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PROMOTING INTERNATIONAL CRIMINAL JUSTICE IN KOREA: A KOREAN WAR CRIMES TRIBUNAL?

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ABSTRACT

Since the Korean Armistice Agreement was signed between representatives of United Nations Command, the Korean People's Army, and the Chinese People's Volunteer Army in 1953, tensions have run high on the Korean Peninsula. North Korea has time and again threatened an invasion of South Korea and has issued warnings to South Korea that, if provoked, it would not hesitate to use nuclear missiles and chemical weapons against its southern neighbor. Both the threat of an invasion and the deployment of weapons of mass destruction leave open an important question in the event of an armed conflict on the Korean Peninsula: What measures would be put into place to ensure the accountability of actors who are responsible for a war of aggression or who deploy prohibited weapons of war?

This article sets forth to answer this question. It analyzes three forms of international criminal justice that can serve the Korean Peninsula: (1) a referral of international crimes to the International Criminal Court; (2) prosecution by domestic Korean courts; and (3) the establishment of a hybrid tribunal, the "Korean War Crimes Tribunal," in coordination with the governments South Korea and United Nations Command member states. This article will argue that options (1) and (2) are marked by a range of jurisdictional deficiencies and practical impediments, whereas option (3)—the creation of the Korean War Crimes Tribunal—offers a range of advantages that would fill gaps in international criminal justice and promote accountability for international crimes.

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I. INTRODUCTION

The Korean Armistice Agreement was signed in 1953 by representatives of United Nations Command, the Korean People's Army, and the Chinese People's Volunteer Army, bringing an end to the three-year-long Korean War and seeking a "complete cessation of hostilities and of all acts of armed force in Korea."[1] Since the Armistice Agreement was signed, tensions have run high on the Korean Peninsula. The Democratic People's Republic of Korea ("North Korea") has time and again threatened an invasion of the Republic of Korea ("South Korea") while developing nuclear missiles and stockpiling thousands of tons of chemical weapons[2] that could form part of an attack on South Korea. Most recently, North Korea, alleging that it found remnants of a South Korean drone in Pyongyang, threatened that "any further 'violation' of its territory would result in a 'declaration of war.'"[3] It is estimated that North Korea has "amassed a substantial inventory of chemical weapons (reportedly 2,500 to 5,000 tons)," as well as an inventory of biological and nuclear weapons.[4] North Korea has repeatedly warned South Korea that in the event of an attack, it would not hesitate to use nuclear and other weapons of mass destruction.[5]

Both the threat of an invasion and the threat of using weapons of mass destruction leave open an important question in the event of an armed conflict on the Korean Peninsula: What measures would be put into place to ensure that actors who are responsible for launching a war of aggression or who commit war crimes involving chemical weapons and other prohibited weapons of war are held to account for their crimes? This question has been discussed at length by South Korean officials, academics, and NGOs.[6] International criminal justice for the crime of aggression and the war crime of using prohibited weapons of war can take one of the following three forms:

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1. Armistice Agreement for the Restoration of the South Korean State, preamble, July 27, 1953, Treaties and Other International Agreements Series # 2782 [hereinafter Korean War Armistice Agreement].

2. Choe Sang-Hun, *What to Know About N. Korea's Mil. Capabilities*, NEW YORK TIMES (Oct. 24, 2024), https://www.nytimes.com/2024/10/24/world/asia/north-korea-military-capability.html.

3. Brendan Cole, *North Korea Threatens To Declare War With S. Korea*, NEWSWEEK (Oct. 19, 2024), https://www.newsweek.com/north-korea-south-korea-war-drills-1971637.

4. BRUCE W. BENNETT ET AL., CHARACTERIZING THE RISKS OF NORTH KOREAN CHEMICAL AND BIOLOGICAL WEAPONS, ELECTROMAGNETIC PULSE, AND CYBER THREATS vi (2022).

5. Yoonjung Seo & Lex Harvey, *N. Korea's Kim Jong Un threatens to destroy the S. with nuclear weapons if provoked,* CNN: WORLD (Oct. 4, 2024), https://www.cnn.com/2024/10/04/asia/north-korea-kim-jong-un-nuclear-weapons-intl-hnk/index.html ("North Korean leader Kim Jong Un threatened to use nuclear weapons to destroy South Korea if attacked.").

6. *See, e.g.*, The North Korean Missile Threat: Expert Roundtable, CTR. FOR STRATEGIC & INT'L STUD. (March 30, 2022). This author attended two such events, including expert roundtables held at the University of the Pacific McGeorge School of Law on August 12, 2024 and at the University of California, Irvine School of Law on October 3, 2024 that convened international lawyers, military personnel, human rights experts, the International Bar Association and Korean civil society to explore means and methods of promoting accountability for international crimes committed on the Korean Peninsula.

1. a referral of international crimes to the International Criminal Court ("ICC"), to which South Korea is a state party[7];

2. prosecution by local Korean courts; or

3. the establishment of a hybrid tribunal in coordination between the government of South Korea and the governments of United Nations Command member states[8] to prosecute international crimes (hereinafter, the "Korean War Crimes Tribunal" or the "Tribunal").

This essay will demonstrate why options 1 and 2 are marked by a range of jurisdictional deficiencies and practical impediments that would fail to fully promote accountability for international crimes. In contrast, option 3—the creation of the Korean War Crimes Tribunal—offers a range of advantages that would fill gaps in international justice and accountability. As a hybrid Tribunal, the Korean War Crimes Tribunal would unlock the benefits of both domestic and international courts. It would draw on the expertise of local judges and prosecutors with knowledge of the Korean language, culture, and context while simultaneously tapping the expertise of international experts with extensive experience in investigating and prosecuting international crimes.

II. LIMITATIONS OF ICC AND DOMESTIC PROSECUTIONS

A. Limitations of the ICC

1. Territorial Limitation

Although South Korea is a state party to the Rome Statute of the ICC ("SICC" or "Rome Statute"),[9] the option of prosecution through the ICC is marked by a range of limitations. Because North Korea is not a state party to the Rome Statute, the jurisdiction of the ICC to try North Korean officials is limited to crimes committed on South Korean territory or on board a vessel or aircraft registered with South Korea.[10] The ICC would be unable to prosecute war crimes committed against South Korean soldiers on North Korean territory or crimes against humanity committed by North Korea on its territory against its own civilians.

7. The Republic of Korea deposited its instrument of accession to the Rome Statute on 13 November 2002. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute].

8. United Nations Command is a multinational military force headquartered in Camp Humphreys, South Korea that was established on 24 July 1950 by the United Nations Security Council following a call to U.N. member states to provide assistance in repelling North Korea's invasion of South Korea. Today, United Nations Command is comprised of the following 18 members: Australia, Belgium, Canada, Colombia, Denmark, France, Germany, Greece, Italy, Netherlands, New Zealand, Norway, Philippines, South Africa, Thailand, Turkey, United States and United Kingdom. *See* S.C. Res. 84, ¶ 2 (July 7, 1950) (calling for the establishment of a Unified Command for United Nations Forces in Korea); *see also* HYUN KIM & DONALD A. TIMM, *Visiting Forces in Korea*, *in* THE HANDBOOK OF THE L. OF VISITING FORCES 624 (Dieter Fleck ed., 2nd ed. 2018).

