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Northeast Asia Peace and Security Network

Ending the Korean Armistice Agreement: The Legal Issues
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The is intended to provide expert analysis of contemporary peace and security issues in Northeast Asia, and an opportunity to participate in discussion of the analysis. The Forum is open to all participants of the Northeast Asia Peace and Security Network (NAPSNet) . A set of questions based on the work below is appended following the conclusion. NAPSNet invites your responses, based either on these questions or on any other thoughts you have after reading the work. Please send your responses to the NAPSNet Coordinator at: napsnet-reply@nautilus.org .

ENDING THE KOREAN ARMISTICE AGREEMENT: THE LEGAL ISSUES

By Patrick M. Norton

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This new study on the legal issues involved in ending the Korean Armistice is an important contribution to the public understanding of the issues underlying the U.S.-North Korea-South Korea joint briefings on the proposed 4-power talks to end the Korean conflict, scheduled to start on March 5. This study will be followed by fora on perspectives from North and South Korea, Russia, Japan, China, Australia, and the United Kingdom over the coming months. For more information or to comment, please contact Dr. Peter Hayes or Dr. Wade Huntley at tel. 510/204-9296, email napsnet-reply@nautilus.org

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ABSTRACT

This paper discusses the legal arrangements necessary to terminate the Korean War and to replace the current Armistice Agreement with a lasting peace. To that end, it discusses the numerous legal issues arising out of: (1) the tension between the war as, on the one hand, a civil war between the two Koreas and, on the other, an international war involving the armed forces of some 20 countries; (2) the unprecedented use of the United Nations' name and flag by one side to the conflict; and (3) China's insistence that the Chinese armed forces participating in the hostilities were only "volunteers." The paper concludes that: (1) each of the governments contributing forces to the U.N. side was a belligerent in the war and is now technically a party to the Armistice; (2) although the Security Council and the General Assembly at various times endorsed one side to the conflict, the United Nations itself was not a belligerent and is not a party to the Armistice Agreement; and (3) the PRC, despite its disavowals, was a belligerent and is now a party to the Armistice. The paper recommends that the Armistice be supplanted by an agreement among the two Koreas, the United States, and China, accompanied by a resolution of the U.N. Security Council endorsing the agreements, pursuant to Chapter VII of the U.N. Charter, as necessary to the restoration and maintenance of international peace and security in Northeast Asia.

INTRODUCTION

The Korean War conjures up flickering black-and-white images of a conflict that seemingly ended long ago. The Armistice Agreement1 that terminated the fighting in Korea has a similarly distant quality, speaking of parties and institutions that have long since faded from most memories and, in fact, now maintain little more than a nominal existence - the "United Nations Command," the "Chinese People's Volunteers," the "Neutral Nations Supervisory Commission." Yet, nearly half a century after the fighting ceased, the demilitarized zone between the two Koreas remains the most heavily fortified border in the world, and the Armistice, despite its archaic terms and terminology, remains the only agreement preventing the re-eruption of armed hostilities.

In recent years there have been recurrent efforts to replace the Armistice Agreement with a permanent peace.2 To supersede the Armistice a new agreement must achieve two purposes: it must legally terminate the armed conflict in Korea; and it must ensure that its terms are fully binding on all parties necessary to an ongoing peace. For these purposes, it is necessary to determine the current status of the Korean War and the ensuing Armistice, and to identify both the parties to the conflict and the parties who now have the authority to replace the Armistice with more permanent arrangements. These are the topics of this Paper.

The issues are more complex than may appear at first glance. From a legal perspective the Korean War and the Armistice Agreement are anomalous in several respects: (1) there was from the outset a fundamental tension between the character of the war as, on the one hand, a civil war between the two Koreas and, on the other, an international armed conflict between the armed forces of some twenty different countries; (2) for the first time the armed forces on one side of an international armed conflict fought under the flag of the United Nations; and (3) one of the principal belligerents, China, insisted that it was not, in fact, a belligerent and that Chinese armed forces engaged in the conflict were only "volunteers." The passage of many years and inconsistent positions taken by all of the interested parties as it has suited their purposes have compounded the legal uncertainties resulting from these anomalies.

I. LEGAL INTERPRETATIONS OF THE KOREAN WAR

A. UNITED NATIONS RESPONSES TO NORTH KOREA'S INVASION OF SOUTH KOREA3

On June 25, 1950, North Korea invaded South Korea. On the same day, the Security Council: (1) determined that the invasion constituted a "breach of the peace"; (2) called for the "immediate cessation of hostilities"; (3) called for North Korea to withdraw; and (4) called upon all Members to "render every assistance to the United Nations in the execution of this resolution and to refrain from giving assistance to the North Korean authorities."4

On June 27, President Truman announced that he was sending U.S. armed forces to assist the forces of the Republic of Korea ("ROK") in repelling the invasion.5 A few hours later, the Security Council adopted a second resolution confirming that the invasion constituted a breach of the peace and "recommending that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area."6 And on July 7, 1950, the Council adopted its Resolution 84(V), "recommending" that Members provide military forces and assistance "to a unified command under the United States," requesting the United States to designate the commander of such forces," and authorizing "the unified command at its discretion to use the United Nations flag in the course of operations against North Korean forces concurrently with the flags of the various nations participating."

Resolutions 82, 83, and 84 were adopted in the absence of the Soviet Union.7 In August 1950, the

Soviet Union returned to the Security Council and vetoed all further resolutions concerning the Korean conflict. The Security Council was thereafter immobilized, and all further U.N. actions took place in the General Assembly. That body adopted, on November 3, 1950, the so-called "Uniting for Peace" Resolution, which asserted that, when the Security Council is unable to take action with respect to a breach of the peace, the General Assembly has the authority to do so.8 When Chinese forces later crossed the Yalu and attacked U.N. forces, the General Assembly found that "the Central People's Government of the People's Republic of China, by giving direct aid and assistance to those who were already committing aggression in Korea and by engaging in hostilities against United Nations forces there, has itself engaged in aggression in Korea."9 The General Assembly called upon the PRC to withdraw its forces from Korea and called upon "all states and authorities to continue to lend every assistance to the U.N. action in Korea." On May 18, 1951, the General Assembly recommended that every state embargo the shipment of arms, ammunition, or implements of war to the PRC or the Democratic People's Republic of Korea ("DPRK").10 A large majority of U.N. Members and several non-Members immediately imposed the recommended restrictions.11

B. THE LEGAL CHARACTER OF THE KOREAN WAR

Customary international law long provided a framework for determining the existence of "war," the parties to that war, and the rights and duties of those parties and non-belligerent neutrals. Based on the participants' own statements, one could conclude that the hostilities in Korea did not constitute a "war" in this sense of customary international law.12

The Korean War was the first major armed conflict after the founding of the United Nations and immediately called into question the applicability and effectiveness of the peacekeeping provisions of the U.N. Charter,13 which had superseded in large part the customary international law of war (jus ad bellum).14 The governments contributing to the United Nations Command ("UNC") expressly invoked the new Charter Law, characterizing their participation in the armed conflict as a "collective action" resisting an "aggression" identified as such by the Security Council.15 By cloaking their operations in the mantle of the United Nations, these governments were able, among other advantages,16 to claim that theirs was a "just war" and, as a consequence, that non-belligerent states were not free to assume the traditional rights and duties of neutrals but were, rather, obligated to "tilt" in favor of the U.N. side.17

For their part, the DPRK, the PRC, and their supporters preferred to characterize the conflict as an internal Korean one. In such a "civil war," they argued, no foreign forces could properly intervene, and the United Nations had no proper role.18 This position was one of the reasons that the PRC chose to cloak its intervention in the guise of "volunteers."

