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A Review of the Legalities Associated with a Sudden Change in North Korea

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Ⅰ. Foreword

The accumulation of limiting and debilitating factors or a power struggle emanating from the North Korean system may paralyze the country's political system or state functions. In North Korea such circumstances are typically referred to as 'sudden change'. Sometimes viewed as the fast track to reunification, sudden change in North Korean carries extreme significance—dangers of an international armed conflict coupled with the force to reconfigure the future security landscape of Northeast Asia, including the Korean peninsula. Therefore, every possible problem that may ensue from sudden change requires detailed consideration. However, comprehensive studies covering the legalities surrounding a North Korean sudden change are few and far between. Such works have only treated the issue peripherally in the process of evaluating larger security issues of the Korean peninsula.

This paper seeks to view the possible legal issues of sudden change by dividing the development of the situation into three specific periods: 1) outbreak; 2) stabilization; and 3) integration. Here, the political, military, and economic discussions will be side-lined for the time being. Of course, covering every legal corner of the sudden change issue is difficult, so this paper will

take a comprehensive approach to outline the overall trajectory for a solution and the implications of specific legal issues, rather than pinpointing exact answers for each of the problem at hand.

First, the following section will cover the substance and ripple effects in the application of domestic and international law in regards to the legal principles of sudden change in North Korea. The third section will evaluate the various legal problems that may arise from sudden change, and focus on intervention by neighboring countries and the issue of North Korean refugees. The fourth section will look at the period of stabilization whereby the international society would have intervened in the scenario of sudden change. This section will discuss the signing of a peace treaty on the Korean peninsula, the legal mechanisms of expanding exchange and cooperation with the North, and other legal modifications such as criminal punishment regarding the suppression of human rights in North Korea. The fifth section will examine the legal issues associated with North-South integration and post-stabilization, which will cover topics such as a unification treaty or the enactment of a unified constitution, the consolidation of North-South civil and criminal law, and the establishment of the rule of law in the Northern region.

Ⅱ. Applicable Legal Principles of Sudden Change and the Role of International Law

1. Theory of Expanding South Korean Law & the Application of International Law

Since the end of World War II, the two Koreas have been operating under ‘a special relationship temporarily constituted in the process towards reunification.’ As a result, a dichotomy exists —one arguing for the expansion of South Korea’s law into North Korean territory based on historical circumstances, and the other viewing the relationship as that of two separate

state entities, and therefore, arguing for international law.

The former logic has grounds in Article 3 of the Constitution, which stipulates that "the territory of the Republic of Korea includes the Korean peninsula and its affiliated islands." The reason behind the provision on territory is that it clearly defines the spatial scope in which the Constitution takes effect, and by claiming that the South is the sole state to have inherited the tradition of the Greater Korean Empire negates any appeal to statehood by the North in times of North-South confrontation. Along these lines, the Northern region is simply relegated to being an un-reclaimed area outside the reach of the South's rule. In the same vein, the court has also ruled the Northern territory to be "an un-reclaimed area illegally occupied by a rebellious organization."[1]

On the other hand, there is also the argument that it is in accordance with international law to apply South Korean domestic law to the areas of North Korea. The basis lies in the United Nations (UN) resolution 195(III) of December 12, 1948 on 'the political situation on the Korean peninsula.'[2] Some view this as evidence of the UN General Assembly's declaration of South Korea as the 'sole legal government on the Korean peninsula.' However, due to the legal structure of the UN, the General Assembly (unlike the Security Council) does not retain the power to enforce effective resolutions regarding issues of security.[3] Moreover, the resolution limits the scope of legitimacy of the South Korean government to 'areas that have undergone elections,' instead of the entire Korean peninsula.[4] In other words, the view that the resolution

[1] The Republic of Korea Supreme Court Decision 2002Do7878 (2004. 3. 26).

[2] UN GA R 195(III), available at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/66/IMG/NR004366.pdf?OpenElement.

[3] UN Constitution Article 10 & 12, available at http://www.un.org/en/documents/charter/chapter4.shtml.

[4] UNGA R 195(III), article 2 "declares that there has been established lawful government (the government of the Republic of Korea) having effectively control and jurisdiction on that part of

recognizes the government in the South as the sole legal entity on the Korean peninsula is incorrect under legal principles, as the territory under enforcement is clearly defined as only those that have held elections (as opposed to the entire peninsula).

Furthermore, from the perspective of international law, there has been the question of whether the North Korean government has obtained recognition as a state. In order for statehood to be recognized, actions alongside the intent of official state recognition must be made. Both the South and the North have yet to express intentions of official cross-recognition. Instead, both sides have signed on to the inter-Korean basic agreement, viewing North-South relations as that of a special internal relationship within one ethnic group.

2. Ripple Effects of the Debate Surrounding Governance Law

In actuality, the issue of applying legal principles to the case of North Korea impacts the Korean peninsula's reunification process. For example, if a sudden change situation arises in North Korea, prompting either the South Korean military or those of neighboring states to intervene due to debilitating circumstances, the reunification scenario may result in largely two forms.

