



# Law and Policy on Korean Unification: Analysis and Implications

Edited by Jong-Chul Park and Jeong-Ho Roh



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Korea Institute for  
National Unification



COLUMBIA LAW SCHOOL  
CENTER FOR KOREAN LEGAL STUDIES

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# **Law and Policy on Korean Unification: Analysis and Implications**

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*Jong-Chul Park and Jeong-Ho Roh*

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## Preface

The aim of this project is to research the necessity of international cooperation on Korean unification in legal terms as South Korea's Unification Policy and how issues of the Korean Peninsula have been dealt with in the international framework. Since this is the second year of a five-year project, the conceptual aspect requires clarification in the overall aspect and this requires a multidisciplinary approach. But the main focus remains the legal aspect, international law, in particular.

This study assumes that unification will be a gradual process, generally in three stages: (1) inter-Korean cooperation, (2) negotiation for inter-Korean unification (be it North Korea's collapse, or actual inter-Korean negotiation for unification, this stage includes any inter-Korean negotiation for unification and international negotiation formula, such as Six Party Talks, etc.), and (3) post-unification integration. The study begins with the understanding that South Korea needs to be prepared for legal matters potentially arising in these processes. The project this year, in particular, deals with the legal issues that should be dealt with in the first and second stages.

The scope of the papers in this project covers four main areas. The first is time span. The research for this project covers the 19th century to the present and draws future-oriented implications, but the main focus is on current issues. The second is in regard to



approaches. The study deals with three main approaches: historical, political, and legal, but for purposes of this project, the main focus is on the legal aspect. The third concerns the issues addressed. These are the nuclear issue, the military issue, inter-Korean cooperation issues, and the human rights issue. Finally, the scope of actors considered includes South and North Korea, neighboring countries (the U.S., China, Japan, and Russia), and international organizations (e.g., UN, WFP, WHO, etc.).

The papers included here are organized into three main sections. The first concerns the meaning of Korean unification and the context of international cooperation. Park Jong-Chul provides a general overview of the Park Geun-Hye administration's North Korea and unification policy, referred to as "Trustpolitik," and the trust-building process on the Korean Peninsula, as well as the need for international cooperation. Sue Mi Terry examines the U.S. and China's perspective on the issues laid out above. She explores areas where U.S.-China interests converge and diverge and whether strategic cooperation and coordination between the two nations are possible in the case of Korean unification.

The second section presents historical and legal perspectives related to the situation on the Korean peninsula. Charles K. Armstrong's work on the historical perspective is divided into three sections chronologically: (1) the struggle of 19th Century Korea to become a modern sovereign state and its failure with the advent of colonial rule, (2) war leading to the division of the Korean Peninsula, and (3) the inter-Korean situation based on *de facto* recognition (as opposed to *de jure*) as a political entity arising out of the 1972 Joint Communiqué and the "special relationship" from then on. Next, Roh

Jeong-Ho provides a legal approach to the question of inter-Korean relations and the debate on unification by dividing the period from 1876 to the present day into five distinct periods and examining the limitations to the legal order and the evolution of world order as they pertain to Korea. Finally, Leon V. Sigal discusses how international law and institutions might improve South Korean security and facilitate inter-Korean reconciliation with special attention to confidence-building in the West Sea.

The third section examines in greater detail the legal aspects of Inter-Korean Cooperation and human rights. Regarding human rights, it is important to consider the link between inter-Korean cooperation and human rights. The improvement of human rights and people's livelihood in North Korea, which is part of the ultimate goal of unification, can be achieved by inter-Korean cooperation. Inter-Korean cooperation leads to inducing change in North Korea, which then logically leads to the improvement of human rights in North Korea. Lee Hyo-Won focuses on the legal matters regarding the establishment of a DMZ World Peace Park. Soung Jea-Hyen looks at the legal matters regarding the internationalization of the Gaeseong Industrial Complex. Cho Jung-Hyun provides an analysis of the contents and legal implications of the recent outcome of the UN Commission of Inquiry (COI) on Human Rights in the DPRK, such as the meaning of stating "crimes against humanity," the notion of Responsibility to Protect (R2P) in respect to North Korea, and transitional justice in the possible post-unification stage. Finally, David Hawk tracks North Korean human rights developments in the post-COI period.

*Jong-Chul Park and Jeong-Ho Roh*





# I

## **The Meaning of Korean Unification in the Context of International Cooperation**



# South Korea's TrustPolitik and International Cooperation

*Jong-Chul Park*

## **The Concept and Major Features of the Trust-Building Process on the Korean Peninsula**

### **The Concept of TrustPolitik: Trust and Equilibrium**

The key concept of the Park Geun-Hye administration's North Korea policy is trust. Trustpolitik is the most important foundation of South Korean government's policies towards North Korea and other nations. In general, trust has the following meanings:

First, trust has a concept of mutuality. Trust cannot be forged by fulfillment of agreement or duties by a single side. Trust is built only when both parties adhere to agreement and thus forge anticipation for mutual benefits in the future.

Second, trust requires certain conditions and facilitating factors. Along with advantages for fulfillment, disadvantages should be given for breaches. Expectation of sticks and carrots allow both parties to be able to predict each other's action, which in turn starts building trust.

One major reason why both Koreas have failed to build trust is the absence of criteria to assess rewards and sanctions. There are no standards on what rewards or sanctions are given to North Korea depending on its behavior. Because of such an absence of criteria, the two Koreas have not had a strong need to comply with the obligations in many circumstances.<sup>1</sup>

Third, trust is built through the progressive and cumulative process. It is not promoted in a short period of time. Trust is established when a consistent adherence to agreement and exchange of benefits foster reliable relations. Inter-Korean relations can be likened to bricklaying where bricks of trust are stacked one by one. As such, based on already fostered trust, both nations can make a new advance and stabilize their relations.

When inter-Korean distrust is deeply entrenched, finding a proper starting point of trust-building is crucial. In a deep distrust situation, a sincere attempt for trust-building can be subject to suspicion. Also, breaching agreement for a short-term gain undermines trust-building. Even if a bit of trust is built, unexpected accident can make it possible to return to the initial state. As such, trust-building could be completed after overcoming many of these obstacles.

Fourth, trust-building requires domestic support and international cooperation. Trust-building will be turned out a failure without domestic support. In order to succeed, the trust-building process needs domestic support such as the other domestic policies. Patience with continuous trials and errors and ups and downs is essential to

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<sup>1</sup> Ihn-Hwi Park, "Early Assessment and Future Tasks of Trust-Building Process," (Fall Conference, The Korean Association of North Korean Studies, 2013.9.27).

built trust between the two Koreas. Domestic support is accounting for a very important role in the trust-building process.<sup>2</sup>

In addition, trust-building requires international cooperation which upholds and assures agreement between parties and supports the agreement implementation. In order to proceed the Trust-building Process, neighboring nations and the international community need to set up a favorable environment for inter-Korean cooperation and uphold their agreements.

The second key foundation of the Park administration's policy toward North Korea is an alignment policy. Alignment means coordination and adjustment rather than arithmetical or mechanical equilibrium. Here, alignment refers to relative and appropriate adjustment or coordination. Under the alignment policy, an equilibrium point is not static but dynamic, where flexible combination of elements is possible depending on the situation. Dynamic equilibrium can be likened to a tightrope walker who keeps his or her balance step by step and travels from one end of the rope to the other end without falling.

Alignment in inter-Korean relations can be divided into three groups. The first group is intersectoral alignment between security and cooperation. Maintaining strong security, South Korean government has to overcome distrust and improve inter-Korean relations through cooperation. The second group is domestic and international alignment. It is necessary to strike a balance between inter-Korean talks

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<sup>2</sup> Young-Ho Park, "The Park Geun-Hye Government's North Korea Policy: Trust-Building Process on the Korean Peninsula and Its Policy Directions," *Unification Policy Studies*, Vol. 22, No. 1 (2013), pp. 19-20.



and international cooperation. Two Koreas should take the initiative in issues on inter-Korean relations and unification, but at the same time they should be resolved through international cooperation. The third group is alignment of policy measures. There should be equilibrium between negotiations and pressure. South Korea should have a valuable means in negotiations in order to make North Korea comply with agreements.<sup>3</sup>

It is very difficult to maintain a dynamic equilibrium among numerous contradicting elements. Precise judgment and strategical flexibility are most needed to keep the balance in continually changing circumstances.

## **Features of the Trust-Building Process on the Korean Peninsula**

The Trust-building Process on the Korean Peninsula has the following characteristics.

First, the Trust-building Process aims to provide improved North Korea policies after carefully considering achievements and limitations of those from past governments. Although engagement policies and principle-based ones made some achievements, they also have revealed some limitations. In South Korea, five-year single-term presidency made North Korea policies of former governments difficult to be continued and improved in the successive governments. While North Korea's policies toward South Korea

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<sup>3</sup> Geun-Hye Park, "A New Kind of Korea: Building Trust Between Seoul and Pyongyang," *Foreign Affairs*, Vol. 90, No. 5 (2011).

are consistently progressed, North Korea policies of South Korean government has been changed whenever a new administration is formed, which undermines the effectiveness of the policies and loses trust from the people and international society. Considering this issue, the Trust-building Process is trying to prepare a sustainable North Korean policy.

Also, the North Korean policy needs to be flexible and cope actively with changing international circumstances as well as North Korean situations. If the North Korean policy is restricted by principles and stereotypes, the policy becomes less adaptable to ever changing situations. In light of this point, the Trust-building Process will provide reliable and flexible policies depending on shifting situations and the level of trust achieved with North Korea.

Second, the Trust-building Process on the Korean Peninsula attempts to break out of a vicious cycle of armed provocations and attentive talks. North Korea has been trying to maximize national interests by repeating this cycle. Committing provocations, North Korea has intended to cause insecurity in the region and increase political leverage in the negotiations with partners. North Korea tends to regard a negotiation with its partners as a gift to them and attempts to maximize national interests by taking advantage of talks. After satisfied with gains, the North Korea suspends the talks with unconvincing political excuses. Then, it raises tension and makes a new provocation again in the near future.

South Korea and the international community so far have responded passively against irrational actions of North Korea and confused with its negotiation strategies. Whenever North Korea committed provocations, South Korea and the international community stress

security, but when the North extends a gesture for talks, they change their attitude and seek negotiations.

However, the Trust-building Process tries to cope with North Korea's double-sided tactic by securing deterrence against provocations and cooperating appropriately with North Korea in the talks.<sup>4</sup>

Third, the Trust-building Process intends to manage the division and prepare for unification at the same time. The Sunshine Policy put relatively more emphasis on peaceful management of the division and cooperation than unification preparation. The Lee Myung-Bak government deemed unification is elusive without denuclearization and changes of North Korea. It stressed denuclearization and changes of North Korea as conditions for inter-Korean cooperation and highlighted the need to be prepared for any type of unification at any time.

The Trust-building Process seeks for peaceful division management and prepares for unification simultaneously. It moves towards normalization of the inter-Korean relations for peaceful division management. At the same time, the Trust-building Process emphasizes increasing internal capabilities of South Korea to prepare for unification and strengthening diplomatic ties with other countries to be supported.

Fourth, the Trust-building Process requires gradual progress. To the extent that trust only can be established through the gradual approaches, the Trust-building Process does not focus on tangible

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<sup>4</sup> Jong-Chul Park, "Characteristics and Challenges of the Trust-Building Process on the Korean Peninsula," *Journal of Peace and Unification*, Vol. 3, No. 2 (2013), pp. 9~13.

results or events, but plans to withdraw fruitful outcomes gradually raising the level of trust.<sup>5</sup>

Fifth, the Trust-building Process seeks to loosen the link between North Korean nuclear issues and the inter-Korean relations. Ever since the North Korean nuclear issues emerged in the early 1990s, they have been working as an decisive factor which determines a structural nature of the inter-Korean relations. In general, the inter-Korean relations have been improved where there is any progress in resolving the North Korean nuclear issues. However, when they are reaching a deadlock over the issues, the relations have been worsened.<sup>6</sup>

The Trust-building Process understands the gravity of the North Korea nuclear problems. Given that the nuclear issues cannot be resolved in a short time, it exerts all the efforts in order to improve the inter-Korean relations amid the deadlock. Furthermore, the Trust-building Process is continuously providing humanitarian aid, progressing inter-Korean talks, and proceeding reciprocal exchange and cooperation to secure the ties between the two Koreas.

Sixth, the Trust-building Process attempts to establish a multidimensional network in cooperation. It aims to build trust between the two Koreas, in the international community, and within South Korea. Its primary goal is to restore inter-Korean trust and improve the relations. In addition, South Korea needs to secure international support for better inter-Korean relations and convinces international

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<sup>5</sup> Jong-Chul Park, "Development and Prospect of Inter-Korean Relations under the Park Geun-Hye Administration," *Diplomacy*, Vol. 106 (2013).

<sup>6</sup> Jong-Chul Park, *et al.*, *Assessment of the 2000s' North Korean Policies and Policy Alternatives: Principles and Tasks of A Simultaneous Virtuous Cycle Model* (Seoul: KINU, 2012), pp. 31~56.

community that peace on the Korean peninsula and unification will contribute to world peace and development. Also, domestic support and cooperation are prerequisites to establish trust with North Korea and the international community. Eventually, those three dimensions of trust-building should form a virtuous cycle where one dimension positively affects the other.

Seventh, the Trust-building Process is multi-layered. It encompasses nuclear and peace issues, economic, social, and cultural exchanges and cooperation, humanitarian aid, reinforcement of unification infrastructure, and peace and cooperation in Northeast Asia, which forge a multi-layered structure where they affect each other. Rather than drawing a road map for each area, the Trust-building Process seeks a flexible action plan considering North Korea's expected reactions and internal and external environment. As unexpected situations may cause a road map to be failed, it aims to set up primary tasks and execute them according to strategical flexibility.

Eighth, the Trust-building Process is going to utilize multilateral networks. A variety of parties are involved in the inter-Korean relations including the governments, civic groups, individuals, other nations, and international organizations. Each of these parties has different influence on different issues and forms diverse policy cooperation networks or coalitions depending on their interests. The Trust-building Process aims to strengthen national capabilities implementing policies related to unification by coordinating each actor's roles and establishing cooperative networks.<sup>7</sup>

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<sup>7</sup> Ihn-Hwi Park, "Trust-Building Process on the Korean Peninsula: Theoretical Analysis and Internationalization Strategy," *Unification Policy Studies*, Vol. 22, No. 1 (2013).

# **The Vision and Preparation for Unification of the Korean Peninsula**

## **The Vision of Korean Unification**

### *Diplomacy and Security: A Nuclear-Free and Peaceful Nation and A Bridge for Peace in Northeast Asia*

A unified Korea will pursue a nuclear-free and peaceful nation. By declaring its nuclear-free policies, a unified Korea will contribute both in Northeast Asia and the international community to establishing “nuclear-free world.” In addition, its nuclear-free policies will promote international cooperation on the purpose of the peaceful atomic energy uses as well as impeding the spread of nuclearization in the region. The peaceable image of a unified Korea as a nuclear-free nation will foster global trust and its national brand.

Also, a unified Korea will promote peace. A peacefully unified Korea is going to set a peaceful resolution of disputes as a primary objective of foreign policies. To integrate two Koreas and resolve after-shocks of unification, a peaceful environment is required, for which a unified Korea will focus more on a means of peaceful negotiations and diplomatic capabilities than that of military power.

Furthermore, a unified Korea will promote multilateral security cooperation in Northeast Asia. The Six-party Talks which currently aims to resolve North Korea nuclear issues can be evolved into a multilateral organization for peace in the region. Experiences of multilateral cooperation are acquired in the process of negotiating the issues, which can be applied to dialogue for the establishment

of “Northeast Asia Peace Community.” A unified Korea will be able to build a network among various civic groups and quasi-civil consultative groups in relation to Northeast Asia multilateral security cooperation. And also, it will be able to turn the network into an official body.

Particularly, a unified Korea will serve as a facilitator of peace and prosperity in the region. It will spread a sense of community across the region, contributing to its peace and prosperity. Also, a unified Korea is expected to become a buffer state preventing clashes between marine powers and land powers. In other words, it will be a bridge state in preventing conflicts and promoting cooperation in the region.