Neither side's legal position, however, stood up to scrutiny. The recommendatory, rather than mandatory character of the Security Council resolutions authorizing a "unified command," adoption of these resolutions in the fortuitous absence of a Permanent Member (the Soviet Union) that was known to oppose them, failure of the UNC structure to follow the procedures specified in Chapter VII of the Charter for United Nations "enforcement actions," and lack of any explicit Charter basis for the General Assembly's Uniting for Peace resolutions caused most observers to conclude that the action in Korea was not an action "of the United Nations" but, at most, an action "sanctioned by the United Nations," or "under the auspices of the United Nations."19 By the same token, the contention of the Communist side to the Korean hostilities that this was a "civil" conflict in which the U.N. side was impermissibly intervening was untenable, at least after the PRC's intervention.20

Despite their carefully formulated legal positions, moreover, all of the belligerents were compelled in practice to rely on the customary law of war as the hostilities progressed. The UNC, the DPRK, and the PRC forces all specifically stated that they would abide by the law of war (jus in bello) in the

conflict, and all at one time or another demanded that their antagonists also abide by that law.21 In applying the embargo recommended by General Assembly Resolution 500(V), the U.N. forces scrupulously applied the traditional legal distinctions between belligerents and neutrals.22 And because the USSR and the PRC were ostensibly neutrals, it was the policy of the U.N. forces - although apparently observed as often in the breach as in the rule - to avoid hostile actions with respect to Soviet and Chinese territory.23

C. THE PARTIES TO THE KOREAN WAR

1. The United Nations Side

Security Council Resolution 84(V) of July 7, 1950, authorized a "unified command under the United States." The United States interpreted this authorization as constituting the United States itself, in its sovereign capacity, as the "Unified Command."24 Fifteen nations other than the United States contributed forces to serve under the Unified Command.25 The United States then created, as an entity theoretically separate from and subordinate to the Unified Command, the "United Nations Command," which it described as an "international field force" conducting the actual hostilities.26 The military contingents from other participants were placed directly under the UNC,27 and the ROK placed its troops under the operational command of the UNC.28

Throughout the conflict, the United States and its allies emphasized the U.N. character of their actions. Secretary of State Acheson described the Korean operations as being "under the aegis of the United Nations and ... not a question of the whole series of nations acting independently to the same result."29 The U.N. Commander generally characterized his forces as "United Nations forces," and various of the contributing states made clear that their offers of assistance were to the United Nations.30 One leading legal commentator has concluded that: "There can be no doubt that, in practice, the overwhelming majority of states involved in the Korean action were fully prepared to regard it as a United Nations action involving United Nations Forces."31

Many actions of the United Nations can also be cited to support the view that the United Nations itself regarded the forces under the UNC as "United Nations forces." At least three General Assembly resolutions (Nos. 376(V), 483(V), and 498(V)) referred to them as such. And Security Council Resolution 84(V) specifically authorized the "unified command" to fly the U.N. flag.

Based on such evidence, one could argue that the United Nations itself was a belligerent in the Korean War.32 In practice, however, the United Nations exercised no control over the combat forces in Korea.33 The United States made all important combat decisions, either alone or in consultation with the other military participants on the U.N. side.34 The "Unified Command," i.e., the U.S. Government, sent reports to the United Nations only after the fact.35

Based in large part on this lack of operational U.N. control over any aspect of the hostilities, most observers, including the leading U.S. Government expert on the law of war at the time, have concluded that the forces under the UNC, "although endowed with the name and flag of the United Nations troops, cannot in strict law be said to comprise United Nations troops, ... [and] the acts of the Unified Command and the United Nations Command are not the acts of the United Nations itself."36 These observers prefer to treat the forces under the UNC as sui generis: neither U.N. forces strictly speaking nor autonomous national contingents but a unique combination of the two. Still other commentators, because of the infirmities of U.N. authorization for the U.N. forces, and because those forces were autonomous from the United Nations itself, go one step further and treat those forces as an alliance of national armies pure and simple, operating pursuant to the collective right of self- defense recognized by Article 51 of the Charter and customary international law.37

2. The Role of South Korea

The insistence of the U.N. participants on fighting under at least the auspices of the United Nations also called into question the position of the ROK. The obvious victim of the aggression that started the war and the bearer of the brunt of the casualties on the U.N. side,38 the ROK had been recognized by the U.N. General Assembly prior to the war as the legitimate government in the part of Korea that it controlled.39 Nevertheless, because ROK armed forces were placed directly under the UNC, effectively placing U.S. officers in command of South Korean troops, the political position of the ROK in the conflict was obscured. This was compounded when the Armistice Agreement was signed for all participants on the U. N. side by the U.N. Commander, i.e., a U.S. general, and the ROK, in contrast to the DPRK, did not itself sign the Armistice.

3. The Communist Parties to the Korean War

The status of the Communist forces was subject to other uncertainties. The DPRK was not recognized as a de jure government of an independent state. In order that it could be regarded as a responsible party for applying the laws of war and as a potential party to the Armistice, it was necessary that the DPRK be accorded some form of legal status or "personality." The U.N. side therefore implicitly recognized the DPRK as a "belligerent" (a sort of de facto recognition for purposes of the law of war), although the articulations of even this position were somewhat ambiguous.40

More problematic was the PRC's characterization of its millions of troops as "volunteers." The PRC so characterized its participation in the conflict for several reasons: to preserve the Communist characterization of the war as a "civil war"; to preserve its position that the PRC did not intervene in the internal affairs of other states; and, most importantly, to ensure that its participation in armed hostilities was confined to Korea.

The General Assembly specifically rejected the PRC's characterization of its role when it found in Resolution 498(V) that the PRC was itself an "aggressor" in Korea.41 The PRC, too, repeatedly contradicted its own position, for example when it appeared at the United Nations to defend Chinese intervention on the grounds of self-defense,42 or when it made demands by diplomatic note that third parties observe neutral duties.43 For present purposes, the important consideration is that China's solicitude for its ostensible neutrality and the unwillingness of the other belligerents to confront China on the issue led to the Commander of the "Chinese People's Volunteers" signing the Armistice.

II. THE ARMISTICE AGREEMENT

A. THE ARMISTICE AGREEMENT AND THE GENEVA CONFERENCE

On July 27, 1953, the Armistice Agreement was signed by General Mark W. Clark, Commander-i--Chief of the UNC, Marshall Kim Il Sung, Supreme Commander, Korean People's Army, and Peng Teh-Huai, Commander of the Chinese People's Volunteers. The Preamble states that the objective of the Armistice is to "ensure a complete cessation of hostilities and of all acts of armed force in Korea until a final peace settlement is achieved...." It further states that the "conditions and terms [of the Armistice] are intended to be purely military in character and to pertain solely to the belligerents in Korea." Paragraph 60 of the Agreement provided that "the military commanders of both sides hereby recommend to the governments of the countries concerned on both sides that ... a political conference of a higher level of both sides be held...." Paragraph 62 provided that the Armistice "shall remain in effect until expressly superseded . . . by provision in an appropriate agreement for a peaceful settlement at a political level between both sides."44

On August 28, 1953, the General Assembly passed a resolution "noting with approval the armistice agreement."45 The General Assembly "welcomed" the holding of a peace conference as contemplated by Paragraph 60 of the Armistice Agreement and recommended that:

"The side contributing armed forces under the Unified Command in Korea shall have as participants in the conference those among the Member States contributing armed forces pursuant to the call of the United Nations which desire to be represented, together with the Republic of Korea. The participating governments shall act independently at the conference with full freedom of action and shall be bound only by decisions or agreements to which they adhere..."

Resolution 711(VII) further recommended that the Soviet Union "participate in the Korean political conference provided the other side desires it."