From the perspective of domestic law, it is logical to assume the natural absorption of the North into the South. This postulates that once the North collapses and neighboring states including South Korea intervene, South Korea's authority will expand upon the consent of the North Korean populace. Therefore, reunification will work along the following tracks: agreement between South Korea and neighboring states (if need be, a referendum to gauge the receptivity of North Korean citizens); a general election held under the premise of the South Korean Constitution, and; the establishment of a

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Korea..."

reunified government. At this point, since North Korea—the other party in the armistice—will ceases to exist, and the South Korean government becomes the sole legal authority on the peninsula, the need to create a North-South peace treaty becomes nullified. Since the goal behind an initial peace treaty would be to officially end the armed conflict between hostile actors, if one of the parties ceases to exist, any attempt to construct a legal relationship no longer works. However, it would be necessary to draft an agreement between the South Korean government and its neighbors on the rights and obligations of the reunified Korean government. This document should adequately reflect the sentiments of the regional states and be seen as an opportunity to gain a consensus from those states on the expansion of South Korea's administrative rule.

From the perspective of international law, a sudden change does not automatically necessitate state extinction, which means that a new government would need to be formed in North Korea. As a result, the process of reunification differs from that of domestic law advocates: the creation of a new government in North Korea; the conclusion of a peace treaty between the North-South and interested parties; a consensus on the method and process of reunification by the North and South (unification treaty); general elections as dictated by the unification treaty; the enactment of a unified constitution by those officials appointed by the general elections, and; the establishment of a unified government under the said constitution.

As discussed in the previous paragraphs, reunification from the viewpoint of domestic law is simpler than that of international law. Nevertheless, one can predict that whatever the case, the common task of establishing a treaty with the regional actors suggests that during the period when a sudden change occurs and draws to a close, the impact of regional conditions and dynamics will play a large role.

Ⅲ. Evaluation of Legalities during the Outbreak Stage

Upon the outbreak of sudden change in North Korea, the regional actors must decide between intervention and non-intervention. On the former, there is also the question of diplomatic engagement or an expanded form such as military intervention. If sudden change happens to influence neighboring states in a palpable way, such states will most likely consider military action. Subsequently, the legitimization of potential military intervention will become the most crucial issue immediately following the outbreak of sudden change. Moreover, the influx of North Korean refugees will be another burdensome factor on the regional actors, thus requiring a close examination of the norms surrounding refugees. Here, it is advised that since the North Korean territory is considered to be part of the South under the South Korean constitution, domestic and not international law should have the right of way in addressing the refugee issue.

1. Legal Grounds for Military Intervention upon Sudden Change

Article 2, section 4 of the UN Charter bans the use of armed force in the international arena. Therefore, all states have an obligation to not unilaterally intervene in a military manner upon sudden change in North Korea. Meanwhile, the international community has also developed the concept of the legal use of armed force. The approval of the use of force in the aid of sanctions and self-defense, both pursuant to Chapter VII of the UN Charter, are quintessential examples. Moreover, through state practice a basis for legitimization has evolved in regards to anticipatory self-defense, intervention in order to protect one's own citizens, and humanitarian intervention. Of course, whether these cases meet the standard of legitimacy has yet to be fully resolved. Nevertheless, these reasons may become the basis for argument by the regional states upon sudden change in North Korea, and thus, we need to

look closely at each rationale along with the potential states that may resort to such reasoning.

a) Intervention under the UN Resolution

The UN, an artifice born under the sentiment that the international society needed to erect a more cohesive organization to guard peace and security after the tragedy of World War II, stipulates the authorization and implementation of armed force as decided upon by the UN Security Council (UNSC) under Chapter VII of the UN Charter.[5] The initial architects of the UN had in mind a system whereupon a threat or attack to the peace of the international community would culminate in a decision by the UNSC (Article 39), followed by the levying of political and economic sanctions (Article 41); if the UNSC resolution went unfulfilled, authorization on the use of armed force would be made (Article 42). Moreover, since Article 103 of the UN Charter stipulated its members to prioritize the obligations set out by the Charter over any other legal responsibility,[6] a UNSC resolution is essentially akin to international law.

Therefore, if the occurrence of sudden change in North Korea threatens the peace and security of Northeast Asia, the UNSC may authorize the use of armed force. Here, the authority regarding the method and period thereof in implementing that force would be up to the UNSC. Typically, when the use of armed force becomes necessary, the UNSC recommends that all states in the international community participate, which means that interested parties such as the U.S., China, Russia, and Japan may all collaborate.

[5] Article 42, UN Charter, available at http://www.un.org/en/documents/charter

[6] Article 103, UN Charter, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

b) Intervention under Self-Defense

Self-defense refers to the right to the use of force to protect one's own state. The term is discussed under international law in two strains. Foremost, self-defense as stipulated under Article 51 of the UN Charter is considered to be the right to either individually, or collectively, resort to the use of armed force upon the incident of an armed attack. This assumes the use of armed force by the instigator, in which case self-defense by armed force is possible until an adequate measure can been made by the UNSC. In the case of North Korea, if power struggles within the North were to intensify, the forces in power may seek to divert attention externally in order to create internal stability. This signifies the possibility of the North resorting to an armed attack against the South or instigating a limited provocation. In the former, it may be difficult to view the attack as that of a full-scale war, but any chances of the attack expanding will form the rationale for military intervention into the North. Since the Caroline Incident,[7] self-defense under international customary law has been recognized in a most comprehensive manner, including the use of force to repel imminent threats—unlike the UN Charter. Self-defense in the face of an imminent threat as stipulated under international customary law has been labeled 'anticipatory self-defense,' and despite the heated debates for and against in the past, the latest trend is to accept the legitimacy thereof.[8] If the influx of refugees from the North into regional states upon sudden change intensifies, neighboring countries may resort to anticipatory self-defense in the face of rising tensions of military confrontation. Moreover, the issue of 'loose nukes' in the North may prompt military intervention. In the instance that one faction in the power struggle gains control of nuclear weapons and its related facilities with the intent of using those weapons to further their political

[7] For more information, see http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm

[8] Report of the High-level Panel on Threats, Challenges and Change, *A more secure world: Our shared responsibility*, (UN: 2004), available at http://www.un.org/secureworld/report2.pdf.

objectives, the level of threat and urgency will definitely increase.

