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International Criminal Law: Unresolved Issues from the Past in the Korean Peninsula

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**INTERNATIONAL CRIMINAL LAW:
UNRESOLVED ISSUES FROM THE PAST
IN THE KOREAN PENINSULA**

JOOTAEK LEE*

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I. INTRODUCTION

There is no clear definition on international criminal law, but it can be narrowly defined—international criminal law *stricto sensu*—as international law penalizing individuals to protect the fundamental values of international society such as human rights and international peace and security.¹ Individual criminal responsibility, merging the principles of international law with modern concepts of human rights and humanitarian law, is a recent development since 1945.² This modern trend imposes obligations directly on individuals instead of states.³ This narrow definition includes crimes against humanity, genocide, war crimes, and aggression.⁴

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1. Claus Kreß, *International Criminal Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 10 (2009), <http://opil.ouplaw.com/abstract/10.1093/law:epil/9780199231690/law-9780199231690-e1423?rskey=OVdEFT&result=1&prd=EPIL> (last visited Oct. 10, 2019).

2. MALCOLM N. SHAW, *INTERNATIONAL LAW* 397 (6th ed. 2008).

3. *Id.*; see M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* (2d ed. 1999).

4. SHAW, *supra* note 2, at 430–40.

Historically, the Republic of Korea (“Korea”) has been passively involved in international criminal law *stricto sensu* until recently. While the development of international criminal law *stricto sensu* is a recent event, international criminal law as applied to Korea cannot be understood without knowing its history, since Koreans suffered through many catastrophic events and international crimes since the late nineteenth century.⁵ Korean citizens were victims of international crime—including slavery, war crimes, aggression, and crimes against humanity—committed by Japan during the Japanese colonial period from 1910 to 1945 and World War II and by North Korea during the Korean War from 1950 to 1953. Most of these international crimes, however, were not properly resolved or even addressed in international or national courts. As many years have passed, criminals, victims, evidence, and witnesses are difficult to find and obtain. Limited research has been performed in this area, and there is very little literature dealing with international criminal law issues relating to Korea.

International criminal law can be also broadly defined to include both the law of international cooperation in criminal matters and crimes happening across national borders—transnational crime—which Korea has been recently exposed to more than before. Examples of transnational crime include piracy, counterfeiting of currency, corruption, trade in narcotics, slavery, undersea cable cutting, terrorism, money laundering, organized crimes, and cybercrimes. Crimes committed by foreigners on Korean soil are mostly regulated by domestic Korean laws while crimes committed in a foreign jurisdiction are usually excluded,⁶ and crimes committed by foreigners that have an international element may be also subject to universal or regional juridical jurisdiction.⁷ As Korea’s ties to the international community increase, foreigners increasingly interact with Korea, entering Korean borders through seaports and airports. Some of them commit immigration crime, entering illegally with forged documents. Some of them commit battery, assault, theft, fraud, robbery, or rape, usually against other foreigners. Some of them are involved in a syndicated crime relating to drugs, gangs, slavery, voice phishing, counterfeiting, and forgery, which are difficult to

5. The modern government of the Republic of Korea was not established until August 15, 1948. *Division of Korea*, NEW WORLD ENCYCLOPEDIA, https://www.newworldencyclopedia.org/entry/Division_of_Korea#After_World_War_II (last visited Oct. 12, 2019).

6. See Hyeongbeob [Criminal Act], Act No. 293, Sept. 18, 1953, *amended by* Act No. 11,731, Apr. 5, 2013, arts. 2, 6 (S. Kor.), *translated in* Korea Legislation Research Institute online database, http://elaw.klri.re.kr/eng_service/lawView.do?hseq=28627&lang=ENG.

7. See SHAW, *supra* note 2, at 397.

trace, investigate, and prosecute; the lack of expertise and data collection by law enforcement in dealing with these types of crimes is another issue.

The difficulty of defining what international crime is leads to difficulty in researching international criminal law issues dealing with Korea. Fortunately, Korea is currently linked to many international and regional criminal legal systems, which helps to analyze international criminal law issues in multi-tier levels—multilateral, bilateral, and domestic. In this article, first I will analyze legal issues surrounding various events where Korea was exposed to international crime and how the results of the crime had been handled. Second, the current Korean status and contribution to international criminal law will be investigated. Finally, I will conclude with recommendations on how to approach unresolved international criminal issues surrounding the Korean peninsula.