Initial attempts at Panmunjom to arrange a political conference were unsuccessful.46 In February 1954, the foreign ministers of the United States, the United Kingdom, France, and the Soviet Union agreed that a conference would be held at Geneva in April to discuss a peaceful settlement of the Korean question. They proposed that the participants be themselves, the two Korean governments, the PRC, and "the other countries the armed forces of which participated in the hostilities in Korea...."47

The Geneva discussions on Korea lasted from April 26 until June 15, 1954.48 All of the states that had contributed armed forces to the UNC except South Africa participated.49 The talks soon foundered on basic issues, however, and were not resumed.50

B. THE NATURE AND SCOPE OF THE KOREAN ARMISTICE AGREEMENT

The Korean Armistice Agreement, both in form and content, closely follows the pattern of a general armistice agreement under customary international law. It is between military commanders, and its principal intention is to cease all hostilities between the belligerents.51 The most significant feature of a general armistice agreement under customary international law is that it does not terminate the state of war.52 Most authorities have concluded that this general rule applies to the Korean Armistice Agreement, which expressly contemplates that it will continue until superseded by an appropriate political agreement, and that the Korean War therefore still continues as a legal matter.53 The persistent state of belligerence at the border and the recurrence of numerous minor armed hostilities there strongly reinforce this view.

It should be noted that this view of the Armistice is not universally held. A number of scholars have questioned whether belligerent rights can continue after the conclusion of an armistice in light of the U.N. Charter's prohibition on the use of force in international relations.54 Several have therefore suggested that the passage of a sufficient amount of time may turn a general armistice into a de facto peace treaty and have specifically applied this theory to the Korean Armistice.55 This view is more plausible with respect to the belligerents on the U.N. side who have long ceased to have any active role in the hostilities or the Armistice; it does not fit well the governments - the DPRK, the ROK, and the United States - that have continued to maintain for more than four decades heavily armed military units confronting one another across the DMZ. The Security Council has, in any event, recently indicated56 that it considers the Armistice as still in force, and this should dispel any doubt on the matter.

C. THE PARTIES TO THE KOREAN ARMISTICE AGREEMENT

The Korean Armistice Agreement is signed by military commanders and is stated to be "purely military in character" (Preamble). Nevertheless, international law has consistently regarded general

armistices as of such political significance that they can only be concluded on behalf of the sovereignty of the state.57 As a consequence, although almost invariably signed by military commanders, as in the Korean case, general armistices are universally recognized as binding states.58 Which states are bound is less clear. The Armistice is studiously ambiguous in this regard, referring to "the governments of the countries concerned" (para. 60), a "political conference of both sides" (id.), and a "peaceful settlement at a political level between both sides" (para. 62).

The relationship of the DPRK to the Korean Armistice Agreement conforms to the traditional rules of international law most clearly. Although signed by Kim Il Sung in his capacity as military commander, the Agreement clearly binds the DPRK as such.59

The statuses of the "United Nations Command" and the "Chinese People's Volunteers" are more problematic. By all objective criteria, the PRC itself was a belligerent in the hostilities. This belligerent status, the rule of customary international law that the parties to general armistices are states and not military authorities, and the PRC's participation in the 1954 Geneva Conference argue persuasively for considering the PRC itself as a party to the Korean Armistice Agreement. The PRC, moreover, implicitly conceded the point in a series of diplomatic notes invoking rights under the Armistice, which were sent by the Ministry of Foreign Affairs through the British Embassy in Beijing to "the Governments of the other countries on the United Nations Command side."60 Nevertheless, China's insistence during the hostilities that it was not a belligerent, and the acquiescence of most of the U.N. side, at one time or another, in that position, gives rise to some ambiguity on this issue.

Throughout the hostilities, the United States and other participants in the UNC maintained that it was the United Nations itself that was engaged in the hostilities. This and the fact that the Armistice Agreement is signed by the "Commander-in- Chief, United Nations Command" have sometimes caused observers to conclude that the United Nations is a party to the Agreement.61 Conversely, the DPRK has long argued that the U.N. Commander was a U.S. general, that it was, therefore, the United States alone that adhered to the Agreement, and that none of the other participants in the UNC, including the ROK, can properly participate in negotiations to supersede the Armistice Agreement.62

The evidence, however, supports neither position. Paragraph 60 of the Armistice specifically suggests that "the governments of the countries concerned on both sides" hold a "political conference of a higher level of both sides ... to settle through negotiation the questions of the withdrawal of all foreign forces from Korea, the peaceful settlement of the Korean question, etc." It thus clearly contemplates that the governments of individual participants, rather than the United Nations, are the real parties in interest here.

The United Nations agreed. General Assembly Resolution 711(VII) of August 28, 1953, recommended that the United Nations side in Korea be represented at a Peace Conference by "the Member states contributing armed forces pursuant to the call of the United Nations ..., together with the Republic of Korea." The General Assembly declined to give any direction to those governments, recommending further that "the participating governments shall act independently at the conference with full freedom of action and should be bound only by decisions or agreements to which they adhere." In accordance with this directive, 16 of the 17 U.N. belligerents, including the ROK, participated in the Geneva Conference as independent governments, with no direction or guidance from the United Nations.63

The clear implication of these events is that the UNC signed the Korean Armistice Agreement as the military representative of all of the governments whose forces actually participated in the hostilities, including the 17 participants in the UNC. The United Nations itself is not a party to the Agreement.64 This interpretation of who the "real parties" on the U.N. side are was also implicitly

accepted by the DPRK, the PRC, and the Soviet Union by their participation in the Geneva Conference.

III. EVENTS SUBSEQUENT TO THE GENEVA CONFERENCE

As it became clear that permanent peace arrangements were not likely to supersede the Armistice Agreement soon, the United States began disassociating its forces in Korea from the UNC and, after 1954, justified their continued presence in Korea under the U.S./ROK Mutual Defense Treaty.65 Other governments participating in the UNC withdrew most or all of their forces in the mid-1950's. By 1975, there were altogether only 300 troops under the UNC.66 In June of that year, the United States informed the Security Council that it was ready to terminate the UNC on January 1, 1976. The United States proposed that military officers of the United States and the ROK be designated as successors-in-command to the UNC in accordance with Paragraph 17 of the Armistice Agreement.67 This proposal strongly implied that the United States considered itself and the ROK as the only continued real parties in interest to the Armistice. In response to the U.S. proposal and to opposition to that proposal by supporters of the DPRK,68 the U.N. General Assembly adopted two inconclusive, and in many respects inconsistent, resolutions generally endorsing the desirability of replacing the Armistice Agreement with a peace treaty and of dissolving the UNC.69

In 1991, the United Nations admitted both the ROK and the DPRK as Members. The admission of the DPRK was seemingly inconsistent with the argument that the United Nations itself is a party to the Armistice since, as a party to the Armistice, the United Nations would technically still be a belligerent in armed hostilities with the DPRK that were only suspended by the Armistice. It would, to say the least, be anomalous for the United Nations to admit as a Member a government technically at war with the organization itself.70

In October 1996, the Security Council made its most definitive statement on the status of the Armistice since its original resolutions in the early 1950's. In response to complaints by both Koreas concerning an incident in which a North Korean submarine foundered on the South Korean coast, the President of the Council made a Statement on behalf of the Council,71 which "urge[d] that the Korean Armistice Agreement should be fully observed" and "stress[ed] that the Armistice Agreement shall remain in force until it is replaced by a new peace mechanism." The Statement was approved by all Members of the Council, including the United States and China, i.e., two of the principal belligerents whose generals signed the Armistice. This Statement should, therefore, effectively refute any suggestion that the Armistice is no longer in full force and effect.