9. Rome Statue, 2187 U.N.T.S. 3.

10. *Id*. art. 12(2)(a).

2. Lack of Jurisdiction over the Crime of Aggression

The Rome Statute limits the ICC's ability to exercise jurisdiction over the crime of aggression. It states: "In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory."[11] Because North Korea is not a state party to the Rome Statute, the ICC lacks jurisdiction to try the crime of aggression. Therefore, opting for a state referral to the ICC would limit the type and amount of crimes for which North Korean officials could be tried.

3. Inadmissibility of Certain Cases Referred to the ICC

Even if South Korea opts for an ICC referral, there is no guarantee that the ICC Prosecutor would take on the case. On multiple occasions, the ICC Prosecutor has declined to act due to the principle of complementarity or when valid issues of admissibility, enumerated in Article 17 of the Rome Statute, are raised.[12] This includes cases both in South Korea and elsewhere deemed to be of insufficient gravity to justify action by the ICC.[13]

For example, on December 6, 2010, the ICC Prosecutor announced the opening of a preliminary examination to assess whether two incidents in the Yellow Sea constituted war crimes falling within the jurisdiction of the ICC.[14] The first was the sinking of a South Korean warship in March 2010, and the second was the shelling of Yeonpyeong in November 2010, a South Korean island.[15] On June 23, 2014, the Prosecutor concluded that the statutory requirements to seek authorization to initiate an investigation of the situation in South Korea had not been satisfied and proceeded to close the preliminary examination.[16] The case failed to move forward due to concerns that the attacks, which may not have constituted war crimes, were not of sufficient gravity to justify further action by the ICC and were therefore barred under Article 17 of the Rome Statute.[17]

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11. *Id.* art. 15(5).

12. For example, in its 2018 report on preliminary examinations, the Office of the Prosecutor ("OTP") of the ICC discussed its examination of executives of Chiquita Brands International (Chiquita) who allegedly approved payments from Chiquita's Colombian branch to the *Autodefensas Unidas de Colombia*, a terrorist group responsible for international crimes in Colombia. The OTP noted the domestic investigation in Colombia of 13 Chiquita executives. In its 2019 report on preliminary investigations, the OTP observed that the domestic indictment of 10 out of the 13 Chiquita executives was confirmed. The OTP subsequently found that "the national authorities of Colombia could not be characterised as being inactive, nor unwilling or unable to genuinely investigate and prosecute relevant Rome Statute crimes." Therefore, in 2021, the OTP decided to close the preliminary examination, believing that potential cases arising from an investigation would be inadmissible under the principle of complementary of the Rome Statute. *See* John M. B. Balouziyeh & Stephen J Rapp, *The Role of Civil Society in Promoting Corporate Accountability for International Crimes*, 22 J. INT'L CRIM JUST. 365, 369 (2024).

13. Article 17 of the Rome Statute bars as inadmissible cases not of sufficient gravity to justify action by the ICC. Rome Statue art. 17(a), (d), July 17, 1998, 2187 U.N.T.S. 3.

14. *Preliminary examination: Republic of Korea*, INT'L CRIM. CT., https://www.icc-cpi.int/korea (last visited Jan. 6, 2025).

15. *Id.*

16. *Id.*

17. WhatsApp correspondence between the author and Stephen Rapp, Ambassador and expert of International Criminal Law (Oct. 4, 2024) (on file with author).

4. A Limited Record of Success in Light of Logistical and Language Barriers

Yet even in cases where the ICC opts to act, the Court's record in taking a case through an investigation, trial, and conviction remains limited. Since it began its operations in 2002, the ICC has convicted only ten defendants.[18] ICC investigations tend to be costly and drawn out.[19] As an institution based in The Hague,[20] the ICC may not be the best-suited institution to investigate the Korean Peninsula, which is nearly 9,000 miles away. The ICC's unpreparedness for the task would be compounded by the need for forensic experts with specialized knowledge and skills relating to chemical weapons and other weapons of mass destruction, as well as a sufficient number of experts with the necessary Korean language skills and cultural expertise to effectively investigate international crimes committed in Korea, all of which the ICC currently lacks.[21]

B. Limitations of Korean Courts

1. Lack of Jurisdiction over the Crime of Aggression

The second option—prosecution by local Korean courts—carries its own limitations and defects. The first issue that arises is that of subject matter jurisdiction. Korean law has only *partially* domesticated international crimes into national criminal law. Under South Korea's Act on Punishment of Crimes under Jurisdiction

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18. *Convicted Defendants*, INT'L CRIM. CT., https://www.icc-cpi.int/defendants?f%5B0%5D=accused_states%3A358 (providing a list of the following 10 convicted defendants: Ahmad Al Faqi Al Mahdi; Narcisse Arido; Fidele Babala Wandu; Jean-Pierre Bemba Gombo; Germain Katanga; Aime Kilolo Musamba; Thomas Lubanga Dyilo; Jean Jacques Magenda Kabongo; Bosco Ntganda; Dominic Ongwen).

19. Eric Wiebelhaus-Brahm & Kirsten Ainley, *The evolution of funding for the International Criminal Court: Budgets, donors and gender justice*, 22 J. HUM. RTS. 31, 31 (2023) ("[the International Criminal Court] works slowly, and the prosecution's cases are often underwhelming despite the resources invested in lengthy investigations"); Douglas Guilfoyle, *Lacking Conviction: Is the International Criminal Court Broken? An Organizational Failure Analysis,* 20 MELB. J. INT'L L. 1, 17-19 (2019) ("The headline figures for the Court look impressive: it has an annual budget for 2019 of over 150 million euros, has spent 1.5 billion euros over its lifetime, and has over 900 employees . . . the ICC proposed it would focus on major perpetrators and promoting a complementarity regime which would 'limit [its] judicial activities' and budget . . . . [t]his has not come about.").

20. *About the Court: Facts and Figures,* INT'L CRIM. CT., https://www.icc-cpi.int/about/the-court#:~:text=Over%20900%20staff%20members%3A%20From,%2C%20Chinese%2C%20Russian%20and%20Spanish.>.cpi.int/korea (last visited Jan. 6, 2025) [hereinafter ICC].

21. For example, none of the 1,032 attorneys featured on the ICC's List of Counsel are nationals of South Korea or North Korea. *See About the Court: List of Counsel before the ICC*, INT'L CRIM. CT. (Oct. 18, 2024), https://www.icc-cpi.int/sites/default/files/2024-10/241018-list-of-counsel-eng.pdf. Moreover, Korean is not one of the six official languages of the ICC, nor is it one of the ICC's working languages. None of the ICC's offices are on the Korean Peninsula or in Asia; the ICC maintains its headquarters in The Hague, a U.N. Liaison Office in New York and seven ICC Country Offices in Kinshasa and Bunia (Democratic Republic of the Congo); Kampala (Uganda); Bangui (Central African Republic); Abidjan (Côte d'Ivoire); Tbilisi (Georgia); and Bamako (Mali). *See* INT'L CRIM. CT., *supra* note 20.

of the International Criminal Court (the "International Crimes Act"),[22] South Korea has domestic legislation criminalizing genocide,[23] crimes against humanity,[24] and war crimes.[25, 26] However, the Act, which was last amended in 2011, does not presently include within its scope the crime of aggression.[27] While the South Korean government may amend its domestic law to include aggression as a crime, at the present time, there does not appear to be an indication that it will do so.

