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HOW IT ALL STARTED - AND HOW IT ENDED: A LEGAL STUDY OF THE KOREAN WAR

Howard S. Levie

A. World War II

Before taking up the basic subject of the discussion which follows, it would appear appropriate to ascertain just what events led to the creation of two such disparate independent nations as the Republic of Korea (hereinafter referred to as South Korea) and the Democratic People's Republic of Korea (hereinafter referred to as North Korea) out of what had been a united territory for centuries, whether independent or as the possession of a more powerful neighbor, Japan — and the background of how the hostilities were initiated in Korea in June 1950.

In the Cairo Declaration, signed by Roosevelt, Churchill, and Chiang Kai-Shek on December 1, 1943, the following statement appears, “The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent.”¹

On July 26, 1945, in the Potsdam Declaration, the same parties agreed that the terms of the Cairo Declaration would be carried out;² and in its declaration of war against Japan, on August 8, 1945, the Soviet Union joined in the Potsdam Declaration.³

Although as early as July 1945 Japan had sought to bring the war in the Pacific to a negotiated end through the mediation of the then neutral Soviet Union, the Soviet Government had refused to pass on messages to that effect to Japan's enemies. (The Soviet Union had agreed with its Allies in the European war that it would enter the war against Japan as

1. The Cairo Declaration, Dec. 1, 1943, 3 Bevens 858 (1969) [hereinafter Bevens]; THE UNITED STATES AND THE KOREAN PROBLEM, S. DOC. NO. 83-74, at 1 (1953) [hereinafter S. DOC. NO. 83-74].

2. Bevens, *supra* note 1, at 1205; S. DOC. NO. 83-74, *supra* note 1, at 1.

3. The relevant part of the Soviet statement reads as follows: “True to its obligation as an Ally, the Soviet Government has accepted the proposal of the Allies and has joined in the declaration of the Allied powers of July 26.” S. DOC. NO. 83-74, *supra* note 1, at 2.

soon as Hitler was overthrown and it did not want the war in the Far East to end without it being able to share in the spoils — in this case, among other things, the Kurile Islands!) Then on August 8, 1945, the Soviet Foreign Commissar advised the Japanese Ambassador that as of August 9th a state of war would exist between the two nations.⁴ On August 10th Japan offered to surrender, conditioned solely on the continuance of the Emperor on the throne.⁵

A somewhat different history of the events of the period will be found in the semi-official book *Liberation Mission*, edited by Marshal of the Soviet Union A.A. Grechko and written by Major-General I.U. Parotkin and a dozen other senior officers of the Soviet Army.⁶ Chapter XI, written by Colonel G.K. Plotnikov, states that “Korea was liberated by the twenty-fifth Army of the First Far Eastern Front, Soviet marine units and the Pacific Fleet warships.”⁷ This completely ignores the fact that Japan had attempted to negotiate an end of the war in July 1945 and had actually offered to surrender on August 10th of that year! He is subsequently somewhat less dogmatic, stating:

“By capturing the town and port of Seishan [on August 14], the Soviet troops disrupted the Kwantung Army’s supply routes with Japan and considerably expedited the surrender of the Japanese forces and the end of the war in the Far East.”⁸

However, once again he is taking credit for the Japanese surrender based on actions taken by the Soviet Union on August 14, 1945 when the Japanese had offered to surrender four days earlier.

B. The Division of Korea

The United States Secretary of War drafted what became known as General Order No. 1. A provision of that Order with respect to Korea provided that Japanese forces north of the 38th parallel would surrender to the Soviet military commander, while those south of that line would surrender to the American military commander. The General Order, with this provision, was sent to Moscow and to London and neither Government made any objection to the provision with respect to the proposed military

4. *Id.*

5. *Id.*

6. *LIBERATION MISSION OF THE SOVIET ARMED FORCES IN THE SECOND WORLD WAR* (A.A. Grechko, ed., Progress Publishers 1975).

7. *Id.* at 402

8. *Id.* at 405 (emphasis added:) This occurred on August 17, 1945, a week after the Japanese offer to surrender.

actions in Korea.⁹ It is obvious that there was no intention on the part of any of the persons involved that this Order should be construed as constituting a political division of the country.¹⁰ As a matter of fact, at a meeting held in Moscow in December 1945 the Foreign Ministers of Great Britain and the Soviet Union and the Secretary of State of the United States reached an agreement, to which the Government of China concurred, that a provisional democratic Korean government should be established for Korea in its entirety. Moreover, it was also agreed that the United States and the Soviet Union would form a Joint Commission composed of representatives of the United States Command in southern Korea and representatives of the Soviet Command in northern Korea which, after consultation with Korean "democratic parties and social organizations," would make recommendations with respect to a provisional Korean government. These recommendations were to be submitted to a Four-Power conference to be held in Moscow and would establish a Four-Power trusteeship which would operate for a period of up to five (5) years. A meeting of the military commanders of the two occupying Powers, for the purpose of solving urgent administrative and economic problems, would take place within two weeks.¹¹ At that meeting of the military commanders, which took place in January and February 1946, the United States Command attempted to end the division at the 38th parallel but completely failed to accomplish its major purpose as the Soviet commander, General Terenty F. Shtykov (subsequently the Soviet Ambassador to North Korea) insisted that plans for the organization of a

9. S. DOC. NO. 83-74, *supra* note 1, at 2-3.

10. General MacArthur, as the Commander-in-Chief, United States Army Forces, Pacific, issued General Order No. 1 on September 7, 1945. It provided in part as follows:

By the terms of the instrument of surrender, signed by command and in behalf of the Emperor of Japan and the Japanese Government and by command and in behalf of the Japanese Imperial General Headquarters, the victorious military forces of my command will today occupy the territory of Korea south of 38° north latitude.

Having in mind the long enslavement of the people of Korea and the determination that in due course Korea shall become free and independent, the Korean people are assured that the purpose of the occupation is to enforce the instrument of surrender and to protect them in their personal and religious rights. In giving effect to these purposes, your active aid and compliance are required.

By virtue of the authority vested in me as Commander in Chief, United States Army Forces, Pacific, I hereby establish military control over Korea south of 38° north latitude and the inhabitants thereof, and announce the following conditions of the occupation:

All powers of Government over the territory of Korea south of 38° north latitude and the people thereof will be for the present exercised under my authority.

Id. at 3; BACKGROUND INFORMATION ON KOREA, H.R. REP. NO. 81-2495, at 3-4 (1950) [hereinafter H.R. REP. NO. 81-2495].

11. H.R. REP. NO. 81-2495, *supra* note 10, at 4; S. DOC. NO. 83-74, *supra* note 1, at 4.

single provisional Korean government were beyond the competence of the military conference.¹² This disregarded the fact that the Four-Power meeting had specifically stated that the military commanders, at their meeting, “would make recommendations with respect to a provisional Korean government.” There can be no question but that the Soviet military command arbitrarily interpreted the 38th parallel “as creating a permanent delineation between two military zones, passage through which was possible only by permission of the military commander.”¹³

When the Joint Commission met in Seoul in March 1946 the Soviet delegation took the position that the Commission should consult only those Korean organizations which had supported the Moscow trusteeship agreement. As many Koreans and Korean organizations in South Korea had expressed opposition to the trusteeship idea, which appeared to them to closely resemble the protectorate exercised by Japan over Korea earlier in the century, this would have disqualified all but the Communist organizations. These latter had also originally opposed the trusteeship plan, but later, pursuant to instructions from Pyongyang, had refrained from criticizing the trusteeship idea and had supported it.¹⁴ As the United States insisted that the Koreans could exercise the right to express their opinions, and that even organizations which had objected to the trusteeship plan were entitled to be heard, the conference of the Joint Commission adjourned without having accomplished its purpose.¹⁵ The Joint Commission met again in May 1947 but was no more successful in reaching an agreement on Korean participation than it had been in 1946.

