⁶ See *id.* para. 1062.

²⁷ See *id.* para. 24.

justice measures.²⁸ To consider whether the crimes found by the commission could be prosecuted before the International Criminal Court, the commission follows the definition of crimes against humanity under the Rome Statute.²⁹ Because the definition under the Rome Statute is narrower than that of international customary law, the commission indicates that following the Rome Statute will allow prosecution before another international or domestic court where the international customary law applies.³⁰ In the report, the COI recommends two options, a Security Council referral of North Korea's situation to the ICC, or the establishment of an ad-hoc tribunal by the UN.³¹ From 2014 to 2016, the United Nations General Assembly adopted resolutions to refer North Korea's situation to the ICC following the COI's recommendation but did not mention creating an ad-hoc tribunal.³² In 2016, the Group of Independent Experts on Accountability also recommended the referral of the North Korean case to the ICC or the establishment of an ad-hoc tribunal. It should be noted that the International community has urged applying or creating institution by referring the case to the ICC or establishing an international tribunal only to deal with the North Korea case.

Considering the seriousness of the atrocities committed and the existence of *jus cogens* crimes, criminal accountability measures are necessary under international legal principles. To meet the state's obligation to prosecute violators of serious human rights violation, the future Korea should evade criminal prosecution of the responsible perpetrators or grant a blanket amnesty. Thus, the future Korea should select and establish criminal accountability measures to deal with the *jus cogens* crimes, crimes against humanity, and possibly genocide which has been reported by COI.

²⁸ See *id.* paras. 1160-1163.

²⁹ See *id.* n.1541.

³⁰ See *id.*

³¹ See *id.* para. 1218.

³² G.A. Res. 69/188, U.N. Doc. A/RES/69/188 (Dec. 18, 2014); G.A. Res. 70/172, U.N. Doc. A/RES/70/172 (Dec. 17, 2015); G.A. Res. 71/202, U.N. Doc. A/RES/71/202 (Dec. 19, 2016).

4. Considerations on Selecting Criminal Justice Options

Before analyzing each criminal justice option, in the following I discuss factors to be considered in the selection process. To find the best-suited option, we should understand 1) The different characteristics of each criminal justice option and 2) The transitioning country's surrounding context. With regard to the first factor, elements of the specific composition of each court setting to be taken into account are discussed. With regard to the second factor, I explain how and why context should be taken account in the assessment. Although the context of future Korea cannot be definitely predicted, we do have knowledge of the human rights atrocities in North Korea, which is one important context. Because another important context that impacts the choice of criminal justice measure will be the form of transition, I will introduce hypothetical situations of transition that I will apply in the analysis as a background.

4.1. Distinct Characteristics of Different Criminal Justice Options

The distinct characteristics of different court systems should be considered in selecting and designing a judiciary institution for transitional justice. Due to its nature as an international institution, domestic institution, or mixed institution, each criminal accountability option possesses particular strengths and limitation. For example, the International Criminal Court has a well-established judicial system and resources, and its operation has been getting more attention from media and making an impact on the international community. However, it may have less effectiveness and legitimacy than domestic courts with locals, to whom higher levels of justice administration might feel distant. The ICC is also limited in its capacity to deal efficiently with a large number of perpetrators,

so it cannot effectively support all aspects of criminal justice. Ad-hoc tribunals have a better capacity to concentrate on one country's case, but they may also be less effective than domestic judicial processes when they lack local ownership. Domestic courts, on the other hand, may have legitimacy with people and effectively make them feel the impact of criminal justice, but they are often emasculated by politics and existing institutional contexts. Mixed tribunals may mitigate some problems in the choice between domestic and international option, but they also have some of the problems of both options.

So far, no empirical studies have provided concrete evidence of the different effect of various criminal accountability measures or a precise list how certain characteristics affect certain results. One reason for this lack of overall guidelines is that the selection of the criminal justice option and its result greatly depend on the specific context of each country's case. However, basic elements that affect a court's result can be derived from various case analyses. Among standard criteria for assessing the characteristics of each court option are legitimacy, effectiveness, efficiency, and practicality. It should be noted that these criteria are exclusive of each other but interrelated.

Legitimacy

Legitimacy is understood as the court's right to rule according to its mandate and in the people's perception, that is, its normative and sociological legitimacy. Normative legitimacy refers to "the right to rule according to pre-defined standards," and sociological legitimacy refers to "perceptions or beliefs that an institution has such a right to rule."³³ Normative legitimacy is the basis that justifies a court's authority. This legitimacy issue is important in an international court because its power to adjudicate is newly created outside of the traditional perception of the State's sovereign jurisdiction. Langvatn and Squatrito

³³ Nienke Grossman, *Legitimacy and International Courts - A Framework*, in LEGITIMACY AND INTERNATIONAL COURTS (Nienke Grossman et al. eds., 2018).

suggest three elements to consider in deciding the legitimacy of an international criminal court: 1) how it came into power, 2) its process of exercising power and procedural fairness, and 3) the result produced by the court.³⁴ The court's jurisdiction is closely related to the issue of legitimacy and also affects its effectiveness, efficiency, and practicality. The consent of the State and fairness of procedure affect the legitimacy of an international court, but its normative goal of justice and stakeholders' participation increasingly impact its legitimacy. In a post-conflict situation, sociological legitimacy and acceptance by the constituency highly impact the court's effectiveness. Legitimacy increases to the extent that constituencies think its decision-making is just and promotes human rights protection.³⁵ Legitimacy also depends on the court's transparency and accountability as well as the participation of various parties.³⁶ The sense of local ownership in terms of sovereignty, victims' participation, community outreach, and participation of local judge, prosecutors, and/or defense counsel is directly related to the legitimacy issue.

Effectiveness

Legitimacy and effectiveness are closely linked: "Legitimacy can help a court to be more effective, and effective court may be considered more legitimate...judicial illegitimacy can produce ineffectiveness and vice versa."³⁷ Effectiveness refers to a court's goal achievement and compliance with the ruling of the court. Most importantly, a court should be able achieve its goal of prosecuting and meting punishment to the key perpetrators. A court's goal may also include the development of the judiciary system and human rights norms of the

³⁴ See generally Silje Aambo Langvatn & Theresa Squatrito, *Conceptualising and measuring the legitimacy of international criminal tribunals*, in THE LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS (Nobuo Hayashi & Cecilia M. Bailliet eds., 2017).

³⁵ Grossman, *supra* note 33, at 10.

³⁶ *Id.* at 7-8.

³⁷ *Id.* at 9. See also Yuval Shany, *Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions*, in LEGITIMACY AND INTERNATIONAL COURTS (Nienke Grossman et al. eds., 2018).

affected society. For future Korea's sake, the selected court should be able to effectively prosecute responsible individuals and redress victims. It should also have a positive impact on rather than impede peace and reconciliation.

The operating language of the court is an important characteristic that affects the court's effectiveness and efficiency. Both oral and written communications play major roles throughout the court proceedings, from hearing cases to rendering judgments. First is the necessary internal communications between judges and staff; second, interactions between the court and the parties coming before it; and third, the court's communication with the larger public, including publication of judgments. The language of the court varies according to court setting and has a different effect on each level of communication.