Therefore, South Korean courts lack jurisdiction to try aggression, the gravest of all international crimes, and the crime that almost always precedes the commission of other international crimes. A war crime cannot be committed before an act of aggression triggers an armed conflict, and genocide and crimes against humanity almost invariably occur within the context of an armed conflict triggered by an act of aggression. The absence of aggression in South Korean national legislation leaves a gaping hole in international criminal liability.

2. Inability to Overcome Head-of-State Immunity

Another limitation inherent to prosecutions by Korean national courts is that of head of state immunity. Heads of state and government hold immunity from prosecution, particularly while holding office.[28] This limitation has precluded the domestic courts of many states from acting against heads of state and government. For example, the finding of head of state immunity by Belgium's *Cour de Cassation* in 2003 represents this historic approach.[29] In the early years of Belgium's universal jurisdiction statute, multiple cases were filed against sitting heads of state and government, including against Israeli Prime Minister Ariel Sharon and former Israeli

22. Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court 2007 (ICC Act No. 8719) (S. Kor.) [hereinafter Int'l Crimes Act].

23. *Id.* art. 8.

24. *Id.* art. 9.

25. *Id.* art. 10-14. As an example, Article 14 of the Act makes the use of biological or chemical weapons in either an international armed conflict or a non-international armed conflict punishable by imprisonment from five years to life. *Id.* art. 14. If harm results to another person's life, body or property, the crime is punishable by imprisonment from seven years to life or by death. *Id.*

26. The English translation of South Korean criminal statutes was taken from the website of the Korea Legislation Research Institute, which is a research institute funded by South Korea and specializing in legislation of the government of Korea. *See generally id.*, *translated in Act on Punishment of Crimes under Jurisdiction of the International Criminal Court*, KOREA LEGISLATION RESEARCH INSTITUTE: STATUTES OF THE REPUBLIC OF KOREA, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=24229&lang=ENG (last visited Jan. 6, 2025).

27. *See generally* Int'l Crimes Act, 2007 (ICC Act No. 8719) (S. Kor.) (the crime of aggression is not among the available crimes enumerated in the most recent amendment to the International Crimes Act).

28. Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgement, 2002 I.C.J. 3, ¶¶ 51-52 (Feb. 14) [hereinafter Arrest Warrant Case] ("The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.").

29. Cour de cassation de Belgique [supreme court for judicial matters] Feb. 12, 2003, RE SHARON AND YARON, HSA V. SA IN P.02.1139.F/1 (art. IV(B) ¶¶ 13-15 (Belg.) (holding that a prime minister benefits from immunity as long as he is in office and thus cannot be prosecuted during that time, while persons not benefiting from immunity can be prosecuted, wherever they may be).

Army chief of staff Amos Yaron.[30] However, on February 12, 2003, the Belgian *Cour de Cassation*, finding the immunity of sitting heads of state and government to be a principle of customary international law, "dismissed the case against Sharon but allowed the investigation against Yaron to proceed. The tribunal left open the possibility that Sharon could be tried after he left office."[31]

Similarly, in October 2011, Australian national Jegan Waran filed charges in the Melbourne Magistrates Court for war crimes and crimes against humanity allegedly committed by Mahinda Rajapaksa, the President of Sri Lanka.[32] The suit claimed that civilian targets were bombed in 2009, and thousands of civilians were killed in the Sri Lankan Civil War.[33] Mr. Waran alleged that he "witnessed Sri Lankan military forces deliberately attacking clearly marked civilian infrastructure such as hospitals"[34] and that civilians were targeted. Concluding that allowing the case to proceed would constitute a breach of international law, which prohibits the arrest and detention of acting heads of state based on head-of-state immunity, former Australian Attorney-General Robert McClelland refused to allow the case to move forward.[35]

These limitations under domestic law would prohibit Korean domestic courts from prosecuting a head of state who may be directly responsible for the crime of aggression or a war crime committed on South Korean territory. However, these limitations could be overcome if a head of state's crimes are charged by an international tribunal rather than a national court, as discussed further below.

III. TRANSCENDING THE LIMITATIONS OF ICC AND NATIONAL PROSECUTIONS: THE KOREAN WAR CRIMES TRIBUNAL

A. Overview

The Korean War Crimes Tribunal, established as a hybrid institution with jurisdiction to try North Korean officials for aggression, war crimes, and crimes against humanity, would be created to fill gaps in international criminal justice, overcome the limitations of ICC and national prosecutions, and ensure

30. *See generally id.*; *see also Belgium, Law on Universal Jurisdiction*, INT'L COMM. OF THE RED CROSS: HOW DOES LAW PROTECT IN WAR?, https://casebook.icrc.org/case-study/belgium-law-universal-jurisdiction (last visited Jan. 6, 2025) ("On the basis of [the universal jurisdiction statute], an investigation concerning Augusto Pinochet was initiated on 1 November 1998 . . . . The trial at the crown court in Brussels in April 2001 of four persons accused of having taken part in the Rwandan genocide and their conviction led to an increase in the number of lawsuits. These were aimed at, among others, Fidel Castro, Saddam Hussein, Laurent Gbagbo, Hisséne Habré and Ariel Sharon.").

31. Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. OF INT'L L. 888, 890 (2003).

32. *Australian accuses Sri Lanka President of War Crimes*, THE TIMES (Oct. 25, 2011), https://www.thetimes.com/article/australian-accuses-sri-lanka-president-of-war-crimes-r772nsp3qdw.

33. *Id.; see also* Anna Hood & Monique Cormier, *Prosecuting Int'l Crimes in Australia: The Case of The Sri Lankan President*, 13 MELB. J. INT'L L. 235, 236 (2012).

34. *No war crimes case against Sri Lanka leader*, ABC NEWS: AUSTL. (Oct. 25, 2011), https://www.abc.net.au/news/2011-10-25/mcclelland-sri-lanka-decision/3600104.

35. *See* Hood & Cormier, *supra* note 33, at 237.

accountability for the most serious international crimes. The establishment of the Tribunal as a partnership between the governments of South Korea and United Nations Command contributing states[36] would support the prosecution of crimes that would arise in the event of an eruption of armed conflict on the Korean Peninsula, including but not limited to: the crime of aggression, in violation of the Korean Armistice Agreement[37] and the U.N. Charter[38]; the deployment of chemical and other prohibited weapons as war crimes; and attacks against civilians as war crimes and crimes against humanity.

B. Staffing and Structure

In order to draw on the expertise of local judges and prosecutors with knowledge of the Korean language, culture, and context while simultaneously tapping the expertise of international experts with extensive experience in investigating and prosecuting international crimes, half the staff of the Korean War Crimes Tribunal could be comprised of Korean judges, prosecutors, and defense counsels, with the other half comprised of foreign nationals, including judges, prosecutors and defense counsels from United Nations Command member states. The Tribunal's judges and prosecutors could be permanently assigned to the Tribunal by member states or temporarily seconded to the Tribunal for the duration of cases.

The Tribunal would complement the Korean national justice system. Korea's national courts would continue to prosecute national crimes, while the Tribunal would prosecute international crimes, including war crimes, crimes against humanity, and aggression. Investigations would continue to be conducted by national authorities, supported by the international community.