Consequently, it may be possible to evaluate the right to invoke self-defense, at least for the countries facing such threats. In particular, South Korea—which is currently in military confrontation with the North—coupled with the U.S., will be able to consider anticipatory self-defense. The same goes for China and Russia, which shares a border with the North.

Lastly, in the past, self-defense has been exercised by states resorting to the use of force in order to protect its citizens under threat in foreign lands. Despite the controversy of such usage, under certain circumstances wherein one must protect its own citizens, harbors no intent to exert political influence, and no room for diplomatic negotiations exists, it is indeed difficult to assert that the inevitable use of force is illegal. This view has led to supporters favoring the inclusion of the use of force in order to protect one's own citizens under the category of self-defense.[9] In this vein, those states that have citizens residing in the territory of North Korea may be able to intervene upon the occurrence of sudden change, if the lives of those citizens come under threat. For South Korea, this means a serious consideration of those South Koreans residing in the Gaesung Industrial Complex (GIC).

c) Intervention under Humanitarian Objectives

There is the case wherein the use of force as authorized under international law may operate as the legitimization for humanitarian intervention.[10] Although the legality of such intervention is still under debate,[11]

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[9] Thomas Franck, *Recourse to Force* (Cambridge: Cambridge University Press, 2002), pp. 51-52.

[10] Up to now, humanitarian intervention is divided among the following: illegal intervention, illegal yet legitimate intervention, excusable breach, and lawful intervention. For more information, see Jane E. Stromseth, "Rethinking Humanitarian Intervention: the Case for Incremental Change," *in Humanitarian Intervention: L Ethnical, Legal, and Political Dilemmas* (J. L. Holzgrefe & Robert O. Keohane eds., 2003), pp. 241-245.

[11] Richard Bilder, *Kosovo and the New* "Interventionism: Promise or Peril?" 9 *Transnat'l. L. & Pol'y.*

since the North Atlantic Treaty Organization (NATO) launched its mission into Kosovo, the argument for unilateral military intervention has gained incremental support as a last resort to prevent grave human rights infringements from taking place in a certain country.[12]

The following have been cited as representing some necessary conditions that would add to the legality or legitimacy aspect of a humanitarian intervention: a humanitarian objective; a UNSC resolution calling for the cessation of oppressive acts; the failure to pass a resolution on authorizing the use of force to operationalize the said resolution; the necessity of a last resort in preventing the violation of human rights; proportionality in the use of force, and; collective action.[13] In the event of the breakout of sudden change in North Korea and the questioning of the validity of humanitarian intervention—perhaps the spread of famine conditions due to a food crisis or the instance of human fatalities akin to a genocide—the regional states or the international community may consider military intervention with humanitarian objectives. Unlike anticipatory self-defense, it is likely that this type of humanitarian intervention will operate under the aegis of the international community or of the regional states, instead of becoming a justification for intervention by one sole country.

d) Intervention under the Invitation by the Target State

Since international law has as its foundation the respect for individual states' free will, if the target state for intervention voluntarily requests outside military intervention or authorizes such operations, the legality condition for

(1999), pp.160-161; Mary Ellen O'Connell, "The UN, NATO, and International Law after Kosovo," 22 *Human Rights Quarterly* 57, (2000), pp. 88-89.

[12] Fernondo R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (3d ed. 2005), pp. 327-329, p. 415.

[13] Stromseth, *supra* note 10, pp. 248-251.

intervention is met.[14] Here, the target state may resort to authorization via treaty or official request by a governmental agency.

Intervention by treaty, as an exception to the general principle of non-intervention, is the most clearly recognized in terms of its legality. There are two possible forms of treaty codification: peacetime military deployment/stationing as stipulated within the treaty, or having a provision on the deployment of military forces upon specific emergency situations without actually having those reinforcements stationed during peacetime. Intervention by invitation refers to the intervention carried out through the request for support of the government in the target state, due to difficulties in resolving the situation through its own military force. This typically occurs during civil wars with the intent to suppress the insurgent forces by attracting support from foreign powers. Here, the request must be made by the body that is initially viewed as being the legitimate government.[15]

In the case of North Korea, all neighboring states may legally intervene upon sudden change by request of the North Korean government. Even if at this stage the North Korean government has lost all sense of authority over its citizenry, the representation factor still exists. Meanwhile, the logic that if one party engaged in the conflict requests the intervention of a third party, the other party in the conflict may do the same, is gaining appeal. Thus, if two or more parties end up competing within North Korea, one party's call for third-party intervention may similarly lead the other party to invite intervention by a third party.

e) Intervention under a Claim to Historical Rights

Under international law, any action waged within one's own territory falls under that state's sovereignty. However, if the situation involves an

[14] Christine Gray, *International Law and the Use of Force* (2002), pp. 51-63.

[15] *Ibid*., p. 57.

ongoing territorial conflict, and a state happens to deploy forces to that contested part of the territory, the act becomes a form of invasion against the other country. Countries such as China and the Soviet Union, China and Vietnam, and Thailand and Cambodia have experienced military confrontations due to territorial problems.