II. KOREA'S HISTORICAL INVOLVEMENT WITH INTERNATIONAL CRIMINAL LAW

A. Japanese Crime During the Colonial Period

In 1876, by the forcible enacting of the unequal Ganghwa-do Treaty, Chosun—a former imperial Korea—began to open its door to Japan and Western countries.⁸ Starting then, Japanese and Western powers began to exploit Korean resources and people and demolish the Korean imperial kingdom that had existed for over 500 years, from 1392 to 1897.⁹ Finally, following the Russo-Japanese War, Japan deprived Korea of its diplomatic power in 1905 and annexed Korea as its colony in 1910 by series of illegal treaties.¹⁰ From 1910 to 1945, Korea was devastated under the Japanese rule in terms of resources and culture, and Japanese military authorities committed a wide range of crimes against Koreans, including sexual slavery and forced labor.¹¹

One notable example of crimes committed by the Japanese is Japanese military sexual slavery relating to Asian “comfort women” during the World War II. Japan exploited women and

8. See *Joseon Dynasty*, NEW WORLD ENCYCLOPEDIA, https://www.newworldencyclopedia.org/entry/Joseon_Dynasty (last visited Oct. 11, 2019).

9. *Id.*; see *Ganghwa Treaty*, DOOPEDIA, http://www.doopedia.co.kr/doopedia/master/master.do?_method=view&MAS_IDX=101013000748492 (last visited Oct. 11, 2019).

10. See *Joseon Dynasty*, *supra* note 8.

11. Erin Blakemore, *How Japan Took Control of Korea*, HISTORY, <https://www.history.com/news/japan-colonization-korea> (last updated Aug. 29, 2018).

adopted forced labor during the wartime. The first military sexual slaves were Koreans from the North Kyushu area of Japan and they were sent to China by the Governor of Nagasaki Prefecture.¹² In 1938, the Japanese Imperial Army revived the comfort station, which had been established in Shanghai in 1932, and many other stations followed after Japan expanded its territory in China.¹³ The comfort women, mostly Korean women, were forced and deceived to serve at the stations.¹⁴

Crimes committed by Japan during the colonial time and World War II were not properly resolved between Korea and Japan, and Japan had denied its responsibility until the early 1990s.¹⁵ In 1994, the Committee on the Elimination of Discrimination Against Women reviewed Japanese reports on the treatment of comfort women; some members suggested that the Japanese Government should pay compensation to the surviving victims and create a women's fund in memory of those victims who had already died, thus meeting its commitment to the women of Asia.¹⁶ The United Nations Commission of Human Rights stated that Japan's exploitation of comfort women was a clear violation of its obligations under international law and that Japan should accept legal responsibility by compensating victims and identifying and punishing perpetrators.¹⁷ In 2001, the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, established by the efforts of nongovernmental organizations such as Violence Against Women in War-Network Japan, concluded that Japan had committed international crimes and that international law required Japan to make reparations.¹⁸

The colonial era ended in August 1945 by the surrender of Japan in World War II. On September 8, 1951, Japan signed the Treaty of Peace with Japan in which it officially recognized the independence of Korea and renounced all rights and claims to

12. Radhika Coomaraswamy (Special Rapporteur on Violence Against Women, Its Causes and Consequences), *Report on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime*, ¶ 11, U.N. Doc. E/CN.4/1996/53/Add.1 (Jan. 4, 1996) [hereinafter *U.N. Report on Sexual Slavery*].

13. *Id.* ¶¶ 11–44.

14. *Id.*

15. Erin Blakemore, *The Brutal History of Japan's 'Comfort Women,'* HISTORY, <https://www.history.com/news/comfort-women-japan-military-brothels-korea> (last updated July 21, 2019).

16. Rep. of the Comm. on the Elimination of Discrimination Against Women, Thirteenth Session, ¶¶ 576, 578, U.N. Doc. A/49/38 (Supp.) (Apr. 12, 1994).

17. *U.N. Report on Sexual Slavery*, *supra* note 12, ¶ 137.

18. *Tokyo Tribunal 2000 & Public Hearing on Crimes Against Women*, WOMEN'S CAUCUS GENDER JUST., <http://iccwomen.org/wigjdraft1/Archives/oldWCGJ/tokyo/index.html> (last visited Oct. 12, 2019) [hereinafter *Tokyo Tribunal*].