A Defense Section would oversee coordination with South Korean legal defense providers and a roster of international defense counsels holding a minimum number of years of legal experience in defending or prosecuting serious international crimes. Such defense lawyers could be assigned to defend the accused in confirmation hearings, motions practice, trials, and appeals.

A Secretariat would be formed to oversee witness protection and support, victim representation and advocacy, and a dedicated outreach unit staffed mostly by

36. *See* Clint Work, *UN Sending States: The Forgotten Parties in the Korean War*, THE DIPLOMAT (Aug. 7, 2023), https://thediplomat.com/2023/08/un-sending-states-the-forgotten-parties-in-the-korean-war (to date, the United Nations Command contributing states are as follows: Australia, Belgium, Canada, Colombia, Denmark, France, Germany, Greece, Italy, The Netherlands, New Zealand, Norway, The Philippines, South Africa, Thailand, Turkey, the United States, and the United Kingdom).

37. Korean War Armistice Agreement, *supra* note 1, at art. II, ¶ 12 (the Korean Armistice Agreement prohibits North and South Korea from entering the territory, airspace or territorial seas of the opposing party and requires Commanders to "order and enforce a complete cessation of all hostilities in Korea by all armed forces under their control, including all units and personnel of the ground, naval, and air forces").

38. U.N. Charter art. 2 ¶¶ 3-4 ("All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered" and "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

South Korean nationals to expand public understanding of and support for the Tribunal. A Registry would handle all administrative aspects of the Tribunal.

C. Jurisdiction

The Tribunal could be established with jurisdiction to try war crimes, crimes against humanity, and the crime of aggression committed anywhere on the Korean Peninsula. The definitions of substantive crimes and the elements of individual criminal responsibility for the crimes would reflect Rome Statute crimes and customary international criminal law.[39]

Jurisdiction for crimes committed in South Korea would be based on the principle of territoriality because states have an inherent right to prosecute all crimes committed on their territory, regardless of the perpetrator's nationality.[40] Jurisdiction for crimes committed in North Korea would be based on the principle of universal jurisdiction, which allows courts to try cases involving the most egregious crimes that are considered *jus cogens* crimes that trigger *obligatio erga omnes* ("obligations towards all"), including aggression, war crimes and crimes against humanity, including where such crimes are committed on the territory of a foreign nation.[41] Universal jurisdiction, an exception to the general rule that holds that sovereign nations must consent to have their nationals tried by international or foreign courts,

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39. *See* Rome Statute art. 5-9, July 17, 1998, 2187 U.N.T.S. 3; *see generally Rule 156. Definition of War Crimes*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule156 (last visited Jan. 6, 2025); *see also Customary IHL: Rule 151. Individual Responsibility*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule151 (last visited Jan. 6, 2025) ("State practice establishes this rule [individuals are criminally responsible for war crimes they commit] as a norm of customary international law applicable in both international and non-international armed conflicts.").

40. Ilias Bantekas, *Criminal Jurisdiction of States under Int'l L., in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INT'L L. (Rüdiger Wolfrum, ed., 2011) ("Territorial Criminal Jurisdiction . . . . [t]his is the simplest and least contentious form of criminal jurisdiction"); *see* Rome Statute art. 12(2)(a), 2187 U.N.T.S. 3; *see* ROBERT CRYER, DARRYL ROBINSON & SERGEY VASILIEV, AN INTRODUCTION TO INT'L CRIMINAL LAW AND PROCEDURE 52-53 (4th ed. 2019); *See also* The Italian Republic v. The Republic of India, PCA Case No. 2015-28, ¶¶ 364-65 (2020) [hereinafter Enrica Lexie Incident] ("The territoriality principle invoked by India denotes the principle that a State may exercise jurisdiction over any offence committed in its territory . . . . [t]he Arbitral Tribunal notes that such an extended territoriality principle is well established, and the domestic criminal legislation of a large number of States confers jurisdiction over offences committed on board national ships or aircraft.").

41. Anne Lagerwall & Marie-Laurence Hébert-Dolbec, *Universal Jurisdiction*, *in* MAX PLANCK ENCYCLOPEDIA OF INT'L PROCEDURAL LAW (Hélène Ruiz Fabri ed., 2022); *see* Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgement, 2012 I.C.J. 422, at ¶ 74 (July 20); *see also* Covey Oliver, *Judicial Decisions: The Attorney-General of the Gov't of Israel v. Eichmann*, Judgment, 56 AM. J. OF INT'L L. 805, 808, 810 (1962) ("The abhorrent crimes defined in this law are crimes not under Israel law alone. These crimes which offended the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself . . . . Maritime nations have also since time immemorial enforced the principle of universal jurisdiction in dealing with pirates, whose crime is known in English law as 'piracy jure gentium' . . . . By these pronouncements the father of international law [Grotius] laid the foundations for the future definition of the 'crime against humanity' as a 'crime under the law of nations' and to universal jurisdiction over such crimes.").

would allow the Tribunal, which would be based in South Korea, to try crimes committed in North Korea.[42]

Establishing a hybrid Korean court with universal jurisdiction to try international crimes—wherever they are committed—would overcome the ICC's jurisdictional limitations while promoting cost efficiency and burden sharing through a staff of Korean lawyers augmented by international lawyers. It would also overcome the jurisdictional defect of Korean national legislation, which does not recognize aggression as an international crime.

D. Advantages of a Hybrid Tribunal

1. Overcoming Head of State Immunity

As discussed under "Inability to Overcome Head of State Immunity,"[43] prosecutions by the national courts of South Korea would be impeded by head of state immunity. This limitation could be overcome if a head of state's crimes were charged by an international tribunal rather than a national court. In the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (the *Arrest Warrant* case), the ICJ held that, regardless of their immunity before national courts, heads of state could be prosecuted for international crimes by international courts holding jurisdiction.[44]

In the *Arrest Warrant* case, the ICJ issued a judgment on February 14, 2002, finding that the issuance by Belgium of an arrest warrant of April 11, 2000, against Abdoulaye Yerodia Ndombasi, the Congo's incumbent Minister for Foreign Affairs, failed to respect the immunity from criminal jurisdiction and the inviolability enjoyed by the Congo under international law.[45] The ICJ ordered Belgium to cancel the arrest warrant.[46] However, while holding that an arrest warrant by a national jurisdiction violated the principle of immunity, the ICJ recognized that international courts could prosecute a sitting or former head of state or government official:

> an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or

42. *See generally* AISLING O'SULLIVAN, UNIVERSAL JURISDICTION IN INTERNATIONAL CRIMINAL LAW: THE DEBATE AND THE BATTLE FOR HEGEMONY (2017).

43. *See* discussion *supra* Section II.B.2.

44. Arrest Warrant Case (Dem. Rep. Congo v. Belg.), Judgement, 2002 I.C.J. 3, ¶ 61 (Feb. 14).

45. *Id.* ¶ 70.

46. *Id.* ¶ 76.

> international law, shall not bar the Court from exercising its jurisdiction over such a person."[47]

Although the ICJ did not specify whether a hybrid tribunal qualified as an "international criminal court" holding jurisdiction to try a head of state, it left this possibility open to speculation while foreclosing the jurisdiction of domestic courts to prosecute such cases.[48]

2. Cost Efficiency

To promote cost efficiency, the Tribunal could rely on specialist national prosecutors, police investigators, and judges from contributing states, seconded to the Tribunal as government-provided personnel paid from regular national budgets. The secondment of law enforcement and experts to the Tribunal would reduce the amount of cash the Tribunal would need for its operational needs, which would, in turn, lighten the burden on donor states to make cash contributions to the Tribunal. Personnel seconded to the Tribunal would continue to be taxed by their national governments, providing an uninterrupted revenue source to contributing states.