Additionally, a unified Korea is expected to be a peace maker which maintains and spreads regional stability. As China is rising as a super power in the region, the possibility of U.S.-China conflicts is growing. Also, the region is ridden with a number of aggravating factors including Japan’s militarization and shift to the right as well as growing nationalism in the region, history-related conflicts, and territorial disputes. A unified Korea will promote peace in the region by stopping aggravation and mitigating conflicts. While putting an end to conflict and divide-ridden modern history of the region by building trust, a unified Korea will become a conflict mediator facilitating settlement of conflicts among neighboring nations.

At the same time, a unified Korea will be able to serve as an issue initiator and an institution builder which presents regional agenda for shared prosperity of the region. It will be also able to lead multi-

lateral cooperation in terms of proposing agenda on comprehensive issues such as environment, health, climate, anti-terrorism, territorial disputes, military confidence building, cooperation on energy and railways.

***Economy: An Eco-friendly and High-Tech Nation and Promotion of Northeast Asia Economic Cooperation***

A unified Korea will establish an environment-friendly development model considering future growth engines, integrating the high-tech industry and the IT industry and leading green growth. Also, based on its competitiveness in cutting-edge areas such as IT, computer engineering, biotechnology, and genetic engineering, a unified Korea will present an eco-friendly and high tech-intensive development model.

Additionally, a unified Korea will contribute to the establishment of an inter-Korean economic community. A unified Korea will concentrate its efforts on North Korea's transition to market economy, integration of the two Korea's economic systems, and development of a new nation. The economic integration between Korea's heterogeneous systems will give lessons for that of the region's different economic systems.

At the same time, a unified Korea will increase mutual economic (e.g. trade, investment, etc.) dependence among Northeast Asian nations and facilitate regional infrastructure (e.g. energy, railways, etc.) initiatives. As Korean unification will remove some of security risk factors, economic cooperation in the region is going to be



activated. Then, a unified Korea will emerge as a regional hub of trades and logistics which connects the Eurasian Continent with the Pacific Ocean.

Building regional infrastructure will help institutionalize regional multilateral cooperation. As products made in neighboring nations are exported through the Korean Peninsula to Europe and the U.S. and large-scale initiatives such as a Siberia natural gas development project and Tumen River Area Development are promoted, multilateral economic cooperation in the region will be accelerated. In particular, capitals, manpower, and technologies from around the world will be utilized for energy resource and transport network development projects such as the Siberian project. In addition, multilateral cooperation in Northeast Asia will become active, when neighboring states upbuild ways of multilateral cooperation for recovery of North Korean economy.

Finally, North Korea's transition to market economy and economy restoration will provide a momentum for economic cooperation both in the peninsula and Northeast Asia. It will make a new chance of investment not only for Korean investors but also for foreign ones, which will further infrastructure building, logistics, and transfer of technologies and capitals in the region, laying a foundation for regional economic cooperation.

### ***Society: A Complex Cultural Model and Cultural Exchanges in Northeast Asia***

A unified Korea will make contribution to the region's socio-cultural cooperation in the fields of culture, art, and tourism and show its

creative capabilities as a cultural nation. Since both Koreas have rich historical and cultural assets, they have potentials to become a cultural powerhouse. A unified Korea will foster a momentum to build a new country as well as social and cultural dynamism, providing a model of cultural nations. Also, combining hard power, soft power, statecraft, and international networks, a unified Korea will rise as a creative cultural nation.

Additionally, a unified Korea will pursue a complex cultural nation, overcoming cultural biases, adapting its traditional culture to the global trend based on open nationalism, and importing foreign cultures. At the same time, it will remain open and adopt characteristics of various cultures to create a complex culture. It will integrate distinctions and creativity of its traditional culture, western culture, and Asian one and create a new culture. A unified Korea will serve as an intermediary of multicultural exchanges and interactions, and shape a new culture and even spread it across the world. It will lead regional culture by becoming a melting pot of different cultures while promoting a salad bowl of different cultures.<sup>8</sup>

A unified Korea will facilitate human and cultural exchanges in socio-cultural areas of Northeast Asia. It will promote the exchanges in education, academics, and tourism, furthering socio-cultural exchanges and cooperation in the region in particular.

Also, a unified Korea will help expand educational exchanges in Northeast Asia. As education demand grows in the North after unification, Northeast Asian nations can join together and forge an edu-

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<sup>8</sup> Jong-Chul Park, *et al.*, 2020 *Advanced Korea's National Strategies (I): Security* (Seoul: KINU, 2006), pp. 124~125.

cational network, which will help shape the region's community culture and identity.<sup>9</sup> A unified Korea will boost cooperation among young Northeast Asians and foster regional human resources by facilitating education programs.

## **Significance and Tasks of the Unification Preparation**

To accomplish unification, proper preparation and efforts are necessary. Whenever and however unification is earned, South Korea should prepare for it in every manner to peacefully manage the unification process and settle post-unification issues.

The Park administration proposed “establishment of a foundation for a peaceful unification” as one of four major government tasks, highlighting the importance of laying a foundation for unification. Also, in her 2014 New Year's speech President Park mentioned unification bonanza for the first time and expressed her views about unification preparation several times.

“Establishment of a foundation for a peaceful unification” presented in President Park's 2014 new year's speech can be divided into three tasks. The first one is establishment of peace on the Korean Peninsula. A key issue is denuclearization of North Korea, for which President Park stressed international cooperation and a variety of solutions. The second task is humanitarian aid and recovery of

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<sup>9</sup> The adoption of “CAMPUS Asia” as a new cooperative program at the 3rd Korea-Japan-China Summit in May 2011 also aimed to foster future leaders who understand each other thanks to education based on Northeast Asia's shared values. Pilot program for the Korea-China-Japan University Student Exchange Program “CAMPUS Asia” started, May 18, 2011, <<http://english.mest.go.kr/web/42208/en/board/enview.do?bbsId=265&tboardSeq=23>>.

homogeneity of South and North Koreans. To this end, President Park emphasized humanitarian aid to the North, expansion of civilian exchanges, domestic and international NGO cooperation on agriculture and cattle farming, and careful support for defectors. The third is international cooperation to be supported for Korean unification, which aims to utilize the Northeast Asia Peace and Cooperation Initiative and the Eurasia Initiative, helping every nation in the region and creating a virtuous cycle of Korean unification and regional prosperity.

In her speech at the first inauguration anniversary on 25th February, 2014, President Park stressed the importance of unification preparation once again and announced a plan to launch the Presidential Committee on the Preparation for Reunification to gather opinions about unification and draw a blue print for a unified Korea. As planned, the committee was launched in July.

Also, President Park made the “Dresden Declaration” on 28th March in Dresden, Germany in order to lay a foundation for peaceful unification. Among its three agenda, Agenda for Humanity includes plans for family reunion and UN-backed maternity and child support. Secondly, for Agenda for Co-prosperity, the administration announced it will establish agricultural complexes to develop North Korea’s agriculture, livestock industry, and forestry at the same time; invest in constructing transportation and communications infrastructure in the North; and pursue Korean Peninsula-Russia joint projects (e.g. the Najin-Khasan project) and Korean Peninsula-China joint projects (e.g. the Sinuiju Project). Third, to pursue Agenda for Integration, the administration plans to support history studies, cultural heritage projects, sports exchanges, education programs for future

generations. To this end, setting up the Inter-Korean Exchange and Cooperation Consultation Office was suggested.

In addition, in her 69th Liberation Day speech, on August 15th, President Park proposed an idea of “small unification,” giving shape to unification preparation tasks and her Dresden Declaration. “Small unification” is a micro idea that turns a macro idea of “unification bonanza” into more practical actions. It also seeks to build mutual trust of South and North Korean people by taking non-military and non-political daily life actions and practical actions.

The starting point of unification preparation is normalizing the erratic inter-Korean relations. To this end, it has been pointed out that North Korea must change its course first. President Park’s Liberation Day speech stressed that North Korea must abandon its nuclear program first and learn from Kazakhstan which successfully developed its economy by giving up nuclear weapons and receiving economic and technologic supports as well as Vietnam and Burma which chose openness and reforms, developing their economy.

Also, three small channels were proposed as inter-Korean action plans. Through small channels, both Koreas can join, communicate, and blend together. When those small channels become connected to each other and grow further, they can forge a broad path towards unification. Those channels should give a chance to South and North Korean people to meet together and exchange goods, information, and technologies.

The first channel is a channel of environmental cooperation. To be specific, divided ecosystems on the peninsula should be linked and restored to create a single environmental community. As a primary

task, joint management of rivers and forests was proposed. Management of rivers shared by both Koreas such as the Imjin River and the Bukhan River is necessary for flood control and the use of rivers. Then, integration and restoration of the Baekdudaegan ecosystem may be sought. At the same time, forestation and pest control are also important. President Park invited a North Korean delegation to the U.N. Convention of Biological Diversity COP to be held in Pyeongchang in October 2014. As North Korea is a party of the convention, it has the right to attend the conference. If it does, both Koreas can set an exemplary case where they seek ways of environmental cooperation, supported by the international community.

The second channel is the livelihood of people. Its goal is to improve the livelihood of South and North Korean people. The purpose of inter-Korean cooperation does not lie at a quantitative increase or an expansion of cooperation but at happiness of South and North Koreans. In particular, North Koreans' right to survive should be first guaranteed.

The priority of the second channel is placed on family reunion. Given many of separated families are of advanced age, family reunion is an urgent issue. Family reunion should be held regularly, and desirable ways to progress massive simultaneous reunions are needed. Also, to improve North Koreans' livelihood, a customized humanitarian aid is required. The maternity and child aid project presented in the Dresden Declaration will be the first priority.

To improve North Korean's livelihood and living conditions, housing, agriculture, forestry, and river management as well as environmental protection should be pursued simultaneously. A good model for this purpose is establishment of agricultural complexes. A way

to utilize South Korea's know-how and experience on rural development, living condition improvement, and forestation should be prepared in order to build livelihood infrastructure in North Korea.

The third is a cultural channel. To truly unite the two nations, it is necessary to bridge the gap between the two different cultures. A recovery of homogeneity of Koreans requires a cultural approach to unification. Cultural integration also emphasizes that unification should not stop at external unification in political and legal terms but encompass internal and cultural integration.

To develop the cultural channel, joint discovery and preservation of cultural assets is most necessary. Cultural cooperation is easier to seek inter-Korean cooperation since it is neither political nor militaristic issue. Current projects including the Gaeseong Manwoldae excavation project, the Unabridged and Unified Korean Dictionary project, and the Gaeseong traditional house preservation project should be more facilitated.

In addition, President Park offered a cultural project where both Koreas can celebrate the 70th Liberation Day 2015. As the project requires inter-Korean talks, it will be contributing to improvement of inter-Korean relations.

Considering President Park's unification ideas, preparation of unification has the following characteristics. First, unification preparation is a basis of the state affairs, which involves the inter-Korean relations, diplomacy, and security. Unification preparation covers almost every aspect from politics, security, diplomacy to education, and culture. To prepare for unification, unification should be assigned as the nation's primary goal and the direction of state affairs

need to be adjusted. Beyond that, in order to achieve unification, there should be constant assessment of how each area is preparing for unification.

Second, unification preparation policies towards South Korea, North Korea, and the international community need to be equally balanced and simultaneously implemented. So far, those towards North Korea have taken the most part of unification policies. However, to achieve unification, unification capabilities are necessary domestically and also those toward the international community are essential to gain their support. Therefore, along with North Korean policies domestic and foreign policies should be considered crucial for unification preparation.

Third, the Park administration's unification preparation emphasizes genuine integration of the lives of both peoples and the recovery of homogeneity. So far, unification debates have focused on a political and legal unification, but to create a truly united Korea it is vital to promote the peoples' mutual understanding and co-existence before a political unification and enhance homogeneity after unification. The administration's unification preparation initiative gives priority not only to a political and legal unification but also a practical unity of the peoples.

Fourth, the initiative aims at a "big unification" through a "small unification". In the past, unification strategies that focused on ideologies, political, and military issues aggravating inter-Korean conflicts and confrontations. Given that, it is necessary to lay a foundation of unification step by step with actionable and sustainable policies. The "small unification" initiative intends to build a path towards unification by creating small channels on the environment, the livelihood,



and cultures where the peoples can understand and help each other.

Fifth, unification should ultimately pursue happiness of the peoples. Preparing for unification itself should improve their quality of life. The unification process as well as the post-unification integration process should particularly contribute to promoting North Koreans' rights and quality of life. At the same time, unification also needs to contribute to regional security and to raise quality of lives living in the Northeast Asia.

Sixth, unification preparation should provide a “navigation towards unification” which leads the way to unification and helps avoid obstacles. It needs to help the Koreas reach their final destination of unification fastest and most safely, avoiding any stumbling block. It also means preparing guidance on unification visions, process, and post-unification integration.

## **The Meaning and Tasks of the Northeast Asia Peace and Cooperation Initiative**

While economic exchanges and cooperation are on the rise in Northeast Asia, conflicts have remained in politics and security, which is called the Northeast Asia Paradox. Though the region is most economically vibrant in the world and shares of regional exchanges and investment are growing, Northeast Asia is ridden with political and military conflicts. Territorial disputes in the region have long been unsettled with no prospect of solutions. Also, the region has conflicted over history issues while China and Japan are increasing their

spending on military force. Among others, the North Korean nuclear issues are the key factor destabilizing security of the region.

Despite such instability and disputes in the region, Northeast Asia does not have any multilateral cooperation to resolve the issues. Although the ASEAN Regional Forum exists to deal with multilateral security issues in the Asia-Pacific region, its role regarding Northeast Asia's issues is limited. Also, the issues cannot be fully addressed by the Northeast Asia Cooperation Dialogue (NEACD) which is a 1.5-track dialogue participated by government officials, scholars, and experts from six Northeast Asian nations.

The practical solutions to overcome the Paradox in the Northeast Asia are an institutional approach and a functional one. The former is to build an intra-regional institutional consultative group. However, given that the nations have different and contradicting interests, launching a multilateral body seems elusive. The latter is to seek cooperation on non-political, non-military, and non-traditional issues first.

It would be easier with non-traditional security issues to urge participation of regional nations. All nations in the region are related to the non-traditional security issues which are very difficult to be treated by a single nation. The issues require participation of every related nation and jointly prepared solutions. Also, they provide benefits to all related nations. However, a multilateral frame cannot deal with disputes over territories, history, arms race, and North Korea's nuclear program owing to different interests of each country in the region.

Soft issues which can draw attention from related nations in Northeast Asia include climate, environment, energy, disaster relief, and cyber terrorism. Climate and environmental issues such as global warm-

ing, flood, drought, and yellow dust are well-known global issues. At the same time, South Korea and Japan as well as China urgently need an efficient use of energy and development of alternative energy sources. As seen in the case of the Fukushima Daiichi nuclear disaster, regional energy security issues require all related nations to be involved in solving a grave calamity. Non-traditional security is associated with human security, which is a universal issue related to the right to live safely with dignity.

The Northeast Asia Peace and Cooperation Initiative (NAPCI) is meaningful as a first step promoting peace and cooperation in the region. It is desirable to seek cooperation on an area where it is most urgent and multilateral cooperation is possible. An advantage of such a functional multilateral cooperation can be also found from the case of the European Union. The most certain way is to gradually promote cooperation on less sensitive issues first and build trust.

The key issue of the Northeast Asia Peace and Cooperation Initiative (NAPCI) is to lead North Korea into the frame of the initiative. So far, North Korea has a negative attitude towards the initiative. To encourage its participation, it is necessary to present benefits of the initiative clearly. For example, South Korea may convince the North that it can clean up its image of a terrorism-supporting country, receive humanitarian aid from the international community, prevent large-scale disasters, and have international assistance in times of disasters.

Meanwhile, President Park also provided detailed plans for the initiative in her Liberation Day speech. She proposed a nuclear safety consultation body as a pilot project to lessen regional conflicts and confrontations and lay a foundation for cooperation. In

Europe after World War II, the European Atomic Energy Community (EURATOM) and the European Coal and Steel Community helped the region resolve conflicts and foster peace. As in Northeast Asia nuclear safety issues are on the rise, the Park administration attempts to launch an organization to seek safety measures and lay the groundwork for multilateral cooperation.