Unable to reach any agreement with the Soviet Union, the United States referred the matter to the United Nations and on November 14, 1947 the General Assembly of the United Nations adopted a Resolution establishing the United Nations Temporary Commission on Korea (UNTCOK).¹⁶ Operative paragraph 2 of that Resolution provided:

12. Paragraph 3 of the Moscow Agreement of December 1945 provided:

3. It shall be the task of the Joint Commission, with the participation of the provisional Korean democratic government and of the Korean democratic organizations to work out measures also for helping and assisting (trusteeship) the political, economic, and social progress of the Korean people, the development of democratic self-government, and the establishment of the national independence of Korea.

S. DOC. NO. 83-74, *supra* note 1, at 4.

13. THE DEP'T OF STATE, KOREA: 1945 TO 1948 3 [hereinafter KOREA: 1945 TO 1948].

14. KOON WOO NAM, THE NORTH KOREAN COMMUNIST LEADERSHIP: 1945 TO 1965 (Univ. of Alabama 1974) [hereinafter Koon Woo Nam].

15. *Id.* at 73-74.

16. S. DOC. NO. 83-74, *supra* note 1, at 11-12. The United Nations named Australia, Canada, China, El Salvador, France, India, Philippines, Syria, and the Ukrainian Soviet Socialist Republic, as the members of the Commission. *Id.* The Ukrainian Soviet Socialist Republic immediately stated that it

2. *Recommends* that the elections be held not later than 31 March 1948 on the basis of adult suffrage and by secret ballot to choose representatives with whom the Commission may consult regarding the prompt attainment of the freedom and independence of the Korean people and which representatives, constituting a National Assembly, may establish a National Government of Korea. The number of representatives from each voting area or zone should be proportionate to the population, and the elections should be under the observation of the Commission.¹⁷

The Resolution also provided for the establishment of Korean military forces and for the withdrawal of the armed forces of the occupying Powers. The Soviet Union took the position that the problem of Korea did not fall within the jurisdiction of the United Nations. Thus, when the United Nations conducted elections in Korea under the auspices of that organization and pursuant to that Resolution, North Korea refused to permit United Nations personnel to enter its territory. Subsequently, after the United Nations-supervised election in South Korea, it conducted its own unsupervised elections. These unsupervised elections, not surprisingly, resulted in the election as its President of the Russian-trained Communist leader, Kim Il Sung, who retained that position for almost fifty (50) years and who, on his death, was succeeded by his son, Kim Jong Il!¹⁸

On December 12, 1948 the General Assembly of the United Nations took notice of the election in South Korea; declared that a lawful government, the Republic of Korea, had been established; recommended the withdrawal of occupying forces and; established a new United Nations Commission on Korea (UNCOK) with numerous functions intended to end the division of the country.¹⁹ According to one author:

would not participate in the work of the Commission.

17. KOREA: 1945 TO 1948, *supra* note 13, at 67.

18. Strange to relate, on 2 October 1950, probably due to the then status of the hostilities and the impending crossing of the 38th parallel by UNC troops, the Communists relented and Soviet Foreign Minister Vyshinsky introduced a resolution in the General Assembly that called for an immediate cessation of hostilities, the withdrawal of foreign troops from Korea, all-Korean elections of a National Assembly under the observation of a United Nations Commission which was to include representatives of states bordering on Korea [this meant the Soviet Union and the Peoples' Republic of China], economic assistance, and admission of the new Korean Government to membership in the United Nation. ALLEN S. WHITING, *CHINA CROSSES THE YALU: THE DECISION TO ENTER THE KOREAN WAR* (Stanford Univ. Press 1960) [hereinafter Project Rand].

19. S. DOC. NO. 83-74, *supra* note 1, at 23-26. The United Nations Commission on Korea (UNCOK) consisted of representatives of the same nations that had constituted the previous Commission except the Ukrainian Soviet Socialist Republic, which had refused to serve on the earlier Commission, was omitted. *Id.* In a speech delivered in May 1950, prior to the initiation of hostilities, Kim Il Sung, the North Korean President and dictator, said:

Under the patronage of U.S. imperialists and their agent, the "UN Commission on

The murderous animosities which existed between the right wing nationalists in the south, led by Syngman Rhee, and the communists in the north, under Kim il Sung, led to persistent attempts by the two sides to destabilise each other through violent incursions across the parallel. Aided and abetted by their patrons, the Soviets and the Americans, the two sides waged a vicious civil war through guerrilla activity which killed 100,000 people before the first shots were officially fired.²⁰

C. THE HOSTILITIES BEGIN

How did Kim Il Sung arrive at the decision to initiate the attack on South Korea in June 1950?²¹ Thousands of Korean Communists had served in the Chinese Communist Army of Mao Tse-tung (now Mao Zedong), the People's Liberation Army (PLA), during its successful war against Chiang Kai Shek's Nationalist Army. In January 1949 the decision was made to send a Korean division of twenty-eight thousand (28,000) men serving in the Chinese Communist forces back to North Korea. In July 1949 the 166th Division of the Chinese People's Liberation Army, consisting entirely of Koreans, returned to Korea and became the North Korean Army's Sixth (6th) Division. Then, around that same time, the PLA's one hundred sixty-fourth (164th) Division, also consisting of Koreans, entered Korea and became the North Korean Army's Fifth (5th) Division. All told, between thirty thousand (30,000) and forty thousand

Korea", the treacherous Syngman Rhee clique is harshly suppressing not only the left forces but also the right elements who are discontented with their reactionary rule . . . The justness of this proposal is clear for all to see. In its proposal the Democratic Front for the Reunification of the Fatherland demanded the immediate withdrawal of the U.S. troops from south Korea [sic] and the "UN Commission on Korea," a tool serving the aggressive ends of the U.S. imperialists. . . .

KIM IL SUNG, FOR THE INDEPENDENT PEACEFUL REUNIFICATION OF KOREA 29-39 (Int'l Publishers 1975). These statements were typical of the North Korean attitude towards the United Nations and its organs - an attitude that has been modified only slightly over the years and will probably harden under the dictatorship of Kim Il Jong, Kim Il Sung's son and successor. Moreover, the Soviet Union prevented the Republic of Korea from being admitted to membership in the United Nations by the use of the veto.

20. JEFFREY GREY, THE COMMONWEALTH ARMIES AND THE KOREAN WAR: AN ALLIANCE STUDY 22 (Manchester Univ. Press 1988). For an in-depth study of the status of South Korea and its internal problems in the late 1940's see Chong-Sik Lee, *The Origins of the Korean War: A Reflection* (in Thomas Hammond, ed. 19xx.).