Apart from article 3 (territorial stipulation) of the South Korean constitution, the preamble of the constitution claims that South Korea has inherited the legal traditions of the Greater Korean Empire and the provisional government in exile during the Japanese colonial period. Although purely theoretical, upon sudden change, South Korea could resort to its historical rights as the justification for intervention. Moreover, China, which is trying to resolve its regional territorial issues through its Northeast Project[16] may also claim historical rights based on the Ch'ongch'on River in North Korea (which formed the border of the Goryo Dynasty). With that said, considering the security situation or dynamics of Northeast Asia, and state actions thus far, it is highly unlikely that these claims to historical rights will be voiced at all.

3. Refugee Relief

a) Legality of North Korean Refugees flowing over into Regional States

One of the most sensitive issues related to the sudden change scenario is the matter of a massive influx of North Korean refugees into neighboring states, including South Korea. Predictions place the possible refugee numbers at tens of thousands at minimum, and over hundreds of thousands at maximum. From the early stages of its establishment, the United Nations has been interested in the issue of refugees, and as a result, the UN Convention Relating to the Status of Refugees (herein, the 'convention') was adopted in

[16] Yun Hwee Tak, "Dongbukgongjongae Munjaejumgwa Daeung Banghyang" (Problems of the Northeast Project and Response), *Jongsaewa Jongchaek* (Trends and Policies) (2006. 10), available at http://www.sejong.org/Pub_ci/PUB_CI_DATA/k-2006-10-04.pdf.

1951, while a Protocol Relating to the Status of Refugees (herein, the 'protocol') was ratified in 1967. Both the convention and the protocol define which populations may be considered as refugees.

In actuality, the fact that refugees are not awarded diplomatic protection as afforded by its own state places the group in a similar category as that of stateless persons. Therefore, refugees do not have the right to enter a specific country, or be punished for such crimes of illegal entry. This means that while North Korean refugees do not have the right to enter China, Russia, or Japan, they cannot be held responsible for entering illegally or be forced to leave the country. Meanwhile, refugees are free to leave a country, and according to article 27 of the convention, are afforded the right to be granted travel documents.

In a similar vein, in the case of sudden change in the North, the North Korean refugees that flee to China, Russia, or Japan for their survival will be granted/refused refugee status by the respective state governments along with the UN High Commissioner for Refugees (UNHCR). However, it remains to be seen whether the bilateral treaty between China and North Korea stipulating the repatriation of North Korean defectors to the North[17] will apply even after sudden change.

In the event of a massive influx of refugees, the recipient state of such refugees has the right to refuse entry. This means that a situation may arise wherein China or Russia may refuse such entry for refugees. Since refugees are afforded the rights to freely exit a country, those that enter China or Russia may argue for (re)entry into South Korea. There is no real way to prevent those refugees that aspire to repatriate to South Korea, especially if they view the North as being part of South's territory—this is reinforced by the fact that the South is currently helping North Koreans to acquire South Korean citizenship.

[17] The agreement retains such measures as the 1960 surreptitious agreement sealing the repatriation of North Korean migrants by China and the 1986 agreement on tasks related to the border region. However, the specifics are yet to be known.

Therefore, the issues of accommodating those refugees along with the necessary economic support will gain critical attention upon sudden change.

Lastly, there remains the question of whether North Korea should be held responsible for 'unleashing' such an influx of refugees. Typically, the state from which the refugees flee must be held responsible under international law against the state at the receiving end of such refugees. Aside from the tangible costs incurred by the accommodating state, the violation of human rights undermines international law. The most general method of relieving oneself of such responsibilities is through compensation for damages.[18] Given the dire situation of the North facing sudden change, it is unrealistic to expect such compensation from the North. However, we must tread cautiously with the issue of succession of remaining state responsibilities. If the North is reunified through absorption into the South on the logic that the North is part of the South's territory, South Korea must be wary that China or Russia may hold the South responsible for settling the bill for managing refugees. Therefore, it will be imperative that the refugee matter is framed as that of an international issue, and accordant efforts fall under the larger UN framework.

b) Legality of North Korean Refugees Entering South Korea

Unlike the perspective of international law, domestic law would stipulate that there would be no situation of refugees since those individuals would be viewed as South Koreans to begin with. Those North Koreans fleeing to South Korea may gain South Korean citizenship without additional requirements. Similarly, the treatment of such refugees is based on the Act regarding the protection of North Korean escapees and readjustment support (Act no.10188, herein, 'North Korean escapees' protection act'). Since the said

[18] ILA, *Report of International Committee on the Legal status of Refugee, Seoul Conference* (1986), p. 8.

act provides guidance on support for settlement and job placement, among others, more protection is offered under the act than the protocol.

However, under the 'North Korean escapees' protection act,' if an escapee acquires a foreign citizenship, the aforementioned provisions do not apply. If an escapee acquires Russian, Chinese, or Japanese citizenship status and enters South Korea, the act in question cannot afford any protection. In fact, under article 1, paragraph C of the protocol, gaining status from a third-party state means that one can no longer be considered a refugee. Thus, if a refugee gains a spouse from a different country and bears a child, or the child becomes a dual citizen, complex legal issues may arise.

The 'North Korean escapees' protection act,' was drafted in consideration of those minority North Korean citizens fleeing from the North into South Korea. Hence, in the case of a massive influx of refugees into the South as a result of a collapse in the North Korean regime, difficulties will surely arise in applying the act. Seoul will need to consider enacting a special act which reflects a careful consideration of the capacity to shoulder the economic costs involved in settlement or job placement support.