## **International Cooperation for Korean Unification**

In its first year 2013, the Park administration tried hard to gain support from neighboring nations and the international community for the Trust-building Process on the Korean Peninsula and broaden its diplomatic influence. In the second year 2014, its diplomatic resources are focused on establishing a foundation for peaceful unification. While former governments concentrated on division management and peace, the Park administration has aimed for unification diplomacy and widely invested its diplomatic resources in securing international conditions and regional and international cooperation for unification.

To earn global support for unification, first a multi-layered international cooperation network is necessary. While unification should be led by the two Koreas, international cooperation is obviously required. The significance of unification diplomacy is already proven by the so called “two-plus-four diplomacy” in which Germany secured cooperation of the U.S., the U.K., France, and the Soviet Union based on the two Germanys’ unification negotiation.

Governance of unification diplomacy is also essential to gain the support. Primarily, South Korea needs to discuss unification with major parties and at the same time reinforce a strategic dialogue. Unification should be assigned as a major agenda on the table of bilateral diplomacy with the U.S., China, Russia, and Japan. In addition, expanding a unification network to middle powers is highly required. By utilizing MIKTA (the cooperative mechanism of key middle powers, Malaysia, Indonesia, South Korea, Turkey, and Australia), South Korea should build a network of middle powers supporting unification.

In order to forge an international cooperative network, inter-governmental channels should be used, and expanding public diplomacy towards citizens of the international community is also important. Thanks to an advance in media and the internet, public opinion has a great influence on international issues and people unite globally for certain issues. Therefore, the Park administration should execute public diplomacy to build a complex network of political circles, media, academics, and civic groups in major parties and the international community.

At the same time, international cooperation is required to progress inter-Korean cooperation for unification. While the International Committee of the Red Cross is needed for family reunion, assistance of the U.N. is necessary for maternity and child aid. Furthermore, in terms of livelihood infrastructure, Germany and European NGOs may participate into agricultural and forestry projects along with development aid from international organizations such as the U.N. and the World Bank. Education programs for the recovery of homogeneity also should be supported by international community.

The DMZ Peace Park needs cooperation with the U.N. and other international bodies, and it is needless to say that resolution of the North Korean nuclear issues require international coordination. In addition, the international cooperation is necessary to have North Korea join an international financial body, attract investment from the world, and establish a Northeast Asia development bank.

Then, what should unification diplomacy cover? It is essential to highlight that unification will not only secure peace and development on the peninsula but also promote peace and economic cooperation in the region as well as world peace. Also, it should be well pointed out that unification will fundamentally remove the region's biggest risk factors, the North Korean nuclear issues and military tension on the Korean Peninsula. At the same time, the vision that Korean unification will open a new chapter of Northeast Asia's economic cooperation needs to be more widely shared with neighboring nations and the international community.

## REFERENCES

- Park, Jong-Chul *et al.* 2020 *Advanced Korea's National Strategies (1): Security*. Seoul: KINU. 2006.
- \_\_\_\_\_. *New Approaches and Action Plans of Korean Community Unification*. Seoul: KINU, 2010.
- \_\_\_\_\_. *Assessment of the 2000s' North Korean Policies and Policy Alternatives: Principles and Tasks of A Simultaneous Virtuous Cycle Model*. Seoul: KINU, 2012.
- Park, Geun-Hye. "A New Kind of Korea: Building Trust Between Seoul and Pyongyang." *Foreign Affairs*. Vol. 90, No. 5, 2011.
- Park, Jong-Chul. "Development and Prospect of Inter-Korean Relations under the Park Geun-Hye Administration." *Diplomacy*. Vol. 106, 2013.
- \_\_\_\_\_. "Characteristics and Challenges of the Trust-Building Process on the Korean Peninsula." *Journal of Peace and Unification*. Vol. 3, No. 2, 2013.
- \_\_\_\_\_. "Comparison of North Korean Engagement Policy and Co-Prosperity Policy: Challenges and Strategic Choices." *The Lee Myung Bak Administration's North Korea Policy: Visions and Directions*. Seoul: KINU, 2008.
- Park, Ihn-Hwi. "Trust-Building Process on the Korean Peninsula: Theoretical Analysis and Internationalization Strategy." *Unification Policy Studies*. Vol. 22, No. 1, 2013.

Park, Young-Ho. "The Park Geun-hye Government's North Korea Policy: Trust-Building Process on the Korean Peninsula and Its Policy Directions." *Unification Policy Studies*. Vol. 22, No. 1, 2013.

Park, Ihn-Hwi. "Early Assessment and Future Tasks of Trust-Building Process." Fall Conference of the Korean Association Of North Korean Studies, 2013.9.27.





# U.S.-China Rivalry and the Unification of the Korean Peninsula

*Sue Mi Terry*

## Introduction

If and when Korean unification occurs, it will constitute a decisive strategic change in Northeast Asia, and it will have great implications for the balance of power in the region. Depending on how various political, military, economic, and regional factors play out, the outcome of the unification process could range from highly problematic and violent to relatively manageable and even beneficial.

Iraq's descent into chaos in the days after the toppling of Saddam Hussein's regime serves as a vivid reminder of the dangers associated with the collapse of a government and the need for detailed planning before it occurs. The consequences of a poorly planned response to instability or regime collapse in North Korea preceding unification are potentially calamitous. Strong and forthright cooperation among the great powers, particularly between the U.S. and China, will be essential to mitigating the negative consequences of unification and ensuring that it winds up benefitting the entire region. The time to start such cooperation is now, because by the time that North Korea is collapsing (if that is how unification comes about), time will be

at a premium. The longer it takes to organize humanitarian efforts, the higher the number of North Koreans who might perish or flee the country. The longer North Korean WMDs are left unsecured, the greater the risk that they will disappear across international borders.

But standing in the way of cooperation are very different interests and assessments that divide the U.S. from China, particularly over whether and how to intervene in the North. The central aim of this paper is thus to explore how American and Chinese leaders currently view the prospects of Korean unification and to examine whether the policy trajectories of Washington and Beijing can be more closely aligned. Will unified Korea inevitably be an arena for heightened U.S.-China rivalry or is strategic cooperation and coordination between the two nations possible?

In addressing this question, this paper will first analyze the current state of U.S.-China relations in the areas of nuclear, military/security, human rights, and inter-Korean relations and identify convergence and divergence points. The paper will then conclude with an assessment of the likely roles Washington and Beijing will play in the unification process and, finally, offer recommendation for policymakers in Seoul and Washington.

## **The Nuclear Issue**

The hierarchy of Chinese strategic interests on the Korean Peninsula is reflected in Beijing's long-standing policy of, in descending order, "no war, no instability, no nukes." In other words, Chinese leaders officially pursue a policy of peace, stability, and denuclearization on

the Korean peninsula, in that order.<sup>1</sup>

Beijing opposes Pyongyang's nuclear program for a number of reasons. First, Beijing worries that the North's acquisition of nuclear weapons will lead to arms race in the region and cause Japan, South Korea, and even Taiwan to potentially develop nuclear capabilities.<sup>2</sup> Secondly, Beijing understands that if North Korea proliferates nuclear materials and technology to another state or a terrorist organization, it is likely to lead to U.S. intervention. The U.S. could consider a strike against a North Korean target once a nuclear proliferation "red line" has been crossed, which then has the potential of escalating into a wider conflict involving China. Ultimately, Beijing is also concerned that in a South Korea-led unification scenario—which is the most likely unification scenario—a unified Korea will inherit the North's nuclear arsenal.<sup>3</sup> Beijing would rather have unified Korea be free of nuclear weapons whether or not unified Korea will keep an alliance relationship with

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<sup>1</sup> Hong Lei, China's Ministry of Foreign Affairs spokesman, said on April 8, 2013, that China remained focused on "unremitting efforts to safeguard peace and stability on the peninsula while it seeks to push forward the denuclearization process," <<http://www.china-un.org/eng/fyrth/t1030030.htm>>.

<sup>2</sup> Ok-Joon Kim, "The Major Reasons of China's Active Role in North Korea Nuclear Issue," *The Korean Journal of Unification Affairs*, Vol. 16, No. 1 (2004), p. 313; "China Must Not Let North Korea Go Nuclear," *Global Times*, June 2, 2012; Bonnie S. Glaser and Brittany Billingsley, "Reordering Chinese Priorities on the Korean Peninsula," *Center for Strategic and International Studies* (November 2012), p. 2.

<sup>3</sup> Dingli Shen, "North Korea's Strategic Significance to China," *China Security*, Vol. 2, No. 3 (Autumn 2006), p. 27. Often when Korea scholars talk of unification scenarios, broadly speaking, three alternative unification scenarios are mentioned, each with its own variations: 1) integration and peaceful unification where unification is achieved through the North's gradual adaptation of China's economic model, leading to closer relations between the two Koreas; 2) collapse of the North Korean regime followed by an external intervention and absorption by the South; and 3) unification through a military conflict.

the United States.<sup>4</sup>

Consequently, despite many differences and rivalry over security and other issues, Chinese and American interests do converge on the issue of North Korea's denuclearization, and the two nations continue to collaborate to counter the nuclear and missile programs in the North. The problem is that Washington and Beijing differ in the prioritization of the goal of denuclearization. That is, while both countries would like to see North Korea denuclearize, China does not see the North's nuclear programs as an existential threat while the U.S. is much more worried about the threat posed by the North's nuclear weapons to South Korea, Japan, and other allies, as well as to the United States itself. Besides concerns about the possibility of a transfer of nuclear weapon technologies, fissile material, and know-how from North Korea to another state or a terrorist group, senior U.S. commanders now warn that North Korea has likely already achieved warhead miniaturization. The ability to place nuclear weapons on its medium-range missiles and reach the continental United States obviously adds to the sense of urgency for Washington policymakers.<sup>5</sup>

Washington and Beijing also differ on the level of pressure that should be applied to the North to bring about the goal of denuclearization. It is true that Beijing in the past few years has grown increas-

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<sup>4</sup> Bonnie S. Glaser, *et al.*, p. 2.

<sup>5</sup> Bruce Klingler, "U.S. General: North Korea Now Has Nuclear Warheads for Missiles," *The Daily Signal*, October 27, 2014. "The U.S. Defense Intelligence Agency concluded more than a year ago with 'moderate confidence' that North Korea might have a nuclear weapon that's small enough to be placed on a ballistic missile."

ingly aggravated by the provocative and erratic behavior of the Kim Jong-Un regime. The execution of Jang Song-Thaek, Kim Jong-Un's uncle and China's key interlocutor with the North Korean leadership, in December 2013 came as a great shock to Beijing and introduced new uncertainties into the North's relationship with China.<sup>6</sup> As a result, Beijing's disenchantment with its erstwhile ally has even allowed a vibrant domestic debate in China about whether the North has become more of a liability than an asset and whether serious readjustment in Chinese policy is required.<sup>7</sup>

Still, for all its internal debate and rhetoric about the importance of denuclearization, Beijing is not willing to implement strong punitive measures that might push North Korea to relinquish its nuclear weapons.<sup>8</sup> The consensus view in Beijing is that even if it took punitive measures, they would not succeed in forcing North Korea to abandon its nuclear weapons. And by doing so China would run

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<sup>6</sup> Andrew Scobell, "A Death in the Family," *U.S. News and World Report*, January 21, 2014.

<sup>7</sup> Semi-governmental Chinese newspapers such as the *Global Times* have openly challenged the strategic value of North Korea to China. Some academics in public institutions agree that China should recalibrate its North Korea policy to better serve its own strategic interests. Satirical jokes about the North Korean leader, Kim Jong-Un, abound on the Chinese Internet. In the words of one China analyst, "China should righteously say 'no' to North Korea's irresponsible behavior that threatens regional peace and stability." Chen Xianqiang, "China Should Control the Strategic Initiative on Peninsula Issue," *China Institute of Contemporary International Relations* (April 16, 2011), cited in Stephanie Kleine-Ahlbrandt, "China's North Korea Policy: Backtracking from Sunnylands?," *38 North, US-Korea Institute at SAIS*, July 2, 2013. Also see Ren Xiao, "China Debates How to Handle North Korea," *Asia Times*, July 23, 2013; Xie Tao, "What's Wrong with China's North Korea Policy?," *Carnegie-Tsinghua Center for Global Policy* (March 26, 2013); David Shambaugh, "Coping with a Conflicted China," *Washington Quarterly*, Vol. 34, Issue. 1 (Winter 2011), pp. 7~27.

<sup>8</sup> *Ibid.*

the risk of aggravating North Korea's internal woes and increasing the odds of regime collapse. As a result, Beijing has concluded for the time being that it is willing to live with a nuclear North Korea for some time to come, even as it emphasizes continued diplomatic efforts to reverse North Korea's nuclear weapons' development. And as in the past, Beijing's policy will diverge from that of Washington in that it will continue to avoid serious pressure or other risky initiatives on their own, and is likely to wait for the actions of others or changed circumstances that will increase the prospects of curbing North Korea's nuclear challenge.

## **Military-Security Arena**

In the general, non-nuclear security arena, there is more obvious divergence between China and the United States. While Beijing is increasingly frustrated with its errant neighbor, China has not disowned or fully distanced itself from North Korea in the security sphere. China's primary concern on the Korean Peninsula is in preventing armed conflict, with avoiding large-scale unrest and regime collapse as a close second. China still maintains military alliance with North Korea. The 1961 Sino-North Korean Treaty of Friendship, Cooperation, and Mutual Assistance obligates China to defend North Korea against unprovoked aggression although the Chinese leaders have on multiple occasions stated publicly and privately that Pyongyang cannot assume that Beijing will come to the rescue in a conflict provoked by North Korea, leaving considerable ambiguity as to if and when the security pact might be invoked by

Beijing.<sup>9</sup> Meanwhile, the U.S. and South Korea have a Mutual Defense Treaty, signed on October 1, 1953, little more than two months after the signing of the armistice that ended the Korean War. The central provision of that treaty is an affirmation that if either country is attacked again, the other will go to its aid. To fulfill U.S. treaty obligations, over 28,000 of U.S. troops are currently deployed in South Korea and are working together with South Korean forces in a joint military command structure that has no parallel outside of the NATO alliance.

As China scholars Andrew Nathan and Andrew Scobell have noted in their book, *China's Search for Security*, leaders in Beijing appear to think of national security in terms of four concentric “rings”: the first ring is a domestic one which equates to internal security with the territory China administers (i.e. “domestic” threats, including Taiwan, Tibet and Xinjiang); the second consists of a ring directly proximate to Chinese territory which includes countries adjacent to China; the third ring is more expansive multistate regional systems encompassing China's wider Asia-Pacific neighborhood including Northeast Asia, continental Southeast Asia, and Central Asia; and the fourth ring encompasses the rest of the world, including Europe, the Middle East, Africa, and the Americas.<sup>10</sup> North Korea firmly belongs in the second ring, which extends beyond China's actual borders to include all 20 neighboring countries. In the second ring,

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<sup>9</sup> The text of the treaty can be found in *Peking Review*, Vol. 4. No. 28 (1961), p. 5. See also Andrew Scobell, *China and North Korea: From Comrades-in-Arms to Allies at Arm's Length* (Carlisle Barracks, P.A.: U.S. Army War College, 2004), pp. 19~20.

<sup>10</sup> See Andrew Nathan and Andrew Scobell, *China's Search for Security* (New York: Columbia University Press, 2012), especially chapter 5.



China faces a crowded and suspicious geopolitical environment and, as such, this area constitutes a band in which Beijing seeks to maintain stable and sympathetic—or at minimum neutral—regimes and deny presence or access to the military forces of external powers (read: the United States).<sup>11</sup> North Korea is perhaps the most important of these neighboring states because of the great sensitivity of the Korean peninsula—it is located in intimate proximity to China’s political and economic center and stands as a blockade against U.S. forces located in the southern half of the peninsula.<sup>12</sup>

Since North Korea is situated on China’s doorway, not only could instability south of the Yalu River emit northward but also any military actions by the U.S and its South Korean ally in the event of a North Korean regime collapse would send shockwaves rumbling across Sino-North Korean borders. In Beijing’s mind, then, the prospect of instability in North Korea means the disintegration of the barrier—“lips” to China’s “teeth”—and raises the specter of U.S. and R.O.K. forces operating north of the DMZ.<sup>13</sup>

Given Beijing’s heightened sensitivity to instability across the Sino-North Korea border, Washington is concerned that Chinese intervention could come quickly if the North implodes or erupts in civil war. In December 2013 and January 2014—almost immediately after Jang Song-Thaek was executed—a series of major exercises occurred in China’s Liaoning Province, which borders North Korea,

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<sup>11</sup> *Ibid.*

<sup>12</sup> Andrew Scobell and Mark Cozad, “China’s North Korea Policy: Rethink or Recharge?,” *US Army War College Quarterly: Parameters*, Vol. 44, No. 1 (Spring 2014), p. 58.