21. Earlier in 1950, Secretary of State Acheson stated that the Republic of Korea was beyond the American defensive perimeter in East Asia. This was construed by most nations, including particularly the Soviet Union, as meaning the United States had no interest in the future of that country and would not intervene if it were attacked. Nevertheless, on 27 June 1950, two days after the North Korean attack, President Truman ordered American air and naval forces to support the South Koreans in their opposition to the attack.

(40,000) Koreans, all dedicated Communists, were moved to North Korea from China during 1949.²²

The report of the United Nations Commission on Korea (UNCOK) leaves no doubt that North Korea was the aggressor on June 25, 1950, despite the self-serving statements of North Korea to the contrary.²³ Dozens of books speculate on the origins of the war in Korea, some laying the blame on Syngman Rhee and the United States and others on Kim Il Sung, the Soviet Union, and the People's Republic of China.²⁴ All of those books were written without knowledge of, or before the final publication of, the three (3) books by Nikita Khrushchev (*Khrushchev Remembers; Khrushchev Remembers: The Last Testament; and Khrushchev*

22. CHEN JIAN, *CHINA'S ROAD TO THE KOREAN WAR: THE MAKING OF THE SINO-AMERICAN CONFRONTATION* 110 (Columbia Univ. Press 1994). In February 1950 the remaining 23,000 Koreans in the Chinese Communist PLA were returned to North Korea and formed the North Korean Army's Seventh Division. *Id.* See also THE DEP'T OF STATE, *NORTH KOREA: A CASE STUDY IN THE TECHNIQUES OF TAKEOVER* 117 (1961) which sets forth the following revealing statement:

These divisions were subsequently redesignated the Korean 5th and 6th divisions, turned in their US equipment [captured upon the flight of Chiang Kai Shek's Nationalist Army to Taiwan] and received Russian equipment, and were assigned Korean commanders and Russian advisers (the latter non-existent during their Manchurian experience). This contribution was followed up in April 1950 by the shipment of additional Manchurian Korean troops. All told, Chinese contributions of former Korean Volunteer Corps troops totaled perhaps 40,000 by June 1950, and accounted for at least one-third of the spearhead divisions of the north [sic] Korean Army.

Id. A comment made by one author with respect to the members of the Chinese Peoples' Volunteers is worthy of note. He says: There is reason to believe that many members of the Chinese forces were not really volunteers at all. They had been coerced into service by threats to their families, or else by the warning that, if they refused, they would be denied any opportunity to make a living in civilian life. RICHARD GARRETT, *P.O.W.* 203 (David & Charles, 1981). The present author believes that few, if any, of the Chinese were volunteers. If they were Koreans and members of the PLA, they were subject to being sent to Korea.

23. The UNCOK report stated in part as follows:

Commission's present view . . . is, first, that judging from actual progress of operations Northern regime [sic] is carrying out well-planned, concerted, and full-scale invasion of South Korea, second, that South Korean forces were deployed on wholly defensive basis in all sectors of the parallel, and, third, that they were taken completely by surprise as they had no reason to believe from intelligence sources that invasion was imminent.

THE DEP'T OF STATE, *UNITED STATES POLICY IN THE KOREAN CRISIS* 3 (1950). See also H.R. R. No. 81-2495, *supra* note 10, at 45; JEFFREY GREY, *supra* note 20, at 22 (citing the Australian military observers attached to UNCOK).

24. See GLENN D. PAIGE, *THE KOREAN PEOPLE'S DEMOCRATIC REPUBLIC* 35 (Jan F. Triska ed., Hoover Inst. 1966). For a presentation of the assumed problems and plans of Syngman Rhee and Kim Il Sung, written before the books by Khrushchev hereinafter referred to and quoted, see Chapter 5, "A Hypothesis on the Origins of the Korean Civil War" in ROBERT R. SIMMONS, *THE STRAINED ALLIANCE: PEKING, PIYONGYONG, MOSCOW AND THE POLITICS OF THE KOREAN CIVIL WAR* (Free Press 1975). For a further elaboration of the events of this period, see THE DEP'T OF STATE, *UNITED STATES POLICY IN THE KOREAN CRISIS* (1950) which contains numerous reports of the United Nations Commission on Korea (UNCOK), resolutions adopted by the United Nations Security Council and correspondence between and statements made by various nations at the time.

Remembers: The Glasnost Tapes).²⁵ Unquestionably, the most accurate statements with respect to the events which preceded the conflict between the two Koreas are the admissions contained in these several autobiographical volumes of Khrushchev, later Chairman of the Soviet Union's Central Committee — the position which Stalin had held for so many years and at the time of the initiation of hostilities in Korea. The admissions intentionally made by Khrushchev in these books leave no doubt that the entire responsibility for the war in Korea falls on Kim Il Sung, supported by both Stalin and Mao Zedong. Inasmuch as his statements are admissions against interest and are contrary to the positions previously asserted by the Soviet Union, Communist China, and North Korea, they should quiet those who continue to insist that South Korea initiated the hostilities on June 25, 1950. Khrushchev says:

at the end of 1949, Kim Il Sung arrived with his delegation to hold consultations with Stalin. The North Koreans wanted to prod South Korea with the point of a bayonet. . . . Stalin persuaded Kim Il-sung that he should think it over, make some calculations, and then come back with a concrete plan. Kim went home and then returned to Moscow when he had worked everything out. He told Stalin he was absolutely certain of success.

I must stress that the war wasn't Stalin's idea, but Kim Il-sung's.²⁶

In a later statement Khrushchev says:

For many years we insisted that the initiative for starting the Korean war came from South Korea. Some say that there is no need to correct this version of events, because it would be of advantage only to our enemies. I'm telling the truth now for the sake of history: it was the initiative of Comrade Kim Il Sung, and it was supported by Stalin and many others — in fact, by everybody.²⁷

When Kim Il Sung came to Moscow in 1949, I was present. He brought

25. NIKITA KHRUSHCHEV, *KHRUSHCHEV REMEMBERS* (Strobe Talbot ed., Little Brown & Co. 1970) [hereinafter *KHRUSHCHEV REMEMBERS*]; NIKITA KHRUSHCHEV, *KHRUSHCHEV REMEMBERS: THE GLASNOST TAPES* (Strobe Talbot ed., Little Brown & Co. 1990) [hereinafter *THE GLASNOST TAPES*]; NIKITA KHRUSHCHEV, *KHRUSHCHEV REMEMBERS: THE LAST TESTAMENT* (Strobe Talbot ed., Little Brown & Co. 1974) [hereinafter *THE LAST TESTAMENT*]. See Chapter I of JOHN MERRILL, *KOREA: THE PENINSULAR ORIGIN OF THE WAR* (Associated Univ. Press 1989), where many of the theories are set forth. Only the last of Khrushchev's books, *KHRUSHCHEV REMEMBERS: THE GLASNOST TAPES*, was published after Merrill's book, in 1990. However, it is probably the most revealing. See also SERGEI N. GONCHAROV ET AL., *UNCERTAIN PARTNERS: STALIN, MAO AND THE KOREAN WAR* Chapter 5 (Stanford Univ. Press 1993).