Korea.¹⁹ The International Military Tribunal for the Far East—also known as Tokyo War Crimes Tribunal (“Tokyo Tribunal”)—was also established and on April 29, 1946, the Tribunal started trials dealing with aggression, war crimes, and crimes against humanity.²⁰

After World War II, however, crimes committed against Korea by the Japanese between 1905 and 1945 were not investigated or tried. This is because after its independence in 1945, Korea was quickly whirled into turmoil and divided and occupied by the U.S. and Soviet Union. Korea began with a new democratic government from the South-only election hosted by the U.S. Military Government on August 15, 1948.²¹ The Democratic People's Republic of Korea (“North Korea”) started as a communist country in alliance with the Soviet Union on September 9, 1948.²² Following these developments, the Korean War started on June 25, 1950, by an invasion of South Korea by North Korea, supported by China and the Soviet Union.²³ During the Korean War, from 1950 to 1953, U.S. Armed Forces and U.N. forces fought alongside Korean soldiers to defend South Korea.²⁴

B. The Korean War and International Crime

Since its inception on August 15, 1948, the Republic of Korea has not been exposed to international crimes *stricto sensu* except during one catastrophic event—the Korean War. The Korean War, which happened from June 25, 1950, to July 7, 1953, created many international criminal issues—most of which resulted from international crimes initiated and committed by North Korea—still left still unresolved today.²⁵ Crimes against peace, such as the crime of aggression; war crimes, including crimes against civilians and their properties; and crimes against humanity, such as genocide, were widely committed. The North Korean army

19. Treaty of Peace with Japan art. 2, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45. The treaty is Japan's promise to the other signatory nations; neither South Korea nor North Korea were invited to this treaty.

20. *The Tokyo War Crimes Trials*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/macarthur-tokyo-war-crimes-trials/> (last visited Oct. 26, 2019).

21. *Division of Korea*, *supra* note 5.

22. *Id.*

23. *Id.*

24. *The World Factbook: Korea, South*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html> (last updated Oct. 30, 2019).

25. See S. Rep. No. 83-848 (1954), https://www.loc.gov/rr/frd/Military_Law/pdf/KW-atrocities-Report.pdf [hereinafter Korean War Atrocities Report]. *But see* Jeremy Williams, *Kill 'em All: The American Military in Korea*, BBC, http://www.bbc.co.uk/history/worldwars/coldwar/korea_usa_01.shtml (last updated Feb. 17, 2011).

committed widespread and systematic attacks on South Korea; killed hundreds of thousands of civilians, officials, and police officers; and destroyed cities, towns, villages, and properties.²⁶

War crimes and grave breaches, including willful killing of and torture or inhumane treatment of prisoners of war and hostages and extensive destruction and appropriation of property not justified by military necessity were committed in violation of the 1949 Geneva Conventions.²⁷ As the Geneva Conventions entered into force on October 21, 1950, this may lead to the conclusion that crimes committed between June 25, 1950, and October 21, 1950, should be exonerated under the principle of *nullum crimen sine lege*. However, war crimes and grave breaches committed by North Korea even before October 21, 1950, are still subject to the customary international law and humanitarian principles that had been established and affirmed by the Nuremberg Tribunal and the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis.²⁸ Therefore, individuals who committed war crimes during the Korean War should be held responsible. Additionally, the fact that a defendant was a government official or acted pursuant to an order of his government will not bar prosecution.²⁹

However, the circumstances surrounding the Korean War have made it difficult to prosecute these international war crimes. While fighting in the Korean War ended in stalemate in 1953, the war did not officially end until April 27, 2018, with the joint “peace declaration” of President Moon Jae-in of the Republic of Korea and Chairman Kim Jong Un of the Democratic People’s Republic of Korea.³⁰ During this stage of truce, no country had won the war, making it hard to punish war criminals from the other party. This

26. See Korean War Atrocities Report, *supra* note 25.

27. See Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950); Convention (III) Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950); Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

28. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

29. *Cf. id.* arts. 7–8.

30. Joshua Berlinger et al., *BREAKING: North and South Korea Vow to End Korean War*, CNN (Apr. 27, 2018, 6:08 AM), https://www.cnn.com/asia/live-news/north-korea-south-korea-summit-intl/h_93eb8f096a50f069c399dd2a359af8f5; see also Read, *Full Declaration of North and South Korean Summit*, CNN (Apr. 27, 2018, 6:10 AM), <https://www.cnn.com/2018/04/27/asia/read-full-declaration-north-south-korea/index.html> [hereinafter *Peace Declaration*].

sixty-five-year stalemate may be the main reason why the U.N. and other international bodies have failed to establish a special tribunal or criminal court to hold hearings on the war crimes arising from the Korean War. Establishing such a tribunal today would be difficult because more than sixty years have passed since the fighting ended; most war criminals, including the former leader of North Korea, Kim Il-Sung, have passed away; and witnesses and evidence would be difficult to obtain. Looking forward, it is unlikely that such a tribunal will be established given that the April 27, 2018, peace declaration did not establish any process for prosecuting the international crimes committed during the Korean War.³¹

C. U.S.-Korea Status of Forces Agreement

Another international criminal issue in Korea comes from the status of the U.S. Armed Forces in Korea as it relates to U.S. soldiers and workers committing crimes among themselves or against Korean citizens outside military bases. While this issue is not included in the definition of international crimes *stricto sensu*, the broad definition of international crime should include this issue because the crimes committed by the members of the U.S. Armed Forces have an international element and these crimes are governed by an international agreement between Korea and the U.S.³²

Since the Korean War ended in 1953, Korea has been closely cooperating with the U.S. for Korea's defense. Both countries made a special agreement relating to the status of U.S. forces in the Korean peninsula. The Agreement Under Article IV³³ of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea ("SOFA") was concluded on July 9, 1966, and entered into force on February 9, 1967.³⁴ The United States and Korea revised SOFA

31. *Peace Declaration*, *supra* note 30.