Efficiency

The high cost of transitional justice has imposed a constraint on transitioning government's choice of transitional justice mechanisms. Holding trials entails a significant financial burden for transitioning countries and even for the international community that supports their operation. Added to the payroll for judges, prosecutors, many investigators, and interpreters, the trial requires accommodation for defendants and protection for witnesses. The cost-efficiency of two ad-hoc tribunals, ICTY and ICTR have been criticized by international society because of its large expenditures, which make the international community reluctant to establish more ad-hoc tribunals in favor of experimenting with hybrid courts or internationalized domestic courts. In their ten years of operation, the ICTY spent US\$1.2 billion and the ICTR spent US\$1 billion.³⁸ It costs an average of US\$10-15 million dollars per accused,³⁹ which has been deemed "hardly acceptable."⁴⁰ The operation of the

³⁸ Rupert Skilbeck, *Funding Justice: The Price of War Crimes Trials*, 15 HUMAN RIGHTS BRIEF 6, 6 (2008).

³⁹ *Id.*

⁴⁰ M.C. Bassiouni, *Reflections on contemporary developments in international criminal justice*, in RESEARCH HANDBOOK ON INTERNATIONAL CRIMINAL LAW 409, 416 (Bartram S. Brown ed., 2011).

ICC is lower than that of an ad-hoc tribunal but still high; its budget for 2009, during which the court covered four cases,⁴¹ was US\$130 million.⁴² The budgets of hybrid courts are far lower than those of purely international courts but vary widely among courts. The expenditures of the Extraordinary Chambers in the Courts of Cambodia (ECCC)'s are surprisingly high, costing US\$300 million dollars during its 11 years of operation⁴³ while achieving only three convictions as of 2017, incurring criticism for inefficiency.⁴⁴ The Special Panels for Serious Crimes in the District Court of Dili (SPSC) operates on a limited budget,⁴⁵ US\$ 6.3 million budget allocated in 2002, but concerns about its achievement have been raised.⁴⁶ The Court of Bosnia and Herzegovina (BiH) spent US\$ 709,000 per trial in 2006.⁴⁷

Olsen et al. investigate the relationship between countries' income levels and transitional justice choices,⁴⁸ find that high-income countries tend to choose trials, medium-income countries tend to choose truth commissions, and low-income countries tend to have amnesties or no transitional justice mechanism, that is, de facto amnesties.⁴⁹ Thus expected economic and resource costs are a realistic consideration in deciding on accountability mechanisms. The choice often reflects not only ability but also willingness to pay. When the cost issue is the ability to pay, the international community often becomes involved by sharing the financial burden or sometimes by leading the transitional justice mechanism.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Seth Mydans, *11 Years, \$300 Million and 3 Convictions. Was the Khmer Rouge Tribunal Worth It?*, THE NEW YORK TIMES, April 10, 2017, available at <https://www.nytimes.com/2017/04/10/world/asia/cambodia-khmer-rouge-united-nations-tribunal.html>.

⁴⁴ *Id.*

⁴⁵ AARON FICHTELBERG, *HYBRID TRIBUNALS: A COMPARATIVE EXAMINATION* 65 (2015).

⁴⁶ Till Skrobek, *Difficult Road to Accountability in East Timor*, 2 SÜDOSTASIEN AKTUELL 26 (2005).

⁴⁷ Skilbeck, *supra* note 38, at 8.

⁴⁸ TRICIA D. OLSEN, LEIGH A. PAYNE & ANDREW G. REITER, *TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY* 61-78 (2010).

⁴⁹ *Id.* at 73. The range of countries' wealth decided according to the gross domestic product (GDP).

The cost-efficiency is not only matter of financial economy but is also matter of time-effectiveness. Redressing injustice and bringing justice on time is also an interest of transitional justice. Scrutiny of cases and reveal the truth is an important merit of the court, but if a certain type of accountability option expected to cost more time and resources it would affect the choice of criminal justice measure. The two ad-hoc trials, ICTY and ICTR have been criticized in this regard as well and this cost-efficiency of the courts make them less preferable option of the international community. When it took inefficiently long time to establish an accountability measure or rendering a decision on the case, it causes delayed justice problem in victims' perspective and also causes a bigger financial burden to support the time-consuming legal process. On the accused's side, this delay impedes his right to speedy trial.

Practicality

The actual practicality of establishing certain criminal justice institutions or implementing available options in particular cases must also be considered. There are different legal, political, social and economic obstacles in applying or creating such a targeted system. Because the circumstances surrounding transitioning countries and their relationship to international treaties are all different, assessments of the practicality of various criminal justice options are also different. No matter how good a system is, it is not worth discussing if it cannot actually be used.

4.2. Context of Transition

4.2.1. Context of Transition in Institutional and Organizational Choice

The choice of criminal justice option should consider the given country's circumstances and context.⁵⁰ States which are experiencing political transition vary according to the nature of the conflict generating the crimes, the structure of the institution overseeing the transition, the form of transition, the political environment, and the economic and social environment. There are primary transitional justice measures and tools to respond to serious human rights violations, there is no one answer that fits every transitioning country.⁵¹ In other words, there is no perfect universal mechanism. Therefore, when selecting measures of transitional justice, the particular context should be carefully considered. The context of the conflict, institutional oversight, local culture and politics, and the economic structure of the transitioning society are all important.⁵² The institutional context is important when selecting, designing, implementing, and assessing transitional justice policies and processes.⁵³

In these regards, Bassiouni explains that in deciding the most appropriate accountability measure, the following factors should be evaluated individually and collectively, and none of the factors should be excluded.⁵⁴

1. The gravity of the violation: for example, is it a *jus cogens* violation?;
2. The extent and severity of the victimization;
3. The number of the accused;
4. Those who are the accused (e.g., the senior architect, low-level executor, bureaucrat);
5. The extent to which both sides are equally committed to international criminal standards;
6. The current government is the violator regime still in power either *de jure* or *de facto*?;
7. The competence and independence of the domestic judiciary;
8. The evidentiary issues;
9. The extent to which the conflict or violations have subsided;

⁵⁰ Milena Sterio, *The Future of Ad Hoc Tribunals: An Assessment of Their Utility Post-ICC*, 19 ILSA J. INT'L & COMP. L. 237, 249 (2012).

⁵¹ Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 295, 310 (2003).

⁵² See generally ROGER DUTHIE, JUSTICE MOSAICS (2017).

⁵³ *Id.* at 14.

⁵⁴ See Bassiouni, *supra* note 1, at 42-43.

10. Cultural concerns or “the will” of the community;
11. Nature of the conflict: international or internal armed conflict, or repressive regime

After evaluating these factors, Bassiouni argues, the selection of an accountability mechanism “must be made in good faith in order to achieve a just result and should be transparent and justifiable.”⁵⁵ Further, Bassiouni emphasizes that this selection “must be acceptable to victims” and also to interested states, as well as satisfactory to international civil society by meeting international legal norms.⁵⁶

4.2.2. Envisaging the Context of Transition of Future Korea

While the scale of human rights violations in North Korea has been identified as an important context, until the transition comes, we cannot know what other contexts should be taken into account in selecting criminal justice options for future Korea. Even so, the purpose of this paper is to be prepared for the chance to respond to calls for criminal justice by envisaging a future post-conflict justice setting for Korea. Therefore, in next sections I presuppose a few elements of a hypothetical situation in order to provide a plausible scenario as the essential context in which to evaluate and suggest particular options for the selection of criminal justice measures.