26. *KHRUSHCHEV REMEMBERS*, *supra* note 25, at 367-68.

27. *THE GLASNOST TAPES*, *supra* note 25, at 144. The entire sequence of events involving Kim Il Sung, Stalin, and Mao, and the decision to attack South Korea can be found in *KHRUSHCHEV REMEMBERS*, *supra* note 25, at 367-69.

with him concrete plans for an attack. I did not participate in all the detailed discussions that took place. Probably they had talks with the general staff. I only learned of the final decisions when we all got together with Stalin in his nearby dacha.²⁸

He elaborates on this statement by adding that when Kim Il Sung brought his plan for the attack on South Korea to Stalin in Moscow in 1949, Kim was exceedingly optimistic based on the belief that the Communist cells established in South Korea had enlisted the support of a vast number of recruits who would rise up and quickly topple the South Korean government.²⁹ Stalin agreed to furnish him with large quantities of military supplies but actually kept ultimate control by virtue of his control of the allocation of petroleum products, one of the major requirements of modern warfare.³⁰ Stalin withdrew all of the Soviet military advisers from Korea for fear that one of them might become a prisoner of war.³¹ However, they later returned to Korea and Soviet airmen not only trained North Korean pilots, but themselves engaged in combat in the air against the UNC pilots! Undoubtedly, neither Kim Il Sung, Stalin, or Mao Zedong had contemplated the military intervention of the United Nations.

Apparently no specific date for the North Korean attack on South

28. THE GLASTNOST TAPES, *supra* note 25, at 145.

29. A number of rival Communist organizations came into being in South Korea immediately after the Japanese surrender. KOON WOO NAM, *supra* note 14, at 71-72.

30. PAIGE, *supra* note 24, at 35.

31. See PAIGE, *supra* note 24, at 35-36, in which the following statement appears:

The extent of Chinese involvement in the original decision is problematical. The assumption of Soviet foreknowledge is based partly upon several revealing facts. First, there was a tight network of Russian advisers and Soviet-Korean officers that stretched from the Defense Ministry in Pyongyang to at least the division level of the Korean People's Army. Second, during April and May 1950 the Soviet Union provided North Korea with heavy artillery, tanks, and airplanes far superior to those available to the Southern forces. Finally, Soviet authorities maintained close control over the Korean People's Army through monthly allocations of vital petroleum products. And, on the other side, it is certain that the war did not result from South Korean initiative, however much the idea of the forceful unification of Korea might have appealed to President Rhee.

Id. In KHRUSHCHEV REMEMBERS, *supra* note 25, at 370, Khrushchev says:

Stalin was partly to blame for the precarious situation which the North Koreans were in. It's absolutely incomprehensible to me why he did it, but when Kim Il-sung was preparing for his march, Stalin called back all our advisors who were with North Korean divisions and regiments, as well as all the advisors who were serving as consultants and helping to build up the army. I asked Stalin about this, and he snapped back at me, "It's too dangerous to keep our advisors there. They might be taken prisoner. We don't want there to be evidence for accusing us of taking part in this business. It's Kim Il sung's affair."

Id. See also THE GLASTNOST TAPES, *supra* note 25, at 146; KOON WOO NAM, *supra* note 14, at 171 n.2.

Korea had been set,³² but there are reasons to believe that the attack ordered by Kim Il Sung took place at a much earlier date than either Stalin or Mao Zedong had expected.³³ The North Korean attack on South Korea began at 4:00 A.M. local time on June 25, 1950.³⁴ Thereafter, on June 25, 1950 New York time (June 26 Korean time), the Security Council of the United Nations adopted a resolution which, among other things, contained the following:

Noting with grave concern the armed attack upon the Republic of Korea by forces from North Korea.

Determines that this action constitutes a breach of the peace.

I. Calls for the immediate cessation of hostilities; and

Calls upon the authorities of North Korea to withdraw their armed forces to the thirty-eighth parallel.

II. Requests the United Nations Commission on Korea

(a) to communicate its fully considered recommendations on the

32. In Chapter 1 of *THE HIDDEN HISTORY OF THE KOREAN WAR* (Monthly Review Press 2d ed. 1969), I.F. Stone argues that the North Korean attack was anticipated by and was no surprise to the United States military. He is unique in this regard.

33. At one point in *THE GLASNOST TAPES*, *supra* note 25, at 145-46, Khrushchev says: "The date was agreed upon when Kim Il Sung would start his actions to unify Korea. The war began [on June 25, 1950]." *Id.* Elsewhere he is not so definite. Another author states:

All Koreans were united in their urgent desire for an early reunification. The specific timing of the June 25 invasion, however, was caused by intense rivalry within the Korean Workers' party in the North, combined with appeals from South Korea-based guerrillas. These pressures may have forced Kim Il-song into war before the date on which his Soviet mentors and he had probably agreed Total command of the invasion date by Russia is questionable. Neither sufficient supplies nor command forces were in Korea before July, and the Soviet Union did not reenter the Security Council until August 1. These facts, combined with the sluggish reaction of Russian propaganda to the war's initiation, indicates that Moscow did not expect a war on June 25—but perhaps did in early August.

Robert R. Simmons, *The Communist Side: An Exploratory Sketch*, in *THE KOREAN WAR: A 25-YEAR PERSPECTIVE* 197, 198 (Francis H. Heller ed., Regents Press of Kansas 1977). In a report dated 4 September 1950, the United Nations Commission on Korea, which was in Korea when hostilities began on 25 June 1950, stated: 202. The invasion of the territory of the Republic of Korea by the armed forces of the North Korean authorities, which began on 25 June 1950, was an act of aggression initiated without warning and without provocation, in execution of a carefully prepared plan. S. DOC. NO. 83-74, *supra* note 1, at 39.

34. For an attempt to place much of the blame for the hostilities on the government of South Korea, see Jon Halliday, *The Political Background in KOREA, NORTH AND SOUTH: THE DEEPENING CRISIS* 47 (Gavin McCormack and Mark Selden eds., Monthly Review Press 1978). While it is true that Rhee's character left much to be desired, he had been chosen President of the Republic of Korea in an election conducted under the oversight of United Nations election inspectors; and the residents of South Korea who fought for the North Koreans were Communists who had remained in South Korea at the time of the partition. They were far fewer in number than Kim Il Sung had assured Stalin in his attempt to convince Stalin how easy it would be to overcome South Korea with the innumerable Communists who would rise and overthrow the Rhee Government, something which never approached reality.

situation with the least possible delay;

(b) to observe the withdrawal of the North Korean forces to the thirty-eighth parallel; and

(c) to keep the Security Council informed on the execution of this resolution.