32. *See* Mutual Defense Treaty Between the United States and the Republic of Korea and the United States of America, S. Kor.-U.S., Oct. 1, 1953, 5 U.S.T. 2368.

33. *Id.* art. 4 ("The Republic of Korea grants, and the United States of America accepts, the right to dispose United States land, air and sea forces in and about the territory of the Republic of Korea as determined by mutual agreement.").

34. Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, S. Kor.-U.S., July 9, 1966, 80 Stat. 271 (entered into force Feb. 9, 1967) [hereinafter SOFA].

through Subsequent Memoranda of Understanding in 1991 and 2001.³⁵ SOFA lasts until the Mutual Defense Treaty between Korea and U.S. expires.

Relating to the international criminal aspects of SOFA, Article 22 deals with criminal jurisdiction regarding alleged crimes committed by members of U.S. Armed Forces.³⁶ It also applies to the employees of the Armed Forces and families of military personnel.³⁷ Relating to subject matter, SOFA applies only to crimes that happen in the territory of Korea.³⁸ Korean adjudicative jurisdiction doesn't apply to crimes committed by U.S. persons outside of Korean territory; however, the U.S. still has jurisdiction over these matters.

Relating to personal jurisdiction, under Article 22(1), both U.S. military authorities and Korea can exercise jurisdiction over soldiers, employees, and family members of U.S. Armed Forces,³⁹ although the U.S. Armed Forces will not exercise jurisdiction during peacetime over members of the civilian component or dependents.⁴⁰ Under Article 22(2), U.S. Armed Forces has jurisdiction over the matters that can be punishable only by U.S. law, including crimes "relat[ed] to its security."⁴¹ There is a risk that the phrase "relat[ed] to its security" could be broadly interpreted under the U.S. protective principle.⁴² Article 22(2) may be considered as reciprocal since Korea also has jurisdiction

35. See Youngjin Jung & Jun-Shik Hwang, *Where Does Inequality Come from? An Analysis of the Korea-United States Status of Forces Agreement*, 18 AM. U. INT'L L. REV. 1103, 1112–14 (2003), <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1207&context=auilr>.

36. SOFA, *supra* note 34, arts. 1(a), 22.

37. *Id.* art. 22(1).

38. *Id.*

39. *Id.*

40. Agreed Minutes to the Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea art. 22(1)(a), July 9, 1966, 6127 T.I.A.S. 92 (entered into force Feb. 9, 1967) [hereinafter SOFA, Agreed Minutes] ("It is understood that under the present state of United States law, the military authorities of the United States have no effective criminal jurisdiction in peacetime over members of the civilian component or dependents. If the scope of United States military jurisdiction changes as a result of subsequent legislation, constitutional amendment, or decision by appropriate authorities of the United States, the Government of the United States shall inform the Government of the Republic of Korea through diplomatic channels.").

41. SOFA, *supra* note 34, art. 22(2).

42. Cf. CHARLES DOYLE, CONG. RESEARCH SERV., RS22497, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW (2016), <https://fas.org/sgp/crs/misc/94-166.pdf> (listing crimes that U.S. courts have construed to be related to U.S. security).

over crimes against Korean security.⁴³ Additionally, Korea has jurisdiction over matters which can be punishable only by Korean law.⁴⁴

However, when both the U.S. and Korea have concurrent jurisdiction over an alleged criminal act by a member of the U.S. Armed Forces or a related civilian, the U.S. has preferential jurisdiction for a broad range of crimes, despite Korea's right to enforce its laws on its own soil per the territorial principle. Article 22(3) states that when there is concurrent jurisdiction,

(a) [t]he military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States armed forces or civilian component, and their dependents, in relation to:

(i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or civilian component or of a dependent:

(ii) offenses arising out of any act or omission done in the performance of official duty.⁴⁵

Article 22(3) grants Korean authorities the primary right to exercise jurisdiction for any other offense.⁴⁶ However, the separate interpretive Agreed Minutes relating to the SOFA states that considering the U.S. military's primary responsibility to maintain good order and discipline, Korean authorities are required to waive its primary right to exercise jurisdiction unless the exercise of jurisdiction is particularly important to Korea.⁴⁷

The SOFA also grants the U.S. preferential pretrial and post-appeal custody rights over U.S. military personnel and related citizens over whom Korean authorities are exercising concurrent criminal jurisdiction. Under the SOFA, Korean authorities must promptly notify U.S. military authorities of the arrest of any member of the U.S. Armed Forces or civilian component, or a dependent.⁴⁸ If the U.S. has exclusive or concurrent jurisdiction, Korean authorities must, upon request, return the accused to U.S. military authorities until the conclusion

43. SOFA, *supra* note 34, art. 22(2).

44. *Id.*

45. *Id.* art. 22(3)(a).