Broadly speaking, in the future there can be either 1) internal-transition of North Korea, 2) reunification of North and South Korea, or 3) no transition at all. An internal political transition in North Korea could provide a chance for transitional justice. The changes in leadership may result in agreement to adopt international criminal justice, or people may stage a coup or revolutionary uprising and demand democratic reforms. There is pervasive surveillance of North Korean people and a high level of blind loyalty to the regime, but North

⁵⁵ *See id.* at 42.

⁵⁶ *See id.*

Korean refugees testify there is also a great discontent with the regime on account of its reign of terror and poverty. In the case of such an uprising, domestic courts may preferably assisted by the international community, and mixed courts, a foreign country's domestic court, or a separate international court might be a venue for the criminal justice.

The reunification of North and South Korea is also a possibility. The form of reunification and the distribution of power between the North and South Korean governments may vary. Setting aside such variation, I assume that the unified government has established a democratic environment and rule of law corresponding to South Korea's current judicial system in this hypothetical situation. I presuppose this situation because reunification of the two Koreas not only is a feasible transition in Korean peninsula but also offers the most viable chance to seek criminal accountability. As a matter of fact, the idea of reunification has been discussed over decades between the two Koreas. Each Korea's general conception of the other is unique but features the usual sentiments often found in other conflict cases of the world. The particular sentiment of hope for peaceful reunification arises from the history of the division of the two Koreas, which was not the will of either North or South Koreans. This common ground for reunification is clearly expressed in both countries' constitutions.⁵⁷ Also there have been a quite a few and cooperative exchanges to reach the common goal of peaceful reunification between North and South Korea.⁵⁸

⁵⁷ Article 4 of South Korea's constitution states that "the Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the basic free and democratic order." North Korea's constitution also states in Article 9 that "the DPRK shall ... reunify the country on the principle of independence, peaceful reunification and great national unity."

⁵⁸ In 2000 and 2007, leaders of two countries announced Joint Declaration reconfirm the will of the peaceful reunification and economic cooperation in the inter-Korean summit. Begin in 1998, Mt. Kumgang tourism began as an inter-Korean economic cooperation and over million South Korean visited Mt. Kumgang in North Korea. In 2005, the Gaeseong Industrial Complex opened in Gaeseong, North Korea, as an inter-Korean economic cooperation between two Korea as well. More than a hundred South Korean firms hired about 54,000 North Korean laborers until the operation halted in 2016.

From the 1990s, there were numerous number of joint research on Korean language, literature, and history. There were also joint or exchange concert in Pyoung-Yang and Seoul, arts and photo exhibitions, film festivals, and film screening. There were sports exchanges, two Koreas had several friendly matches and joint team in the international games. The two had a joint parade in the 2000 and 2004 Summer Olympics. In 2018 winter

The transition scenarios I propose may sound ambitious. However, without transition, internal criminal justice options conforming to international human rights principles are hardly imaginable in current North Korea. Of course, there could be no transition at all and criminal justice pursued in the *status quo*. For a long time, the current standoff in the Korean peninsula has been firm and human rights violations widespread. Given the repressive regime, its surveillance of people, and the strong punishment imposed on political offenders, the *status quo post bellum* may be continued, and the international community decides to implement international criminal justice anyway. The international community's current discussion of criminal justice is based mainly on the current situation, but it also recognizes the possibility of sudden political change in the Korean peninsula. International options, whether a foreign country's domestic court or a new form of mixed setting in the region or in a foreign country, including South Korea's participation, may be possible. However, without any transition in North Korea, the international court option may not be feasible in the current political environment, especially because of the Security Council's composition. There are also legal obstacles to bringing perpetrators to court if they are traveling outside of North Korea. I will further discuss these political and legal obstacles later. Furthermore, if the court can secure only a few people in custody, only partial accountability and justice can be achieved. Most importantly, seeking only partial accountability is likely to have very minimal effects on people in North Korea and human rights victims, neither enhancing human rights condition nor preventing recurrences. Therefore, in *status quo*, pursuing domestic or mixed options with North Korean government's involvement, or local justice does not have enough merit to be examined.

This being said, and in light of the purpose of this paper to analyze and suggest a best-suited criminal justice organization and institution for future Korea in the post-conflict justice

Olympics in South Korea, there was a joint parade of North and South Korea under one Korean peninsula flag even after the serious and terrifying confrontation between the U.S.A. and North Korea in 2017.

setting in the event of transition, the following analysis is based on the two hypothetical transition situations in Korea.

5. Analysis of Criminal Justice Options for Future Korea

In this section, I will conduct a comprehensive analysis of each criminal justice options' characteristics and apply it with the known context of human rights violations and the hypothetical context of future Korea to determine what form best suits future Korean society. In the practice of transitional justice, there are five different settings of judicial proceedings. The first category comprises international tribunals to deal with specific cases. Starting with the Nuremberg and Tokyo tribunals, the ICTY and ICTR were created to deal with specific human rights issues within a specific time and regional context. Later, to have a permanent judicial body to deal with the most serious human rights and humanitarian law violations, the ICC was created, making it possible to seek individuals' accountability for international crimes within larger territorial jurisdictions, and this body constitutes the second category of criminal justice option. The third is a "mixed" or "hybrid" model, which combines international and domestic courts. The fourth option is using domestic courts without international involvement in delivering the criminal justice. Under the domestic court option, a domestic court of a foreign country also can be a venue for criminal justice. The fifth option, local or traditional justice processes are applied as an informal judicial body when they are a more effective tool to bring justice and reconciliation. In the next part, I will preliminarily examine the five different criminal justice options, the ICC, an ad-hoc tribunal, a mixed tribunal, and domestic courts and local justice, in that order.

5.1. International Criminal Court(ICC)

The option of referring the leadership of North Korea to the ICC has been discussed most actively among international community members and Korean scholars. Considering the seriousness of the human rights abuses in North Korea, the international community recognizes the possibility of the ICC prosecuting North Korea's case. However, prosecution by the ICC will be limited by the court's legitimate jurisdiction. The ICC can have jurisdiction over a State's case under the following circumstances: the State is a member to the Rome Statute; the State accepts the ICC's jurisdiction over it; or the UN Security Council refers the case to the ICC. North Korea is not a member state of the Rome Statute, and there is almost no possibility that North Korea voluntarily accept the ICC's jurisdiction considering possible prosecution of the current regime. The ICC may exercise its jurisdiction over North Korea if the UN Security Council refers the North Korea case to the ICC using its power under Chapter VII of UN Charter. However, the feasibility of using the ICC to deal with North Korea case has been criticized. Even though international community currently puts emphasis on using the ICC to deal with the North Korea case, to refer the case to the ICC, the role of the UN Security Council is absolutely crucial. Although most of the UN Security Council member states agree on referring the North Korea case to the ICC, China and Russia, two longstanding allies of North Korea and who have veto power over the Security Council's decisions,⁵⁹ oppose this plan with the argument that the Security Council should deal with matters of international peace and security, not human rights issues.⁶⁰ As long as China and Russia are likely to use veto power, the ICC option is not considered realistic at this stage. These two countries' attitudes may change at the time of transition, but for now, they are obstacles in the way of the Security Council's referring North Korea to the ICC. In 2014, the Security Council agreed to discuss North Korea's human rights issue, however, no step has

⁵⁹ China, Russia opposes U.N. council meeting on North Korea, REUTERS, December 8, 2015, *available at* <https://www.reuters.com/article/us-northkorea-rights-un/china-russia-oppose-u-n-council-meeting-on-north-korea-idUSKBN0TR01X20151208>.