*III. Calls 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.*³⁵

On July 7, 1950, after North Korea had disregarded both this resolution,³⁶ and another of June 27, 1950,³⁷ the Security Council adopted a resolution calling upon the members of the United Nations to make armed forces available to a unified command under the United States and requesting the United States to designate a commander of such forces.³⁸ The United States promptly designated General of the Army Douglas

35. *Resolution of the Security Council, June 25, 1950*, U.N. SCOR, U.N. Doc. S/1501 (1950) reprinted in S. DOC. NO. 83-74, *supra* note 1, at 35. Joseph Malik, the representative of the USSR on the Security Council, was boycotting that organization in an attempt to force the unseating of the representative of the Republic of China and to replace him with a representative of the People's Republic of China. There is also a theory that his actions were taken in order to keep the People's Republic of China out of the United Nations! ROBERT R. SIMMONS, *THE STRAINED ALLIANCE: PEKING, PYONGYANG, MOSCOW AND THE POLITICS OF THE KOREAN CIVIL WAR* 87 (The Free Press 1975). In his absence the vote for the resolution was nine to nothing (Yugoslavia abstained). Had he been present he could have vetoed the resolution. He later challenged the validity of the Resolution because it had not received the affirmative votes of the five permanent members of the Security Council, the USSR having been absent and the Chinese vote having been cast by the Republic of China, rather than by the People's Democratic Republic of China. U.N. Doc. S/1517, (1950). The United States issued a press release pointing out the numerous occasions upon which an abstention by a permanent member of the Security Council had not been considered to be a veto and did not even deign to attempt to justify the presence of the Republic of China in the Chinese seat on the Security Council. THE DEP'T OF STATE, UNITED STATES POLICY IN THE KOREAN CRISIS 61-62 (1950).

36. "In two days they had captured Seoul, and then inaugurated a reign of terror which ended in the death of thousands of South Koreans." EDWIN P. HOYT, *ON TO THE YALU 135* (Military Heritage Press, 1984).

37. *Resolution of the Security Council, June 27, 1950*, S.C. Res. 83, U.N. SCOR, U.N. Doc. S/1511 (1950) reprinted in UNITED STATES POLICY IN THE KOREAN CRISIS, *supra* note 36, at 24. This Resolution recommended 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." *Id.*

38. *Resolution of the Security Council, July 7, 1950*, S.C. Res. 84, U.N. SCOR, U.N. Doc. S/1588 (1950) reprinted in UNITED STATES POLICY IN THE KOREAN CRISIS, *supra* note 36, at 66-67. Eventually, sixteen nations (Australia, Belgium, Canada, Colombia, Ethiopia, France, Greece, Luxembourg, Netherlands, New Zealand, Philippines, Thailand, Turkey, Union of South Africa, United Kingdom, and the United States) responded to the United Nations request and volunteered armed force to the United Nations. In addition, Denmark, Italy, India, Norway, and Sweden furnished medical units. See DAVID REES, *KOREA: THE LIMITED WAR* (Saint Martin's Press 1964). For a full discussion of the political aspects of the Korean Conflict and the overall part played by the United Nations therein, see MARC FRANKENSTEIN, *L'ORGANISATION DES NATIONS UNIES DEVANT LE CONFLIT COREEN* (Editions A. Pedone 1952) and Oberson Blaise, *Le CICR et la Guerre de Coree* : Une Tache Impossible (1986).

MacArthur, then the post-World War II Supreme Commander for the Allied Powers in Japan, and Commander-in-Chief of the Far East Command of the United States, located in Tokyo, as the Commander-in-Chief of the unified command, which received the title of the United Nations Command (hereinafter referred to as the UNC). It is with this last-named Command that we will be primarily concerned, as it was this Command that General MacArthur designated as the Detaining Power for captured North Korean and Chinese Communist prisoners of war.

In every conflict there are two facets to the treatment of prisoners of war: (1) the treatment of your own personnel captured by the enemy; and (2) your treatment of enemy personnel whom you have captured. Inasmuch as the second facet listed above does not have the patriotic appeal that the first one does, and is really of minor interest to the average person, it is rarely discussed. It is here proposed to discuss and compare both facets of the problem as they arose in the hostilities in Korea (1950-1953); and to demonstrate the effect of the different attitudes on the armistice negotiations. In discussing this matter it must be realized that when hostilities erupted with the North Korean invasion of South Korea³⁹ neither side was a Party to the 1929 Geneva Convention Relative to the Treatment of Prisoners of War,⁴⁰ that only Chile, Czechoslovakia, India, Liechtenstein, Monaco, Switzerland, and Yugoslavia were already Parties to the 1949 Geneva Convention Relative to the Treatment of Prisoners of War,⁴¹ and that the 1949 Geneva Convention was not even in force.⁴² Nevertheless, on June 26, 1950, the day after the outbreak of hostilities, the International Committee of the Red Cross (hereinafter referred to as the ICRC) sent a message to the two parties to the conflict calling their attention to the 1929 Convention and to Article 3 of the 1949 Geneva Conventions. Article 3 of each of the four 1949 Geneva Conventions is

39. The North Koreans contended, and probably still contend for propaganda purposes, that the South Koreans initiated the attack and the North Koreans were, in a few hours, able to stop the attack and reverse the direction of armed movement from north to south. As we have seen, even Khrushchev has admitted the falsity of that claim. See *supra* notes 25-30 and accompanying text. Moreover, a report of the United Nations Commission on Korea a neutral international Commission that was in Korea at the time, specifically found the "invasion of the territory of the Republic of Korea by the armed forces of the North Korean authorities, which began on 25 June 1950, was an act of aggression initiated without warning and without provocation, in execution of a carefully prepared plan." Document No. 74, *supra* note 1, at 39.

40. Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343.

41. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135.

42. 35 Int'l Rev. of the Red Cross 114 (No. 304 1995). The Convention did not enter into force until 21 October 1950 (*Id.* at 112).

identical. It is concerned with non-international conflicts which was, of course, the status of the hostilities on June 26, 1950.⁴³ When the number of parties to the fighting escalated as a result of the action of the Security Council of the United Nations, notes were sent by the ICRC to all of the participants offering its services and once again calling attention to the 1929 Geneva Convention and to the four 1949 Geneva Conventions. On July 5, the United States replied that it would be guided by the humanitarian principles of the Conventions.⁴⁴ Similar commitments were made by the other States which had contributed armed forces to the United Nations Command.⁴⁵ On July 7, 1950 South Korea agreed to be bound by the 1949 Geneva Conventions.⁴⁶ On July 15, 1950 the Secretary-General of the United Nations advised the ICRC that he had received a telegram from North Korea which stated that it was “*strictly abiding by principles of Geneva Conventions in respect to Prisoners of War.*”⁴⁷ Thus, all of the parties to the conflict were committed to compliance with the then current humanitarian provisions of the international law of war pertaining to the protection of prisoners of war.⁴⁸ The extent to which these commitments were complied with by each side will be the major theme of this study.

43. 1 CONFLIT DE COREE: RECUEIL DE DOCUMENTS 4, 6 (International Committee of the Red Cross, 1952) Article 3 is sometimes referred to as a “Mini Convention” as it contained the only provisions of those Conventions concerned with non-international hostilities, a subject that international Diplomatic Conventions had previously avoided. In order to ensure delivery to North Korea, the ICRC also sent the message to Moscow with a request that it be forwarded to North Korea. *Id.* at 3. The ICRC continued this practice until 22 August 1950 when it was advised by the Soviet Charge d’Affaires in Switzerland that the post and telegraph to North Korea were functioning normally. *Id.* at 49.

44. 1 CONFLIT DE COREE, *supra* note 43, at 13. When the hostilities in Korea commenced, the treatment of prisoners of war by the United States Army was governed by Technical Manual 19-500, Enemy Prisoners of War, which had been issued in October 1944 during the course of World War II.