To promote cost efficiency, it would be proposed that the Tribunal be based in Korea (most logically, in Seoul), which would reduce or altogether avoid the need to cover transportation for investigators and analysts between crime scenes on the Korean Peninsula and the Tribunal's headquarters. The Tribunal's secretariat and trial and appeal chambers would both be based in Seoul. Investigators and analysts could be decentralized, with some based in member states to reduce costs, but all trials and appeal hearings would take place in Seoul, South Korea. The Tribunal could also form judicial benches in first instance chambers and appellate chambers from a roster of experts to sit only when there are active cases in order to reduce costs when court is not in session.

The court could use the existing infrastructure of the South Korean criminal justice system, including courtrooms and detention facilities and resources of international criminal tribunal residual mechanisms (*e.g.*, the International Residual Mechanism for Criminal Tribunals and/or the Residual Special Court for Sierra Leone)[49], thereby avoiding the need for the costs of new construction. States could find efficiencies in pooling capacity for witness protection and support, outreach, translation, and interpretation.

3. Burden Sharing with Partner States

As a hybrid institution created in partnership with United Nations Command member states, the Tribunal would offer a broad source of funding for South Korean international criminal trials, relieving South Korea of solely carrying the burden of

47. *Id.* ¶ 61.

48. *Id.* ¶ 70.

49. *About: United Nations*, INT'L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, https://www.irmct.org/en/about (last visited Jan. 6, 2025); *Home,* RESIDUAL SPECIAL CT FOR SIERRA LEONE, https://rscsl.org/ (last visited Jan. 6, 2025).

war crimes investigations and prosecutions of international crimes, which can be costly, complex, and time-consuming. The Tribunal would be financed through voluntary funding from United Nations Command member states and the Republic of Korea. In addition, the Tribunal could be open to cooperation agreements with states outside of United Nations Command, which could lead to expanded financial support and cooperation in the form of suspect arrests, extraditions to South Korea, witness protection, and detention services.

States parties to the Tribunal could maintain rosters of national experts in international investigations, witness protection, forensic analysis, evidence preservation, and international criminal justice. Such experts could be mobilized to assist the Tribunal in its day-to-day work, partnering with Korean counterparts and exchanging knowledge and experience in international criminal investigations and prosecutions.

Finally, the Tribunal's criminal procedure and rules of evidence could be negotiated based on member state codes. South Korea could implement such a project in partnership with Tribunal member states to ensure that the procedural and evidentiary codes adopted conform to South Korean constitutional and criminal law.

4. Deterrence Factor

A hybrid institution comprised of staff from the criminal justice mechanisms of both Korea and United Nations Command member states is more commensurate with the scale and gravity of the international crimes than a domestic court acting on its own to prosecute such crimes. The establishment of a supranational institution to prosecute the crime of aggression, war crimes, and crimes against humanity is a signal of intent to hold North Korean leaders to account for international crimes. It may also contribute to the deterrence of potential proliferators of weapons of mass destruction in both North Korea and other jurisdictions, such as Syria and Iran. Establishing the Tribunal sends a powerful message to would-be international proliferators that the international community will not tolerate their acts.

E. Oversight

The Tribunal would include provisions for formal oversight of court officials to ensure ethical conduct. Before sitting on the bench or appearing before the court, all attorneys must be members of a recognized bar association, credentialing association, or judicial oversight body in their country of nationality (or another state). The Tribunal would also provide for high levels of transparency, including public trials, access to the media, and trial monitoring by civil society organizations.

IV. PRECEDENTS

The proposed Tribunal would not be an institution without precedent. Similar courts and tribunals established in Europe, Africa, and Asia have successfully tried

international crimes and convicted perpetrators.[50] The following is a list and overview of the main features and characteristics of hybrid tribunals whose structure and jurisdictional scope could be considered when structuring the Korean War Crimes Tribunal.

A. Kosovo Specialist Chambers and Specialist Prosecutor's Office

The Kosovo Specialist Chambers and Specialist Prosecutor's Office are temporary institutions seated in The Hague and established under an international agreement adopted between the Republic of Kosovo and the European Union and ratified by the Kosovo Assembly, a Constitutional Amendment, and the Law on Kosovo Specialist Chambers and Specialist Prosecutor's Office with a mandate and jurisdiction over crimes against humanity, war crimes and other crimes under Kosovo law, which were commenced or committed in Kosovo between January 1, 1998 and December 31, 2000, by or against citizens of Kosovo or the Federal Republic of Yugoslavia.[51]

The European Union Rule of Law Mission in Kosovo ("EULEX Kosovo" or "EULEX"), which supports Kosovo rule of law institutions on their path towards increased effectiveness, sustainability, multi-ethnicity, and accountability in compliance with international human rights law, offers the Kosovo Specialist Chambers and Specialist Prosecutor's Office logistic and operational support.[52]

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50. Examples in Africa include the *Special Court for Sierra Leone*, now *Residual Special Court for Sierra Leone* and the *International Criminal Tribunal for Rwanda*. *See, e.g.*, *The RSCSL,* RESIDUAL SPECIAL CT FOR SIERRA LEONE, https://rscsl.org/the-rscsl/ (last visited Jan. 6, 2025); *The ICTR in Brief*, UNITED NATIONS INT'L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, https://unictr.irmct.org/en/tribunal (last visited Jan. 6., 2025). Examples in Asia include the *International Crimes Tribunal* ("ICT") of Bangladesh, and the *Extraordinary Chambers in the Courts of Cambodia*, which ended its functions after 16 years. *See, e.g.*, *Home*, INT'L CRIMES TRIBUNAL-1, BANGLADESH, https://www.ict-bd.org/ict1/ (last visited Jan. 6, 2025); *Home*, THE EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, https://www.eccc.gov.kh/en (last visited Jan. 6, 2025). Examples in Europe include the *International Criminal Tribunal for the former Yugoslavia*, and the *Kosovo Specialist Chambers & Specialist Prosecutor's Office*. *See, e.g.*, *Home*, U.N. INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, https://www.icty.org/ (last visited Jan. 6, 2025); *Background*, KOSOVO SPECIALIST CHAMBERS & SPECIALIST PROSECUTOR'S OFFICE, https://www.scp-ks.org/en (last visited Jan. 6, 2025).

51. Law No. 04/L-274 on Ratification of the Int'l Agreement Between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo 23 Apr. 2014, art. 2 (Republic of Kosovo) ("[A] specialist court within the Kosovo court system and a specialist prosecutor's office would be used for any trial and appellate proceedings arising from the SITF [EULEX Kosovo's Special Investigative Task Force]."); Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office 3 Aug. 2015, art. 1 (Republic of Kosovo); Amendment of the Constitution of the republic of Kosovo, Amendment no. 24, Article 162: The Specialist Chambers and the Specialist Prosecutor's Office 3 Aug. 2015 (Republic of Kosovo). *See* KOSOVO SPECIALIST CHAMBERS & SPECIALIST PROSECUTOR'S OFFICE, *supra* note 50.