<sup>13</sup> *Ibid.*

including one in which the number of participating PLA soldiers from the 16th and 39th Army Groups of the Shenyang Military Region was reported to be as many as 100,000. While China's Ministry of National Defense insisted that "the drill is a normal military exercise to train soldiers to fight in winter and long-range conditions," PLA sources describe winter-time drills of this size and scope as highly unusual, and a number of China scholars speculated that they were training in preparation for Korean peninsula crisis.<sup>14</sup>

At a bare minimum, in the event of a regime collapse in North Korea, Beijing will seek to prevent a flood of refugees into China. This will require cordoning off an area south of the Yalu River and establishing refugee camps. Beyond its immediate goals of stabilizing the border and preventing an influx of refugees, how far will China go in intervening? Certainly China would send the PLA to its border, but would it send the troops beyond the border into North Korean territory? It could, especially if China is worried about nuclear weapons getting loose and desirous of preempting American action. The specter of Chinese forces racing south while U.S. and South Korean troops race north is of the greatest concern to both powers given the experience of the Korean War and a climate of suspicion that continues to exist between the two countries.

A small step toward trying to dispel that climate of suspicion was taken during the course of the APEC Summit in Beijing in November 2014 when the U.S. and China signed a series of agreements in

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<sup>14</sup> "PLA mobilizes 100,000 troops for North Korean border exercise," *Want China Times*, January 15, 2014; "Shenyang Drills were 'Regular Training' MOD," *Global Times*, January 21, 2014; Paul Joseph Watson, "China Mobilizes 100,000 Troops in Preparation for Korean Peninsula Crisis," *Infowars*, January 16, 2014.

the military sphere that will help the two countries reduce the risk of a military confrontation.<sup>15</sup> The agreements establish a framework for cooperation in the event that either side takes any large-scale military actions, requiring the parties to notify each other in advance of any such steps.<sup>16</sup> The agreement further reflected progress made on defense ties since the Sunnylands summit in California between Presidents Xi Jinping and Barack Obama in June 2013. The need for better military relations has been further underscored lately because there has been an increase in incidents in areas unrelated to the Korean Peninsula (in particular, because of China's inclusion of East China Sea territory in its air defense zone) that could draw the U.S. and China into conflict.

But the significance of this new accord should not be exaggerated. All of the issues that have raised tensions between the U.S. and China remain, in particular China's steady acquisition of maritime power projection capabilities, growing tensions over territorial issues along China's maritime periphery, and a growing sense in China that the U.S. is in economic decline and destined to be overtaken by China as the next great superpower. And the Korean peninsula will remain a hot spot and sore point in U.S.-Chinese relations.

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<sup>15</sup> "Report: US, China Agree on Military Protocols," *Stars and Stripes*, November 12, 2014.

<sup>16</sup> *Ibid.*

## Human Rights

Significant divergence also remains between Washington and Beijing over human rights concerns in North Korea. Improving the quality of life for average North Korean citizens remains an important U.S. interest, albeit less pressing than denuclearization and deterring a North Korean attack on its allies. But for Beijing, not only are human rights concerns in the North the least of its priorities, it actually adopts policies that enable human rights violations in the North.

In North Korea, there has been no discernible improvement in human rights since Kim Jong-Un assumed power. The North Korean regime continues to impose absolute totalitarian rule. Some 80,000 to 120,000 North Koreans, including children, are imprisoned in Soviet style gulags where many perish from forced labor, inadequate food, and torture by guards. Arbitrary arrest, detention, torture, execution, enforced disappearance and lack of due process are pervasive problems. North Koreans must live in a state that violates a person's right to freedom of thought, expression, and religion, and right to freedom of movement and residence. The North Korean regime tolerates no independent media or civil society organizations or any basic freedoms, and the people are regularly subjected to food shortages and even famines—violations of their “right to food.”<sup>17</sup>

The United Nations Commission of Inquiry (COI), set up in 2013 to investigate the “systematic, widespread, and gross human rights viola-

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<sup>17</sup> “Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea,” *UN Doc. A/HRC/25/CRP.1*, February 7, 2014.

tions” in North Korea, has implicated China for facilitating North Korea’s crimes against humanity.<sup>18</sup> The COI’s 400-page report points out that over a period of two decades, China has forcibly returned tens of thousands of North Koreans, almost all of who have been subjected to “torture, arbitrary detention, summary execution, forced abortions and other sexual violence.”<sup>19</sup> The majority of the North Koreans who have fled to China in recent years are women, including many who were pressed into sexual slavery as prostitutes, Internet pornography workers, and “brides” for Chinese men. If Beijing repatriates a woman who is pregnant, North Korea either forces her to undergo an abortion or if the baby is born, infanticide is committed, driven by official ideology that emphasizes the importance of maintaining the purity of the Korean race at all costs.<sup>20</sup> The father is presumed to be Chinese and North Korea’s regime considers babies born by these women to be “impure.” The widespread occurrence of these crimes is facilitated by the climate of impunity that prevails in the interrogation detention facilities. Besides rape, at minimum, all women repatriated are forced to undergo invasive body searches conducted by ordinary guards using unsanitary techniques. The nude “pumping” and vaginal searches are carried out in the presence of other prisoners.<sup>21</sup>

Nevertheless Beijing’s longstanding policy is to deny refugee status to North Koreans. Rather, Chinese authorities pursues a rigorous policy of tracking down, arresting, and forcibly repatriating North Koreans who cross the border illegally.<sup>22</sup> The COI challenges China’s

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<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*, pp. 339~367.

<sup>20</sup> *Ibid.*, p. 336.

<sup>21</sup> *Ibid.*, p. 335.

claims that those North Koreans entering China illegally are “economic migrants” rather than “refugees” *sur place* because of the severe punishments they face if they are forced back to North Korea.<sup>23</sup> It then calls on China to halt its collaboration with North Korean security agencies, such as State Security Department, Ministry of People’s Security, and Korean People’s Army, in identifying and forcing back North Koreans and to extend asylum to persons fleeing North Korea. COI Chair Michael Kirby has even cautioned China that its officials could be “aiding and abetting crimes against humanity” by sharing information with North Korea’s security bodies and forcibly turning back those who try to escape. At the very least, China is a party to the UN Convention against Torture, which provides that “No state party shall expel, return, or extradite a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.”<sup>24</sup>

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<sup>22</sup> Rhoda Margesson, Emma Chanlett-Avery, and Andorra Bruno, “North Korean Refugees in China and Human Rights Issues: International Response and U.S. Policy Options,” (Congressional Research Service, 2007.9.26), <<http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA473619>>.

<sup>23</sup> As defined by United Nations High Commission for Refugees, refugees *sur place* are not persons who are refugees when they leave their country. They become refugees at a later date because of a valid fear of persecution upon return. The 1951 Refugee Convention sets out in Article 1 that a refugee is a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.” UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status: Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees*, paragraphs 94 and 95, HCR/IP/4/Eng/REV/11, Reedited Geneva, January 1992.

<sup>24</sup> See, “The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>>, Article 3.

China's response to date has been defensive and at odds with Washington's policy on human rights in the North. It has not enacted legislation to codify its obligations even though it has been a party to the Refugee Convention since 1982 and a party to the Torture Convention since 1988. The more fundamental question is, however, whether over the longer term, China will see it in its interests to modify its policies?

There is good cause for Beijing to take umbrage at North Korea's policies. The forced abortions carried out by North Korea on repatriated women have been clearly racially based because these women have become impregnated by Chinese men and the infanticide perpetrated against babies are entitled to Chinese nationality. Furthermore, allowing North Korean security agents free reign to carry out abductions or murder on the Chinese side of the border is an infringement of China's sovereignty. Violating the international refugee convention so deliberately through forcible repatriations also smears Beijing's reputation in the international community.

There is, thus, reason for China to rethink its stance on North Korean human rights but scant reason to believe that it will do so. Barring a major change from China, it is likely that North Korean human rights will remain another area of contention between the U.S. and China.

## **Inter-Korean Relations and Unification**

China does not offer its views on Korean unification in any great detail, which reflects its continued support for the status quo “two Korea” policy. To publicly oppose unification would offend Koreans on both sides of the parallel, so at least officially, China supports Korean unification as long as it occurs “peacefully” and through the efforts of the Korean people themselves. In reality, Beijing supports the division in the hope of ensuring a friendly nation on its north-eastern border that would provide a buffer between China and the democratic, pro-American South Korea, home to 28,500 American forces. After all, it was the specter of American forces permanently stationed close to the Chinese border that prompted Mao Zedong to intervene in the Korean War in 1950.

For these reasons China has appeared content with the status quo of a divided Korea and has worked to reduce the chances of another Korean war rather than promoting unification. China’s policy is to encourage a North-South dialogue, with an emphasis on the pending issues being solved by the Koreans themselves.

China has continued to pursue a normal state-to-state relationship with North Korea, believing that this was the best means to preserve the status quo, protect China’s interests, and increase its influence in Pyongyang. Unfortunately, the failure of these policy goals has been fully revealed by the recent purge and execution of Jang Song-Thaek, who was a chief channel of Chinese influence into the elites in Pyongyang. Still, China’s acute risk aversion to any shift its North Korea policy persists, and it is uninterested in exploring the possibilities of a different relationship with Seoul and Washington.



To maintain the status quo, China continues to play a decisive role in providing sustaining the North Korean economy, and hence essential lifeline to the regime itself. An estimated 80 percent of North Korea's foreign trade is conducted with China.<sup>25</sup> The bulk of foreign investment in the North, predominantly extraction of mineral resources, port development, and closely related infrastructural commitments, are emanating from Beijing, with business enterprises and provincial authorities in China's northeastern region playing a key role.<sup>26</sup> China's trade with North Korea has also steadily increased in recent years. In 2013, trade between Beijing and Pyongyang grew by more than 10 percent from 2012 to \$6.5 billion.<sup>27</sup> Beijing also continues to be the primary source of the North's energy (90%), food (45%), and consumer goods (80%), including luxury goods for the elites, and fertilizer which is needed for the agricultural sector. The *yuan* is the most widely traded foreign currency in the North, exceeding the role of the dollar and the euro.

While China supports the North Korean status quo, the United States broadly supports South Korea's vision of a reunified Korea under the control of Seoul. North Korea has proven to be one of the most vexing and persistent problems in U.S. foreign policy ever since 1950. The threat has not declined with the end of the Cold

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<sup>25</sup> Emma Chanlett-Avery and Ian E. Rinehart, "North Korea: U.S. Relations, Nuclear Diplomacy, and Internal Situation," (Congressional Research Service, 2014.12.5), p. 10. Also see for background information, Dick K. Nanto and Mark E. Manyin, "China-North Korea Relations," (Congressional Research Service, 2010.12.28).

<sup>26</sup> Drew Thompson, "Silent Partners: Chinese Joint Ventures in North Korea," *A US-Korea Institute at SAIS Report* (February 2011), p. 22.

<sup>27</sup> Beina Xu and Jayshree Bajoria, "The China-North Korea Relationship," *The Council on Foreign Affairs*, updated on August 22, 2014.

War, as many once expected that it would. North Korea continues to pose major risks to U.S. and regional security interests, including not just the threat of an attack on South Korea that would put U.S. troops in harm's way but also the ultimate threat of nuclear proliferation or even possibly in the future the threat of actual attack on the American mainland from a North Korean ICBM armed with a nuclear warhead. Even though the United States has never had formal diplomatic relations with North Korea, three U.S. administrations going back to the days of Bill Clinton in the 1990s have tried to address the threat through negotiations—at first bilateral and then multilateral through the six-party mechanism. Such talks, in whatever form, have failed in their goal of achieving complete North Korean denuclearization.<sup>28</sup>

Given this reality, Washington is showing signs that it understands its policy towards the Korean peninsula cannot be limited to seeking denuclearization of the North and that it needs to fundamentally alter its strategic calculus in favor of unification. In a panel discussion on Korean reunification, former U.S. Ambassador to Seoul Kathy Stephens articulated the U.S. desire for “shared prosperity, shared peace and genuine stability.”<sup>29</sup> She added that “we support

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<sup>28</sup> The path of negotiations has proven no more promising in the era of Kim Jong-Un than during the days of his father or grandfather. The first bilateral agreement concluded on February 29, 2012 with the new supreme leader of North Korea—the so-called “Leap Day” accord involving the provision of aid in return for freezing some nuclear and missile activities—fell apart after Pyongyang launched a satellite in April 2012 in a clear violation of that agreement as well as of several United Nations Security Council resolutions. Mark Fitzpatrick, “Leap Day in North Korea,” *Foreign Policy*, February 29, 2012.

<sup>29</sup> Evan Ramstad, “U.S., Japan, Russia on Reunification: Good!,” *The Wall Street Journal Asia*, April 8, 2011, <<http://blogs.wsj.com/korearealtime/2011/04/08/u-s-japan-russia-on-reunification-good/>>.

reunification—too long postponed, too long delayed, too tragically prolonged—by peaceful means and in accordance with the wishes of the Korean people.”<sup>30</sup> Clearly this places the U.S. and China even more at odds because China has given no indication that it is rethinking its opposition to reunification on South Korean terms.

It would be a positive step forward if Stephens’ words are a reflection of official U.S. policy but, if so, it would place the U.S. and China even more at odds because China has given no indication that it is rethinking its opposition to reunification on South Korean terms.

## **Alignment or Divergence on the Korean Peninsula?**

In sum, U.S. and Chinese interests on the Korean Peninsula both converge and diverge. Start with areas of convergence. Neither Washington nor Beijing sees its interest served by a military conflict and both nations oppose the North’s nuclear program. China realizes that the North’s ballistic missiles are an important impetus to U.S. national missile defense and theater missile defense, neither of which is desired by China. Beijing realizes that the North’s nuclear weapons could provoke an arms race in the region and undermine the nonproliferation regime, which Beijing, as a nuclear power has an interest in preserving. For these reasons, China’s concerns with North Korean nuclear weapons and ballistic missiles programs are in many ways comparable to U.S. concerns.

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<sup>30</sup> *Ibid.*

However, there are significant divergences in priorities between Washington and Beijing. Denuclearization is of paramount importance to the United States, but China ranks eliminating nuclear weapons as a lesser priority and will pursue that goal only by means that will not threaten peace and stability. The United States does not have an interest in promoting instability in North Korea, but it does not share China's interest in preserving stability at all costs. Beijing attaches far less importance to the provision of basic human rights for the North Korean people, although it has strong interests in the implementation of economic reforms. And whereas Beijing fears the unification of North and South Korea and seeks to forestall that outcome as long as possible, Washington shares Seoul's aspiration for a unified peninsula.

Given these competing priorities, how will Washington and Beijing deal with the prospect of Korean unification?

## **Washington, Beijing, and the Lack of Unification Dialogue**

Korean unification can unfold in a variety of different scenarios, from a "soft landing" in which South and North peacefully decide to reunify to a "hard landing" in which unification occurs after North Korean collapse or even a second Korean War. It is impossible to predict and prepare for every detail of every such scenario. However, regardless of whether unification comes quickly or slowly, explosively or implausibly, the most disputed element of any scenario will be the point at which surrounding powers deem North Korea to

have ended as a viable sovereign state. This is the critical threshold point for when external intervention might start to take place.

It is highly likely that there will be disparate interpretations of this metric, particularly from Washington and Beijing. Washington, concerned with securing nuclear weapons, is more likely to define the “collapse” of the Kim regime in political terms—that is, once there are initial signs of political discontinuity and a precipitous erosion of the Kim family’s control. Beijing, however, will define this metric very conservatively through legal definitions of sovereignty to preserve North Korea as a buffer state until there is clear evidence of near-total chaos inside the country. Bridging this gap is important because it could define subsequent longer-term cooperation between the two nations on transition imperatives.