45. 1 CONFLIT DE COREE, *supra* note 43: Great Britain, at 16; Netherlands, *loc. cit.*; Canada, *Id.* at 19.

46. *Id.* at 15.

47. *Id.* at 16 (emphasis added). Note that the message was sent by North Korea to the Secretary-General of the United Nations, not to the International Committee of the Red Cross. Throughout the hostilities, even when the Armistice was about to be signed, North Korea viewed the ICRC as an arm of the United Nations Command, and not as a neutral! So, too, did the People’s Republic of China and, therefore, the Chinese Red Cross, which, as in all Communist countries, was only an agency of the Government. (for purposes of simplicity, the so-called Chinese Peoples’ Volunteers (who were, in fact, complete field armies of the People’s Republic of China) are referred to herein as the “Chinese Communists”).

48. Being committed to compliance and actual compliance are, unfortunately, two different things insofar as the North Koreans and the Chinese Communists were concerned. See PHILIP D. CHINNERY, KOREAN ATROCITY: FORGOTTEN WAR CRIMES, 1950-1953 (Naval Institute Press 2000).

D. The International Committee of the Red Cross

Communist countries have always been allergic to the idea of having neutral States or organizations or international organizations monitor the performance of their international obligations. Both North Korea and the Peoples' Republic of China suffer from a major case of that allergy.⁴⁹ A question which has long gone unanswered is why countries like the Peoples' Republic of China, North Korea, Vietnam, etc. rarely, if ever, designate or accept Protecting Powers pursuant to Article 8 of the 1949 Geneva Prisoner-of-War Convention and steadfastly refuse to permit the International Committee of the Red Cross to perform the functions allocated to it by Article 9 of that Convention, availing themselves of the provision of that Article which makes the activities of the ICRC "subject to the consent of the Parties to the conflict concerned." If there is any answer to that question other than the fact that those countries intend to, and do, mistreat prisoners of war, have no intention of complying with the provisions of the Convention, and do not desire to have representatives of neutral or international agencies witness their violations of the law of war, they have never attempted to make such answer known.⁵⁰

Beginning on the day after the outbreak of hostilities, and continuously thereafter, the ICRC fruitlessly sought permission, first from North Korea, later from Communist China, and from both at the same time, for its delegates to enter North Korea and to perform their usual function of visiting prisoner-of-war camps and hospitals and reporting to the Detaining Power any deficiencies which they find in the treatment that the prisoners of war are receiving. Rather than appear to recognize the powers conferred on the International Committee of the Red Cross by the 1949 Geneva Conventions, North Korea responded to the ICRC telegram of June 26, 1950 and to a similar telegram from the Secretary-General of the United Nations sent on July 12, 1950, with the telegram to the latter set forth above.⁵¹ For the next two and one-half (2 ½) years the ICRC continued, without success, its efforts to obtain permission to perform the functions conferred on it by the 1949 Third Geneva Convention.⁵² Eventually,

49. In its slow move towards capitalism, and its desire to maintain and increase its position in the markets of the capitalist countries, the Peoples' Republic of China is, to some extent, loosening these chains. The same cannot be said for North Korea despite its economic chaos.

50. For a disheartening example of the mistreatment of prisoners of war (and civilians) by members of the North Korean army, a country that advised the Secretary-General of the United Nations it was strictly abiding by principles of Geneva Conventions in respect to Prisoners of War, see JOHN TOLAND, *IN MORTAL COMBAT: KOREA, 1950-1953* 255-264 (William Morrow & Co. 1991).

51. See *supra* note 45 and accompanying text.

52. In addition to a denial of the right of Delegates of the ICRC to visit prisoner-of-war camps maintained first by the North Koreans and then by the Chinese Communists, neither of the latter

despite the fact that the ICRC had sent them copies of well over one hundred reports on the results of the inspection visits of its Delegates to UNC prisoner-of-war camps and hospitals, many with critical findings which they caused to be rectified, the Communists indicated their belief that the ICRC was an arm of the UNC by proposing that “joint Commissions should be set up to visit prisoner of war camps after an armistice had been signed. The Commission would be composed of representatives of the North Korean Red Cross, the Chinese Red Cross and the International Committee.”⁵³ Not unnaturally, the ICRC rejected this proposal which seemed to, and was undoubtedly intended to, indicate that the ICRC was a creature of the UNC, rather than an impartial international relief organization.

Probably among the more important provisions of both the 1929 and the 1949 Geneva Conventions Relative to the Treatment of Prisoners of War are those relating to the functions of the Protecting Powers and of the ICRC.⁵⁴ These organs are the only means by which a party to the hostilities can be assured that members of its armed forces who have been captured are receiving the humanitarian treatment mandated by international law. Inasmuch as there were no Protecting Powers during the hostilities in Korea, all of these functions fell upon the ICRC. The ICRC immediately instructed its Hong Kong delegate, Frederick Bieri, to proceed to Tokyo and South Korea in order to perform the humanitarian functions normally performed by the ICRC, particularly in the absence of a Protecting Power.⁵⁵ Bieri, and his successors, were given full access to all UNC prisoner-of-war installations.⁵⁶ However, the Communists, both the

complied with the provisions of the 1949 Geneva Prisoner-of-War Convention contained in Articles 122-125, particularly in Article 123 concerning the Central Prisoners of War Agency charged with collecting and receiving information concerning prisoners of war. Early in the hostilities the North Koreans submitted two lists of prisoners of war, with a total of 110 names. They then discontinued the practice, probably on the theory that lack of information would cause discontent among the families of those men missing in action who might be prisoners of war or might be dead. On the other hand, the UNC provided the Central Agency with 178,000 names, 157,000 of North Koreans and 21,000 of Chinese Communists. See Summary Report of the International Committee of the Red Cross, XVIII International Red Cross Conference, Toronto. July-August 1953, at 72-73.

53. International Review of the Red Cross, March 1952, Vol. V, No. 3, at 54. “The Committee felt that the proposal seemed to imply that it could be considered as the United Nations Red Cross.”

54. See The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, *supra* note 41, Art. 8, 9, and 10.

55. 1 *Conflit de Coree*, *supra* note 43, at 8-9.

56. On December 20, 1952 the British Consulate General in Geneva sent the following letter to the British Foreign Office in London:

** I am sending you herewith by Air Bag two copies, one in French and the other in English of all the reports on P.O.W. Camp visits in South Korea made by the delegates of the International Committee of the Red Cross covering the period July 26, 1950 to

North Koreans at that time and the Chinese Communists later, refused to permit the ICRC to function in their prisoner-of-war camps. Hence, there was no outside neutral organization to oversee the manner in which the UNC prisoners of war were treated in those camps.⁵⁷ For this information we must, therefore, rely on other sources, such as the interrogation of post-hostilities repatriated prisoners of war.⁵⁸

E. The People's Republic of China Joins the War

The Republic of Korea Army (ROKA) was unable to arrest the southward move of the North Korean Army. The troops of the United States who were first brought to Korea to reinforce them were garrison troops from Japan, none of them seasoned veterans. However, these combined South Korean and United States troops did succeed in stopping the North Koreans at the Naktong River, forming the Pusan Perimeter, and

April 7, 1952.