52. *What is EULEX?,* EULEX: EUROPEAN UNION RULE OF LAW MISSION IN KOSOVO, https://www.eulex-kosovo.eu/?page=2,16 (last visited Jan. 6, 2025) ("The Mission also assists the Kosovo Specialist Chambers and Specialist Prosecutor's Office by providing logistic and operational support in line with relevant Kosovo legislation."); *see also EULEX New Mandate*, EULEX: EUROPEAN UNION RULE OF LAW MISSION IN KOSOVO: NEWS (June 21, 2016),

B. Extraordinary African Chambers (Senegal/Chad)

The Extraordinary African Chambers ("EAC") (*Chambres Africaines Extraordinaires*) is a tribunal established under an agreement between the African Union ("AU") and Senegal with jurisdiction to try international crimes committed in Chad during the regime of former Chadian President Hissène Habré from June 7, 1982 to December 1, 1990.[53] It began its operations in 2013 in Dakar, Senegal.[54]

Several events led to the formation of the EAC. An Economic Community of West African States ("ECOWAS") Court of Justice decision held that trying Habré under Senegalese law would violate the principle of non-retroactivity because Senegal passed statutes on the crimes long after Habré's acts were committed.[55] The Court held, however, that this defect would be overcome through a trial at a tribunal of an "international character."[56] Belgium filed suit against Senegal at the ICJ, demanding that Senegal either prosecute or extradite Habré.[57] However, Senegal and the AU wanted the trial to occur in Africa rather than Belgium.[58] Senegal failed to

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https://www.eulex-kosovo.eu/?page=2,11,438 ("Following the Council's decision to extend the mandate of the EU Rule of Law Mission in Kosovo until 14 June 2018, and exchange of letters between President Hashim Thaci and EU High Representative Federica Mogherini, the EULEX Mission in partnership with Kosovo authorities, will continue gradual transfer of its activities to local institutions and other EU actors. EULEX Kosovo will assist Kosovo judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and custom service, ensuring that these institutions are free from political interference and adhering to internationally recognized standards and European best practices.").

53. Accord entre le Gouvernement de la République du Sénégal et l'Union africaine sur la création de chambres africaines extraordinaires au sein des juridictions sénégalaises [Agreement between the Government of Senegal and the African Union on the Establishment of Extraordinary African Chambers within the Senegalese Judicial System] Sen.-African Union, Aug. 22, 2012, 52 I.L.M. 1024 [hereinafter Agreement Between Senegal and the African Union] (containing the Statute of the Extraordinary African Chambers within the Senegalese judicial system for the prosecution of international crimes committed on the territory of the Republic of Chad during the period from June 7, 1982 to December 1, 1990).

54. Reed Brody, *Bringing a Dictator to Justice: The Case of Hissène Habré*,13 J. OF INT'L CRIM. JUST. 209, 209, 215 (2015); Emanuele Cimiotta, *Extraordinary African Chambers, in* MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW, ¶ 1 (Hélène Ruiz Fabri ed., 2019).

55. *ECOWAS/ECOWAS ruling: Hissein Habré v. Republic of Senegal*, HUM. RTS. WATCH (Nov. 18, 2010), https://www.hrw.org/fr/news/2010/11/18/arr-t-cedeaoecowas-ruling-hissein-habr-c-r-publique-du-s-n-gal [hereinafter ECOWAS Judgment]; Valentina Spiga, *Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga*, 9 J. OF INT'L CRIM. JUST. 5, 10 (2011).

56. ECOWAS Judgement, *supra* note 55, ¶¶ 48-49 (noting the implementation of the African Union's mandate must be carried out in accordance with international custom, which has established the habit of creating ad hoc or special jurisdictions in such situations, and any other undertaking by Senegal outside this framework would violate the principle of the non-retroactivity of criminal law. Also stating the mandate received by it from the African Union confers on it rather a mission of conception and suggestion of all modalities likely to prosecute and have judged within the strict framework of a special ad hoc procedure of an international character as practised in International Law).

57. Questions Relating to the Obligation to Prosecute or Extradite, *supra* note 41, at 423.

58. *Id.* at 433, ¶ 23 ("Senegal referred to the African Union the issue of the institution of proceedings against this former Head of State. In July 2006, the Union's Assembly of Heads of State and Government, by Decision 127 (VII), *inter alia*, 'decid[ed] to consider the 'Hissène Habré case' as falling within the competence of the African Union . . . .'").

extradite Habré but also failed to try Habré in its domestic court due to political reasons and financial factors.[59]

As a result of the ECOWAS Court of Justice decision and due to the potential for financial support, the AU and Senegal established the EAC through a treaty.[60] The EAC was situated in the Senegalese judicial system with an international judge from another African country in both the trial and appeal chambers.[61] By "internationalizing" the tribunal, the trial was deemed not to offend the prohibition of trial by an *ex post facto* law since the crimes of which Habré was charged were already crimes under international law when Habré committed them.[62]

C. Special Court for Sierra Leone

The Special Court for Sierra Leone ("SCSL") was an independent judicial body based in Freetown, the capital of Sierra Leone.[63] The purpose of the Court was to try those who "bear the greatest responsibility for [the commission of crimes against humanity, war crimes and serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law] in the territory of Sierra Leone since 30 November 1996," during the Sierra Leone 1991-2002 Civil War.[64] The Court was set up in 2002 and began trials in 2004.[65]

The Court sought to bring justice for violations of international and Sierra Leonean law, including:

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59. Brody, *supra* note 54, at 210, 212 ("[A]fter alleged political interference by newly-elected President Abdoulaye Wade, Senegalese appellate courts dismissed the case on the ground that despite its ratification of the United Nations (UN) Convention against Torture, Senegalese courts lacked jurisdiction to try crimes committed abroad because the Convention had not been implemented into national law."); *id.* at 212 ("Senegal needed full up-front funding of US$ 36.5 million from the international community before beginning any prosecution. Three years of halting negotiations over the trial budget ensued until . . . . Senegal and donor countries finally agreed in November 2010 to a budget of US$ 11.4 million for Habré's trial.").

60. Agreement Between Senegal and the African Union, Sen.-African Union, 52 I.L.M. 1024; Brody, *supra* note 54, at 213 ("Senegal and the AU then revived the plan to create 'Extraordinary African Chambers' inside the existing Senegalese court structure.").

61. Brody, *supra* note 54, at 213 ("The trial chamber and the appeals chamber will each consist of two Senegalese judges and a president from another African country.").

62. Sofie A. E. Høgestøl, *The Habré Judgment at the Extraordinary African Chambers: A Singular Victory in the Fight Against Impunity*, 34 NORDIC J. HUM. RTS. 147, 151-52 (2016) ("The EAC can therefore be classified as an 'internationalised' court, similar to the ones created under UN administration in East Timor and Kosovo. The hallmark of 'internationalised' criminal courts is, as the name suggests, that international elements are introduced into the domestic court system . . . . [t]he subject-matter jurisdiction of the EAC is specified in article 4 of the statute, and gives the court jurisdiction over war crimes, crimes against humanity, genocide and torture. The statute likewise gives primacy to the international law enshrined within it.").

63. Charles Chernor Jalloh, *Special Court for Sierra Leone: Achieving Justice?*, 32 MICH. J. INT'L L. 395, 401-02, 404 (2011) ("[T]he Court was to be independent of Sierra Leonean courts as well as of the United Nations.").