Another major issue focuses on the competing demands of stability versus legitimacy. Past cases of state collapse have taught us there are immediate tasks that need to be undertaken for the purposes of securing stability. These include establishing law and order, providing humanitarian relief, fostering indigenous political leadership, border control, securing WMD, disarmament of conventional weapons, and deterrence or defeat of any military resistance. The need to act quickly to secure stability is enhanced by the overriding political imperative to show the subject population, North Koreans in this case, in relatively short order that life under the new situation is better than under the old one. But the past cases have shown that the efficacy of such actions in fostering a longer-term transition is significantly undercut if they are not seen as politically legitimate by both the internal and external actors. Charging in with a grand plan from the outside may secure stability, but it may not be seen as legitimate

by all. In the Korean case, finding the balance between stability and legitimacy, therefore, will be critically important. First-movers into a collapsing North Korean state may be trying to act in the name of efficiency, but will they necessarily be seen as legitimate? Washington is likely to support South Korea, which will undeniably see itself as the party with the most legitimate authority to act. But China is likely to focus on a longer timeline for intervention and only see a protracted UN process as legitimate. This is another area where U.S.-Chinese talks could do much to dispel dangerous confusion.

The problem is that, thus far, multilateral planning that involves China has been stymied. Despite increasingly showcasing its displeasure with the North particularly this year, China has been, and remains, reluctant to provoke the North by coordinating plans for its demise with its “enemies.” Beijing is concerned that open discussion of a North Korean collapse could increase the probability that it occurs. And, as previously noted, it dreads a North Korean collapse leading to South-led unification for a variety of reasons. Thus there has been a total absence of dialogue between Washington and Beijing on the crucial issues that could determine the success or failure of Korean unification.

## **The Road Ahead: Preemptive Diplomacy, Planning, and Coordination**

Miscommunication, misunderstandings, and competing strategic interests between the U.S. and China could complicate a coordinated multilateral response to a North Korean regime collapse. If

sufficiently severe, miscommunication and misunderstandings could even lead to an inadvertent conflict between the two powers attempting to intervene militarily on the Korean peninsula, particularly if a collapse of the North is sudden and dramatic. Therefore preemptive diplomacy is critical. American efforts to shape the political and security environment through dialogue with China, prior to collapse in the North, could provide the foundation for a coordinated, broader multinational approach in managing the transition to a reunified Korea. A key objective for such discussions should be assuaging China's concerns over any potential military deployments that the U.S. might deem necessary for defensive and counter-proliferation purposes.

Before involving Beijing, Washington and Seoul should first launch a deliberate and intensive diplomatic effort with each other to augment current joint military planning with a coordinated political, diplomatic, economic, and legal strategy to tackle the core unification issues likely to arise. Both sides have much to gain from this process: South Korea's Unification Ministry and other agencies could contribute years of expertise devoted to precisely this scenario, while the U.S. could contribute lessons learned from its experiences, good and bad, with nation-building in states such as Germany, Japan, Kosovo, Iraq, and Afghanistan.

Once a common vision is developed, the U.S. and South Korea should then actively encourage China's participation in trilateral talks. South Korean and U.S. officials could make the case to Beijing that unification would be in its interest too. Unification of the Korean peninsula could replace its expensive transfers of fuel, food, and other goods to Pyongyang with capital investments that yielded

income. And once it stopped propping up the most despotic regime in the world, Beijing would find it easier to portray itself as a responsible international stakeholder.

A unified Korea ruled from Seoul would also provide stability along the border, which would result in increased trade and other economic benefits. China's economic relationship with South Korea is already extremely close. In 2013, the total trade volume between China and South Korea surpassed over \$270 billion, which is more than the value of South Korea-U.S. and South Korea-Japan trade combined.<sup>31</sup> Unified Korea would be a further economic dynamo for China, particularly in the northern region, contributing to investment and cross-border prosperity. It would also permanently end the refugee problem posed by Northern poverty.

Most importantly for China, in a unification scenario, pressure could increase for U.S. forces to leave the Korean Peninsula because the threat from North Korea will be gone. Currently the threat from North Korea serves as one of the primary justifications for U.S. commitment in Northeast Asia, as well as for its missile defense program. With North Korea gone, there will be less justification for the U.S.-led missile defense system in the region. If Beijing were to think strategically, it might be able to see that a unified Korea will be able to provide more stability in the region and, ultimately, for China and that it is in China's interest to manage the unification process as peacefully as possible.

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<sup>31</sup> Kang-Kyu Lee, "Discussion Nears Conclusion on China-South Korea FTA," *Asia Briefing Ltd.*, October 10, 2014; "Chinese President Xi Jinping's Visit to South Korea," (IIT Madras China Studies Center Article, 2014.7.9), <<http://www.csc.iitm.ac.in/?q=node/494>>.



This will not, to be sure, be an easy sell in Beijing, but if the message is delivered patiently and persuasively it may start to sink in with the Chinese Politburo. Chinese receptivity to such a message may have increased because of the growing strains between Beijing and Pyongyang. Instead of standing by, hoping that China will change its policy toward the North on its own, Washington and Seoul should be working hard in behind-the-scenes talks to make China understand that a unified Korea could be in its interest as well as ours, and that continuing to provide the Kim family dynasty with a virtual blank check is a strategic liability for China.

Even if such talks don't succeed in the short term, simply the process of initiating them and continuing them over a long period could increase China's comfort level with the unification of the Korean peninsula. And that, in turn, could be the key to ensuring that Korean unification, when it eventually occurs, occurs in as orderly a manner as possible while avoiding some of the worst-case scenarios associated with this massive geopolitical shift.

## REFERENCES

- Nathan, Andrew James and Andrew Scobell. *China's Search for Security*. New York: Columbia University Press, 2012.
- Scobell, Andrew. *China and North Korea: From Comrades-in-Arms to Allies at Arm's Length*. Carlisle Barracks, P.A.: U.S. Army War College, 2004.
- Kim, Ok-Joon. "The Major Reasons of China's Active Role in North Korea Nuclear Issue." *The Korean Journal of Unification Affairs*. Vol. 16, No. 1, 2004.
- Scobell, An and Mark Cozad. "China's North Korea Policy: Rethink or Recharge?." *U.S. Army War College Quarterly: Parameters*. Vol. 44, No. 1, Spring 2014.
- Shambaugh, David. "Coping with a Conflicted China." *Washington Quarterly*. Vol. 34, Issue. 1, Winter 2011.
- Shen, Dingli. "North Korea's Strategic Significance to China." *China Security*. Vol. 2, No. 3, Autumn 2006.
- Glaser, Bonnie S. and Brittany Billingsley. "Reordering Chinese Priorities on the Korean Peninsula." *Center for Strategic and International Studies*. November 2012.
- Xianqyang, Chen. "China Should Control the Strategic Initiative on Peninsula Issue." *China Institute of Contemporary International Relations*. April 2011.

*Asia Business News.*

*Asia Times.*

*Foreign Policy.*

*Global Times.*

*The Daily Signal.*

*Wall Street Journal.*

*Want China Times.*

38 North. <<http://38north.org>>.

Carnegie-Tsinghua Center for Global Policy. <<http://www.carnegiet-singhua.org>>.

Congressional Research Service. <<http://www.loc.gov/crsinfo>>.

Council on Foreign Relations. <<http://www.cfr.org>>.

Federation of American Scientists. <<http://www.fas.org>>.

IIT Madras China Studies. <<http://www.csc.iitm.ac.in>>.

Infowars. <<http://www.infowars.com>>.

Office of the High Commissioner for Human Rights. <<http://www.ohchr.org>>.

Peking Review. <<http://www.marxists.org>>.

Permanent Mission of the People's Republic of China to the UN. <<http://www.china-un.org/eng>>.

Stars and Stripes. <<http://www.stripes.com>>.

U.S. News & World Report. <<http://www.usnews.com>>.

U.S.-Korea Institute at SAIS. <<http://www.uskoreainstitute.org>>.

United Nations High Commissioner for Refugees. <<http://www.unhcr.org>>.





# II

## **The Situation on the Korean Peninsula: Historical and Legal Perspectives**



# An Unfinished Project: Challenges and Struggles of Korea to Become a Modern Sovereign Nation-State

*Charles K. Armstrong*

## Introduction

The division of Korea in 1945 split in half a country that had been one of the most culturally and geographically unified societies in world history. From at least the beginning of the Goryeo dynasty in the early tenth century, if not the Silla unification of the Three Kingdoms in the late seventh century, Korea existed as a unified polity.<sup>1</sup> Culturally and linguistically, there have been no major divisions in

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<sup>1</sup> Korean historians on both sides of the DMZ continue to debate the true beginnings of “unified” Korea. Whereas in the South there had once been a consensus that Korean unification began with Silla’s conquest of Baekje and Goguryeo in the 660s, more recently South Korean scholars have argued that the period from Unified Silla until the founding of Goryeo was one of “North-South division” between Silla, which occupied the southern two-thirds of the peninsula, and Balhae, which extended from the northern boundary of Silla into Manchuria. In North Korea, the standard interpretation of Korean history is that unification was not realized until Goryeo. See Yong-Ho Choe, “An Outline History of Korean Historiography,” *Korean Studies*, Vol. 4 (1980), pp. 1–27.



Korea for many centuries. The geographical boundaries of Korea are exceptionally well defined by world standards, the current Korea-Japan dispute over Dokdo notwithstanding. Territorial integrity, cultural unity, and political sovereignty are the key defining features of the modern nation-state.<sup>2</sup> If in modern times the nation-state has been the primary form of large-scale human community and the locus of ultimate political authority, Korea could combine the nation-state's essential elements as well as or better than any other society on earth. Yet the great irony of Korea's modern history is that Korea has never existed as a modern, unified, independent nation-state. Korea's unitary sovereignty was cut short by Japanese colonial annexation in 1910, just as the Joseon dynasty was attempting to re-invent Korea as a modern nation-state. Immediately after liberation from Japanese colonial rule Korea was divided by the Soviet Union and the United States, who had defeated Japan in World War II; in 1948 two separate states were established, followed by a brutal North-South war less than two years later. Since the Korean War armistice of 1953, the two Koreas have been locked in mutual antagonism despite periodic breakthroughs in inter-Korean relations beginning with the North-South Joint Communiqué of 1972.

This chapter seeks to put Korea's division, and potential unification, in historical context. It focuses on the reasons for Korea's loss of sovereignty in the twentieth century; the factors leading to division and war after colonial liberation; and the bases for the continued division of the country decades after the end of the Cold War. In particular, I wish

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<sup>2</sup> Korea can be considered specifically an "ethnic nation," where ethnic identity and territorial integrity coincide. See Walker Connor, "A Nation is a Nation, Is a State, Is an Ethnic Group, Is a . . ." *Ethnic and Racial Studies*, Vol. 1, No. 4 (1978), pp. 377~400.

the address the question of why the two Koreas seem to remain stuck in the “1972 system”: de facto but not jure recognition of one another as separate entities co-existing in a “special relationship” that is neither international nor intra-national. Despite their stated common goal of unification, neither North nor South Korea have conceded sovereignty to the other to any significant degree, and the prospect of gradual and voluntary integration in the manner of the European Union seems quite unlikely. But however unification were to occur, the merger of North and South would create a Korean nation-state that, in some important respects, would be unprecedented.

## **Sovereignty, Imperialism and Geopolitics at the Turn of the Twentieth Century**

For well over a millennium, Korea participated in an “international system” that included states on the Korean peninsula, in continental East Asia, and in the Japanese and Ryuku archipelagos. The names and distribution of states, density of interaction, and violence of contact varied widely over time; there were numerous wars, pirate raids, and border clashes, but there was also a complex set of trade and diplomatic practices that became increasingly systematized, especially during the early Joseon period (1392~1592).<sup>3</sup> To call this “international relations” in the modern sense—that is, a global sys-

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<sup>3</sup> Kenneth R. Robinson, “Centering the King of Chosŏn: Aspects of Korean Maritime Diplomacy, 1392-1592,” *Journal of Asian Studies*, Vol. 59, No. 1 (February 2000), pp. 109-125.

tem of interaction based on legalized norms of behavior among equal sovereign states—would be anachronistic, but it would also be misleading to draw too strong an opposition between the “Western” system of international relations and the “traditional” East Asian interstate order. For many decades, the predominant view of Western (and many Asian) scholars has been that traditional East Asia was characterized by a “Sino-centric” system in which China was the Central Kingdom demanding “tribute” from its neighbors, some of whom (notably Korea) could be considered “civilized” based on their adherence to Chinese-derived cultural practices, while others were “barbarians” (*yi*).<sup>4</sup> This so-called “tributary system” was fundamentally hierarchical and culturally specific. On the other hand, the modern system of international relations is generally thought to originate in the history of European states and specifically the Treaty of Westphalia in 1648, which ended the Thirty Years’ War and established a set of equal relations among sovereign states in Europe, a system of relations that would eventually become the bases of modern world order.<sup>5</sup> In fact, both the Sino-centric “tributary system” and the European-cum-global “Westphalian System” are highly problematic notions when set against the actual history of interstate relations in Europe and East Asia. A clearer understanding of both “systems” helps to explain Korea’s loss of sovereignty in the early twentieth century and the country’s subsequent fate.

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<sup>4</sup> The idea of a Sino-centric “tributary system” was popularized by Harvard scholar John K. Fairbank in the 1960s, and has had a lasting influence on East Asian studies to this day. See John K. Fairbank (ed.), *The Chinese World Order* (Cambridge: Harvard University Press, 1968); Key-Hiuk Kim, *The Last Phase of the East Asian World Order: Korea, Japan, and the Chinese Empire, 1860~1882* (Berkeley: University of California Press, 1980).

<sup>5</sup> Henry Kissinger, *World Order* (New York: Penguin Press, 2014), especially pp. 11~48.

On the East Asian side, sovereignty and territorial boundedness were highly developed by the early modern period, more so than in much of Europe. Not least, the authority of the sovereign—the king or Emperor—was firmly established over the territory of the state, and there were no competing supranational authorities such as the Catholic Church in Europe. The political boundary between Joseon and China, or for that matter between Joseon and Japan, was also a cultural boundary: Koreans were highly conscious of their “local customs” (*tosok*) distinct from their continental and insular neighbors.<sup>6</sup> Relations between states in pre-modern East Asia were explicitly unequal, and Joseon’s relationship with Ming and Qing China was ostensibly one of subordination, embodied in the term “to serve the Great” (*sa dae*). Only the Chinese Emperor could be the “Son of Heaven,” while the Joseon monarch was merely “king” (*Wang*). On the other hand, China rarely interfered in Joseon’s internal affairs, and Korea exercised a great deal of de facto autonomy through much of its history. Western terms such as “vassal” and “tributary,” rooted in a European imperial tradition going back to ancient Rome, are inadequate if not misleading when applied to pre-modern East Asia.

If the relationship among East Asian states during the early modern period was one of hierarchy in theory and sovereign autonomy in practice, the Eurocentric system of the late nineteenth century was almost the opposite. The Peace of Westphalia did not usher in a new “international system” in 1648, even in Europe, where the idea of a Christian universalism would continue for another two centuries.<sup>7</sup>

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<sup>6</sup> Martina Deuchler, *The Confucian Transformation of Korea: A Study of Society and Ideology* (Cambridge: Harvard University Asia Center, 1995), p. 123.

<sup>7</sup> Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge, U.K.: Cambridge University Press, 1995), p. 137.

Furthermore, the principle of religious self-determination—*cuius regio, eius religio* (“whose realm, his religion”)—invoked by the Westphalia treaties to end the Thirty Years’ War, did not apply outside of Christendom. The Europeans distinguished between the civilized (Christian) and the barbarian (non-Christian) as firmly as did the Chinese, if not more so. Westphalia did not establish the basis of modern international relations even in theory, much less in practice, and not until the middle of the twentieth century would sovereign equality among nation-states become widely accepted as a universal principle governing global affairs. What did exist in the last quarter of the nineteenth century, when Joseon was “opened” to modern diplomatic and commercial relations by a newly modernizing Japan, was a highly unequal system of economic, military and political relations in which Europe and the United States dominated much of the world. Sovereignty in the international system was, in the phrase of political scientist Stephen Krasner, little more than “organized hypocrisy.”<sup>8</sup> Korea had the misfortune of becoming incorporated into the global order at the high point of imperialist competition and geopolitics.

First articulated in Europe (especially England and Germany) and later adopted enthusiastically by the Japanese, geopolitics represented a new way of envisioning and controlling the world’s spaces.<sup>9</sup> It was a military advisor from Germany, Major Jacob Meckel, who

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<sup>8</sup> Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999).