⁶⁰ *Id.*

been taken to refer the case to the ICC because of China and Russia's opposition. This example shows the apparent current impracticality of the ICC option.

The ICC also has a limitation on its temporal jurisdiction. The ICC has temporal jurisdiction over the violations committed after July 1, 2002, the date of the entry into force of the Rome Statute. The history of operating political camps in North Korea goes back to the 1970s. Thus, the ICC cannot prosecute those who responsible for human rights violations under Kim Il-Sung's and most of Kim Jong-Il's regime. As for the several cases in which North Korea abducted people from South Korea, Japan, and other countries before 2002, these can be regarded as continuing crimes over which the ICC may exercise its temporal jurisdiction.

The ICC also has a fixed subject matter jurisdiction, meaning that it cannot hear cases not related to certain crimes listed in the Rome Statute, which are genocide, crimes against humanity, war crimes, and crimes of aggression. Thus, the ICC may be a venue for high-profile cases, but it cannot deal with other human rights violations not listed in the Rome Statute.⁶¹ Different from the ICC, ad-hoc tribunals or mixed tribunals can extend their subject matter jurisdiction. So, in Korea's case, the ICC may only be suited for four of the listed crimes.

Further, the ICC is a complementary jurisdiction with a national judicial system. Because of the ICC's national complementarity, if the case is prosecuted by a domestic court, the ICC will not hear the case.⁶² The Rome Statute Article 17 grants the ICC jurisdiction when the domestic court system is unwilling or unable to carry out the criminal justice task. When the future Korean government does not have the intention or capacity to investigate or prosecute serious human rights violation, the ICC's intervention will be justified. Priority of

⁶¹ See Milena Sterio, *The Future of Ad Hoc Tribunals: An Assessment of Their Utility Post-ICC*, 19 ILSA J. INT'L & COMP. L. 237, 249 (2012).

⁶² See RENEE JEFFERY, AMNESTIES, ACCOUNTABILITY, AND HUMAN RIGHTS 148 (2014).

jurisdiction will be given to the domestic court, which will be the successive Korean government of North Korea in reunification scenario so long as the ICC assesses the successive government's capacity and/or willingness as insufficient. It may also be considered that priority should be given to the affected State over international proceedings to rebuild the capacity of the State and restore civic trust in the national institution.

One other practical problem with the ICC is that, because it takes on various cases in different countries, it cannot handle a large number of human rights violation cases of one State at a time but is best suited to take on only the most serious cases.⁶³ In this regard, criminal accountability is shared by the complementary roles of the ICC to take the most serious cases and the national or ad-hoc tribunals to take the rest of the cases.

Overall, compared to other options, referring a case to the international court will diminish sovereignty, victim's participation, community outreach, and/or development of the country. There will be less sense of local ownership by leading the procedures and participating as staff, prosecutors, or judges than if trials take place at the domestic level. Because of the geographical distance between the court and the site of the case, access to the crime scene and the participation of victims, witnesses and the public will be limited. The outreach of the court to the community to investigate, tell the truth, and restore civil society will also be limited due to its distance. They may not take sufficient account of local needs. Witness protection may also be a problem. Also, different operating languages may require extensive use of interpreters, which can impede speedy trial, increase costs, and risk misinterpretation. Also, the language barrier may decrease domestic attention, and domestic media may have inadequate access to the international court, both resulting in an understanding gap between the local population and the international criminal procedures. As

⁶³ See Sterio, *supra* note 61, at 239.

an international court, it has more difficulty understanding the context and cultural aspects of the transition than do domestic-based models.

The ICC's primary purpose is to seek accountability, not serve the needs of the society affected by the atrocities. The goal of the ICC is to promote international justice rather than one state's reconciliation or smooth transition. The needs of each society and its preferred ways of ensuring accountability are associated with its cultural and historical background. Thus, because of its international focus, the ICC may not sufficiently address each country's specific needs, which can cause an unintended side effect. In fact, some of the ICC's involvement has been criticized for aggravating ethnic conflict and violence and in this way impeding peace.⁶⁴

Another foundational criticism of the ICC and internationalized criminal justice levied by realists is that the court is not free from international politics.⁶⁵ As I mentioned above, the Security Council's role is critical in implementing international criminal justice in that it exercises exclusive power to decide what matters threaten international peace and authorize criminal justice action. However, the Security Council's response to atrocities in the world has been selective and not free from political motivation. Its neglect of certain atrocities, for example, in Syria, Ukraine, Somalia and Sri Lanka, but its intervention in other cases such as Libya, Rwanda, and former Yugoslavia, clearly shows the Security Council's biased selection.⁶⁶ Boas and Chifflet, arguing that from the international criminal justice perspective no conflict situation is any less morally deserving of intervention than any other, contend that political realities constrain the Security Council from fully meeting its purpose of maintaining international peace and security by limiting its response.⁶⁷ When justice

⁶⁴ *Id.* at 240.

⁶⁵ *See generally* GIDEON BOAS & PASCALE CHIFFLET, INTERNATIONAL CRIMINAL JUSTICE ch. 3 (2017).

⁶⁶ *Id.* at 70-1.

⁶⁷ *Id.* at 73, 70-7.

procedures are led solely by outside actors, it is not free the impact of international politics, the victor's justice problems, or even westernized justice problems.

However, there are also benefits in using international courts. The primary strengths of choosing the ICC option lie in using well-devised judicial proceeding and international criminal law expertise. Compared to mixed courts, the ICC has a long legacy and standing in dealing with international crimes.⁶⁸ The legitimacy of the court and the crimes will not face debate as much as the other cases because the authority of international community has already established the definition of crimes. Also, the ICC can independently decide the cases apart from domestic politics.

In terms of cost, it will be less expensive than creating a separate tribunal and reduce the time because it is using existing resources. The attention of major world-wide media and international society can be guaranteed because the court sits in Hague, Netherlands. International publication of court documents of the investigation, including evidence, testimonies, and rulings, will alert a wider audience throughout the world to the atrocities. To consider an important purpose of transitional justice, prevention, the use of English or French as an international language will warn potential perpetrators in other countries. The archived documents will also contribute to post-conflict and human rights studies. The well-developed procedures of the ICC also forefronts the victim's perspective and can award restitution to victims from funds under its structure. Its complementarity to the domestic prosecution may be used positively when the domestic institution is ineffective or unavailable.⁶⁹

5.2. Ad-hoc Tribunals

⁶⁸ See Sterio, *supra* note 61, at 248.

⁶⁹ See BOAS et al., *supra* note 65, at 226.

An ad-hoc tribunal or special tribunal is created to deal with certain regions or events only at an international level. The ad-hoc tribunal option has been recommended by the COI and the Group of Independent Experts on Accountability to deliberate criminal justice for North Korea's human rights situation.⁷⁰ Different from the ICC, it is free from temporal jurisdiction limitations and so can set a temporal jurisdiction which will enable the court to deal with the long-term human rights abuses in North Korea's history. The court can be specifically designed to concentrate on North Korea, and it can be provided with sufficient personnel and material resources to carry its task by the UN.