4. The Mutual Defense Treaty between South Korea & the U.S.

We need an accurate understanding and perhaps even an amendment to Article 3 contained in the Mutual Defense Treaty between the Republic of Korea and the U.S. (herein, the 'treaty'), which refers to the concept of respective administrative control. Particularly, the phrase, "territories here after recognized by one of the parties as lawfully brought under the administrative control of the other" may become contentious. Using the logic of the said article, if South Korea eventually enforces administrative influence over the North (either due to sudden change or some other unforeseen circumstances), the U.S. must view the action as being legal in order for the treaty to come into effect for the expanded Korean territory. As a result, despite the influence over

the Northern territory, if the U.S. regards this as being illegal, the territory is excluded from the scope of the treaty. With the consistent bedrock of bilateral trust between the South and the U.S., a problem is unlikely to arise. However, from the perspective of legislation, it may be advisable to revise the treaty in a more complete manner. In the future when potential revisions do take place, the phrase “territories here after recognized by one of the parties as lawfully brought under the administrative control of the other” should be left out.

Ⅳ. Evaluation of Legalities during the Stabilization Stage

If sudden change in North Korea reaches the stage of stabilization due to the intervention of regional states, efforts will be made to add specificity to mechanisms that could further peace and stability in Northeast Asia. Such contents will be inserted into the peace treaty between the North and the South, including by neighboring countries. If the regional actors consent to the expansion of South Korea’s authority, we may swiftly move on to the next stage of integration. During the stabilization stage, the following issues may be discussed: matters falling under criminal law, such as crimes of a humanitarian nature arising from the process of sudden change; laws governing reform and openness measures in stabilizing North Korea’s economy, and; the assurance through legal mechanisms of implementing interaction between the North and South Korea.

1. Concluding a Peace Treaty

Once the process of sudden change reaches the stage of stabilization, discussions will be held among related parties on how to secure both the future of North Korea and peace and stability for Northeast Asia. This will manifest into a peace treaty, which will assure a peaceful regime on the Korean peninsula. Hence, further understanding on the substance of what will be

contained in the peace treaty, and how to go about preparing for the treaty is needed.

Generally, a peace treaty contains measures toward ending acts of aggression and assuring peace. This may entail defining the conditions for peace, determining territory or a particular region, and if necessary, outlining the contents of both the political and economic regimes. Moreover, the treaty may outline resolutions to the legal issues that were raised during the conflict. The '2+4 treaty' concluded during the German reunification process by East and West Germany as well as the U.S., France, and Russia serves as an example. The said treaty contained the confirmation of definitive borders and territory of a reunified Germany (Article 1), disarmament (Articles 2, 3 & 5), the withdrawal of Soviet armed forces stationed in East Germany (Article 4), issues of military alliance (Article 6), and the termination of rights and responsibilities of the victors (Article 7). For the Korean peninsula peace treaty, main concerns that must be considered include: the termination of the Korean War, prohibition on inter-state use of force, prevention of military confrontation due to accidental incidences, delineation of North Korea's political regime, an outline of the rights and responsibilities of the treaty parties, settlement of territorial/border issues, and arms control. Furthermore, the treaty may serve as a mechanism to guarantee peace and nonaggression by stating guidelines for North Korea to join such international monitoring regimes as the Non-proliferation treaty (NPT), the Chemical Weapons Convention (CWC), the Biological Weapons Convention (BWC) and other global nonproliferation regimes.

2. The Legal Status of the UNC

There has been a continuous domestic debate surrounding the existence of the United Nations Command (UNC) once the Armistice is replaced by a peace treaty. Some claim that the role of the UNC would no longer be valid once peace and stability have been recovered on the Korean peninsula, since

its initial purpose was to serve as the organization for UN members militarily supporting South Korea during the Korean War. According to this logic, the responsibilities of the UNC in overseeing the process of the Armistice will end in tandem with the ratification of a peace treaty. Therefore, the UNC may be disbanded without any specific resolutions.[19]

On the other side, there is the camp that argues that since the UNC is a supplementary establishment of the UN created through a UNSC resolution, its dissolution and the formation of a peace treaty are two separate items. This would suggest that dismantling the UNC would rely on passing a UNSC resolution.[20]

If a peace treaty is drafted during the stabilization stage of sudden change in North Korea, its contents will most likely include the issue of the UNC- especially as requested by China or Russia. However, it is also feasible for the UNC to inherit the responsibilities of overseeing the process of the new peace treaty, through the powers of a UNSC resolution. This is particularly poignant as simply creating a peace treaty does not automatically suggest the establishment of a peace regime, and thus the need for a body to both support and oversee the overall process. In this case, a comprehensive discussion (including the issue of the command structure) must precede the endowment of new roles for the UNC.

3. International Criminal Court (ICC)

Once the process of sudden change reaches the stabilization stage, the

[19] Cho Seong Ryul, "Hanbando Pyonghwachajae guchuk eehu Juhanmeegunae Jeewee Jojung" (The Status Adjustment of the USFK After the Establishment of a Peace Regime on the Korean Peninsula), *USFK* (Kim Il Young·Cho Seong Ryul Piece, 2003), pp. 252-253.