<sup>9</sup> On the rise of geopolitical thinking in the nineteenth and twentieth centuries, see Gearoid O Tuathail, *Critical Geopolitics: The Politics of Writing Global Space* (Minneapolis, M.N.: University of Minnesota Press, 1996). The best account of Korea in late nineteenth-century geopolitics is George Alexander Lensen’s two-volume study, *Balance of Intrigue: International Rivalry in Korea and Manchuria, 1884–1899* (Tallahassee, FL.: University Press of Florida, 1982).

originally suggested to the Japanese government in the 1880s that Korea was “a dagger pointed at the heart of Japan.”<sup>10</sup> For Japanese leaders of the Meiji era (1868~1912), the Korean peninsula was of new and vital strategic importance, and had to be kept out of the hands of geopolitical rivals—first China, then Russia. This sense of geopolitical rivalry on the part of the Japanese, the desire to control spaces that might otherwise come under the domination of competitors, is quite different from the desire to drive through Korea to become emperor of China, which had motivated Hideyoshi to invade Korea in the 1590s. Korea, in short, fell victim to the rise of geopolitics in the final quarter of the nineteenth century. It was at this point that Korea became a “shrimp among whales,” a vortex of Great Power conflict. Korea was the central focus of two wars in the decade surrounding the turn of the twentieth century: the Sino-Japanese War of 1894~1895, and the Russo-Japanese War of 1904~1905. Japan won both wars, and annexed Korea in 1910.

Ironically, Joseon had minimized its foreign relations at almost precisely the same time that modern international relations were supposedly being invented at Westphalia. Europe’s Thirty Years’ War (1618~1648) overlapped with East Asia’s “Fifty Years’ War” between Japan’s wars against Joseon and Ming (1592~1598) and the Manchu takeover of China (1644). On the way to establishing the Qing dynasty, the Manchus invaded Korea in 1627 and again in 1636. After the disasters of the Japanese and Manchu invasions, Joseon kept foreign interaction to a minimum. This was a perfectly rational and effective foreign policy for its time. Korea’s relations with the

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<sup>10</sup> Peter Duus, *The Abacus and the Sword: The Japanese Penetration of Korea, 1895~1910* (Berkeley, C.A.: University of California Press, 1995), p. 49.

outside world, which meant primarily China but included Japan, the Ryukyu Island kingdom (present-day Okinawa) and “barbarian” groups in Manchuria, drew maximum advantage at minimum cost. Japan was kept at arm’s length, primarily for trade relations, with a small outpost of Japanese merchants residing in the area of Busan and occasional diplomatic missions via the island of Tsushima. Joseon exchanged envoys three or four times a year with China and gave lip service to Chinese suzerainty, but for the most part acted independently. Barbarians to the North were generally kept in check, with Chinese assistance, or absorbed into the Korean population. As for the rest of the world, Koreans had no use whatsoever. Those few Westerners who happened to land on Korean shores, such as Dutch sailors shipwrecked on Cheju Island in the seventeenth century, were treated with respect and curiosity but were not seen as sources of any important knowledge (unlike the Dutch colony in Japan, which was a vital source of Western or “Dutch” learning during Japan’s long isolation).<sup>11</sup> The Joseon ideal was a self-contained, self-sufficient agrarian society led by enlightened Confucian scholar-bureaucrats.<sup>12</sup> While Korea never entirely attained this ideal, there were few if any prominent thinkers before the late nineteenth century who disagreed with it.

The problem with such an approach to the world is that it works relatively well so long as the world is willing to remain at arm’s length. It becomes much more difficult to sustain when the world is banging on Korea’s door, as the Western imperial powers were

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<sup>11</sup> Gari Ledyard, *The Dutch Come to Korea* (Seoul: Royal Asiatic Society, Korea Branch, 1971).

<sup>12</sup> James Palais, *Confucian Statecraft and Korean Institutions: Yu Hyôngwôn and the Late Chosôn Dynasty* (Seattle, W.A.: University of Washington Press, 1996).

in the late nineteenth century. Euro-American military expansionism, missionary zeal, and commercial enterprise were impossible for Koreans to resist with traditional methods, although they certainly made an attempt. American and French incursions into Korean territorial waters in the 1860s and 1870s were successfully fought off, despite the overwhelming military might of the Western countries—Korea was simply not a prize worthy of much sacrifice, as far as most Europeans and Americans were concerned. Other parts of Asia—India, Indochina, the Philippines, not to mention the vast markets and resources of China itself—preoccupied Western interests in the latter nineteenth century. Korean recalcitrance earned it the nickname “Hermit Kingdom”; Westerners, for the most part, shrugged their shoulders at these peculiarly isolated and stubborn people and moved on. However, this apparent success at resisting Western aggression lulled Korean elites into a false sense of security. When a foreign power came along that was truly determined to open up Korea to Western-style diplomacy and commerce—in this case, a rapidly westernizing Japan in 1875—Korean isolation could not be maintained. Japan signed the first modern diplomatic treaty with Korea in 1876, and other countries soon followed. The Hermit Kingdom was isolated no more, and the Joseon dynasty itself would collapse after a few short decades.

Timing and geography go a long way toward explaining Korea’s loss of sovereignty in the early twentieth century and its inability to regain unified self-determination since. In the final decades of the nineteenth century, many Korean elites believed—correctly—that Japanese demands for Korea to terminate its “tributary” relationship with China and enter into Western-style diplomatic relations were intended to facilitate Japanese and other imperial interests in Joseon



under the façade of sovereign equality.<sup>13</sup> But infighting among Joseon elites, often linked to support from competing Great Powers whose interests now converged on Korea (mainly China, Russia, the US and Japan) delayed Korea's modernization program until the mid-1890s. Finally, in October 1897 King Gojong formally severed Joseon's tributary relationship with the Qing Empire and declared Korea a sovereign state under the name "Great Han Empire" (*Dae Han Jeguk*).<sup>14</sup> Korea was now an "empire" (*jeguk*) on an equal level with China and Japan, both formally empires as well. By 1900 Korea had established modern, legal diplomatic relations and trade relationships with most of the major Western countries, beginning with the United States in 1882. But Korea's attempt to enter the community of modern nations did not last long. Less than eight years after the founding of the Great Han Empire, Korea became a protectorate of Japan, which took control of Joseon's foreign relations and shaped much of its domestic policies as well. Internally, the apparatus of nation-building—public education, mass media, strong links among social strata and the state, the general cultivation of the "imagined community" of the nation—remained nascent and underdeveloped by the time the Great Han Empire came to an abrupt end. Internally and externally, Korea was still in the process of becoming a modern sovereign nation-state when Japan annexed Korea in 1910.<sup>15</sup>

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<sup>13</sup> Henry Em, *The Great Enterprise: Sovereignty and Historiography in Modern Korea* (Durham: Duke University Press, 2013), p. 37.

<sup>14</sup> Andre Schmid, *Korea Between Empires, 1895~1910* (New York: Columbia University Press, 2002), pp. 74~75.

<sup>15</sup> Karl Deutsch, *Nationalism and Social Communication: An Inquiry into the Foundations of Nationality* (Cambridge: MIT Press, 1954); Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (London: Verso, 1991); Sinisa Malesevic, *Nation-States and Nationalisms: Organization, Ideology and Solidarity* (New York: Polity, 2014).

In the world of the late nineteenth century, sovereign equality and the struggle for geopolitical advantage were strikingly at odds: like the animals in George Orwell's *Animal Farm*, some nations were more equal than others. Equal treatment under international law depended on nations achieving a "standard of civilization" that placed Europe at the top, although non-Europeans such as the Japanese might enter into the civilized circle—particularly if they defeated a European power.<sup>16</sup> In 1896, Japan and Russia had secretly discussed dividing Korea into spheres of influence. Instead the two expanding empires agreed to respect Korean independence *de jure* while Japan and Russia respected each other's *de facto* dominance in Korea and Manchuria respectively. This *quid pro quo* was undermined by Japan's attack on the Russian naval base of Port Arthur in February 1904, the catalyst of the Russo-Japanese War. Japan's defeat of Russia in 1905, with peace terms facilitated by US President Theodore Roosevelt, led in turn to US-Japanese negotiations over Korea and a secret agreement—negotiated between US Secretary of War Taft and Japanese Prime Minister Katsura—to allow a Japanese protectorate over the peninsula. Korea could rely on neither Great Power support nor international law to prevent annexation by Japan five years later. The Qing Empire was disintegrating, Russia was defeated, and Britain and the US were on Japan's side. Korea's mission to the Hague Peace Conference in 1907, intended to advocate Korean independence before the international community, was rebuffed. From 1910 to 1945 Korean sovereignty was eclipsed by Japanese colonialism.

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<sup>16</sup> Mark Mazower, *Governing the World: The History of An Idea* (New York: Penguin, 2012), pp. 71–72.

## Unsettled Sovereignty: Colonial Liberation, Division and War

The legality of Japan's colonial annexation remains a subject of dispute to this day, but the major powers of the time accepted Korea's colonization as a *fait accompli*.<sup>17</sup> Although the Korean Provisional Government was established in Shanghai in 1920, neither this nor any pro-independence Korean organization was publicly accepted as the legitimate government of an independent Korea by any major foreign country. However, as World War II advanced and it became clear that Germany and Japan would likely lose the war, the question of Korean independence was addressed by the Allies at the Cairo Conference of November 1943. The Cairo Conference was the first Allied meeting focused on the war against Japan and the postwar order in Asia. The main participants were US President Franklin Roosevelt, UK Prime Minister Winston Churchill, and Generalissimo Chiang Kai-shek of the Republic of China; Stalin, the leader of the Soviet Union, did not attend due to the USSR's neutrality pact with Japan. The main issues in Cairo dealt with the China-Burma-India theatre, and Korea was mentioned only briefly. The second paragraph of the Cairo communiqué reads in part:

The Three Great Allies [US, Britain, and China]... mindful of the enslavement of the people of Korea, are determined that in due course, Korea shall be free and independent.<sup>18</sup>

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<sup>17</sup> For Japan's use of international law to justify its colonization of Korea, see Alexis Dudden, *Japan's Colonization of Korea: Discourse and Power* (Honolulu: University of Hawaii Press, 2006).

<sup>18</sup> Cited in Ronald Ian Heiferman, *The Cairo Conference of 1943: Roosevelt, Churchill, Chiang Kai-Shek and Madame Chiang* (Jefferson, N.C.: McFarland, 2011), p. 112.

“In due course” was a fateful phrase that would resonate for years to come. In the original draft by Roosevelt’s advisor Harry Hopkins, Korea was to be granted independence “at the earliest possible moment.” Roosevelt changed this to “in due course” apparently at the urging of the British, who were concerned with maintaining control of their own colonies after the war. For his part Roosevelt advocated independence for the colonies, whether Japanese or European, but had in mind a period of “tutelage” during which Koreans like other colonized peoples would be educated in self-government before achieving full independence.<sup>19</sup> Sovereignty still had limits, as it had in the late nineteenth-century Age of Empire; in the post-World War II period self-determination was delayed for many former colonies, some of which would be administered by the United Nations’ Office of Trust Territories. Roosevelt had suggested along these lines an American-Soviet “trust administration” for Korea, an idea that became a foundation for the four-power Trusteeship (administered by the US, USSR, Britain and the Republic of China) agreed to by the Moscow Conference of Foreign Ministers in December 1945. Many Koreans, who had expected immediate independence, vehemently opposed trusteeship and the idea was ultimately scrapped. By this time, the peninsula was well on its way to divided sovereignty, split between North and South.

The long-term division of Korea into separate states was neither planned nor expected by any of the parties involved with the post-war settlement. Division resulted from a series of decisions and con-

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<sup>19</sup> Herbert Feis, *Churchill, Roosevelt and Stalin: The War They Waged and the Peace They Sought* (Princeton: Princeton University Press, 1957), pp. 251~252. Cited in Heiferman, Cairo Conference, p. 183, fn. 72.

flicts arising from a confluence of Cold War geopolitical rivalry between the Soviet Union and the United States—both of whom were preoccupied with events in Europe—and political fissures within Korea itself.<sup>20</sup> Initially the dual Soviet-American occupation was intended to oversee the orderly surrender of Japanese forces and facilitate the creation of a free and independent Korean government “in due course,” as stipulated in the Cairo communiqué. The collapse of the trusteeship agreement in 1946 meant that a “free and independent” Korean government would not come about through multiparty tutelage. Instead, separate governments coalesced under Soviet and American occupation in Pyongyang and Seoul respectively. In the fall of 1947, over Soviet objections, the United States brought the Korean problem before the United Nations, which established a Temporary Commission on Korea (UNTCOK) to oversee Korean elections. The Soviet Union refused to recognize the authority of the UN to supervise Korean elections, and did not allow UN election monitors into the Soviet-occupied North during the general election of May 1948. On August 15 the Republic of Korea was declared in Seoul, with Rhee Syng-Man as President. On August 25 the North held its own elections, declaring the South’s elections invalid, electing a Supreme People’s Assembly (two-thirds of which was reserved for representatives of South Korea), and establishing the Democratic People’s Republic of Korea on September 9 under Premier Kim Il-Sung. Both governments claimed authority over the entire peninsula.

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<sup>20</sup> John Merrill, *Korea: The Peninsular Origins of the War* (Newark, D.E.: University of Delaware Press, 1989).

The almost inevitable result of such competing claims of legitimacy was civil war. On June 25, 1950, with Soviet backing and arms, the Korean People's Army of North Korea attacked the South to reunify the peninsula by force. The attack had been considered for well over a year, since Kim Il-Sung had first proposed to Stalin that, given the current balance of forces in the North's favor, military conquest of the South would be relatively swift and cost-effective, forcing the Americans to accept a Communist *fait accompli*.<sup>21</sup> Circumstances, however, did not evolve quite as Kim had predicted. The Americans did intervene, pushing the North Korean forces back well above the thirty-eighth parallel, and provoking a Chinese counter-intervention. The result, after the Chinese entered the war in late October 1950, and had pushed the Americans in turn south of the thirty-eighth parallel by January 1951, was two-and-a-half years of brutal stalemate. Finally, in July 1953, the People's Republic of China, North Korea, and the United Nations Command signed an armistice to end the fighting. A De-Militarized Zone (DMZ) was established, running close to the initial thirty-eighth parallel line, to separate North and South. After three years of fighting, millions of casualties, and untold physical destruction, the Korean War ended approximately where it had begun, and Korea remained more bitterly divided than ever.

The Korea War itself would not have necessarily perpetuated Korea's division. On the contrary, a decisive victory on either side would have resolved the problem of divided sovereignty once and for all. But the stalemate on the battlefield, rather than the original thir-

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<sup>21</sup> Sergei Goncharev, John W. Lewis, and Litai Xue, *Uncertain Partners: Stalin, Mao and the Korean War* (Stanford: Stanford University Press, 1993).

ty-eight parallel boundary between the two occupation zones, became the foundation of Korea's long-term division. The UN Commission for the Unification and Rehabilitation of Korea (UNCURK), established on October 7, 1950, embodied the UN allies' expectation that unification would soon be forthcoming.<sup>22</sup> The Korean War armistice was by definition a temporary arrangement for a cessation of hostilities "until a final peaceful settlement is achieved," according to the preamble of the Armistice Agreement.<sup>23</sup> The nineteen belligerents of the Korean War met in Geneva from April 26 to June 15, 1954, to hammer out "a final peaceful settlement." The Geneva Conference resolved nothing, and was the last time all the participant in the Korean conflict would attempt to establish a peace agreement. The breakdown of the Geneva talks reflected the world's de facto acceptance of the long-term division of Korea. Sixty years later Korea still exists within a "division system" established by the ambiguous end of the Korean War and the failure of the belligerents to achieve peaceful unification of the peninsula.

## The Division System

By the early 1960s, both Korean regimes were supported by mutual defense treaties with their respective Great Power patrons—the United States for South Korea (1954), the Soviet Union and China

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<sup>22</sup> UNCURK was finally dissolved by the UN General Assembly on February 16, 1974.