However, in last two decades' questions concerning the efficiency of the ICTY's and ICTR's operation of ad-hoc tribunals have emerged from the international community. They need separate buildings, staff and detention facilities, which require larger budgets than domestic or ICC options. The time from the creation of an ad-hoc tribunal to the actual prosecution and sentencing is longer than that of any other options. It results in more expenses and possibly impairs the rights of alleged perpetrator to speedy trial. Thus the trial may take so long to eventually achieve justice that some victims may not live long enough to see the results. The UN COI report, recognizing this problem when suggesting an ad-hoc international tribunal as an alternative to the ICC, states that the ad hoc tribunal for North Korea would "require substantial resource commitments and institutional planning, leading to a further delay in bringing perpetrators to justice."⁷¹

Furthermore, as an international tribunal, the ad-hoc tribunal option raises the same concerns as using the ICC. Because the court will use English and French as an official international language, many interpretations and double documentations will be necessary at every stage of the court proceedings. Misunderstandings from faulty translations or lack of

⁷⁰ See Detailed Findings, *supra* note 23, para. 1218.

⁷¹ See *id.* para. 1201.

cultural understanding may cause unnecessary delays. In addition, the attention of the international community is not guaranteed. For example, in the case of an ICTR court that was established in a country far from the reach of international media, there was less international attention to the court procedures and outcomes.

Local ownership to lead the criminal accountability procedures will also be questioned. The venue will still be outside of the country, which will limit victim participation, community outreach, and investigation of the crime scene. This option may deprive the country of the chance to re-establish rule of law by transitional justice and restore justice to the victims and community. The ad-hoc tribunal may focus on and achieve the goal of criminal prosecution independently from domestic politics, but the victor's justice can be an issue when the international society establishes the court to punish the leaders of North Korea without the initiative of the citizens. Rather, if future Korea has the willingness and capacity to carry the task, a complementary arrangement will be preferable to establish the court completely at the international level.

With regard to the establishment of the court, the UN Security Council will take the same conclusive role as when a case is referred to the ICC. The power to establish an ad-hoc tribunal comes from UN Charter Chapter VII, which establishes the UN Security Council's power to decide measures to maintain or restore international peace and security. The consensus required to create the ad-hoc tribunal will need China's and Russia's votes as well, and as noted, these two countries' objections are highly predictable.

There are arguments for the alternative of establishing an ad-hoc tribunal through the UN General Assembly. The COI report also notes that the UN General Assembly may establish an ad hoc tribunal, referring to its residual power to unite for peace in association with member states' sovereign power according to universal jurisdiction on crimes against

humanity.⁷² This view is based on the example of the General Assembly's establishment of the Extraordinary Chambers of Cambodia by resolution. But North Korea's and Cambodia's cases are different. In Cambodia's case, the Cambodian government initially sought international cooperation, and the Chambers were established as a domestic court first and secondarily as an agreement with United Nations. The Cambodian case hardly seems to have been established as an ad hoc tribunal by a General Assembly resolution. Without the North Korean government's request, this option could not be an alternative to the ICC option or avoid the veto power problem in the UN Security Council. There is also an argument for the establishment of an ad-hoc tribunal by the General Assembly using the power granted in Article 22 of the UN Charter.⁷³ Those who insist on the establishment through the General Assembly refer to Article 22, which states, "The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions."⁷⁴ However, this argument is considered to lack a proper legal basis because the ICJ concluded that Article 22 does not grant the General Assembly the power to establish a judicial body governing external matters.

Nevertheless, despite questions regarding its establishment and efficiency, an ad-hoc tribunal one of the preferable options for thoroughly investigating the atrocities, effectively seeking accountability, and assuring that the international community will prevent reoccurrence as the COI and the Group of Independent Experts on Accountability have recommended.

5.3. Mixed Tribunals

⁷² *Id.*

⁷³ Derek Jinks, DOES THE U.N. GENERAL ASSEMBLY HAVE THE AUTHORITY TO ESTABLISH AN INTERNATIONAL CRIMINAL TRIBUNAL FOR SYRIA? JUST SECURITY (2014), available at <https://www.justsecurity.org/10721/u-n-general-assembly-authority-establish-international-criminal-tribunal-syria/>.

⁷⁴ *Id.*

The mixed or hybrid tribunal is a cooperative form of international and domestic court. Dickinson defines hybrid courts as “both the institutional apparatus and the applicable law consist of a blend of the international and the domestic.”⁷⁵ They are also called internationalized-domestic courts.⁷⁶ This model is suited for pursuing the goals of both international justice and domestic growth together.⁷⁷ As the latest court model to deal with international crime, the mixed model has been enthusiastically welcomed by the international community as an alternative to ad-hoc tribunals.⁷⁸ It is expected to have benefits of international tribunals and domestic courts while mitigating the problems of purely international justice and purely local justice.⁷⁹ Examples of the mixed model are the Special Court for Sierra Leone(SCSL), the Extraordinary Chambers in the Courts of Cambodia(ECCC), the Special Tribunal for Lebanon(STL), the Special Panels for Serious Crimes in the District Court of Dili (SPSC), and the Regulation 64 Panels in the Courts of Kosovo.

The government of a State and the international community constitute the court together and share the monetary burden and duty to prosecute. The mixed court setting helps integrate the perspectives of an international court and domestic court. Foreign judges and domestic judges sit on the court together, and both the prosecutors and defenders include international and domestic lawyers. For the international actors, the collaboration with local

⁷⁵ Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 295, 295 (2003).

⁷⁶ There are views to differentiate hybrid tribunals and internationalized-domestic courts when the domestic court is not newly created with international composition but only is supported by international community. E.g., Sterio analyzes hybrid tribunals and internationally-supported domestic chambers in different categories. In his analysis, the Iraqi Special Court, the Bosnian War Chamber, Somali, Kenya, Seychelles cases are considered internationally-supported domestic chambers. In this case, the judges and the source of law are domestic, but they have support from the international community by training the court's personnel, employs international staff, or monetary contribution. *See generally* Sterio, *supra* note 61.

⁷⁷ *Id.* at 240.

⁷⁸ *See* Sarah M. H. Nouwen, “Hybrid courts” *The hybrid category of a new type of international crimes courts*, 2 UTRECHT LAW REVIEW 190, 190 (2006).

⁷⁹ *Id.*

actors enhances their understanding of local issues, culture, and approach to justice beyond what they would gain in a purely international court.⁸⁰ The court uses local judicial principles together with international standards, and its location inside the country facilitates investigation and community outreach without geographical restraints. The mixed model has strength in its capacity and time-effectiveness. It can handle more and lower cases than the ICC, which can handle only a limited number of cases. In this regard, the mixed model can in a sense augment the ICC's prosecution by undertaking less high-profile cases and proving a forum earlier than can the ICC's operation.⁸¹

The mixed model also has strength in legitimacy, capacity building, and norm penetration.⁸² The legitimacy problems of international and domestic courts are not at a theoretical but at a practical level. When the domestic court pursues criminal prosecution of past regimes' personnel, people may feel it is a political action to purge political opponents of the new regime and regard the prosecution as selective and incomplete if not every human rights violator is prosecuted. In contrast, a purely international tribunal may face great hardship in establishing local legitimacy, especially with the society to which the accused belongs.⁸³ Thus, by gaining legitimacy for its impartiality, the mixed model fosters broader local acceptance. By appointing international and domestic judges together to assure independence of the judiciary, the mixed model is especially beneficial when cases are highly sensitive. In cases where the local population is divided, a mixed composition of judges may have the best chance of securing broad support.⁸⁴ In either hypothetical transition, future Korea is expected to face problems of division between perpetrators and victims, between

⁸⁰ Dickinson, *supra* note 75, at 307.