In the meantime, the most directly interested parties have taken a number of actions bearing directly on ways to supersede the Armistice. In February 1992, the two Koreas entered into an "Agreement on Reconciliation, Nonaggression and Exchanges and Cooperation between the North and South," in which they agreed, inter alia, to "endeavor together to transform the present state of armistice into a solid state of peace between the South and the North and [that they would] abide by the present Military Armistice Agreement until such a state of peace has been realized." This undertaking was reaffirmed in a Protocol entered into in September 1992.72

Less than two years later, however, the DPRK repudiated its commitments to the ROK and reverted to its position that the Armistice should be replaced by a peace treaty between the DPRK and the United States alone.73 The DPRK also, in violation of the Armistice Agreement, withdrew its delegates from the Military Armistice Commission74 and reportedly pressured Poland to withdraw from the Neutral Nations Supervisory Commission, leaving those two institutional remnants of the Armistice Agreement all but defunct.75

In April 1996, the United States and the ROK proposed four party talks to replace the Armistice, to

include the United States, the ROK, the DPRK, and the PRC.76 The DPRK and the PRC both indicated that they would consider the proposal, though neither had taken a definitive position as of October 1996.77 Moreover, although the ROK has sponsored the four party talk proposal, it is unclear whether the ROK would not, in fact, prefer to resolve the principal issues on an inter-Korean basis.78

IV. SOLUTIONS

Against this background of shifting and often ambiguous legal positions, what steps can or should be taken to replace the Armistice Agreement with a new agreement that will end the Korean War once and for all? There are essentially two issues here: What form should any new agreement take? And who should the parties to that agreement be?

A. FORM VERSUS SUBSTANCE

The classic approach of customary international law to the termination of a war was (1) an armistice signed by military commanders that ended the fighting, followed by (2) a peace treaty among the belligerent states. The Napoleonic Wars and World War I are perhaps the best examples. There is no reason why that should not be the case with Korea. Many of the interested parties have specifically spoken in terms of a "peace treaty."

Form should not, however, dictate policy. There is no compelling reason why the Korean Armistice could not be superseded by an agreement or agreements not expressly entitled "treaty." The Armistice itself (para. 62) speaks only of "an appropriate agreement for a peaceful settlement at a political level between both sides." And the recent Statement of the President of the Security Council,79 speaks of a "peace mechanism." Under international law, moreover, any agreement between states, however denominated, constitutes a "treaty" in the sense of an agreement legally binding the parties to its terms.80

Nor need the necessary actions be limited to agreements between states. The Security Council is empowered to determine, inter alia, "the existence of any threat to the peace" and to "make recommendations, or decide what measures shall be taken ... to maintain or restore international peace and security...." (Charter, art. 39.) Further, the "Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures." (Id., art. 41). All UN Members are bound to "accept and carry out the decisions of the Security Council...." (Id., art. 25). Action by the Security Council in support of any political resolution of the Armistice by the interested governments would be especially appropriate in light of the Council's (admittedly disputed) role in the Korean War itself. Because the Council's decisions in this regard could be drafted so as to be binding on all U.N. Members, a Council resolution could effectively resolve any doubt as to whether one of the belligerent parties was bound by the resolution even if that party did not sign the operative agreements.81

B. PARTIES TO A NEW AGREEMENT

The armed forces of some twenty different governments fought in Korea. Since the U.N. Commander signed on behalf of all governments participating on the U.N. side, nineteen of these governments should properly be viewed as being parties to the Armistice. The twentieth, the Soviet Union, was effectively a belligerent, though not recognized as such, and it was expressly invited by the United Nations and by the governments constituting the U.N. side to the negotiations to participate in Geneva at initial efforts to conclude a peace treaty. All twenty states, therefore, with Russia presumably succeeding to the Soviet position, could legitimately sign a new agreement. In practice,

however, the participation of some of these governments is now much more important than that of others.

1. The Two Koreas

It should be self-evident that each of the Koreas must be a party to any new agreement. It is simply inconceivable that any lasting peace on the Korean Peninsula can be made without the participation of the parties most directly interested, and the admission of both Koreas to the United Nations now gives them a legal status and de facto sovereign "equality" or "legitimacy."

DPRK contentions that only it and the United States are parties to the Armistice Agreement are polemical and legally without foundation. The ROK was one of the belligerents represented by the U.N. Commander when he signed the Agreement. Any doubt in this regard is dispelled by the ROK's participation in the Geneva Conference at the recommendation of the U.N. General Assembly and with the acquiesce of the DPRK and the PRC, and the DPRK's own 1992 agreements with the ROK.

2. The United States

Theoretically, it would be possible for the United States to stand aside and endorse an agreement between the two Koreas. Any uncertainties as to whether the United States were bound by the resulting arrangements could be resolved by a combination of unilateral U.S. undertakings82 and a Security Council resolution binding on the United States and adopted with its support.

As a practical matter, however, it seems highly probable that all interested governments would wish the United States to be a direct party to any new agreement by virtue of its important military and political position in Northeast Asia. A direct U.S. role would seem necessary as, in effect, a guarantee of the long- term stability of any resolution of the outstanding issues. Legally, a direct U.S. role would also clearly be appropriate in light of the United States' role as the "unified command" under Security Council Resolution 84(V), its direct command role in the fighting itself, and its intimate political and military involvement in the maintenance of the Armistice over more than four decades.

3. China

China, too, could in theory stand on the sidelines but is unlikely to do so for similar political reasons. As with the United States, China could dispel any concerns that it might be deemed a continuing belligerent by appropriate unilateral statements and support of a Security Council resolution. However disingenuous, China might also invoke the ostensible "volunteer" status of its armed forces in Korea to argue that, in fact, it was never properly speaking a belligerent in the first place. And, unlike the United States, China has played only a limited role in maintenance of the Armistice in recent decades.

But China's direct involvement in the resolution of the Korean situation would seem nearly as desirable as that of the United States. China's own interests in the maintenance of peace and stability on its borders and in demonstrating to the region and the world its geopolitical significance would seem to dictate such a role. All parties, moreover, would probably welcome Chinese participation as giving an extra measure of stability to both the negotiation of peace arrangements and the maintenance of those arrangements once agreed. (Some might also think that involving China in the establishment of important arrangements for peace and stability in Northeast Asia would have more general beneficial effects on inducing China to take a more responsible role in international affairs commensurate with its political and military importance.) China's role as one of the principal belligerents in the fighting, the signature of the Armistice Agreement by a Chinese

general, and the PRC's prominent role at Geneva provide more than an adequate legal justification for making China a party to any new agreements.

4. Others

Each of the other governments that contributed armed forces to the U.N. side is a party to the Armistice, was a participant at the Geneva Conference (except South Africa), and has a legitimate claim to being a party to any new agreement superseding the Armistice Agreement. None of these other governments, however, is necessary to a political solution to the Korean situation, and none has had an enduring role in the Armistice. Indeed, it would be possible to argue that the passage of time and their non- involvement in subsequent events has eliminated the necessity for their participation - that any belligerent status they once had no longer exists as consequence of desuetude. The United States might, as a courtesy to erstwhile allies, wish to notify each of these governments of the progress of any negotiations and invite them to endorse any agreement. But their public support and adoption of an appropriate Security Council resolution binding on them would seem to suffice to refute any argument these governments continued to be belligerents vis--vis the DPRK or the PRC.

One could argue that Russia, as the successor to the USSR, a de facto belligerent and participant at Geneva, and Japan, by virtue of its proximity and political importance in the region, would also be appropriate parties to a final resolution of the Korean War.83 This would, however, be a purely political consideration. Neither country was formally a belligerent in the fighting, and neither is a party to the current Armistice.

V. CONCLUSIONS

The most important considerations in any effort to replace the Korean Armistice Agreement are that the Korean War be definitively terminated and a firm basis for a lasting peace be established. Both purposes can best be served by the four party negotiations currently proposed by the United States and the ROK, conjoined with an appropriately supportive resolution of the Security Council. The two Koreas, the United States, and the PRC were the principal belligerents in the war; they have played the predominant roles in maintaining the Armistice; and they have the clearest long-term interest in, and ability to contribute to, a lasting peace in Korea. One or more agreements among those four parties can, accordingly, effectively terminate the legal state of armed hostilities in Korea and lay the basis for a lasting peace. The Security Council can and should use its authority to lay to rest the many lingering anomalies of the Korean War and, in accordance with its Resolution 83(V) of nearly half a century ago, finally " restore international peace and security in the area."

NOTES

1 Military Armistice in Korea, signed at Panmunjom, July 27, 1953, entered into force, July 27, 1953, 4 U.S.T. 234, T.I.A.S. 2782.