I have obtained these two versions of the reports from Monsieur de Traz Assistant Executive Director of the I.C.R.C. who informs me that the French version has been communicated regularly and exclusively to the North Korean Authorities. The English version has also been communicated regularly to the United States Government (Unified Command), the South Korean authorities and the European office of the United Nations.

British Records Office, Fk 1553/128.

57. Not even their own Communist Red Cross Societies were permitted access to their prisoner-of-war installations. In any event, in view of the fact that both of these Red Cross Societies were merely adjuncts of their Governments, they would have accomplished little had they been permitted to perform the normal Red Cross functions in the prisoner-of-war camps maintained by the North Koreans and later by the Chinese Communists (support for this latter statement will readily be found by reading FACTS CONCERNING THE ATROCITIES OF THE U.S. ARMED FORCES ON PRISONERS OF WAR (Red Cross Society of China 1953) and REPORT ON THE INVESTIGATION OF MEDICAL ATROCITIES AND MALPRACTICES COMMITTED BY THE U.S. ARMED FORCES IN KOREA ON SICK AND WOUNDED CHINESE PEOPLE'S VOLUNTEERS PRISONERS OF WAR, (Red Cross Society of China 1953) both post-hostilities products of the Red Cross Society of China, each of which is 5% fact and 95% propaganda.) Both Societies refused even to accept relief food and medical equipment offered to them by the ICRC and others for the prisoners of war held by their governments.

58. The following testimony was given by PFC John E. Martin on 2 December 1953 during the Hearing before the Subcommittee on Korean War Atrocities of the Permanent Subcommittee on Investigations of the Committee on Government Operations, United States Senate, 83rd Cong., 1st Sess., pursuant to S. Res. 40, Part I, 2 December 1953 (hereinafter cited as Hearings):

They marched us into Chenju about 3 miles away and we met seven more prisoners there. We were met by a man wearing a Red Cross band that he claimed to be a member of the International Red Cross and he said that we would receive shelter and medical care and food.

We had 10 men then. They brought in two wounded men a little while later. One was walking. The other one we had to bring in on the litter. About 5 o'clock that evening the Red Cross, the so-called Red Cross man, came back again and gave us all 6 or 5 little rice cookies about that big around.

Part I, at 28-29. This was, of course, a complete fraud as no member of the ICRC was ever granted access to UNC prisoners of war.

thus retaining control of the last port in South Korea through which troops and supplies could reach the defenders of that country.⁵⁹

Following the amphibious landing of UNC combat troops at Inchon, on the west coast of South Korea, on September 15, 1950, accompanied by a massive UNC attack from the Pusan Perimeter, the North Korean Army was decimated. Thousands upon thousands of its troops were taken prisoner as they were caught in the trap between the UNC troops moving north from the Pusan Perimeter and those moving east and south from Inchon.⁶⁰ The UNC then began moving north,⁶¹ crossing the 38th parallel and occupying Pyongyang, the capital of North Korea. When the North Korean defeat appeared inevitable, Mao Zedong sent Zhou Enlai to inform Stalin that the Chinese Communists had mobilized an army of 500,000 and were prepared to assist the North Koreans.⁶² In October 1950, several Chinese Communist field armies crossed the Yalu and entered the fray.⁶³ Although they were actually field armies of Communist China (now the People's Republic of China), long since completely organized, equipped, trained, and supplied by the Communist government of China, and acting pursuant to orders emanating from Mao Zedong, the Chinese Communist dictator, they adopted and maintained the fiction that they were merely volunteers and insisted on being referred to as the Chinese People's

59. One author of this period has written that [f]or some three weeks [in June-July 1950] the Americans faced disaster after disaster; many of the wounded were murdered in cold blood by the enemy and prisoners of war were bayoneted by their captors in a manner reminiscent of the Japanese during World War II. PETER GASTON, THIRTY-EIGHTH PARALLEL: THE BRITISH IN KOREA 4-5, (A.D. Hamilton, 1976)

60. In MARRHEW B. RIDGWAY, THE KOREAN WAR 31 (Doubleday & Co. 1967), General Matthew Ridgway says:

On September 27, [1950], men of the 1st Cavalry Division, rolling northward, near Suwon, met forward elements of the U.S. 7th Division striking south. The Jaws of the trap had been closed. Now the NKPA began to disintegrate, with tens of thousands of its men flowing into the prisoner-of-war cages hastily erected by the Eighth Army and the X Corps.

Id. On the same subject, another author states that "In August 1950 the UN held fewer than 1,000 POWs. But by November, with the Inchon invasion and the rapid drive into North Korea, the total rose to more than 130,000." JOSEPH C. GOULDEN, KOREA: THE UNTOLD STORY OF THE WAR 592 (McGraw-Hill 1982).

61. On October 1, 1950, ROKA troops crossed the thirty-eighth parallel. On October 2, 1950 Chou En-lai advised the Indian Ambassador that if troops of the United States entered North Korea, China would intervene in the war. Five days later, on 7 October 1950, the U.S. First Cavalry Division crossed the 38th parallel. On 16 October 1950 the first Chinese Communist Volunteers crossed the Yalu and entered North Korea. PROJECT RAND, *supra* note 18, at 93-94.

62. See THE GLASTNOST TAPES, *supra* note 25, at 145-47.

63. "Between mid-October and November 1, from 180,000 to 228,000 crack Fourth Field Army troops crossed into North Korea." PROJECT RAND, *supra*, note 18, at 118. For further data on how the decision was made for China to intervene, see Nikita Khrushchev, KHRUSHCHEV REMEMBERS, *supra* note 25, at 371-72.

Volunteers (CPV).⁶⁴ They immediately became, and remained, the main enemy of the UNC⁶⁵ and took over the management of UNC prisoners of war from the North Koreans.⁶⁶ By the end of the year they had driven the UNC forces back across the 38th parallel and on January 1, 1951, they had retaken Seoul. Their victories also created a problem for the UNC as to what it should do with the thousands of prisoners of war which it held and who, it appeared, would be liberated by the Chinese in their inexorable move south.⁶⁷

F. The End of Hostilities - The Armistice Negotiations

On April 11, 1951, General MacArthur was relieved of his command of the United Nations Command and was succeeded by General Matthew B. Ridgway, former commander of the UNC fighting force in Korea.⁶⁸ Sometime thereafter the Soviet Ambassador to the United Nations made a

64. On several occasions during the armistice negotiations the Chinese representative objected violently to being referred to as the "Chinese Communists" and would insist on the fiction that all of the Chinese were volunteers and should be referred to as the "Chinese People's Volunteers".

65. "Russia lost its unique position as the only important Communist ally of North Korea." PAIGE, *supra* note 24, at 36.

66. On 1 February 1951 the General Assembly of the United Nations adopted a Resolution in which it found that the People's Republic of China "has itself engaged in aggression in Korea." S. DOC. NO. 83-74, *supra* note 1, at 55. One author has stated "the Chinese, when they joined the fray from October 1950, came from the regime which would soon impress upon the world its detachment from prevailing norms of international behavior." GEOFFREY BEST, *WAR AND LAW SINCE 1945*, 352 (Oxford Univ. Press 1994).