⁸¹ *Id.* at 308-9.

⁸² *Id.* at 301-2.

⁸³ *Id.* at 303.

⁸⁴ *Id.* at 306.

regime supporters and so-called traitors among North Koreans, and between North and South Koreans. The mixed model will be an option to ensure legitimacy and acceptability to the larger group of people.

The mixed model can also positively affect the local capacity building. Contrary to the goals of transitional justice, a purely international court does not effectively support local capacity building. A post-conflict society may lose monetary resources, physical infrastructure, and human resources due to purification during the transition. A purely international court, established outside of the post-conflict State with foreign staff, has little chance of establishing the needed institution and training local people for capacity building.⁸⁵ On the other hand, a purely domestic institution in the difficult process of transition may not have enough resources to fulfill its objectives. However, a mixed model can provide teamwork for training personnel and develop local infrastructure. To consider North Korea's needs for capacity building and its lack of resources in transition, the mixed model will be more beneficial than other options.

Neither a purely domestic nor a purely international court can be fully effective in penetrating the norms of international human rights law and international criminal law. In the time of transition, understanding and implementing human rights standards to deal with mass atrocities is important. However, the local court may not be familiar with international standards and tend to refer to its domestic standards and criminal law to prosecute perpetrators. On the other hand, a purely international court will have well established and understood international norms but may have little impact on the local penetration of those norms. The mixed model would mitigate these problems and facilitate penetration of norms at both levels by networks linking international legal scholars and domestic actors.⁸⁶ The

⁸⁵ *Id.* at 303-4.

⁸⁶ *Id.* at 304-5.

mixed model also promotes domestic and regional human rights as shown in the Sierra Leone case. South Korea has produced several recognized international criminal court judges who are familiar with international human rights and international criminal law. However, in North Korea's case, dissemination of human rights norms is one of the primary and indispensable goals of transitional justice.

The mixed model also has positive impact on circumventing and overturning amnesties. The statute and rulings of domestic-international mixed tribunals (the SCSL, the SPSC, and the ECCC) are strongly against granting amnesty for the serious crimes.⁸⁷ For example, the SCSL has declared that amnesty given for crimes against humanity, war crimes, and other violations of the Geneva convention will not bar the SCSL's prosecution.⁸⁸ The ECCC has not only prohibited a request for amnesty from the Cambodian government but also has the power to decide on already granted amnesty.⁸⁹

Nevertheless, the hybrid setting may create difficulties in communication and disagreements in judgment. The hybrid setting requires working in several different languages and mitigating different interpretations of the law. The hybrid court will still have the problem of victor's justice if it excludes the participation of certain local groups and works only to recognize victims and designate reparations. The ownership problem also arises in a mixed model. Even though the court is established by both international and domestic authority, the question of who has more or dominant control can create controversy. When the international community has more control, the process may seem tainted by

⁸⁷ See JEFFERY, *supra* note 62, at 154-7.

⁸⁸ The statute of the Special Court for Sierra Leone, art 10; *Id.* at 154.

⁸⁹ "The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in articles 3, 4, 5, 6, 7 and 8 of this law. The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers," Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, ch. XII, art 40.; JEFFERY, *supra* note 62, at 155-6.

imperialism or victor's justice. On the contrary, when the domestic actors have more control, questions of independence and impartiality issue can be raised.⁹⁰

To establish a mixed court, either request or agreement by the State in question or an action by UN Security Council is required. Establishing a mixed court also requires the same legal basis as do other international courts to justify infringement of the State's judicial sovereignty. In this regard, a mixed model often faces resistance and pressure from the two establishing parties, the domestic government and the international community or foreign government.

5.4. Domestic Courts

5.4.1. Domestic Prosecution in Korea

Criminal prosecution in a domestic court is a matter of sovereignty. People want to have control over serious crimes that have affected their society and bring offenders to justice by their own hand. To exercise criminal jurisdiction and execute police power is the State's sovereign power over its land, which the State is reluctant to give up. Domestic prosecutions in transitional justice can achieve the broader goal of transitional justice to rebuild the society and reconstruct its institutions. Holding domestic proceedings helps restore civic trust in the national institutions which previously failed to protect people from the atrocities or a guardian of the past regime. Prosecutions in domestic courts to deal with past human rights violations are considered to have a greater positive impact on the society than cases of internationally led prosecution. The participants in the court proceedings will be familiar with the law, languages, and the environment of the local setting. The participation of victims and witnesses will be facilitated as better access to the court will be guaranteed. The public will pay attention to the court procedures through the news media and direct observation. Thus the

⁹⁰ JEFFERY, *supra* note 62, at 155-6.

domestic court option maximizes the educational impact on the society. It is also an efficient option in terms of both time and financial costs, as having better access to victims and crime scenes and little or no need for multiple operating languages will lead to a quicker and cheaper trial. Using the existing judiciary system will also reduce costs and save time, and as noted public participation will be more encouraged in this than any other settings. Thus, when the domestic government has the willingness and capacity, it should lead the criminal justice proceedings.

However, a domestic prosecution is not the best option when the society in transition lacks the will to deal with its past or the ability to carry the court procedures. Also if the officials of the institutions, such as judges, prosecutors, and the police, have functioned as enforcers and perpetrators of the former regime, they would not be suitable agents to carry out criminal accountability. Without international involvement, domestic courts are more prone to corruption compared to other options.⁹¹ For sensitive cases in which the perpetrators and victims belong to the same society, a domestic court also may not effectively conduct the case with legitimacy and fair debates. If the society is divided, and the proceeding is led by one side justice for victims may be problematic and political controversies may result. For the human rights victims of the North Korean regime, holding local ownership over accountability and restoring trust in national institutions are important, but their experience with the judiciary and police power suggests a possible involvement of the accused group, so a local court may not be a viable option.

Because it is hard to separate the North Korean regime's human rights violations from the North Korean judicial branch, their participation may impair the criminal justice outcome, and the public may not accept their participation. In designing a transitional justice plan, the lustration issue of the North Korean regime will be seriously considered, and it will prohibit

⁹¹ See Sterio, *supra* note 61, at 249.

the participation of North Korea's former officers in the judicial system. Moreover, only North Korean led criminal accountability will face a problem in ensuring adequate human resources and conformity with international human rights standards.

In the case of procedures led only by South Korea, the capacity is not in question. If the reunification takes place, it is highly likely that the developed judicial system of South Korea will be adopted. The South Korean government has consistently been putting efforts into preparing for possible reunification including plans for integration of the legal system and criminal prosecution. The South Korean government recently adopted the North Korean Human Rights Act to preserve the evidence of human rights violation in North Korea, and judicial branches have started a discussion of ways to deal with transitional justice issues in the future. The judges and scholars of Korea have experienced several international tribunals and therefore are able to bring lessons from the international judicial system and international standards into the domestic systems. However, if the transitional justice court is composed only of South Koreans, it can be seen as victor's justice and fairness can be questioned. The exclusion of North Korean may result in lack of sovereignty of North Korean citizens.