46. *Id.* art. 22(3)(b).

47. SOFA, Agreed Minutes, *supra* note 40, art. 22.

48. SOFA, *supra* note 34, art. 22(5)(b).

of all judicial proceedings.⁴⁹ While Korean authorities may request keeping pretrial custody of the accused and U.S. military authorities must give “sympathetic consideration” to the request, the SOFA does not require U.S. military authorities to make the transfer if the U.S. has jurisdiction.⁵⁰ However, U.S. authorities must promptly make such accused available to Korean authorities for purposes of investigations and trials.⁵¹

III. KOREA’S CONTRIBUTION TO INTERNATIONAL CRIMINAL LAW

A. Treaties to Which Korea Is a Party and Implementation

In addition to Korea being bound by international custom and general principles of law, since relatively recently, Korea has signed and ratified numerous treaties relating to international criminal law. The international criminal treaties Korea has ratified so far will resolve many international criminal issues as they relate to Korea.

First of all, Korea signed the Rome Statute of the International Criminal Court on March 8, 2000, and ratified it on November 13, 2002, without any declaration and reservation.⁵² Thus, Korea started being subject to the jurisdiction of the International Criminal Court over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression⁵³ on November 13, 2002. Korea also signed the Agreement on the Privileges and Immunities of the International Criminal Court on June 28, 2004, and ratified it on October 18, 2006.⁵⁴ Under this treaty, Korea admitted the legal status of jurisdictional personality of the Court,⁵⁵ and the Court shall enjoy privileges and immunities in the territory of Korea.⁵⁶

Korea also signed United Nations Convention Against Corruption on December 10, 2003, and ratified it on March 27,

49. *Id.* art. 22(5)(c).

50. *Id.*

51. *Id.*

52. 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]. Note that as of Nov. 13, 2002, Korea did not yet sign and ratify the following Rome Statute amendments to be discussed.

53. *Id.* art. 5.

54. Agreement on the Privileges and Immunities of the International Criminal Court, Sept. 9, 2002, 2271 U.N.T.S. 3 (entered into force July 22, 2004).

55. *Id.* art. 2.

56. *Id.* art. 3.

2008.⁵⁷ Ratifying this treaty, Korea agreed to the seriousness of problems and threats posed by corruption to the stability and security of societies, democracy, ethical values, justice, sustainable development, and the rule of law.

Korea also actively participated in the international movement against terrorism by joining many anti-terrorism treaties. Korea entered the International Convention Against the Taking of Hostages on May 4, 1983,⁵⁸ and Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents on May 25, 1983.⁵⁹ More recently, Korea signed the International Convention for the Suppression of the Financing of Terrorism on October 9, 2001, and ratified it on February 17, 2004.⁶⁰ Korea signed the International Convention for the Suppression of Acts of Nuclear Terrorism on September 16, 2005, and ratified it on May 29, 2014.⁶¹

Furthermore, Korea has participated in international activities against transnational organized crime. Korea signed the United Nations Convention Against Transnational Organized Crime on December 13, 2000, and ratified it on November 5, 2015.⁶² Korea also signed and ratified protocols supplementing this Convention. It signed the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime on December 13, 2000, and ratified it on November 5, 2015.⁶³ It signed the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime on December 13, 2000, and ratified it on November 5, 2015.⁶⁴ It

57. United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005).

58. International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205 (entered into force June 3, 1983).

59. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 167 (entered into force Feb. 20, 1977).

60. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197 (entered into force Apr. 10, 2002).

61. International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, 2445 U.N.T.S. 89 (entered into force July 7, 2007).

62. United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209 (entered into force Sept. 29, 2003).

63. Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2241 U.N.T.S. 507 (entered into force Jan. 28, 2004).

64. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003).

signed the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime on December 13, 2000, and ratified it on November 5, 2015.⁶⁵

As of 2018, Korea also concluded and ratified bilateral extradition treaties with thirty-two countries, including Australia, Canada, Spain, the Philippines, the United States, China, Brazil, Thailand, Argentina, Mongolia, Mexico, Chile, Paraguay, France, Indonesia, Hong Kong SAR, Guatemala, Peru, India, Vietnam, Uzbekistan, Japan, New Zealand, Iran, the United Arab Emirates, Malaysia, South Africa, Kuwait, Kazakhstan, Cambodia, Bulgaria, and Algeria.⁶⁶

Korea also made efforts to implement international criminal treaties. The Korean National Assembly promulgated the Act on Punishment, Etc. of Crimes Under Jurisdiction of the International Criminal Court on December 21, 2007, and further revised it on April 12, 2011.⁶⁷ The Act on International Judicial Mutual Assistance in Criminal Matters was enacted on April 8, 1991, and revised it four times, with the last revision in 2017.⁶⁸ The Act on International Judicial Mutual Assistance in Criminal Matters covers many topics, including the scope of mutual assistance (Art. 5), restrictions on mutual assistance (Art. 6), cooperation with requesting countries (Art. 9), arresting and repatriating persons to foreign countries (Art. 10), the acceptance and requesting of materials concerning mutual assistance (Arts. 11 & 12), actions and measures taken by prosecutors (Arts. 16 & 17), requests for examination of witnesses (Art. 18), and which courts are viewed as competent to handle jurisdiction (Art. 25).⁶⁹ Korea also enacted the Act on Anti-Terrorism for the Protection of

65. Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime, May 31, 2001, 2326 U.N.T.S. 208 (entered into force July 3, 2005).

66. See Michael S. Kim et al., *Extradition: Korea*, GLOBAL INVESTIGATIONS REV. (U.S.), <https://globalinvestigationsreview.com/jurisdiction/1005813/korea> (last updated June 19, 2019).

67. Act on Punishment, Etc. of Crimes Under Jurisdiction of the International Criminal Court, Act No. 8719, Dec. 21, 2007, *amended by* Act No. 10577, Apr. 11, 2011 (S. Kor.), *translated in* Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=24229&lang=ENG.

68. Act on International Judicial Mutual Assistance in Criminal Matters, Act No. 4343, Mar. 8, 1991, *amended by* Act No. 14839, July 26, 2017 (S. Kor.), *translated in* Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=46746&lang=ENG.

69. *Id.* arts. 5–6, 9–12, 16–18, 25.

Citizens and Public Security on March 3, 2016, and revised it once.⁷⁰ The Act defines terrorism (Art. 2) and created the National Counter-Terrorism Commission (Art. 5).⁷¹

*B. Domestic Development Relating to
International Criminal Law*

After the devastation created by the Japanese colonial period and the Korean War, Korea spent the next few decades recovering—this period of economic growth is referred to as the “Miracle on the Han River.”⁷² During this time, Korea may not have had the time or opportunity to look outside and contribute to the development of international law. Still under military dictatorship during the 1980s,⁷³ Korea started to actively join and contribute to the international society. Korea hosted the 1986 Asian Games and the 1988 Olympic Games. Also, the current Korean Constitution, which was revised last in 1987, reaffirmed Korea’s contribution to international peace and security.⁷⁴ The Preamble of the Korean Constitution states a clear mission for the peaceful unification of two Koreas and to contribute to lasting world peace and the common prosperity of mankind.⁷⁵ Under Article 5 of the Korean Constitution, Korea pledged to maintain international peace and “renounce all aggressive wars.”⁷⁶ Under Article 6, Korea gave international law the same status as the domestic laws.⁷⁷

Relating to transnational crime committed in Korea, the courts in Korea are making efforts to provide fair and equitable trials to foreigners who commit crimes in the territory and sea of Korea. The courts in Korea officially use Korean as a communication language, but allow interpreters when relevant parties cannot

70. Act on Anti-Terrorism for the Protection of Citizens and Public Security, Act No. 14071, Mar. 3, 2016 (S. Kor.), *translated in* Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/lawView.do?lang=ENG&hseq=38450.

71. *Id.* arts. 2, 5.

72. *Miracle on the Han River*, WIKIPEDIA, https://en.wikipedia.org/wiki/Miracle_on_the_Han_River (last visited Oct. 24, 2019).

73. *See South Korea – Timeline*, BBC (May 1, 2018), <https://www.bbc.com/news/world-asia-pacific-15292674>.

74. DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] (S. Kor.).

75. DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] pmb1. (S. Kor.).

76. DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] art. 5 (S. Kor.).

77. DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] art. 6 (S. Kor.).

speak and read Korean.⁷⁸ The courts also allow foreign documents and evidence, but these must be translated,⁷⁹ otherwise, a party who fails to translate loses her right to appeal.⁸⁰

While Korea began to sign and ratify treaties in 1948, starting in the 1980s Korea made special efforts to contribute to the development of international criminal law, signing and ratifying numerous treaties relating to international criminal law. Korea is one of 122 parties to the Rome Statute.⁸¹ Thus, Korea will be subject to the jurisdiction of the International Criminal Court over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. As a party to the Rome Statute, Korea also affirms general principles of international criminal law including *nullum crimen sine lege*,⁸² non-retroactivity *ratione personae*,⁸³ individual criminal responsibility,⁸⁴ irrelevance of official capacity,⁸⁵ non-applicability of statute of limitations,⁸⁶ and allowance of the mistake of fact defense.⁸⁷ Any Korean who commits a crime enumerated above shall be individually responsible and liable for punishment according to the Rome Statute.⁸⁸

Two Koreans have served as judges on the International Criminal Court. Sang-Hyun Song was elected in 2003 for a three-year term, and was elected again in 2006 for a nine-year term.⁸⁹ Judge Song was also elected as President of the International Criminal Court (ICC) in March 2009 and had served as the ICC's president until March 2015.⁹⁰ Chang-ho Chung is the second Korean judge serving at the ICC and was elected in 2015.⁹¹

78. Court Organization Act, Act No. 3992, Dec. 4, 1987, *amended by* Act No. 13522, Dec. 1, 2015, art. 62 (S. Kor.), *translated in* Korea Legislation Research Institute online database, http://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=37126&type=sogan&key=9.

79. Criminal Procedure Act, Act No. 341, Sept. 23, 1954, *amended by* Act No. 9765, Jun. 9, 2009, art. 182 (S. Kor.) *translated in* Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=22535&lang=ENG.

80. *See* Supreme Court [S. Ct.], 98Da1038, June 23, 1998 (S. Kor.).

81. *Status of Treaties: Rome Statute of the International Criminal Court*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (last visited Oct. 26, 2019).

82. Rome Statute, *supra* note 52, art. 22.

83. *Id.* art. 24.

84. *Id.* art. 25.

85. *Id.* art. 27.

86. *Id.* art. 29.

87. *Id.* art. 32.

88. *Id.* art. 25.

89. *Judge Sang-Hyun Song*, INT'L CRIM. CT., <https://www.icc-cpi.int/CourtStructure/Pages/judge.aspx?name=Judge%20Sang-Hyun%20Song> (last visited Oct. 26, 2019).

90. *Id.*

91. *Judge Chang-ho Chung*, INT'L CRIM. CT., <https://www.icc-cpi.int/CourtStructure/Pages/judge.aspx?name=Judge%20Chang-ho%20Chung> (last visited Oct. 26, 2019).

IV. CONCLUSION

Many Koreans during the Japanese colonial time of 1910 to 1945 were exposed to international crime, but these victims have not received adequate official apology or compensation.⁹² Since international crime *stricto sensu* is a recent development and most were recognized after the Nuremberg Charter and Tokyo Charter, it cannot be applied retrospectively *ex post facto* to the events that happened before World War II. War crimes, however, can still be applied to this time period because war crimes had been developed under customary international law and were recognized and codified by 1907 Hague Convention IV.⁹³ After being illegally annexed by Japan in 1910, as part of the efforts for liberation, Koreans were able to establish a new government, a Provisional Government of the Republic of Korea in Shanghai, China on April 11, 1919, officially and systemically starting Korea's independence wars against Japan.⁹⁴ These circumstances triggered the war crimes mechanism during the colonial period. Thus, appropriate compensation and punishment should be made by Japan for their crimes committed against prisoners, the wounded, and civilians during the colonial period.

Relating to the crimes it committed during World War II, Japan officially compensated Myanmar, Indonesia, the Philippines, and Vietnam for Japan's various war crimes.⁹⁵ Korea, however, has not received an adequate official apology or compensation from Japan for its crimes committed during the World War II.⁹⁶ For

92. See, e.g., *Koreans Executed as 'Japanese War Criminals' After WWII*, JAPAN PRESS WKLY. (May 22, 2016), <http://www.japan-press.co.jp/modules/news/index.php?id=9597> [hereinafter *Japanese War Criminals*].

93. Laws and Customs of War on Land (Hague, IV), Oct. 18, 1907, 36 Stat. 2277 (entered into force Jan. 26, 1910).

94. Sarah Kim, *Korea's Shanghai Gov't Was Born 100 Years Ago*, KOREA JOONGANG DAILY (Apr. 11, 2019), <http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=3061693>.

95. See Geoffrey Gunn, *War Claims and Compensation: Franco-Vietnamese Contention over Japanese War Reparations and the Vietnam War*, 9 ASIA-PAC. J. 1, 8 (2011), <https://apjif.org/-Geoffrey-Gunn/3658/article.pdf>.