2 Proposals to replace the Armistice Agreement are summarized in Jhe, Seong Ho. "Replacing the Military Armistice Agreement on the Korean Peninsula?" Korea and World Affairs 19 (1995): 67 [hereafter "Jhe"].

3 Useful summaries of the facts and compilations of documents may be found in several publications of the United States Department of State: "Korea's Independence," American Foreign Policy 1950-55, vol. 2, Washington, D.C.: GPO, 1957; "Korea's Independence," Dept. Pub. No. 2933 (1947); "Korea: 1945 to 1948," Dept. Pub. No. 3305 (1948); "Peace in Korea," Dept. Pub. No. 4771 (1952); "Armistice in Korea," Dept. Pub. No. 5150 (1953); and "The Record on Korean Unification: 1943-

1960," Dept. Pub. No. 7084 (1960). These sources will be cited hereafter as "A.F.P." and, e.g., D.P. 2933. See also Bowett, Derek, United Nations Forces, New York: Praeger, 1964 [hereafter "Bowett"]; Sohn, Louis B, United Nations Law, 2nd rev. ed., Brooklyn, N.Y., The Foundation Press, 1967 [hereafter "Sohn"]; Higgins, Rossalyn, United Nations Peacekeeping 1946-67, vol., New York and London: Oxford University Press, 1970 [hereafter "Higgins"].

4 S.C. Res. 82(V), S/1501, S/INF/5, at pp. 4-5.

5 A.F.P. at 2539-40; D.P. 7084 at 99-100. The fact that U.S. forces were committed to combat before S.C. Res. 83(V) recommended military assistance to the ROK has caused some observers to conclude that the United States was a belligerent in Korea without U.N. authorization. Goodrich, Leland M. and Simons, A. The United Nations and the Maintenance of International Peace and Security, pp. 435-36. Washington: Brookings Institution, 1955 [hereafter "Goodrich & Simons"].

6 S.C. Res. 83(V), S/1511, S/INF/Rev. 1, at p. 5. S.C. Res. 84(V), S.1588, S/INF/5/Rev. 1, at p. 5.

7 The Soviet Union had been boycotting the Security Council because the Republic of China, rather than the People's Republic of China ("PRC"), was then occupying China's seat on the Council.

8 G.A. Res. 377A(V), V GAOR, Supp. 20 (A/1775), at pp. 10-12. There was an extensive debate on the constitutionality of the "Uniting for Peace" Resolution. See Sohn at pp. 491-509 and sources in id. at p. 509 n.7; Bowett at pp. 290-98.

9 G.A. Res. 498(V), V GAOR, Supp. 20A (A/1775/Add. 1), Feb. 1, 1951, p. 1.

10 G.A. Res. 500(V), id. at p. 2.

11 Sohn at p. 526; Goodrich & Simons at p. 449.

12 Numerous domestic courts, in fact, drew such a conclusion in determining, for example, the applicability of "war clauses" in insurance contracts or for purposes of military discipline, application of limits on trading with enemy states, jurisdiction of maritime prize courts, effect of treaties, etc. The courts were badly divided on this question, although their decisions were frequently based on specific domestic laws or statutes, rather than a determination of whether the Korean War was a "war under international law." See the U.S., U.K., French, Australian, and New Zealand cases cited in McNair, Arnold, The Legal Effects of War, p.51, Cambridge: Cambridge University Press, 1966 [hereafter "McNair"]; Leech, Noyes E., Oliver, Covey T. and Sweeney, Joseph Modeste, eds., The International Legal System, pp. 751-61, Mineola, N.Y.: The Foundation Press, 1973; Lauterpacht, Hersch, "The Limits of the Operation of the Law of War," British Yearbook of International Law 30 (1953): 22 n.3; and Bowett, p. 53 n.13.

13 I.e., the obligations of Members to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state" (Article 2(4)), to "give the United Nations every assistance in any action it takes in accordance with the present Charter" (Article 2(5)), and to "refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action" (id.); and the authority of the Security Council to take "action with respect to threats to the peace, breaches of the peace, and acts of aggression" (Chapter VII).

14 The law applicable to the initiation and termination of war, as opposed to the jus in bello - the law applicable during hostilities. As discussed below, all of the belligerents in the Korean War acknowledged the applicability of the jus in bello.

15 The most famous statement was that of President Truman, who called the war a "police action." The New York Times, 30 June 1950, p. 1. The British Government repeatedly denied that the conflict was a war. See, e.g., 502 Parl. Deb. H.C. (5th ser.) (1950): 292 . As late as 1956, Prime Minister Eden specifically denied that the conflict was a war. See McNair at p. 51. See also the Canadian statement in U.N. Doc. S/1538.

16 In addition to the reasons of international law and policy discussed in the text, it has been suggested that the Truman Administration did not characterize the Korean conflict as a "war" in order to avoid the U.S. constitutional requirement that only Congress may declare war. See, e.g., the colloquy between Senator Gillette and Secretary Acheson in "Military Situation in the Far East," Hearings before the Senate Comm. on Armed Services and Foreign Relations, 82nd Cong., 1st Sess., Part 3, pp. 1936 et seq. (1951) [hereafter "Korean War Hearings"]. The constituionality of U.S. participation in the Korean War continues to be a much-debated issue whenever a U.S. President sends armed forces abroad without Congressional authorization. See Fisher, Louis, "The Korean War: On What Legal Basis Did Truman Act?" American Journal of International Law 89 (1995): 21.

17 See Lauterpacht, Hersch, loc. cit. at p. 206 (rejecting the argument); Schwartzenberger, Georg, International Law as Applied by International Courts and Tribunals, p. 97, London: Stevens & Sons, 1957 [hereafter "Schwartzenberger"]; Norton, Patrick M. "Between the Ideology and the Reality: The Shadow of the Law of Neutrality," Harvard International Law Journal 17 (1975): 249, 253 n.12 [hereafter "Norton"]. Some governments wished to characterize their use of armed force as an action of the United Nations to avoid any implication that they recognized the DPRK. See, e.g., the June 11, 1952 statement of the British Secretary of State for Foreign Affairs in Parliament that "we are not engaged in a war with the Republic of North Korea [sic] because we do not admit that there is such a state." 481 Parl. H. C. vol. 13, quoted in Lauterpacht, loc. cit., at 222 n.1. See also Stone, Julius, Legal Controls of International Conflict, p. 382 n.17, Sydney, London, and New York, 1954 [hereafter "Stone"]; Norton at 265.

18 See, e.g., the Polish note of June 30, 1950, to the Secretary General, U.N. Doc. S/1545; the statement of Soviet Representative Malik before the Security Council on August 3, 1950, 5 U.N. SCOR No. 24 at 3-14, No. 28 at 4-11, reprinted in Sohn at pp. 482-85. See also, Shen, Chun-ju. "On the Indictment and Punishment of War Criminals," People's China, no. 4 (supp.), 16 September 1951, pp. 3, 4, 6-8, reprinted in Cohen, Jerome Alan and Chiu, Hungdah, eds. People's China and International Law, pp. 1471, 1473, Princeton: Princeton University Press, 1974 [hereafter "Cohen & Chiu"].

19 The literature on this subject is voluminous and well summarized in Bowett at pp. 32-36. See also Higgins at pp. 173- 78. Leading scholars such as Bowett, McNair and Lauterpacht accepted the U.N. character of the action with varying technical reservations. Others, such as Kelsen and Stone, considered the technical infirmities of the U.N. resolutions as depriving the U.N. Command's action of any defensible U.N. auspices. See Stone at pp. 228-37; Kelsen, Hans, Recent Trends in the Law of the United Nations, pp. 931-38, New York: Praeger, 1951.

20 See, e.g., McNair at p. 26. Even prior to that time, the argument enjoyed little sympathy because of the Soviet Union's repeated sabotaging of attempts to unify Korea and its action in arming the DPRK in an apparent attempt to achieve by force of arms what it had been unable to achieve by diplomacy. Bowett at p. 35.