5.4.2. Universal Jurisdiction Cases in Foreign Domestic Courts

Jus cogens crimes are subject to universal jurisdiction, which means foreign countries can prosecute those crimes in their domestic courts. A notable example is the Pinochet case, in which the Spanish national court exercised its universal jurisdiction over Augusto Pinochet of Chile under Spanish law.⁹² By exercising universal jurisdiction, any foreign country may prosecute perpetrators regardless of where the crime happens or the nationality of victims or

⁹² Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311, 311 (2000).

perpetrators.⁹³ Traditional jurisdiction assumes that the state should have a nexus to the relevant party, but universal jurisdiction does not require this nexus.⁹⁴ The Rome Statute of the ICC also notes that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”⁹⁵

Recognition of universal jurisdiction in a foreign country's court contributes to assuring that accountability will be sought and sends a warning to potential perpetrators. It is also an effective tool to circumvent and overturn blanket amnesties granted to the perpetrator by a domestic institution.⁹⁶ The foreign country's efforts to seek accountability under the universal jurisdiction principle also inspire the country and civil society affected directly by the atrocity to seek accountability and circumvent the existing amnesty.⁹⁷ The international crimes that draw universal jurisdiction are understood to include genocide, crimes against humanity, war crimes, torture, piracy, and slavery.⁹⁸ Because the victims of crimes against humanity by the North Korean regime includes foreigners, mostly abductees from Japan, China, and other countries, those foreign countries may exercise their jurisdiction over the perpetrators.

However, the use of universal jurisdiction is rare and limited by legal, political, and practical obstacles.⁹⁹ Politically, foreign countries are often reluctant to use universal jurisdiction that may disrupt an amicable relationship. There are political pressures against using universal jurisdiction from allies. Other problems include politically and morally

⁹³ Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 337 (2000).

⁹⁴ BOAS et al., *supra* note 65, at 77.

⁹⁵ The preamble to the Rome Statute, *See also* JEFFERY, *supra* note 62, at 148.

⁹⁶ JEFFERY, *supra* note 62, at 138-150.

⁹⁷ *Id.* at 146-7.

⁹⁸ BOAS et al., *supra* note 65, at 77; GIDEON BOAS, PUBLIC INTERNATIONAL LAW 263 (2012).

⁹⁹ BOAS et al., *supra* note 65, at 78.

justifying involvement with the country's own people and persuading them to agree on unanticipated expenditures incurred by exercising universal jurisdiction.

The legal obstacles the following: 1) to exercise universal jurisdiction, individual states need to adapt it to the domestic legislative system and create a legal basis of authority, and 2) the exercise of universal jurisdiction is barred by the doctrine of sovereign immunity which senior government officials are immune from foreign jurisdiction at least while holding their position.¹⁰⁰ Therefore, in the case of North Korea, the domestic courts if foreign countries seeking to deal with North Korea's situation need to first recognize universal jurisdiction in their domestic legislative system, and they may not exercise the jurisdiction as long as the criminals hold office.

Another practical obstacle is the difficulty of actual enforcement. Universal jurisdiction does not allow the country to encroach on another country's sovereign jurisdiction. In the Pinochet case, the actual arrest could happen when he was traveling outside of his home country. Thus, to physically gain custody the accused, the foreign prosecuting country needs the cooperation of the country where the accused is located. If the other country does not agree on extradition, or the accused has the country's protection, actual enforcement is impossible.

5.5. Local/Traditional Justice

Either under or separately from the domestic court, indigenous or informal tradition-based measures for administering justice or settling disputes can be adopted in a post-conflict setting. A good example of adopting a localized forum for justice is the Rwandan *Gacaca* courts. To deal with the Genocide atrocity, the *Gacaca* courts provided informal court

¹⁰⁰ *Id.* at 78-9. The ICJ denied Belgium court's exercise of universal jurisdiction to the Minister of Foreign Affairs of the Democratic People's Republic of the Congo, Yerodia in the Arrest Warrant case in 2011 based on the doctrine of sovereign immunity.

settings where the perpetrator and victims could sit together to acknowledge the truth and forgive.¹⁰¹ A lay judge adjudicated the case, and a community sentence was often given to a perpetrator.¹⁰² The court focused on restorative justice to overcome racial conflict and also dealt with the realistic problem that an ordinary judiciary system could not handle over 100,000 perpetrators effectively. The courts' procedures had problems of inconsistency, questionable legitimacy, and ineffectiveness, but they were largely embraced by the community and facilitated local participation.¹⁰³

The Chicago Principles state that “States should support and respect traditional, indigenous, and religious approaches regarding past violations”¹⁰⁴ because these approaches have already been integrated into the society and so have high levels of local legitimacy.¹⁰⁵ Through the international community's lens, such concepts as “justice,” “injustice,” and “victim,” are specific tools to address the legacies of human rights abuse in transitional justice, and “transitional justice solutions” are formed and imposed upon the local society exogenously. This outside implementation of justice may be felt to be illegitimate by the local population, causing unnecessary resistance and so is likely to be unsuccessful in the long term.¹⁰⁶ In designing transitional justice, it is important to make a sincere effort to understand and respect local preferences and values.¹⁰⁷ Rather than globalized or westernized concepts of transitional justice, there is increasing interest in and possibilities of adopting traditional justice as a transitional justice modality. The Chicago Principles also

¹⁰¹ *Id.* at 66.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ THE CHICAGO PRINCIPLES ON POST-CONFLICT JUSTICE, princ. 6.

¹⁰⁵ *Id.*

¹⁰⁶ See The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General, ¶ 17, 26, U.N. Doc. S/2004/616 (Aug. 23, 2004).

¹⁰⁷ See Dustin N. Sharp, *Transitional justice and 'local' justice*, in RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE 142 (Cheryl Lawther et al. eds. 2017).

state that just as the global approach to justice should respect local and less formal justice processes, local and traditional justice agents should respect due process and human rights guidelines.¹⁰⁸ The Chicago Principles, therefore, recognize both the international human rights perspective and the values of traditional justice and the importance of balancing traditional processes of justice and due process and other human rights principles.¹⁰⁹

South Korea's judicial system is patterned on a western model, so there is no significant traditional justice procedure that should be taken into account. In North Korea's case, the situation is similar, but because North Korea is a totalitarian State there is strong centralized control. In North Korea's case, the "Review Meeting of Party Life" may be seen as a kind of local justice system, in which smaller groups meet to self-examine and criticize each other. However, this tool has been implemented by the central government to promote the power of the North Korean regime and maintain mutual surveillance among citizens rather than promote justice, so future Korea in either reunification scenario or internal transition scenario should be vigilant to avoid establishing a similar process. On the other hand, religious accountability and reconciliation may be considered a tool to respect authentic community-based justice procedures. Also, considering the large number of perpetrators who are direct violators of human rights or collaborators of the regime, and the immensity of the reconciliation task in future Korea, alternative restorative justice measures such as the *Gacaca* courts may be considered.

6. Best-Suited Criminal Justice Options for Future Korea

¹⁰⁸ THE CHICAGO PRINCIPLES ON POST-CONFLICT JUSTICE, *supra* note 104, Princ. 6.

¹⁰⁹ *Id.*

Different options and considerations come into play when choosing the setting of criminal justice measures to carry the goals of the transitioning country. Each option, whether the ICC, ad-hoc, mixed, domestic, or local courts, has different merits and weaknesses. Also, preferences may be changing at times according to the nature of reunification, resources, the succeeding government, the needs of the public, and the international community's intentions. Future Korea should consider these contexts along with each court's characteristics. In making choices, it is crucial to thoroughly review those factors and try to minimize the weaknesses of any chosen option while fulfilling the people's desire for criminal justice and respecting the needs of victims in the application of justice.