<sup>23</sup> For the full text of the agreement see, <[www.ourdocuments.gov/doc.php?flash=true&doc=85&page=transcript](http://www.ourdocuments.gov/doc.php?flash=true&doc=85&page=transcript)>.

for the North (1961). If open hostilities between the two Koreas had broken out again, this may very well have led to a nuclear war between two of the major Cold War antagonists. For decades, the near-symmetrical conflict on the Korean peninsula neatly reflected the duality of the Cold War: a zero-sum political and strategic antagonism buttressed by ideological opposition. Korea, like Germany and Vietnam, was a “divided nation in a divided world,” in the memorable phrase of a noted Korea expert.<sup>24</sup> What is remarkable about Korea is that it remains divided decades after the “divided world” of the Cold War has ended, giving way to a much more fluid global system of conflict, co-operation and integration. Korea seems like a Cold War anachronism, but only if we fail to appreciate the unique and *sui generis* way that Korean division evolved over the past seventy years: linked to, but not dependent upon, the dynamics of the Cold War.

In the first half of the Cold War, the three major divided nations (Korea, China, and Germany) held similar policies of non-recognition: the two Koreas, like the two Chinas and the two Germanies, refused to recognize their rival state’s existence or to maintain diplomatic ties with any foreign country that did recognize it. Both Koreas were entrenched in their respective Cold War blocs, which reinforced the North-South Korean confrontation and inhibited North-South contact. This external environment changed dramatically in the early 1970s, when the Nixon administration made secret, and then public, overtures toward normalization with the People’s Republic of China, North Korea’s closest supporter. To preempt abandonment by

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<sup>24</sup> Gregory Henderson, *et al.* (eds.), *Divided Nations in A Divided World* (New York: McKay, 1974).



their respective patrons, the two Koreas took matters into their own hands and began direct negotiations with each other, first through their respective Red Cross committees and then through a series of meetings between North and South Korean intelligence officers. Just under a year after Henry Kissinger's secret visit to Beijing on July 9, 1971, Seoul and Pyongyang issued a Joint Communiqué on July 4, 1972, outlining their principles for peaceful unification.

The 1972 breakthrough marked a milestone in inter-Korean relations: Seoul and Pyongyang each recognized the existence of the other, and jointly proclaimed unification as their ultimate goal. But at the same time, each state consolidated its own domestic power, articulated in new constitutions in both the ROK and the DPRK. Both constitutions, the DPRK Socialist Constitution and the ROK *Yushin* (“Revitalization”) Constitution, concentrated greater power in the hands of the top leaders, Kim Il-Sung and Park Chung-Hee respectively. Both modified the organizations of their legislator. The North Korean constitution of 1972 acknowledged for the first time that Pyongyang, and not Seoul, was the capital of the DPRK.<sup>25</sup> Each Korean state therefore was trying to deal with the other from a position of strength, asserting greater sovereignty vis-à-vis the other rather than relinquishing it. Theoretically, the two Koreas could have begun integrating their two states together under the rubric of a single nation—perhaps along the lines of “one nation, two systems” later advocated by the People’s Republic of China in its integration with Hong Kong in 1997. Alternatively, mutual rec-

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<sup>25</sup> Charles K. Armstrong, *Tyranny of the Weak: North Korea and the World, 1950~1972* (Ithaca: Cornell University Press, 2013), p. 165.

ognition could have become more formalized and the two Koreas could have begun dealing with each other as truly foreign states, moving toward gradual integration along the lines of the European Union. Instead, inter-Korean relations were and remain in a grey area, neither domestic nor international. Although both 1972 constitutions have since been superseded in North and South Korea, the essential contradiction—asserting unification as a goal while strengthening identity as separate states—has never been resolved, and the two Koreas remain in this “1972 system” more than forty years later.

After a half-dozen meetings of the newly created South-North Coordinating Committee, the two sides reached an impasse and the North cut off talks in mid-1973. North-South Red Cross dialogue was revived in the mid-1980s and there was a brief flurry of cultural exchanges and visits of separated families in 1985, but this too quickly fizzled out. The next breakthrough in official inter-Korean relations would not come until the beginning of the 1990s, by which time the international environment had changed drastically, to the benefit of the South and the great detriment of the North.

The growing economic strength of South Korea in the 1980s found diplomatic expression in the Northern Policy or *Nordpolitik* of President Roh Tae-Woo in the latter part of the decade. Focused on wooing North Korea's communist allies into economic and political relations with the ROK, and modeled on West Germany's *Ostpolitik* toward East Germany and the Soviet bloc, *Nordpolitik* was extremely successful at establishing ties between South Korea and the communist countries in Eastern Europe, including the Soviet Union itself, which recognized the ROK in 1990. For the North, Roh outlined a

broad vision of inter-Korean cooperation, and ultimately unification, into what he called a “Korean National Community.”<sup>26</sup> The main North Korean proposal for unification, to which Roh’s proposal was in part a response, was a “Confederation” of the two existing political systems on the Korean peninsula, first proposed in 1960. While initially presented as a sudden union of the two systems, over time the North has shown flexibility in its Confederation proposal, willing to see confederation not as the end-goal of unification but a transitory institution and giving more rights to the two “regional governments.” By 1991, in fact, North Korean officials including Kim Il-Sung were suggesting that there was room for negotiation with the South on the form of confederation and that both sides within a confederated Korean system could have considerable autonomy even in its foreign relations, under the general rubric of military and diplomatic unity.<sup>27</sup> This proposed “Confederal Republic of Koryo” was thus not dissimilar to Roh’s “Korean National Community.” Both proposals, however, remained fairly abstract; on the ground, inter-Korean relations moved cautiously toward government-to-government contacts.

As the 1990s dawned, high-level North-South talks began again. In December 1991, the fifth in this series of high-level talks produced an agreement on reconciliation, nonaggression, and exchanges and cooperation. The “Basic Agreement” was the most important declaration of North-South cooperation and co-existence since the 1972

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<sup>26</sup> B.C. Koh, “A Comparison of Unification Policies,” Young Whan Kihl (ed.), *Korea and the World: Beyond the Cold War* (Boulder, C.O.: Westview Press, 1994), p. 156.

<sup>27</sup> Selig Harrison, *Korean Endgame: A Strategy for Reunification and US Disengagement* (Princeton, N.J.: Princeton University Press, 2002), p. 76.

Joint Communiqué, and was far more detailed than the 1972 agreement had been. It was followed in February 1992 by a joint “Declaration of the Denuclearization of the Korean Peninsula.” Once again, hopes were high for a major change in North-South relations and for a new momentum toward reconciliation and eventual unification. But once again such hopes would be unfulfilled. Regional and global circumstances had shifted dramatically, and the very survival of the North Korean regime became Pyongyang’s preoccupation. Movement toward inter-Korean reconciliation would be postponed as North Korea went through a series of profound crises. The collapse of every communist state in Eastern Europe between 1989 and 1991, including the USSR itself, came as a deep shock to North Korea and deprived Pyongyang of most of its important trade partners, political supporters, and allies. Even before the communist collapse, East European countries had begun to normalize relations with the ROK; by 1992, Russia and even North Korea’s allegedly staunch ally China had established diplomatic relations with Seoul. It would take almost a decade for a reciprocal movement of Western countries normalizing ties with Pyongyang. Economically, South Korea had long since leapt almost unimaginably beyond the level of the DPRK. Far from the Basic Agreement ushering in a new age of equality between the two Koreas, the times seemed to call into question the continued ability of the DPRK to exist at all. Movement in inter-Korean relations seemed almost a moot point. German-style unification, with the South absorbing the North as West Germany had absorbed East Germany in 1990, was widely predicted, especially by Western analysts.<sup>28</sup>

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<sup>28</sup> See for example Nick Eberstadt, *The End of North Korea* (Washington, D.C.: AEI Press, 1999).

Instead, North Korea doubled down and insisted on its own unique “Korean-style socialism” based on “military-first politics” (*seon-gun jeongchi*). Despite the death of founding leader Kim Il-Sung in 1994 followed by a catastrophic three-year famine, North Korea survived as a political system. And although inter-Korean relations became more active than ever before in the late 1990s and early 2000s, the terms of the Basic Agreement were never realized and the February 1992 De-Nuclearization Agreement was openly defied by North Korea, which conducted three nuclear tests (in 2006, 2009, and 2013) and has demanded international acceptance as a nuclear-armed state. After a decade of active engagement North-South relations declined again in 2008, reaching a post-war nadir with the North Korean shelling of Yeonpyeong Island in South Korea in November 2010. Under President Park Geun-Hye North-South relations somewhat improved, but despite ups and downs the basic condition of inter-Korean relations remains frozen in the 1972 system: de facto but not de jure mutual acceptance as separate states, tension without open hostilities (although Yeonpyeong came close), neither war nor peace. The question of divided sovereignty remains unresolved.

Seventy years after liberation from Japanese colonial rule and division into temporary occupation zones by the United States and the Soviet Union, a quarter-century after the fall of the Berlin Wall, and over twenty years after the Soviet collapse, Korea remains divided. Korea’s continued division has its own perverse dynamic, both within the peninsula and in connection to regional and global forces, which go well beyond the World War II settlement and Cold War confrontation that made division possible. At the regional level, the geopolitical competition around the Korean peninsula that emerged at

the end of the nineteenth century has continued, albeit in modified form, in the competition around Korea today, especially between the United States and China. At the peninsular level, the implacable hostility between the two Koreas is less a product of the Cold War than of the brutal, fratricidal “hot war” that took place in the 1950s. The two Germanies did not fight a war with each other, and even so unification was far from a smooth process. Peaceful unification between two entities still in a state of war is difficult to imagine, if not impossible by definition.

Vietnamese unification might offer a useful lesson here, if only a cautionary tale. North Vietnam conquered the South in April 1975 and imposed a victor’s justice on the southern part of the country, leading to enormous social dislocation and conflict. Should the northern part of Korea be conquered by Seoul—even in the case of a peaceful merger (an all-out war would simply be a catastrophe, at best a hollow victory for the South)—the fate of North Korean civilian leaders, military forces, and the system as whole would pose tremendous challenges for the victors. Re-educating the northern population, addressing questions of war crimes and responsibility for humanitarian atrocities, even dealing with the vast propaganda apparatus would be enormous tasks for a unified Korea, tasks the Seoul government and South Korean people would have to address with great sensitivity and consideration for the people of the North. A heavy-handed “victor’s justice” could lead to backlash and resentment for many years to come. In this sense Korean unification would have to be more than an extension of the Republic of Korea northward. It would be the creation of something entirely new, something that has not existed before in modern history: Korea as a sovereign, independent, unified nation-state. Unification would be in that sense truly a

second “nation building” (*geonguk*), or perhaps nation-building for the first time. Appropriately, Germany in the period of Cold War division referred to German “reunification” (*Wiedervereinigung*), whereas Koreans use the term “unification” (*tongil*). Korean unification would not be a simple return to the past, but an unprecedented event.

## REFERENCES

- Anderson, Benedict. *Imagined Communities: Reflections on the Origins and Spread of Nationalism*. London: Verso, 1991.
- Armstrong, Charles K. *Tyranny of the Weak: North Korea and the World, 1950~1972*. Ithaca: Cornell University Press, 2013.
- Bartelson, Jens. *A Genealogy of Sovereignty*. Cambridge, U.K.: Cambridge University Press, 1995.
- Deuchler, Martina. *The Confucian Transformation of Korea: A Study of Society and Ideology*. Cambridge: Harvard University Asia Center, 1995.
- Deutsch, Karl. *Nationalism and Social Communication: An Inquiry into the Foundations of Nationality*. Cambridge: MIT Press, 1954.
- Dudden, Alexis. *Japan's Colonization of Korea: Discourse and Power*. Honolulu: University of Hawaii Press, 2006.
- Duus, Peter. *The Abacus and the Sword: The Japanese Penetration of Korea, 1895~1910*. Berkeley: University of California Press, 1995.
- Eberstadt, Nick. *The End of North Korea*. Washington, D.C.: AEI Press, 1999.
- Em, Henry. *The Great Enterprise: Sovereignty and Historiography in Modern Korea*. Durham: Duke University Press, 2013.
- Feis, Herbert. *Churchill, Roosevelt and Stalin: The War They Waged and the Peace They Sought*. Princeton: Princeton University Press, 1957.



- Goncharev, Sergei, John W. Lewis, and Litai Xue. *Uncertain Partners: Stalin, Mao and the Korean War*. Stanford: Stanford University Press, 1993.
- Heiferman, Ronald Ian. *The Cairo Conference of 1943: Roosevelt, Churchill, Chiang Kai-Shek and Madame Chiang*. Jefferson, N.C.: McFarland, 2011.
- Henderson, Gregory, et al. (eds.). *Divided Nations in A Divided World*. New York: McKay, 1974.
- Kim, Key-Hiuk. *The Last Phase of the East Asian World Order: Korea, Japan, and the Chinese Empire, 1860~1882*. Berkeley: University of California Press, 1980.
- Kissinger, Henry. *World Order*. New York: Penguin Press, 2014.
- Krasner, Stephen. D. *Sovereignty: Organized Hypocrisy*. Princeton: Princeton University Press, 1999.
- Ledyard, Gari. *The Dutch Come to Korea*. Seoul: Royal Asiatic Society, Korea Branch, 1971.
- Lensen, George Alexander. *Balance of Intrigue: International Rivalry in Korea and Manchuria, 1884~1899*. Tallahassee, FL.: University Press of Florida, 1982.
- Malesevic, Sinisa. *Nation-States and Nationalisms: Organization, Ideology and Solidarity*. New York: Polity, 2014.
- Mazower, Mark. *Governing the World: The History of An Idea*. New York: Penguin, 2012.
- Merrill, John. *Korea: The Peninsular Origins of the War*. Newark, D.E.: University of Delaware Press, 1989.

- O Tuathail, Gearoid. *Critical Geopolitics: The Politics of Writing Global Space*. Minneapolis, M.N.: University of Minnesota Press, 1996.
- Palais, James. *Confucian Statecraft and Korean Institutions: Yu Hyong-won and the Late Choson Dynasty*. Seattle, WA.: University of Washington Press, 1996.
- Schmid, Andre. *Korea Between Empires, 1895~1910*. New York: Columbia University Press, 2002.
- Choe, Yong-Ho. "An Outline History of Korean Historiography." *Korean Studies*. Vol. 4, 1980.
- Connor, Walker. "A Nation is a Nation, Is a State, Is an Ethnic Group, Is a..." *Ethnic and Racial Studies*. Vol. 1, No. 4, 1978.
- Koh, B.C. "A Comparison of Unification Policies." Young-Whan Kihl (ed.). *Korea and the World: Beyond the Cold War*. Boulder, C.O.: Westview Press, 1994.
- Robinson, Kenneth R. "Centering the King of Choson: Aspects of Korean Maritime Diplomacy, 1392~1592." *Journal of Asian Studies*. Vol. 59, No. 1, February 2000.



# The Limits of Legal Order in an Evolving World Order on the Korean Peninsula

***Jeong-Ho Roh***

This chapter focuses on identifying and conceptualizing the question of inter-Korean relations and the unification debate viewed from the prism of law and legal institutions. While this topic can be approached from a myriad of different perspectives<sup>1</sup> and from different disciplinary approaches, the use of a methodology based on a legal framework is an attempt to identify and give legal context to coverage of inter-Korean relations and the unification debate drawing on scholarship from history, political science, economics and international relations studies. This chapter employs a different methodology to the study of inter-Korean relations and the unification debate by drawing on a hybrid history/legal approach to the topic. A purely legal approach, without meaningful linkages to important events in history and a

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<sup>1</sup> See Michael Haas (ed.), *Korean Unification: Alternative Pathways*, 2nd ed. (Los Angeles, C.A.: Publishing House for Scholars, 2012) in which several authors have attempted to provide different approaches to the question of unification including, historical approach, neutralization approach, functionalist approach, non-violence approach, mediation approach, negotiation approach, political feasibility approach and contemporary approach.

contextual understanding of the motives, interests and rationale of the stakeholders involved, would have limited utility for purposes of furthering the debate on unification for it would tend to result in a narrative that is narrowly legalistic. In order then to capture the contextually important shifts in inter-Korean relations and the unification debate, and in order also to trace the changes in the paradigm relating to this debate, this chapter classifies the period from 1876 to the present day into five eras. During each of the five periods, there are subtle but nonetheless noticeably distinct shifts in the relationships between the stakeholders on the Korean Peninsula. These shifts or evolutionary changes in the world order during each period, particularly as they relate to the Korean, highlight at the same time some of the inherent limitations of the legal order or legal system. It is important to note that the classification of the five periods in this chapter do not necessarily correspond to customarily cited milestones in either history or international relations. Instead, the focus has been to identify key events in history and international relations that have noteworthy legal significance and therefore provide a meaningful point of departure from which to give a contextual understanding of such events from a legal perspective.