[20] Baek Jin Hyun, "Jongjeonchaejaeae Pyonghwachaejae Jeonhwan Munja" (Transferring the Armistice into a Peace Regime), *Seoul National University Law Journal,* Volume 41, Issue 2 (2000), p. 293.

various criminal issues that would have arose during the playing out of the sudden change must be resolved. Politically, genocide or crimes against humanity may become contentious. North Korea's actions of oppression such as imprisoning or torturing political prisoners will constitute actions undermining the spirit of human rights. If specifiable groups were responsible for such criminal actions, they may be tried under the International Criminal Court (ICC).[21] During the visit of Prime Minister Koizumi in 2002 to Pyongyang, Kim Jong-il admitted to the kidnapping of Japanese citizens- this may also be brought to the ICC.

There are two considerations that must be made in regards to the ICC. The first pertains to the management and maintenance of records. One of the difficulties inhibiting the ICC is the lack of specific records. Often the perpetrators of crimes are governmental agencies, thus, expecting the government to be in charge of managing such records is difficult. This would require the testimony and statements by the victims, but it will likely be difficult to substantiate specific evidence. The South Korean government should be mindful of securing evidentiary statements.

The second relates to the question of whether amnesty will be offered in order to hasten political stability for North Korean society. To a certain extent, the establishment of an international court is a political issue. During the process of sudden change, North Korean leaders must be convinced of the need for a court in bringing political stability to North Korea. To that end, we may even consider a comprehensive amnesty for those leaders. Of course, from the perspective of international law, the justification for comprehensive amnesty is weak. In reality, the situation may conclude with an agreement for not setting up an international court and instead, indicting a handful of individuals. In the end, there must be a balance between criminal justice and political necessity.

[21] Article 5 of the ICC Statute, available at http://untreaty.un.org/cod/icc/statute/romefra.htm.

4. Reconstituting the Legislative System Regarding Openness and the Termination of Unfair Contracts

a) Reconstituting the Legislative System Regarding Openness

Since 1984, Pyongyang has initiated an economic liberalization policy in order to attract Western resources and technology, including the set up of a legal system in regards to foreign investment. However, this was largely the result of its highly-contained liberalization policy. Regardless of the partially-adopted minimal market mechanisms, Pyongyang is still passive in its stance of adhering to its socialist system. In the case of land leases, once a contract has been terminated, buildings and the like are returned at no cost- adhering to the policy of state ownership. Moreover, there are many limits that go against international standards, such as labor management, foreign exchange, and taxes. Due to such regulations, Pyongyang's economic liberalization and foreign investment policy has yet to gain competitiveness.

Economic stabilization will be crucial in order for Pyongyang to successfully overcome the potential sudden change. This means aggressive efforts to attract foreign capital. In particular, the impractical laws regarding foreign investment must be reconstituted. The North Korean economy should aim to create a transparent environment for investment, limit the regulations enforced by the government to the bare minimum, and guarantee freedom of investment and collection of profits. Labor relations should also aim for flexibility.

The laws regarding foreign economic affairs may correspond to those of South Korea. This will encourage the flow of capital from the South to the North as well as attract foreign investment, and eventually minimize the work in streamlining the legal system during the process of reunification.

b) Termination of Unfair Contracts

Recently, North Korea has been luring Chinese investment to overcome economic hardships, which has led to an increase in the amount of overall Chinese investment in the North.[22] However, North Korea's chronic trade deficit with China has yet to break free from its structure of loss. Consequently, the rise in North Korea-China trade has led to the expansion of the North's deficit, further debilitating Pyongyang's foreign economic infrastructure while increasing China's influence. If North Korea's economy becomes even more vulnerable and feeble to the point that sudden change may occur, the issue of economic exploitation through unfair contracts may become a serious problem. Once sudden change comes to a close and the north reaches the stage of stabilization, the matter of the termination of unfair contracts may become a legal issue. If a particular contract is found to have exploited North Korea's destitute situation, thus constituting fraud, the principles of treaty law will provide the basis for termination. By actively espousing such principles and incorporating these into a peace treaty, we may lay the legal justification for the termination of unfair contracts. Thus, the most optimal way would be to insert the contents of such termination and adjustment of unfair contracts in to the peace treaty.

5. Amendment to the Exchange and Cooperation Law under South-North Coexistence

After the resolution of sudden change in North Korea and the onset of coexistence between the two Koreas, we will need to prepare a legal system that could better facilitate active bilateral economic cooperation. With the law on Inter-Korea Exchange and Cooperation (Act no.10282, herein, 'law')

[22] Hana Institute of Finance, "Bukjung Kyungjaehyeobryeokae Shimhwaga Nambukkyunghyeobae Michineun Pageubyongyanggwa Shisajeom" (The Ripple Effects of an Intensified North Korea-China Economic Cooperation for Economic Cooperation between the Two Koreas and its Implications), *Geumyung Yeongu Series* (Finance Research Series), Vol. 3 (2010. 3), p. 13.

currently in place, once sudden change reaches stabilization, the necessity of revising such laws will be raised.

The current law prohibits visits to North Korean territory, with the exception of acquiring visitation documentation with authorization from the Minister of National Unification (Article 9, Clause 1). If North Korea no longer constitutes enemy territory, the process of acquiring such documentation may become unnecessary. Thus related administrative processes should be minimized, while the process based on authorization may instead be fashioned into one based on declaration.

The same logic currently applies to any interaction with North Korean citizens. Here, 'interaction' refers to any exchange in correspondence via communication mechanisms (phone, mail, fax etc) or physical rendezvous. Such actions must gain prior authorization from the Minister of National Unification (Article 9, Clause 3). If the North is no longer regarded to be enemy territory, it may be unnecessary to maintain such regulations.