64. Statute of the Special Court for Sierra Leone, art. 1, ¶ 1 (Sierra Leone).

65. Scott Worden & Emily Wann, *Special Court of Sierra Leone Briefing: The Taylor Trial and Lessons from Capacity-Building and Outreach*, U.S. INST. OF PEACE: PUBL'NS. (Aug. 1, 2007), https://www.usip.org/publications/2007/08/special-court-sierra-leone-briefing-taylor-trial-and-lessons-capacity-building.

> -Crimes against humanity, such as the abduction and forced prostitution of young girls;
>
> -War crimes (*common Article 3* of the Geneva Conventions and its Additional Protocol II, both of which deal with *conflicts not of an international nature*) and other serious violations of international humanitarian law, including the enlistment of child soldiers by the government of Sierra Leone and by the RUF;
>
> -Certain serious violations of Sierra Leonean criminal law.[66]

Among the indictees was former Liberian president Charles Taylor, who was heavily involved in the Sierra Leonean Civil War.[67]

D. Special Panels for Serious Crimes in Dili District Court (East Timor)

The Special Panels for Serious Crimes in Dili District Court (informally known as the "East Timor Tribunal") is a hybrid international-East Timorese tribunal that was created in 2000 by the United Nations Transitional Administration in East Timor ("UNTAET").[68] The Special Panels for Serious Crimes were created to try cases of "serious criminal offences" (*e.g.*, genocide, war crimes, crimes against humanity, murder, sexual offences, and torture), which occurred in East Timor between January 1 and October 25, 1999.[69] The Special Panels for Serious Crimes heard cases beginning in 2000 and concluded in 2006.[70] The Special Panels have many features of hybrid (mixed national-international) tribunals due to the presence of international prosecutors and judges and UNTAET's role in their creation.[71]

66. Statute of the Special Court for Sierra Leone, art. 2-3, 5 (Sierra Leone).

67. Bruce Zagaris, *Sierra Leone Tribunal Indicts Liberian Leader Despite Surrender of Warlord's Body*, 19 INT'L ENF'T L. REP. 320, 320 (2003).

68. Cheah Wui Ling, *Forgiveness and Punishment in Post-conflict Timor*, 10 UCLA J. INT'L & FOREIGN AFF. 297, 300 (2005) ("On June 6, 2000, UNTAET established . . . the Serious Crimes Panels . . . in order to criminally prosecute 'serious crimes', particularly those committed in 1999.").

69. *Id.* at 324 ("The Serious Crimes Panels exercise exclusive jurisdiction over 'serious crimes;' namely, genocide, war crimes, crimes against humanity, and torture, as well as murder and sexual offenses committed between January 1, 1999 and October 25, 1999.").

70. *Special Panels for Serious Crime*s, WIKIPEDIA, https://en.wikipedia.org/wiki/Special_Panels_for_Serious_Crimes_(East_Timor) (last visited Jan. 6, 2025).

71. *Hybrid*, INT'L CRIMES DATABASE, https://www.internationalcrimesdatabase.org/courts/hybrid (last visited Jan. 6, 2025); ELENA NAUGHTON, COMMITTING TO JUSTICE FOR SERIOUS HUMAN RIGHTS VIOLATIONS: LESSONS FROM HYBRID TRIBUNALS 6 (2018) ("Most hybrids are staffed by both national and international judges, prosecutors, and staff . . . ."); *see* Patricia M. Wald, *Accountability for War Crimes: What Roles for Nat'l, Int'l, and Hybrid Tribunals?*, 98 AM. SOC'Y INT'L L. PROC. 192, 192 (2004) ("In rapid succession (rapid at least for this line of work) we have seen the establishment of . . . several hybrid courts (Sierra Leone, East Timor, Kosovo, and Cambodia) . . . .").

E. Extraordinary Chambers in the Courts of Cambodia

The Extraordinary Chambers in the Courts of Cambodia ("ECCC") (informally known as the "Cambodia Tribunal") is a court that was established in 2003[72] to try the most senior and most responsible members of the Khmer Rouge for serious violations of Cambodian criminal law, international humanitarian law and international conventions recognized by Cambodia, including *genocide, crimes against humanity* and *war crimes*, committed between 1975 and 1979.[73]

The ECCC is a hybrid international-Cambodian court in that it was established as part of an agreement between the government of Cambodia and the U.N.[74] The ECCC is independent of the U.N. and holds trials in Phnom Penh, Cambodia, using local (Cambodian) staff and local and foreign judges to apply international standards.[75]

F. Court of Bosnia and Herzegovina

The Court of Bosnia and Herzegovina ("Court of BiH") is a domestic court of the State of Bosnia and Herzegovina that includes international judges and prosecutors.[76] Based in Sarajevo, the Court of BiH was established on July 3, 2002, by the Parliament of Bosnia and Herzegovina, with the Law on the Court of Bosnia and Herzegovina promulgated on November 12, 2000.[77] The Court of BiH does not have a time-limited mandate.[78]

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72. Talitha Gray, *To Keep You is no Gain, To Kill You is no Loss—Securing Justice Through the Int'l Crim. Ct.*, 20 ARIZ. J. INT'L & COMP. L. 645, 681, 683 (2003) (after negotiations in 2001, "the tribunal was established and Cambodia signed the new legislation into law," but the U.N. refused to support the initial 2001 Cambodia Tribunal because it lacked independency, impartiality and objectivity. In June 2003, "the United Nations and Cambodia reached a tentative agreement for the creation of a hybrid court - that is, a combination of a Cambodian court and an international tribunal").

73. *Id.* at 680, 683 ("The court is referred to as the Extraordinary Chambers and is comprised of one trial court and one supreme court.").

74. Sara L. Ochs, *In Need of Prosecution: The Role of Pers. Jurisdiction in the Khmer Rouge Tribunal*, 55 STAN. J. INT'L L. 117, 125 (2019) ("The Law on the Establishment of the Extraordinary Chambers ('ECCC Law'), which was incorporated into Cambodian domestic law, the Agreement Between the U.N. and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea ('the ECCC Agreement'), and the ECCC Internal Rules.").

75. Christie Nicoson, Lisa Dailey & Rachel Hall Beecrot, *Extraordinary Chambers in the Courts of Cambodia*, WORLD WITHOUT GENOCIDE (June 2020), https://worldwithoutgenocide.org/genocides-and-conflicts/cambodia/eccc ("The tribunal operates in Cambodia, though independently of both the Cambodian government and the United Nations.").

76. Eldina Pleho Sarajevo, *Bosnia: international judges under scrutiny*, OSSERVATORIO BALCANI E CAUCASO TRANSEUROPA (Mar. 15, 2011), https://www.balcanicaucaso.org/eng/Areas/Bosnia-Herzegovina/Bosnia-international-judges-under-scrutiny-89568?utm_source=chatgpt.com.

77. Law on the Ct. of Bosn. and Herz., Official Gazette of Bosn. and Herz. 49/09 art. 1, ¶ 2 (2009) ("The seat of the Court shall be at Sarajevo."); *Domestic,* INT'L CRIMES DATABASE, https://www.internationalcrimesdatabase.org/Courts/Domestic#:~:text=The%20Bosnian%20War%20Crimes%20Chamber,on%20the%20Court%20of%20BiH (last visited Jan. 6, 2025) ("[The Court] was established on 3 July 2002 by the Parliament of BiH with the Law on the Court of BiH.").