21 See Lauterpacht, loc. cit., at p. 223; Brownlie, Ian, International Law and the Use of Force by States, p. 400, New York: Oxford University Press, 1963 [hereafter "Brownlie"]; Higgins at pp. 188-95.

22 See Norton at pp. 266-67.

23 Id. The United States deliberately refrained from blockading Port Arthur and Dairen, then still Soviet-controlled, because such an action toward a "neutral" was a casus belli. United States' allies refused to blockade the PRC because of its ostensible neutrality. See testimony of General Marshall, Korean War Hearings, vol. 1, pp. 328, 483; testimony of Admiral Sherman, id. vol. II, p. 1512. See also Norton at pp. 266-67; Verplaetse, J. G., "The jus in bello and Military Operations in Korea 1950-53," Zeitschrift für ausländisches und öffentliches Recht. 23 (1963): 679, 700, 719-20. Several third parties also chose to exercise neutral rights despite the U.N.'s endorsement of one side to the conflict. Norton at p. 267. Recently disclosed documents indicate that, in fact, hundreds of Soviet pilots fought for the DPRK, generally garbed in Chinese uniforms, and that the U.S. Air Force may have routinely flown into Manchurian air space, Holliday, Jon, "A Secret War," Far East Economic Review, 22 April 1993, pp. 32-31.

24 The fullest explication of the U.S. position is set out in Baxter, Richard, "Constitutional Forms and Some Legal Problems of International Military Command," British Yearbook of International Law. 29 (1952): 325, 332-36 [hereafter "Baxter"]. See also Bowett at pp. 40-41. The United States rejected a proposal by the Secretary-General that the U.N. forces be directed by a committee of participants. Higgins at p. 179.

25 Australia, Belgium, Canada, Columbia, Denmark, Ethiopia, France, Greece, Luxembourg, The Netherlands, New Zealand, The Philippines, South Africa, Thailand, Turkey, and the United Kingdom. See Higgins at pp. 199-202. Taiwan's offer of three divisions and several offers of less than a battalion were turned down. See Note of July 1, 1950 to ROC Ambassador, A.F.P. at 2541; Bowett at pp. 39-40.

26 Many observers, presumably unaware of or confused by the two- tiered command structure, have understandably concluded that the UNC is the command spoken of in Security Council Resolution 84 and hence is a U.N. entity. The confusion on this point has led to the further erroneous conclusion that, because the Armistice was signed by the "United Nations Commander," the United Nations itself it party to the Armistice. See, e.g., Pollack, Samuel, "Self Doubts on Approaching Forty: The United Nations' Oldest and Only Collective Security Enforcement Army, the United Nations Command in Korea," Dickinson Journal of International Law 6 (1987): 1, 8-9.

27 Most military units of other nations contributing to the UNC were integrated into U.S. Army divisions. Bowett at pp. 40-41; Goodrich & Simons at pp. 464. After July 27, 1951, units from Commonwealth countries were consolidated into a Commonwealth division. Id.

28 United States Department of State, Department of State Bulletin 23 (1950): 206. Korean divisions were generally incorporated into U.S. corps. Goodrich & Simons at p. 464.

29 Korean War Hearings, vol. III, p. 1937. The United States even refused to accept diplomatic communications from the PRC and the Soviet Union concerning the conflict, insisting that they be sent directly to the United Nations itself. Lauterpacht, supra note 12, at p. 221 n.2.

30 The United States entered into bilateral negotiations with the states contributing armed forces and, in some instances, with states supplying other forms of assistance. In most such agreements the United States characterized itself as "the executive agent of United Nations forces in Korea." Bowett at p. 37. See, e.g., the Agreements with South Africa, 3 U.S.T. 3990, The Netherlands, id. at 3987, Belgium, id. at 2829, Sweden, id. at 1209, and Norway, id. at 1903.

31 Bowett at p. 47. See also Higgins at p. 178; Halderman, "Legal Basis for United Nations Armed

Forces," American Journal of International Law 56 (1962): 971, 974-76.

32 Bowett so concludes. At pp. 45-47, 55. Lauterpacht seemingly concurs. Oppenheim, L., Oppenheim's International Law, pp. 224-28 ("hostilities conducted by and on behalf of the United Nations in Korea"). Edited by H. Lauterpacht. 7th rev. ed., London: Longmans, 1958 [hereafter "Oppenheim"]. The Soviet Union also alleged at the Geneva Convention of 1954 that the U.N. was a belligerent. See "Report to the United Nations on the Korean Political Conference at Geneva, November 11, 1954," U.N. Doc. A/2786, 9 U.N. GAOR, Ann. at pp. 2-4, reprinted in D.P. 7084 at 187, 193. Similarly, the PRC so characterized the United Nations in a diplomatic note of March 4, 1959, to members of the UNC delivered through the British Embassy in Beijing. D.P. 7084 at 227-28.

33 Bowett at pp. 42-43; Baxter at p. 334; Higgins at p. 179.

34 See Goodrich & Simons at pp. 468-80. The major strategic issue on which the United States acted without consultation with the United Nations was the decision to advance to the Yalu with U.N. forces. See Higgins at pp. 185 et seq. President Truman and Secretary Acheson maintained that General MacArthur himself made this decision, which was apparently inconsistent with his written instructions from the President and the JCS. Acheson, Dean. Present at the Creation pp. 452-53, New York: Norton, 1969.

35 Bowett at p. 42. Such reports by the "Government of the United States, as the Unified Command," lasted after the Armistice. See, e.g., Report of August 7, 1953, U.N. Doc. S/3079, D.P. 7084 at 135; Report of August 16, 1956, U.N. Doc. A/3167, id. at 196; Report of August 9, 1957, U.N. Doc. A/3631, id. at 206.

36 See Baxter at p. 336. Baxter was then a major in the U.S. Army. He subsequently became a professor at the Harvard Law School, President of the American Society of International Law, Editor-in-chief of the American Journal of International Law, and, shortly before his death, a judge on the International Court of Justice.

37 Kelsen at pp. 965-75; Stone at pp. 234-38. Similarly, Professor Gross denied that the war was a U.N. action but, by virtue of Security Council Resolutions 82, 83, and 84, considered U.N. Members obligated to assist the U.N. side. Gross, Leo, "Voting in the Security Council: Abstention from Voting and Absence from Meetings," Yale Law Journal 60 (1951): 209, 254-55. Eugene Rostow more recently reached a similar conclusion. Rostow, Eugene, "Agora: The Gulf Crisis in International and Foreign Relations Law, Continued," American Journal of International Law 85 (1991): 506, 508.

38 The South Koreans are estimated to have suffered some 1.7 million fatalities versus 55,000 for the United States. Pollack, supra note 26, at p. 4n. 15.

39 G.A. Res. 195, 3 U.N. GAOR at 25, U.N. Doc. A/810 (1948).

40 On the status of unrecognized governments in armed hostilities generally and the DPRK and the PRC in particular, see Brownlie at pp. 379-80, 397-98. On the UNC's recognition of the DPRK and the PRC as belligerents, see Bowett at p. 35. Recognition of the DPRK as a result of the war became a major issue under British law in interpreting H.M.G.'s authority to control exports (under the embargo) to "foreign states." In re Harshaw Chemical Co.'s Patent, 41 I.L.R. 15 (1970); In re Al-Fin Corporation's Patent, [1969] 2 W.L.R. 1405. See also the statement of the British Secretary of State quoted in note 17, supra.

The other modern conflict in which some belligerents have not recognized their adversary de jure but have accorded it certain belligerent rights de facto is the various Arab-Israeli wars. See Brownlie

at p. 398; Rosenne, Shabtai, "Directions for a Middle East Settlement - Some Underlying Legal Problems," in Moore, John Norton, ed., The Arab-Israeli Conflict, vol. II, pp. 777, 783-84, Princeton: Princeton University Press, 1974; Feinberg, Nathan, "The Arab-Israel Conflict in International Law," in The Arab-Israeli Conflict, loc. cit., vol. I, pp. 386, 455-57. See also The Case of the Fjeld, 17 I.L.R. 345, 347 (Alex. Prize Ct. 1950) (Arab states implicitly recognized Israel in armistices).