96. See Gregg A. Branziksy, *How Japan's Failure to Atone for Past Sins Threatens the Global Economy*, WASH. POST (Aug. 11, 2019, 5:00 AM), <https://www.washingtonpost.com/outlook/2019/08/11/how-japans-failure-atone-past-sins-threatens-global-economy/#comments-wrapper> ("Since the 1990s, Japanese leaders have made several dozen statements apologizing for and expressing remorse for their country's past misdeeds. However, they have consistently undermined these statements by issuing clarifications or engaging in other actions such as visiting the notorious Yasukuni Shrine that raise questions about their sincerity."); cf. Hannibal Travis, *Genocide in Sudan: The Role of Oil Exploration and the Entitlement of the Victims to Reparations*, in TOP TEN GLOBAL JUSTICE LAW REVIEW ARTICLES 2008 107, 149 (Amos N. Guiora ed., 2009) ("Victims

context, after World War II, Korea and Japan restored their official relations on December 18, 1965, signing the Treaty on Basic Relations Between the Republic of Korea and Japan.⁹⁷ In the concurrently signed Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-Operation Between Japan and the Republic of Korea, Japan agreed to support Korea economically by providing 300 million dollars and lending 200 million dollars with low interest rates.⁹⁸ This compensation was more about civil compensation than criminal compensation; satisfaction through official apology was not made. Regarding criminal prosecutions of Japanese war criminals, in addition to the Tokyo Tribunal, trials of about 5,700 Japanese criminals were held at 49 courts in Asia, and more than 900 people were executed.⁹⁹ Most Japanese criminals who committed crimes in the Korean territory or on Koreans during the World War II, however, were not prosecuted and punished. Furthermore, the comfort women issue should be resolved and treated as an international crime against humanity and sexual slavery. U.N. Human Rights Commission Special Report¹⁰⁰ and the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery¹⁰¹ affirmed that Japan's exploitation of Korean comfort women represented a clear violation of Japan's obligations under international law. While Japanese officials have made some attempts to apologize,¹⁰² Japan has not make any further efforts to prosecute criminals; and has only made minimal efforts to compensate comfort women and their survivors.¹⁰³

Relating to the Korean War, the peace declaration on April 27, 2018, politically ended the war and started a new era of peace.¹⁰⁴ However, the period of armistice has been too long to blame and

of Japan's occupation, mass murder, and enslavement of Asian populations during World War II have received very little in reparations payments compared to what they have lost.”).

97. Treaty on Basic Relations Between Japan and Republic of Korea, Japan-S. Kor., June 22, 1965, 8471 U.N.T.S. 44.

98. Agreement on the Settlement of Problems Concerning Property and Claims and on the Economic Co-Operation Between Japan and Republic of Korea art. 1, Japan-S. Kor., June 22, 1965, 8473 U.N.T.S. 258 (entered into force Dec. 18, 1965).

99. *Japanese War Criminals*, *supra* note 92. Note that of the around 5,700 who were tried, 148 of the prosecuted were Korean; most of these Korean soldiers were forced into working for the Japanese Imperial Army. *See id.*

100. *U.N. Report on Sexual Slavery*, *supra* note 12, ¶ 137.

101. *Tokyo Tribunal*, *supra* note 18.

102. *See* Kang Min-jin, *The First Official Apology of the Japanese Government Comfort Women, and 26 Years Have Passed*, HANKYOREH (S. Kor.) (Jan. 29, 2018), <http://www.hani.co.kr/arti/politics/diplomacy/829830.html>.

103. Cho Ki-weon & Park Min-hee, *UN Declares Japan's Compensation to Comfort Women as Inadequate*, HANKYOREH (S. Kor.) (Nov. 21, 2018), http://english.hani.co.kr/arti/english_edition/e_international/871186.html.

104. *Peace Declaration*, *supra* note 30.

punish criminals based on nearly seventy-year-old crimes. This may be the reason that the declaration did not resolve any criminal issues committed during the Korean War. Amnesty to the criminals may also be meaningless at this time unless one can clearly identify war criminals with witnesses and evidence. Maybe, for the peace of the Korean peninsula, the past can be better resolved politically than legally.

If we ask when the best time is to prosecute criminals, there may be no answer. Statutes of limitations are usually set for crimes due to the difficulty of arresting and prosecuting criminals, finding witnesses, and obtaining evidence after the passage of a certain period of time.

International criminal law issues surrounding Korea must be resolved either legally or politically, which will become a foundation for peaceful relations among North Korea, South Korea, and Japan. The equitable procedural cooperation in the criminal matters with the other countries, including the SOFA issue with U.S., will enhance the safety and peace in Korea.