Among the different criminal accountability options, I believe the mixed model or use of complementary court options will be the best model for future Korea. Its location inside the Korean peninsula facilitates the investigation and community outreach. It also has strength in its time-effectiveness and capacity to handle a large number of cases. The mixed model has strength in legitimacy as well, so it will be more acceptable to the divided society and will promote local ownership. The benefit of capacity building and norm penetration will help future Korea to move to a different trajectory. The international component that circumvents amnesty will ensure accountability and justice. The multilingual operation may give wide publicity to the local and international community. However, future Korea must put efforts into overcoming and heading off the weaknesses of the mixed model in the areas of communication, sovereignty, and impartiality.

Another positive factor of mixed courts is that there is no standard design, but the pattern may keep transforming to meet specific needs of the transitioning State. For example, the Kosovo Specialist Chamber is a mixed court adopting the domestic court system, but no domestic judges are presiding. The chamber has more of a regional-domestic form, which is

mainly supported and organized by the EU. A recent hybrid court, the Extraordinary African Chambers in Senegal, is an internationalized model under a foreign domestic court (Senegal) to deal with crimes in Chad supported by a regional organization, the African Union.

Complementarity also adds flexibility and capacity to criminal justice options. It can allow the ICC to adjudicate the most serious cases and the domestic courts or mixed courts perhaps to deal with smaller cases. The future Korea will have the capacity to deal with human rights violations in its domestic court. It will be a cost and time-efficient option which maximizes the local impact of criminal justice. In this way, the domestic court can allow the ICC to try the high-profile cases independently and try mid-level cases itself. Also, the caseload burden can be shared court to facilitate the criminal justice process. To accomplish an effective reconciliation of North and South Korea, having an international or internationalized court together will benefit Korean society. The mixed model also can be adopted along with the international court, the ICC, or purely domestic procedures. As Dickinson points out, a mixed model is not a complete substitute for either international or domestic courts, but it should be understood as a complement to both.¹¹⁰ Both international and domestic court systems can function as “mutually supportive forums of justice,” and the choice of forum will be decided by comparing the advantages of each option. This approach entails not only the burden of choosing more specialized options but the effort to share the burden and achieve justice together. For a proper justice future, Korea needs the wisdom and flexibility to use more than one option to meet various needs in criminal justice.

Further, there is also no one answer to the issue of selecting or creating criminal accountability measures. Just as ad hoc tribunal and mixed models have been developed, an innovative new model can be created in the future to minimize the weaknesses and maximize

¹¹⁰ See Dickinson, *supra* note 75, at 310.

the strengths of current models. Also, criminal accountability measures often fail to focus on victims or meet their needs for truth-seeking.¹¹¹ Criminal Accountability measures are not designed for effective response to mass atrocities or provide redress for the suffering of victims.¹¹² Therefore, the limitation in criminal accountability measures calls for measures other than transitional justice. Truth commissions and other non-retributive justice measures are considered alternative justice mechanisms.¹¹³ Combinations of transitional justice mechanisms are also more effective to secure democracy and human rights than relying on only one mechanism.¹¹⁴ Working together, a truth commission, trial, and amnesty can produce the most effective outcomes.¹¹⁵ Bassiouni also notes that a combination of at least two mechanisms is necessary to respond to long-lasting and large-scale victimization.¹¹⁶ By using different mechanisms as appropriate, transitional justice can meet various needs by finding the truth, prosecuting perpetrators, restoring victims' rights, providing amnesty, and reconciling the society.

These mechanisms don't have to be used simultaneously but can be activated sequentially or in response to specific situations.¹¹⁷ They can also be linked so that one mechanism's operation can accommodate the next mechanism, or they can be complementary to each other. Thus, future Korea should also facilitate cooperation among different mechanisms, such as providing information gathered from the truth commission to the court, rotating use of staff in certain sectors, and dividing complex tasks. Such

¹¹¹ See Brianne McGonigle Leyh, *Nuremberg's Legacy within Transitional Justice: Prosecutions Are Here to Stay*, 15 WASH. U. GLOBAL STUD. L. REV. 559, 568 (2016).

¹¹² See *id.*

¹¹³ See *id.* at 569.

¹¹⁴ See Sharp, *supra* note 107, at 141-51.

¹¹⁵ See *id.* at 147-8.

¹¹⁶ See Bassiouni, *supra* note 1, at 43.

¹¹⁷ See Sharp, *supra* note 107, at 148.

cooperative measures can achieve cost-efficiency while expeditiously fulfilling the goals of transitional justice.

7. Conclusion

Bassiouni (2002) explains importance of criminal justice system in transition stating: “Accountability and victim redress are also fundamental to post-conflict justice, as the re-establishment of a fair and functioning criminal justice system in the aftermath of conflicts is the only means to avoid impunity and ensure a lasting peace, which only a viable criminal justice system can protect and guarantee.”¹¹⁸ He evaluates that bringing perpetrators to justice is not only a duty but an important tool to prevent future human rights atrocities.¹¹⁹

When considering transitional justice for North Korea’s egregious and systematic human rights violations, one of the essential issues in transitional justice is criminal accountability. International human rights norms mandate a State to take reasonable steps to prosecute perpetrators of gross human rights and humanitarian law violations. Under the principles of international law, impunity for serious crimes is prohibited. The judicial process in transitional justice plays an important role in bringing justice to society and to victims. Not only by rules but by principle, the international community and victims’ groups demand criminal accountability. The Korean legal value placed on justice through court procedures also mandate criminal proceedings to deal with human rights atrocities. Therefore, a preliminary inquiry should consider the criminal accountability option for future Korea.

To find out what form best suits future Korean society, the context at the time of transition, the scale of human rights violations, and the political and economic capacity of the

¹¹⁸ See Bassiouni, *supra* note 1, at 54.

¹¹⁹ See *id.*

future transitioning society will be crucial considerations. The characteristics of each criminal justice option, legitimacy, effectiveness, efficiency, and practicality, will affect the decision. The Korean society's willingness and ability to take the lead in the criminal justice procedures, its willingness to have international involvement, and the international community's willingness to provide support also impact the choice.

It is impossible to presuppose every contextual factor and possible result of each criminal justice option for future Korea now. However, an inquiry into criminal justice options cannot be put off considering the international community's serious calls for concrete criminal accountability measures. In addition, the ongoing grave human rights violations urge the necessity of this inquiry and demand the attention of international criminal law entities responsible for the future investigation.

I conclude that among criminal justice options, the mixed court or complementary court options using more than one court will be suited to carry out future Korea's transitional justice. It is true that transitional justice is greatly affected by the critical choice of the institution best-suited to carry out the aspirations of a society. However, choosing the "right" institution is necessary but not sufficient for achieving justice. The institution needs to keep growing to reflect the society's changing beliefs and needs as truths are unveiled. Institutions are not only chosen, but they also need to continue maturing over time. Further, once the work of one institution such as a special criminal tribunal has been completed, a new institution to meet the next demand of society is necessary. Throughout the whole process, as one transitional justice task succeeds another, the process of choosing and designing the best institution for that task should be repeated to meet all the society's needs. As noted above, so far, no empirical or comparative studies have provided concrete evidence of the different effects of criminal accountability measures and factors that lead to satisfactory results. Also, this paper is a mere preliminary inquiry into criminal justice options for future Korea's

transitional justice. A further institutional analysis will contribute to finding the best-suited options and ways to develop these options for future Korea.