41 Recently released Chinese documents confirm what was generally assumed at the time: that the Chinese forces were fully organized Chinese military units operating directly under Chinese Government command. See Sheng. "Beijing's Decision to Enter the Korean War," Korean and World Affairs, 19, no. 2 (1995). Virtually every scholarly commentator had previously dismissed the PRC's position as a transparent charade. See, e.g., Bowett at p. 43 n.66; Brownlie, Ian, "Volunteers and the Law of War and Neutrality," International and Comparative Law Quarterly 5 (1956): 570.

42 See statements of the PRC delegate to the Security Council, Wu Hsiu-ch'üan, on November 28, 1950, U.N. Doc. S/PV. 527, at 96- 97, and December 16, 1950, U.N. Doc. A/C. I/661, reprinted in Cohen & Chiu, vol. II at pp. 1469-70.

43 When ten North Korean prisoners of war escaped to Japan, the Japanese authorities turned them back over to the United States. The PRC protested that this violated Article 91 of the Third Geneva Convention of 1949, which provides that an escaped POW shall be deemed to have succeeded when "he has left the territory under the control of the detaining power, or of an ally of the said power." author?. "Yoshida Government Unlawfully Turns over the U.S. Aggressors Korean POW's Escaped from Koje," New China News Agency, 30 January 1953, reprinted in Cohen & Chiu, vol. II at 1545.

44 Also worth noting are the provisions establishing the "Neutral Nations Supervisory Commission" (Arts. 36-59), and the "Neutral Nations Repatriation Commission" (Supp. Agreement). For these purposes, Article 37 stated that:

The term "neutral nations" as herein used is defined as those nations whose combatant forces have not participated in the hostilities in Korea.

This was a classic definition of a "neutral" and is difficult to reconcile with the previous position of the U.N. forces that their participation in the hostilities was sanctioned by the United Nations and that third parties were not entitled to be neutral.

45 G.A. Res. 711(VII), 7 GAOR, Supp. 20B (A.2361/Add. 2) at p. 1.

46 See D.P. 5609 at 4-5.

47 The Quadripartite Communiqué of February 18, 1954, appears in D.P. 5609 at 33; D.P. 7084 at 152; and A.F.P. at 2685. The Joint Communiqué further stated that

Neither the invitation to, nor the holding of, the ... conference shall be deemed to imply diplomatic recognition in any case where it has not already been accorded.

The United States was careful to avoid implying recognition of either the DPRK or the PRC, although such recognition would have been virtually inevitable had the Geneva Conference resulted in a peace treaty signed by the governments present. See Wright, Quincy, "The Chinese Recognition Problem," American Journal of International Law 49 (1955): 320, 330.

48 See D.P. 5609 at 5-17. The Geneva Conference was, of course, also concerned with other issues, notably Indochina. This is of interest in the present context since the "Geneva Accords" on Indochina included an armistice similar to the Korean Armistice.

49 Id. at p. 5.

50 The U.N. side had demanded that any peace settlement be based on the following two principles:

1. The United Nations, under its Charter, is fully and rightfully empowered to take collective action to repel aggression, to restore peace and security, and to extend its good offices to seeking a peaceful settlement in Korea.

2. In order to establish a unified, independent and democratic Korea, genuinely free elections should be held under United Nations supervision, for representatives in the National Assembly, in which representation shall be in direct proportion to the indigenous population in Korea.

"Declaration by the Sixteen" of June 15, 1954. D.P. 5609 at 191; D.P. 7084 at 186; A.F.P. at 2692. Point One was included to preserve "the legality of the collective action undertaken by the United Nations to repel the Communist aggression." See "Report to the United Nations on the Korean Political Conference at Geneva, November 11, 1954," U.N. Doc. A/2786, 9 U.N. GAOR, Ann. at pp. 2-4, reprinted in D.P. 7084, at 187, 190. The Communist side would accept neither position.

51 See Art. 36, Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention No. IV, Oct. 18, 1907, Chap. V (Annex), 36 State. 2277. On the customary international law of armistices, see Phillipson, C. Termination of War and Treaties of Peace, London: T.F. Unwin, 1916. See also Greenspan, M., The Modern Law of Land Warfare, Berkeley: University of California Press, 1959. [hereafter "Greenspan"].

52 Levie, Howard, "The Nature and Scope of the Armistice Agreement," American Journal of International Law 50 (1956): 880, 884-85 ("armistice does not terminate the state of war existing between the belligerents, either de jure or de facto"). See Oppenheim, vol. II at p. 548; Greenspan at p. 386; McNair at pp. 13-14. See also, Kahn v. Anderson, Warden, 255 U.S. 1, 9 (1921) (November 1918 Armistice did not legally end World War I). The Permanent Court of International Justice also affirmed the rule in The Wimbleton Case (Germany v. United Kingdom), P.C.I.J., Ser. A, No. 1 (1923) at 35, and the French Cour de Cassation in In re Suarez (1943-45), Ann. Dig. 412. See also the Attilio Regolo and Other Vessels arbitration, cited in Schwartzenberger, vol. II at p. 726; the Ahmed Emin Bey arbitration, id. at p. 733.

53 Levie, loc. cit. at pp. 892-93; von Glahn, Gerhard, Law Among Nations, p. 557, New York and London: MacMillan, 1965. But see McNair (at p. 29 n.1), who considers that the Korean conflict was not legally a war in the first place and hence that a state of war did not survive the Armistice.

54 See Rosenne, Shabtai, Israel's Armistice Agreements with the Arab States, Tel Aviv: Blumstein's, 1951; Yahuda, "The Inge Toft Controversy," American Journal of Internal Law 54 (1960): 398; Wright, Quincy, "The Middle East Problem," in Moore, supra note 40, vol. II at pp. 828, 823. See also discussion in Gross, Leo, "Passage Through the Suez Canal of Israel-Bound Cargo and Israel Ships," in id., vol. I, at pp. 863, 876-82; Selak, Charles B., Jr., "Legal Status of the Gulf of Aqaba," in id., vol. I at pp. 697, 718-21.

55 Schwartzenberger, vol. II, at pp. 730-31; McNair at pp. 14- 15, 29; Stone at p. 646; Castren, E. J. S., The Present Law of War and Neutrality, p. 131, Helsinki: Suomalainev Tiedeakemia, 1954. In the only other instance in which this issue has arisen, the 1949 armistices between Israel and the Arab States, the armistices between Egypt and Israel and Egypt and Jordan have been expressly superseded by peace treaties. Syria has continued to maintain that it is in a state of war with Israel despite the armistice.

56 See Section III, infra.

57 The principle was stated as early as the 18th century by Vattel:

The conclusion of a general armistice is a matter of such importance that the sovereign is always presumed to have reserved it to himself.

Vattel, Emmerich de. The Law of Nations, vol. III, sect. XVI, p. 237, 1758., quoted in Levie, op. cit., at p. 883 n.19.

58 Levie, op. cit., at p. 883; Oppenheim at p. 550; Greenspan at p. 386.

59 By entering into the Armistice with the DPRK, the participants in the UNC recognized that government as a belligerent, although not necessarily a state. See Schwartzenberger, vol. II, at pp. 728-29. See also German Interests in Polish Upper Silesia (merits) (Poland v. Germany), P.C.I.J. Ser. A. No. 7, at 27-28 (Poland could not rely on November 11, 1918 Armistice because Germany did not recognize it as a belligerent at that time).