78. *The War Crimes Chamber in Bosnia and Herzegovina*, HYBRID JUSTICE,

The Court of BiH issues verdicts in accordance with the laws of the State of Bosnia and Herzegovina, including the Bosnia and Herzegovina Criminal Code and Criminal Procedure Code.[79] Besides international judges and prosecutors who worked at the Court of BiH, the key functions of the Court are held by Bosnia and Herzegovina nationals.[80] Trials are conducted in one of the official languages of Bosnia and Herzegovina, and convicted persons serve time in Bosnia and Herzegovina prisons.[81]

G. Human Rights Chamber for Bosnia and Herzegovina

The Human Rights Chamber for Bosnia and Herzegovina was created to consider violations of basic human rights and discrimination on the part of the state of Bosnia and Herzegovina following the Bosnian War, the Federation of Bosnia and Herzegovina or Republika Srpska.[82] The Human Rights Chamber served as a judicial body established in Bosnia and Herzegovina within Annex 6 of the Dayton Peace Agreement to ensure the protection of the human rights of all peoples within Bosnia and Herzegovina following the Bosnian War.[83] The Human Rights Chamber operated between March 1996 and December 31, 2003, with the mandate to consider:

> -alleged or apparent violations of human rights as provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto; and
>
> -alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the Convention and 15

https://hybridjustice.com/the-war-crimes-chamber-in-bosnia-and-herzegovina (last visted Jan. 6, 2025) ("The Chamber has no time limited mandate.").

79. Criminal Code of the Federation of Bosn. and Herz., Official Gazette of the Federation of Bosn. And Herz. 36/03 art. 1 (2003); Criminal Procedure Code of Bosn. and Herz., Official Gazette of Bosn. And Herz. 72/13 art. 1 (2013); Carrie Leonetti, *Showing Up: Eyewitness-Identification Requirements in Bosnia and Herzegovina: A Comparative Case Study*, 119 PENN. STATE L. REV. 439, 442 n.5 (2014) ("The BiH CPC sets forth the rules of criminal procedure that govern the criminal proceedings of the Court of Bosnia and Herzegovina, the Chief Prosecutor of Bosnia and Herzegovina, and other participants in criminal proceedings.").

80. John Eichlin, *Undercutting the Political Economy of Conflict in Bosnia and Herzegovina: A Transitional Justice Approach to Prosecuting Systemic Economic Crimes*, 48 COLUM. J. TRANSNAT'L L. 353, 359 (2010) (stating the court "was designed to utilize both national and international personnel"); *see* NERMA JELAČIĆ, NIDŽARA AHMETAŠEVIĆ & MERIMA HUSEJNOVIĆ, IN PURSUIT OF JUSTICE: GUIDE TO THE WAR CRIMES CHAMBER OF THE COURT OF BH VOL. II 7 (Nerma Jelačić & Nidžara Ahmetašević eds., 2007) ("Although the idea to establish the WCC came from the international community, the project aims to deliver a fully functioning national institution within the national judicial system at the end of the project.").

81. Law on the Ct. of Bosn. and Herz., 49/09 art. 3 (2009) ("The official languages of Bosnia and Herzegovina, Bosnian, Croat and Serb, and the official alphabets, Latin and Cyrillic, shall be used in the proceedings before the Court and in its communication with the parties. Persons participating in proceedings have the right to use any of these languages at any stage of the proceedings.").

82. The General Framework Agreement for Peace in Bosn. and Herz. *Annex 6, art. 1, Dec. 14, 1995.*

83. *Id*.

other international agreements listed in the Appendix to Annex 6 of the Dayton Peace Agreement.[84]

V. CONCLUSION

In conclusion, establishing the Korean War Crimes Tribunal would close an impunity gap in international criminal justice on the Korean Peninsula in the event of an armed conflict in which weapons of mass destruction were used. The Tribunal would offer South Korea and international civil society a means of ensuring that the crime of aggression, war crimes, and crimes against humanity committed within the context of such an armed conflict would not go unpunished. The Tribunal would ensure that victims are not left without justice due to gaps in ICC jurisdiction or a decision by the ICC Prosecutor not to proceed with an investigation if the Prosecutor does not consider the crimes committed on the Korean Peninsula to bear sufficient gravity to justify action by the ICC. The Tribunal would also offer an answer to gaps in South Korean domestic legislation, which does not currently criminalize the crime of aggression and has no answer to head of state immunity. The Tribunal could be established based on the architecture that already exists in South Korea, building on South Korea's existing criminal justice system and the partnership that South Korea has already built with United Nations Command, whose members are currently contributing military officers and assets to strengthen South Korea's defense in the event of a North Korea breach of the Armistice Agreement.[85] Establishing the Tribunal would simply be a matter of expanding this already existing partnership to include the secondment of legal professionals—judges, prosecutors, defense attorneys, legal analysts, and investigators—to partner with their Korean counterparts in running the day-to-day operations of the Tribunal. Establishing the Tribunal could be done at a fraction of the cost of maintaining United Nations Command's military presence,[86] since the Tribunal requires only personnel without the additional costs of military assets accompanying the military mission. The Tribunal could be established cost-efficiently to overcome the jurisdictional and

84. *Id*. ch. 2, art. II.

85. S.C. Res. 84; KIM & TIMM, *supra* note 8, at 624 ("[The UNC] was authorized by the United Nations Security Council and provides the foundation and framework for the relationship between the [Republic of Korea] and the non-US forces on the peninsula, as well as providing some of the basis for the US/ROK relationship. Sixteen national contingents comprised the UNC during the Korean conflict, and all have declared their intention to provide forces should hostilities resume . . . . [T]he mission of the UNC today is overseeing the maintenance of the 1953 Korean Armistice Agreement, pending a peaceful political resolution to the Korean conflict. Of course, should hostilities resume, the original mission of restoring international peace and security in the area would still apply.").

86. *See U.S. Security Cooperation With the Republic of Korea (ROK)*, U.S DEP'T OF STATE: REMARKS AND RELEASES – BUREAU OF POLITICAL-MILITARY AFFAIRS (Jan. 20, 2025), https://www.state.gov/u-s-security-cooperation-with-korea ("Since 1991, the ROK has defrayed a portion of the cost of maintaining U.S. military personnel in Korea through successive U.S.-ROK Special Measures Agreements. The estimated total value of the ROK contribution over the duration of 11th SMA will be just over $7 billion."); *see also* KIM & TIMM, *supra* note 8, at 628-29, 633 ("When massive numbers of US forces began pouring into Korea at the commencement of the Korean conflict . . . the ROK began urging the US to regularize the situation as to US forces by negotiating a formal status-of-forces agreement . . . . Art. V of the US-ROK SOFA provides that the ROK is responsible for providing the areas and facilities without cost to the US.").

logistical deficiencies of relying on ICC action or having the South Korean courts prosecute cases domestically. Finally, the Tribunal would send a powerful signal to would-be perpetrators that their international crimes will not be tolerated and that the international community will not rest until justice is served. For all these reasons, establishing the Korean War Crimes Tribunal is the best possible option for strengthening and ensuring international criminal justice on the Korean Peninsula.