67. The following statement appears in MATTHEW B. RIDGWAY, *supra* note 60, at 205-06:

As early as January 6, 1951, I became sufficiently concerned with the problems of what to do about the prisoners of war in our custody to include the subject in my letter to General MacArthur. What we were faced with and what had me worried, was the presence close to the fighting zone of some 140,000 prisoners of war whom we had to feed, water, guard, and care for. It took a substantial fraction (which we could ill spare) of our armed forces just to guard the compounds and it took much of our scanty transportation to carry supplies to feed and clothe and house them. If we had to withdraw from the peninsula, there was their removal to fret about. If we held on, a substantial part of our own logistic effort would have to go to their subsistence, medical care, clothing, even their drinking water.

MacArthur's reply was to inform me he had already recommended the removal of the prisoners to the United States. They could not be brought to Japan, not only because their presence was likely to enrage the populace but because their establishment there might provoke a charge of Japanese belligerency. No immediate decision on removal was forthcoming from Washington.

Id. He does not mention that consideration was also given to moving the POWs to the Ryukyu Islands. GOULDEN, *supra* note 60, at 593 (stating the ultimate decision was to move the POWs to the Korean island of Koje-do).

68. General Ridgway was succeeded by General James Van Fleet as the commander of the UNC forces in Korea.

radio address in which he indicated that there was no reason why the hostilities in Korea could not be brought to an end. The United Nations Command interpreted this as an indication of a desire and willingness on the part of the Communists to end the fighting and an agreement was reached by the military commanders for liaison officers to meet and make the necessary arrangements for discussions at a higher level.

Negotiations for an armistice began at Kaesong on July 10, 1951. Shortly thereafter, the negotiations were moved to Panmunjom at the insistence of the UNC because Kaesong, which had been between the two lines at the time of the negotiations of the liaison officers, had been occupied by the Communists and they presumed to dictate who could enter the area,⁶⁹ while Panmunjom was located in a zone between territories occupied by the two sides. It was declared a neutral zone as were Kaesong (the Communist Armistice Delegation headquarters),⁷⁰ Munsan-ni (the UNC Armistice Delegation headquarters), and the roads leading from each Delegation headquarters to Panmunjom.

It took two (2) weeks to agree on an agenda, principally because the Communists insisted on including in the agenda an item calling for the withdrawal from Korea on both sides of the 38th parallel of all non-Korean armed forces, a matter beyond the authority of the UNC Delegation. As a compromise, the UNC agreed to an item proposed by the Communists by which the military commanders would recommend to their governments that a political conference be held within three months from the end of hostilities.

The negotiations continued for almost a year, with an agreement being reached on all items of the agenda except that relating to prisoners of war, because the UNC insisted on "voluntary repatriation," i.e., that every prisoner of war could make a personal determination as to whether he would return to the country in whose armed forces he had been serving at the time of his capture.⁷¹

69. They also required the UNC convoy to fly white flags, ostensibly for identification purposes, but actually in order to let the dozens of Communist cameramen take pictures which appeared to indicate that the UNC was coming to the Communists on bended knees to secure an end of the hostilities.

70. On numerous occasions the Communists would call the UNC Delegation headquarters, usually at night, to complain of a violation of their neutral zone. It is probable that UNC pilots did, on occasion, inadvertently overfly the Communist headquarters. On one occasion they contended that a UNC plane had dropped a bomb which had failed to explode. I was the liaison officer sent to investigate, accompanied by an Air Force officer. When shown the "bomb", my Air Force assistant whispered in my ear that it was actually a belly tank which was so rusty that it had probably been lying in its present position for months!

71. The UNC was well aware of the fact that early in the course of the hostilities, when the North Koreans had occupied all of the Korean peninsula north of the Pusan Perimeter, they had conscripted every South Korean male of military age, many of whom had subsequently surrendered to or been

In May 1952 the armistice discussions were adjourned indefinitely on the issue of “voluntary repatriation,” and the UNC Armistice Delegation and Staff returned to their normal assignments, remaining available should the need arise.⁷² Then, on March 5, 1953, Stalin died and the Soviet leaders became more interested in internal politics than in the hostilities in Korea. The first indication of a change in attitude on the part of the Communists in Korea was their agreement, announced on March 28, 1953, to the prior UNC proposal for the exchange of sick and wounded prisoners of war. As we shall see, the hostilities ended in an Armistice Agreement signed at Panmunjom on July 27, 1953.⁷³ In a speech delivered on August 5, 1953, Kim Il Sung, still the President (and dictator) of North Korea, said: “Comrades, the armistice signifies a great victory for us.”⁷⁴ However, Kim completely ignored the fact that while North Korea had gained a small amount of territory below the 38th Parallel in the western part of Korea, South Korea had gained a large amount of territory north of the 38th Parallel in the central and eastern parts of the peninsula; and, more important, the Republic of Korea had not been absorbed into North Korea, as had been the basic purpose of the hostilities, but remained a strong, independent nation. Moreover, thousands of Korean and Chinese prisoners of war had publicly rejected life under Communism, certainly not much evidence of a “great victory” for that way of life! Kim’s statement can only be construed as an attempt to justify the mistake he had made in embarking on the war in the belief that the South Korean Communists would rise up and overthrow the government of South Korea and that the North Korean troops would then be able to occupy all of the territory of South Korea practically without opposition before the United States and the United Nations would be in a position to intervene — if, indeed, they did decide to intervene — a belief which he had used to convince Stalin and Mao to assist him in his undertaking for the glory of Communism in the expectation of extending its jurisdiction over millions of people — and all under Kim’s control!

captured by the UNC, and that the great majority of these individuals had no desire to be “repatriated” to North Korea. In addition, it was known that there were many Chinese prisoners of war who had been conscripted into the Chinese Communist army upon the defeat of Chiang Kai-shek and who had no desire to be repatriated to Communist China.

72. The author remained at Munsan-ni as the sole representative of the UNC Armistice Delegation and Staff in order to be available to receive any messages that might emanate from the Communist Armistice Delegation. However, he, too, was ordered back to Tokyo late in June 1952.

73. It is important to bear in mind that an armistice does not end a war, it merely suspends hostilities. See Howard S. Levie, *The Nature and Scope of the Armistice Agreement*, 50 AM. J. INT’L L. 880, 884 (1956).

74. KIM IL SUNG, *supra* note 19, at 36. Similar statements appear throughout his speech.

In 1996 North Korea denounced the Armistice Agreement. What its reason was for this action has never been explained. It is certainly in no condition to undertake another war, particularly as it cannot be assured of either Chinese or Russian support – and it is far from self-supporting. Moreover, in recent years there were efforts to convene a conference to be held in Geneva with representatives of the Republic of Korea, the United States, the People’s Republic of China, and the Democratic People’s Republic of Korea, for the purpose of negotiating a treaty of peace. This author was far from sanguine that such an event would arrive at a meaningful conclusion despite North Korea’s extremely poor economic condition and its lack of adequate food even to feed its own population. The conference did, in fact, accomplish nothing. Since then there have been a number of incidents which demonstrate clearly that the hostilities between the two Koreas continue to exist, although at the moment they are on a restricted scale. How long that situation will continue to exist before it bursts into flames only Kim Il Jong (Kim Il Song’s son and successor) and his advisors know!