60 See notes reprinted in D.P. 7084 at 216, 218, 223, and 227.

61 For example, in discussing the Pueblo incident, one scholar apparently believed that the United Nations was formally party to the Armistice and felt compelled to argue that the United States should also be treated as a party because of its participation as a belligerent in the war. Butler, William E., "The Pueblo Crisis: Some Critical Reflections," Proceedings of the American Society of International Law 7 (1969): 11.

62 In fact, from 1962-74, the DPRK argued that the two Koreas should sign a peace treaty. When South Korea accepted this proposal in 1974 by offering to sign a non-aggression pact, the DPRK changed its position and argued that only the United States was properly the other party to a peace treaty, a position it has since continued to maintain. See Jhe at p. 69.

63 A report on the Conference was filed by "the Governments which participated in the United Nations action in Korea." See Report, supra note 50. The report is ambivalent in that it clearly distinguishes the participant governments from the UNC and the United Nations, on the one hand, and yet characterizes the war as a "United Nations action," on the other.

64 The most percipient of the commentators on these arrangements has rightly observed that this approach to the Armistice contradicts the position taken by the U.N. side throughout the conflict itself and represents a deliberate volte face by the United States and its allies. Bowett at pp. 52-53. It has been suggested that this volte face reflected a change in U.S. administrations, President Eisenhower being willing to disassociate the United States and its allies from the United Nations when President Truman was not. Frye, A. United Nations Peace Force, p. 57, New York: Oceana, 1957.

65 The United States signed a Mutual Defense Treaty with the ROK, 5 U.S.T. 2368, T.I.A.S. 3097, 238 UNTS 199, on October 1, 1953, i.e., approximately ten weeks after the Armistice and six months prior to the Geneva Conference. The MDT entered into force November 17, 1954. The DPRK concluded separate mutual security treaties with the Soviet Union and China in July 1961.

66 See statements of Ambassadors Moynihan and Bennett in United States Department of State, 1975 Digest of United States Practice in International Law, pp. 824 and 826-27. Washington, D.C.: GPO, 1975.

67 Id. at 820, et seq. The United States noted that, under the terms of Paragraph 17, such a change would require the prior agreement of the other signatories to the Armistice. In the course of discussions of the competing resolutions, Ambassador Moynihan submitted a letter to the Security Council advising it that "the United Nations flag no longer flies over military installations in the Republic of Korea except at facilities directly associated with the implementation of the armistice agreement...." Id. at 826-27.

68 The DPRK submitted a memorandum to the General Assembly arguing that it and the United States were the only proper parties to the Armistice. U.N. Doc. A/C. 1/1054, Sept. 24, 1975, at 12.

69 By a vote of 59 to 51, with 29 abstentions, the General Assembly adopted Resolution 339OA (XXX), which expressed the hope "that all the parties directly concerned will enter into negotiations on new arrangements designed to replace the armistice agreement ...," and urged "all the parties directly concerned, as a first step, ... [to] embark on talks as soon as possible so that the United Nations Command may be dissolved concurrently with the arrangements for maintaining the armistice agreement." At the same time, the General Assembly also passed, by a vote of 54 to 43, with 42 abstentions, Resolution 339OB (XXX), which "considered" that "it is necessary to dissolve the 'United Nations Command' and withdraw all the foreign troops stationed in South Korea under the flag of the United Nations." It called upon the "real parties to the armistice agreement to replace the Korean military armistice agreement with a peace agreement...." The sponsors of Resolution 339OB suggested that by "real parties to the armistice agreement" they intended the DPRK and the United States, specifically excluding the ROK. See 1975 Digest, supra note 66, at 824.

70 In 1993, U.N. Secretary General Boutros-Galli was quoted on at least two occasions as averring that a "peace treaty" among the "parties to the Armistice" should be negotiated, and that the Security Council should dissolve the UNC - again, seemingly indicating that the United Nations viewed itself as a neutral party to the conflict and the Armistice. Jhe at p. 71.

71 Security Council Press Release SC/6279, October 15, 1996.

72 See Jhe at p. 77.

73 See id., passim.

74 On May 24, 1994. See Jhe at p. 67-68.

75 Czechoslovakia had previously withdrawn, leaving the Neutral Nations Supervisory Commission with a skeletal staff of some 20 Swiss and Swedish soldiers. Knipp, Steven. "In Harm's Way," Far Eastern Economic Review, 15 August 1996, p. 52.

76 The New York Times, 16 April 1996, p. 8.

77 The New York Times, 19 April 1996, p. 4.

78 For a South Korean viewpoint that only the two Koreas should be parties to a solution, see Jhe at p. 76 ("the two Koreas are the legal and actual parties to the Armistice Agreement").

79 See text at note 71.

80 See Vienna Convention on the Law of Treaties, art. 2(1)(a), signed at Vienna May 23, 1969, entered into Service January 27, 1980, U.N. Doc. A/CONF. 39/27 (1969), reprinted in American Journal of International Law 63 (1969): 875.

81 Compare the end of the Gulf War. In that instance, Iraq signed a truce with the military commanders of the allied coalition. The Security Council then adopted its Resolution 687 setting out the terms of a permanent cease fire. Iraq accepted those terms in writing, and the Security Council formally declared the cease fire to be in effect a few days later. There was no peace treaty or other final agreement among the belligerents; the Security Council, in effect, was able to impose a supervening legal mechanism. The Gulf War events are summarized in Rostow, supra note 37, at 509.

82 Note that unilateral undertakings can sometimes constitute binding obligations of states. Nuclear Test Case (Australia v. France), 1974 I.C.J. 253, 267 ("declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations").

83 The Bush Administration in fact proposed in 1991 "six party talks" among the two Koreas, the United States, China, Japan, and Russia. The other parties, however, demonstrated no public interest in the proposal. The New York Times, 17 April 1996, p. 13.

NAPSNET INVITES YOUR RESPONSES:

Your are invited to participate in this "virtual forum" by considering the questions below, or collecting any other thoughts you have after reading the paper, and then emailing your comments to: napsnet-reply@nautilus.org

1. Is the Korean conflict most properly characterized as an international or a civil war? Norton finds fault in both the former position (the premise of UN involvement) and the latter position (held by the DPRK and PRC). What bearing does this problem have on strategies for pursuing peace on the Korean peninsula today?

2. Norton argues that the four-party peace talks proposal represents an accurate grouping of the major parties to the conflict "in practice." Given the formal UN role as a party to the war and the Armistice, ought there be a role for the UN in any negotiations toward a peace treaty? In particular, what role might the UN Command allies such as the UK or Australia play in the UN debates which may occur over a proposal to end the Armistice?

3. Norton notes that the UN abrogated its own charter to involve itself in Korea, that it had no actual control over combat forces during open hostilities, that the UN had no role in the Geneva conference following the Armistice, and that today the DPRK is now a UN member. Do these considerations obviate any UN role in such negotiations?

4. Norton notes that during hostilities ROK forces were effectively under US control, and that the ROK (unlike the DPRK) was not a formal party to the Armistice. Yet he also argues that the DPRK's insistence that negotiations for a peace treaty include the US but not the ROK are "polemical and without legal foundation," given the ROK's role since the Armistice. Does the DPRK position have a credible legal basis?

5. Is a formal peace treaty required to bring peace to the Korean peninsula? Norton notes that a peace treaty customarily follows an armistice, and that many interested parties have expressed such a need. However, he also notes that an armistice may evolve over time into a de facto peace treaty (although this has not happened among the major belligerents in Korea). Might more of a political focus (ie. toward a "detente" rather than a treaty) ultimately prove more constructive than continued abortive efforts to convene formal negotiations?

6. How do decisions regarding bringing a formal peace to the Korean peninsula bear on the objective

of Korean unification?

7. The Soviet military fought in the undeclared war, although Moscow denied US allegations at the time. Does this provide the legal or realpolitik basis for Russian participation in negotiatons to end the Armistice, given the argument that the ROK obtains such a right by virtue of its military participation in the fighting on the Peninsula.

- A discussion on Norton's paper is presented by Kim Myong Chol

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