There is also potential room for revisions to inter-Korean cooperation projects. Inter-Korean cooperation projects constitute any jointly implemented activities in the field of culture, academia, physical education, and the economy (Article 2, Clause 4), which must similarly obtain authorization from the cooperative partner of the Minister of National Unification. Here, the cooperative partner represents one that can contribute to inter-Korea exchange and cooperation, with three years of business experience in the field with accompanying records. Authorization may be revoked if a violation in procedures is found, there is an absence of business performance, or a potential to hinder inter-Korea exchange and cooperation exists (Article 30, Clause 32). After the stabilization stage, any excessively elaborate procedural mechanisms should be trimmed.

Ⅴ. Evaluation of Legalities during the Integration Stage

Once the sudden change situation approaches the stabilization stage, the question of integration in preparation for reunification will be raised. Since the understanding of the neighboring invested parties would have already been addressed during the stabilization period through mechanisms such as the peace treaty, the integration stage will serve as a stage mainly for the two Koreas. Foremost, the establishment of a unification treaty and accordant constitution to facilitate reunification will become an issue. Additionally, we must prevent the potential of confusion in exchange or family relations which may arise during the process of integrating the civil law governing the two Koreas. For a smooth transition to reunification, we must integrate and tweak the public law of both Koreas, and given the lack of exposure to the rule of law by North Koreans, we will need to emphasize sufficient education.

1. Unification Treaty and the Enactment of a Unification Constitution

a) Making a Unification Treaty

During the integration stage, the predominant issue will center on the specific legal procedures involved in reunification. If there is reunification by absorption, North Korea will naturally be placed under the influence of South Korea's constitutional law, which is unlikely to give rise to serious procedural problems. However, if any type of residual official government remains in North Korea, we will need a unification treaty or the enactment of an integrated constitution.

First, ratifying a unification treaty will better clarify the issue of post-reunification procedures and the enactment of a unified constitution. Moreover, contents regarding economic integration will also be included in the treaty. In particular, the consolidation of currency, which is directly related to the everyday life of citizens, will become a critical matter.

If we aspire to raise the state of the North Korean economy to a certain level before reunification, we may be advised to temporarily restrict inter-Korea relocation or movement. Such provisions should be included in the unification treaty.

A national referendum on unification may also become an issue. In the case of Germany, there were views advocating a national referendum in the run up to the general elections. However, the referendum did not occur due to the potential confusion that a referendum could have on society if unification was voted down.[23] The German case is one that could serve as reference for inter-Korea reunification.

b) Enactment of a Unification Constitution

Once a unification treaty has been ratified, we must set about enacting a unification constitution. In form, we can think of two methods: the first, South Korea's constitution expanding to enforce its powers over the Northern territory, and second, erecting a new constitution between the two Koreas. In the latter case, there are a few considerations to be made: 1) at what level one would place the necessary approval rating by the public for amending the constitution; 2) how one would go about composing the constitutional assembly; 3) in what form the government would take shape, and; 4) to what values would the constitution aspire, and to what scope the constitution would protect basic rights. Although they are equally important, the first would be the most politically sensitive issue. The current constitution stipulates over two-thirds majority in congress and the majority of people for a revision to the constitution. Given the unforeseen troubles at the post-reunification stage (especially those of an economic nature), it is doubtful as to whether two-thirds in congress and majority of the public is a reasonable target. Hence, we need

[23] Ministry of Justice, *Dogil Beobryeul Sabeob Tonghab Gaegwan* (Overview of Germany's Integration of Jurisdiction) (1993), p. 64.

to approach this specific issue with extreme caution.

The general contents of the unified constitution must be similar to that of the current constitution of South Korea, based on the following orders of liberal democracy and politics, a market economy, and the protection of human rights. Unification will not be feasible without the inclusion of such values. In the matter of the government structure however, we have more alternatives. We should take into consideration the political environment at the time, to see which of the forms—whether it be a parliamentary, presidential, or semi-presidential system—will be most fitting.

2. Integration of Civil Law

We may incur severe problems associated with civil law during the process of reunification. There may be property rights issues (for those with residual property in the respective counterpart's territory), and even those of family law for newly-wedded couples that have since moved from their part of the peninsula. Therefore, we must seek to consolidate civil law during the integration stage.

Foremost, there is the question of whether we should recognize the property rights of those that have moved to the South, but have property left over in the North. Although the rights may have expired in terms of movable assets, there is no limit as to the domestic extinctive prescription for land ownership, which may become a tricky matter. If we were to retroactively recognize property rights at a time when more than 60 years have passed since the two Koreas were separated, we may experience great confusion in the certainty and predictability of law. Therefore, we will need to create harmony and balance among objectives such as societal integration, the guarantee of legal certainty, and the protection of property rights.

Next on the agenda is to resolve the ownership issue of the North Korean citizens. North Korea emphasizes state ownership and only partially

recognizes private ownership rights. As a result, we may face a problem of whether we need to recognize the property rights for those with houses or farms. Here, there are different degrees to recognition ranging from complete ownership to only the right of use. Moreover, in the case of joint ownership of farms, we must decide whether to acknowledge joint ownership or parse out the ownership into individual rights, or simply accept only joint beneficiary rights.

Once we set the parameters for the recognition of property rights, we must adopt a system of registration. This will be necessary to stabilize public transactions and economic utility of managing property through mortgages. We will need to clarify property rights in order to assure secure economic transactions, and similarly, a registration system in order to enable loans based on real estate.

We may incur more complex problems in the case of family law, starting with whether to acknowledge bigamy. This will become an issue for those that were married that either fled the North prior to or after the Korean War, and eventually re-married in South Korea. If the civil law of the two Koreas is consolidated into one, the marriage record in South Korea for those defectors that had already wed in the North will become null. We will need some sort of transition or grace period, which may even lead to the inevitable decision to temporarily admit bigamy.

The law regarding inheritance may also become an issue, especially considering the aforementioned situation of bigamy. For example, even after succession has occurred upon the death of a defector from the North, we will need to decide whether to recognize the legal rights to the initial inheritance for the descendants in the North that have come about as a result of reunification. We must enforce certain regulations during the transition period in order to prevent legal confusion and realize societal justice. In the case of Germany where similar problems were witnessed mainly in the Eastern section, they applied East Germany's civil law system when the individual holding the

inheritance had passed away *prior* to reunification, while they adopted West Germany's system for when they passed *after* reunification.[24] It is said that Germany placed an emphasis on legal stability.

Aside from civil law, we may need many more revisions in the area of commercial law. Fields requiring adjustments may include the scope of commercial law, the recognition of the corporate body, methods of transaction, and stipulations regarding capitalist elements such as the laws regarding intellectual property rights or stocks.

3. Integration of Criminal Law and Public Law

So long as we clearly stipulate the standards for public law as that of criminal and administrative, we may not foresee any major issues on the part of the state enforcing such law. Here, we must clarify the transitional provisions and make efforts for wide-spread promotion in order to prevent confusion.

In regards to criminal law, matters of abuse of governmental authority or protection of human rights may arise, especially considering that there may have been more than a few instances of such abuses in the North. Even if these do not fall under the aforementioned section of crimes against humanity, these clearly require criminal jurisdiction but may go unpunished if we were to strictly adhere to the principle of prohibition of retroactive punishment. In order to set social justice on the right path, we will need to find resolutions to such problems. This may mean either a broad interpretation of the laws governing internal North Korea, or if necessary, enacting special laws.

The area of administrative law will not be as tricky. There is however, the issue of how we should view the nature of the many decisions made by a non-governmental agency as that of the Korean Workers' Party (KWP). Even

[24] *Ibid.*, pp. 142-143.

though the KWP can be viewed as constituting the actual ruling body of a state, it is not formally a government. In the case that a decision by the KWP happens to infringe on an individual's rights, the actions will only be legitimate in the sense that the KWP is perceived to be a state/government entity; if the KWP is regarded as a private organization, this will constitute illegitimate action. We will need to clarify this issue and perhaps enact a special law to that end.

4. Establishing the Rule of Law in the Northern Territory

North Korea has yet to establish the rule of law, which suggests immense effort in laying the foundations for law in order to prevent mass confusion for the North Korean citizenry in the post-reunification scenario. Subsequently, aside from wide-spread promotion of the contents of the law, we must educate the North Koreans to be aware of their rights and responsibilities.

Even in the North, the basic logic that if one violates another's rights there will be consequences is most likely well known. However, other basic rights that have been denied to the North Koreans such as the freedom of expression, freedom of the media, and those pertaining to religion must be propagated. Moreover, those that resemble the remnants of a developing country, such as prohibition of bribes and physical punishment, must be prevented. Additionally, we must educate the North Koreans and disseminate information regarding the most fundamental yet surely unfamiliar areas such as property registration.

Meanwhile, although a minor issue, the decision of whether to recognize the legal professions of those in North Korea retains political significance. The legal education system in the North emphasizes the training of lawyers with an extremely high sense of political ideology: in other words, individuals loyal to the KWP. Thus, on top of grades, other factors including the origin of birth and recommendations played a part in producing lawyers. These individuals could only become certified once they completed the 'Three

Activities of Revolutionary Molding.' Acknowledging such individuals in their legal professions may potentially undermine social justice and legal certainty. The opposite, may just as well be counter to the spirit of integration in the eyes of the North Koreans. We should delay decision-making until we can take into account the potential societal implications at the time of reunification. Even if we decide to recognize those legal professions, we will need a considerable amount of time for re-education.

Ⅵ. Conclusion

This paper has taken a sweeping view of the legal issues that may arise from sudden change in North Korea. In a sense, this is only the tip of the iceberg, as we will need to prepare for many other issues that may come about.

In order to prepare for sudden change from a normative aspect, we will need to be savvy in our approach towards the linkage between international law and domestic law. Even if international law does not recognize South Korea's claim to rights over North Korean territory, we must retain such an argument within the field of domestic law. This will ensure that the Northern territory under international law will be treated as an 'area of contention.' If the South revises its constitution to separate the North from being part of the South's territory, this behavior will mean that North Korea will no longer serve as South Korea's object of territorial sovereignty. As a result, upon the breakout of sudden change in the North, South Korea will lose the legal basis for priority over reunification. Occasionally, a flexible approach is necessary.

Regardless of the outbreak of sudden change, the legal issues arising from the stages of stabilization and integration are those pertaining to reunification that the South Korean government must prepare for. Issues ranging from establishing legal mechanisms to bolster North Korean reform and liberalization and legal foundations for activating inter-Korea exchange, erecting a peace regime through a peace treaty on the Korean peninsula, to

enacting a unification treaty or constitution, all require careful preparation.

Lastly, we must place emphasis on the importance of the rule of law prior to the resolution of the sudden change scenario. Law serves as a tool to limit state decision-making, justifying and strengthening the power of those decisions that are reached, and thereby revising and stabilizing state functions. The rule of law cannot take effect overnight. We must ponder over a variety of issues that may accompany sudden change in North Korea with a long-term perspective.