**The First Period (1876~1942: *Limits of Legal Order in an era of “Old Political Order”*)** begins with Korea’s initial encounter with unequal treaties, starting with the Treaty of Ganghwa Island<sup>2</sup> in 1876 between the Empire of Japan and the Joseon Kingdom. It traces the period of imperial expansion in the early 1900’s by the big powers where territorial annexation was not considered per se illegal. Inso-

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<sup>2</sup> This treaty is also known as the Japan–Korea Treaty of 1876 or the Japan-Korea Treaty of Amity in Japanese.

far as it related to Korea specifically and in general elsewhere in Asia, the modern concepts of “legality” existed only secondarily to the pursuit of the national interests of the then big powers in the region, most notably the United States and Japan.

The point of departure that marks the start of **the Second Period (1943~1971: *Limits of Legal Order in an era of “Bipolar-Multilateralism”*)** is the Cairo Declaration in 1943 where the question of the future of Korea is taken up for the first time in a multilateral setting envisioning a post World War II world order. “Bipolar-Multilateralism” refers to the subsequent creation of a new multilateral world order under the United Nations system in 1945 but one that coexists with a deeply divided ideological confrontation between the two opposing superpowers—the United States and the Soviet Union. The division of Korea, formation of two separate governments in the South and the North, the ensuing Korean War and the uncertain resolution of the war through the Armistice Agreement are consequences of this newly formed bipolar multilateral world order.

**The Third Period (1972~1992: *Limits of Legal Order in an era of “Bilateral-Multilateralism”*)** begins a period marked by the 1972 Joint Communiqué which attempted to formulate for the first time bilateral principles for a possible unification between the two Koreas. Twenty years following this landmark understanding, the Koreas enter into two separate agreements outlining terms for reconciliation and denuclearization of the Korean Peninsula. In tandem with these bilateral developments, this period also sees normalization of relations between South Korea with Beijing and Moscow as well as the simultaneous entry of the two Koreas into the United Nations. At the same time, North Korea signs the Nuclear Non-Proliferation

Treaty in 1985 and begins the long process of signing the Safeguards Agreement with the IAEA. Although the bipolar division is still very much evident on the Korean Peninsula, this period is characterized by a shift to bilateralism as an important legal development within the context of an evolving multilateral platform with full membership of the two Koreas.

**The Fourth Period (1993~2005: *Limits of Legal Order in an era of “Multilateral-Bilateralism”*)**. North Korea’s declaration of its intent to withdraw from the Nuclear Non-Proliferation Treaty in March 1993 marks the start of one of the most significant shifts in the legal relationship among the stakeholders on the Korean Peninsula. Following the death of Kim Il-Sung in 1994, the signing of the Agreed Framework between the United States and North Korea sets the stage for an addition of another multilateral platform called KEDO to address North Korea’s nuclear issue. The additional layer of multilateral relations through KEDO and later through the Six Party Talks creates an important change to the nature of the multilateral relations compared with the previous period. At the same time, with South Korea taking a leading role in implementation of the Agreed Framework through KEDO, a new framework is created for fostering bilateral relations. The term “multilateral-bilateralism” is a term that is used to describe relations on the Korean Peninsula where multilateralism and bilateralism co-exist and influence each other but multilateralism becomes the impetus for advancement of bilateral relations. This period may be characterized as a period of successive failures in “multilateral-bilateralism” efforts with the end of the Agreed Framework and North Korea’s ultimate withdrawal from the NPT in 2003. The end to this period and the start of the Fifth period is on October 9, 2006 marked by North Korea’s declara-

tion three years thereafter that it had conducted its first nuclear test.

**The Fifth Period (2006~ : *Limits of Legal Order in an era of “New Political Order”*)** marks the beginning of an international legal regime that is faced with a North Korea possessing proven nuclear weapons capability. This period is characterized by a growing recognition of the inherent limitations in the existing legal order to effectively address issues presented by a nuclear North Korea. A nuclear North Korea outside the NPT regime with limited ties to the international community, coupled with its missile program, dismal human rights record and a three generation dynastic succession of its leadership illustrate a need to re-conceptualize the debate surrounding unification, inter-Korean relations and the nature of world order on the Korean Peninsula.

### **First Period (1876~1942): *Limits of Legal Order in an era of “Old Political Order”***

Korea's initial encounter with the Western powers came as a result of a confluence of interests of the Western powers in the region. Ironically Korea's first “unequal treaty” came not from a Western power but from Japan through the Treaty of Ganghwa Island of 1876. As a result of the Ganghwa Island Incident which was a military confrontation between Japan and then Joseon Dynasty, Japan used gunboat diplomacy to open Korea in much the same way that gunboat diplomacy was used in 1853 by the United States to open Japan.<sup>3</sup> Much

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<sup>3</sup> Peter Duus, *The Abacus and the Sword: The Japanese Penetration of Korea, 1895~1910* (Los Angeles, C.A. : University of California Press, 1995), pp. 43~51.



like other unequal treaties imposed on China and Japan by the west at the time, the Gangwha Island Treaty granted extraterritorial rights to Japanese citizens in Korea and forced the Korean government to open three Korean ports to Japan. What followed was a flurry of treaties with Western powers including the 1882 Treaty of Amity and Commerce between the United States and Korea.

The Sino-Japanese War (1894~5) and the Russo-Japanese War (1904~5) were significant events during the First Period in that both wars were over the control of Korea. Korea was placed at the center of the rivalry between China and Japan during the Sino-Japanese War and between Russia and Japan over Manchuria and Korea during the Russo-Japanese War.<sup>4</sup> The loss in the war to Japan during the Sino-Japanese War marked an end to the centuries of Chinese suzerainty over Korea and signaled an unmistakable demise of Chinese influence in the area and shifting balance of power in favor of Japan's dominance in the area. On the other hand, the Treaty of Portsmouth which effectively ended the Russo-Japanese War marked the beginning of the involvement of the United States in establishing a new paradigm for regional balance of power in the region. Facing humiliating military loss at the hands of the Japanese and with internal unrest domestically, Czar Nicolas II of Russia accepted then President Theodore Roosevelt's offer to mediate a peaceful solution. The peaceful solution mediated by the United States came in the form of Russia withdrawing from Manchuria and acknowledging Korea as being part of the Japanese sphere of influence. President Roosevelt would later be awarded the Nobel Peace Prize for "excellent job of

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<sup>4</sup> See, W.G. Beasley, *Japanese Imperialism 1894~1945* (New York: Oxford University Press, 1987).

balancing Russian and Japanese power in the Orient, where the supremacy of either constituted a threat to growing America.”<sup>5</sup>

The formal annexation of Korea in 1910 by Japan through the Japan–Korea Annexation Treaty met with no opposition from the Western powers and occurred with the tacit understanding and through prior arrangements agreed upon with the United States. The infamous *Taft-Katsura Memorandum* was a discussion held in 1905 between the United States and Japan during the waning days of the Russo-Japanese War where Japanese victory was all but certain in which then Secretary of War, William Taft who would later become President, concurred in the desirability of Japan’s dominance in Korea to ensure peace and stability in Asia in return for Japan’s assurances that it would not challenge U.S. domination of the Philippines.<sup>6</sup> While there is debate over whether this memorandum constituted a formal agreement between the United States and Japan over Korea and the Philippines, the subsequent Root-Takahira Agreement which was signed in 1908 between the United States and Japan leaves no doubt as to the formal agreement between the two countries regarding Japan’s recognition of the United States’ annexation of the Kingdom of Hawaii and the Philippines in return for U.S. recognition of Japanese interests in Northern China, including Korea.<sup>7</sup>

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<sup>5</sup> George E. Mowry, “The First Roosevelt,” *The American Mercury*, November 1946, p. 580.

<sup>6</sup> See generally, David Wolff and John W. Steinberg (ed.), *The Russo-Japanese War in Global Perspective: World War Zero*, Volume 2 (Boston: Brill Publishers, 2005).

<sup>7</sup> J. Chay, “The Taft-Katsura Memorandum Reconsidered,” *Pacific Historical Review*, Vol. 37, No. 3 (1968), pp. 321–326

One significant aspect during this period is the overwhelming limitation, viewed from a modern perspective, of a legal order over national interests of the big powers in the region. We might posit that in the early 1900's such acts of territorial annexation by imperial powers were not per se illegal under international law as it existed at that time though such acts under modern day international law would be deemed illegal. Most of the territorial acquisitions that were made during this period were restored to its original state after the defeat of Japan in World War II but in the case of Korea, what follows is a series of events beginning with the Second Period that sets the stage for a restoration that is distinguishable from that of other countries including China and Russia.

### **Second Period (1943~1971): *Limits of Legal Order in an era of “Bipolar- Multilateralism”***

While it may seem that the end of World War II and division of Korea in 1945 or the establishment of separate governments in South and North Korea in 1948 might seem to be the logical starting point for the Second Period, for purposes of establishing a legal starting point, the Cairo Declaration of 1943 is the milestone that marks the beginning of this period. During the conference, the leaders of the United States, Great Britain and China declared that:

“The Three Great Allies are fighting this war to restrain and punish the aggression of Japan. They covet no gain for themselves and have no thought of territorial expansion. It is their

purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and The Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed. The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course (emphasis added) Korea shall become free and independent.”

The significance of the Cairo Declaration can be found in recognition by the three parties at the time to restore Korea to the state it had been prior to the illegal annexation and colonization of Korea by Japan. If the First Period can be characterized as one in which Korea was illegally striped of sovereignty to become a colony of Japan, the Second Period is one where efforts are undertaken for the first time to restore Korea to its previous position. The Cairo Declaration begins this multilateral process and hence from a legal perspective can be viewed as an important turning point that later provides the foundations for independence of Korea and attempts of restoration to its previous state. However, the tentative nature of the “in due course” language contained in the declaration as it pertains to the future of Korea is in contrast to the relatively clear expression of territorial restoration pertaining to China. This language foreshadows the start of a sequence of events on the Korean Peninsula that to this day has arguably failed to successfully restore Korea to its original state.<sup>8</sup>

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<sup>8</sup> See, Edward A. Olsen, *Toward Normalizing U.S.-Korea Relations: In Due Course?* (Boulder, C.O.: Lynne Rienner Publishers, 2002).

At the Yalta Conference in 1945, President Franklin Roosevelt proposed a trusteeship over Korea overseen by the United States and the Soviet Union. However, upon the surrender of Japan in 1945 the question of how now to implement the Cairo Declaration and the Yalta Conference with respect to Korea was not of paramount interest among the wartime allies and not one that the Soviets had much interest in.<sup>9</sup> Korea had long been an afterthought in the struggles among the big powers for hegemonic control. During the final days of World War II, in spite of the Cairo Declaration, Korea once again became one of an ancillary interest in the overall scheme of how a post war world would look like in Asia. There had not been agreement among the allies or planning regarding the future of a post war Korea and a line, roughly dividing Korea in two equal parts, demarcating the U.S. zone and the Soviet zone where the surrender of the Japanese would take place was hurriedly incorporated into *General Order Number One* governing the occupation of Japanese-held territory. In effect, dividing Korea into two “temporary” zones of occupation was the most expedient manner under which the conclusion of the Second World War could be achieved from the viewpoint of the allied powers. That the division of Korea was without consultation or consent of the Korean people was a critical flaw and an afterthought that has taken center stage in what we refer to as the “Korean question.” A far more critical flaw to the notion of creating a “temporary” division rested on the assumption that the United States and the Soviet Union would continue to remain on friendly and cooperative terms.<sup>10</sup> However, as the

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<sup>9</sup> Allen R. Millett, *The War for Korea, 1945~1950: A House Burning* (Kansas: University Press of Kansas, 2005), pp. 64~71.

<sup>10</sup> James Irving Matray, *The Reluctant Crusade: American Foreign Policy in Korea, 1941~1950* (Hawaii: University of Hawaii Press, 1985), pp. 52~74

Cold War deepened, Korea unwittingly became the front line battleground between opposed ideology and principles and the two antagonistic Koreas became further rooted in the respective conflicting interests of the two Cold War powers. What started out as a “temporary” division of the Korean Peninsula became institutionalized, neither side being able to overcome their ideological differences in a bipolar world, with establishment of the Republic of Korea on August 15, 1948 and the Soviet-backed Democratic People’s Republic of Korea on September 9, 1948.

The cause and the start of the Korean War on June 25, 1950 and the armistice agreement in 1953 that put a temporary halt to the war has been the subject of much debate and scholarly research over the years. Kim Il-Sung writes:

“At dawn, on Sunday, June 25, 1950, heavy rain was falling along the 38th Parallel. Lightning flashed and thunder rolled in the dark, threatening sky. Suddenly a new, deafening roar rose above the elements. The roar of guns from south of the 38th Parallel, with their jets of flame, opened up and they pumped their shells into the northern areas of the Republic....[Under] the command of the U.S. Military Advisory Group, they now started a frenzied all-out attack on the northern half....Using the Syngman Rhee puppet army in a frontal attack, U.S. imperialism opened up, by deliberate provocation, a piratic aggressive war against the Korean people...”<sup>11</sup>

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<sup>11</sup> Baik Bong, *Kim Il-Sung Biography* (II) (Dar Al-Talia, 1973), p. 271.

A more accepted version of the start of the Korean War outside of North Korea is:

“The Korean War began in the predawn hours of June 25, 1950, a rainy Sunday along the two hundred mile boundary between North and South Korea. At around 4:00am, North Korean units positioned just north of the thirty eighth parallel on the isolated Ongjin Peninsula launched an artillery barrage against ROK forces to the south. A North Korean ground attack followed shortly thereafter.”<sup>12</sup>

The debate over the start of the Korean War is important not so much for the factual aspects of who actually began the war but because it highlights the perceptual differences that underlie the fundamental conflict in ideology between the two Koreas that the North has sought to perpetuate in order to support their version of which Korea is the legitimate representative of the entire Korean Peninsula. In addition, the perceptual differences concerning the start of the Korean War also underscore nature of the bi-polar ideological confrontation of the Cold War era. The starting point of approaching the study of inter-Korea relations and unification from a legal framework must necessarily take into account how the intractable perceptual differences espoused by North Korea have added a layer of complexity and uncertainty to gaining a clearer understanding of what is required to formulate a workable definition regarding the legal nature of the relationship between the two Koreas. One of the questions that need to be addressed is whether

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<sup>12</sup> William Stueck, *Rethinking the Korean War: A New Diplomatic and Strategic History* (Princeton, N.J.: Princeton University Press, 2002), p. 61.

the Korean War should be characterized as a war between two sovereign nations or an internal conflict, a war having a stronger characteristic of a civil war.<sup>13</sup> In addition, the entry of the United Nations into the Korean War marks an important turning point during this period wherein the short lived era of cooperation between the United States and the Soviet Union is substituted by an unmistakable bi-polar relationship within the multilateral setting of the United Nations.<sup>14</sup> While some commentators have questioned the legality of an UN intervention in the event of that the Korean War is defined as a civil war,<sup>15</sup> by the same token, what then would be the legal basis upon which China (albeit “Chinese Volunteer Army”) enters the war?<sup>16</sup>

The uncertainty that may exist regarding the character of the Korean War is dwarfed by the complexities surrounding the “end” of the Korean War through a legal instrument that we know of as the Armistice Agreement. The Armistice Agreement, comprising 5 articles and a total of 63 paragraphs, established the parameters of a cease-fire, which consisted of a military demarcation line and a four-kilometer wide demilitarized zone (the DMZ) that ironically remains today as one of the most heavily fortified borders in the world. The irony is that the agreement was to be by definition “tem-

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<sup>13</sup> See, Bruce Cumings, *The Origins of the Korean War Volume II, The Roaring of the Cataract 1947~1950* (Princeton, N.J.: Princeton University Press, 1990), pp. 568~621.

<sup>14</sup> Charles M. Dobbs, *The Unwanted Symbol: American Foreign Policy, the Cold War, and Korea, 1945~1950* (Ohio: The Kent State University Press, 1981), pp. 104~128

<sup>15</sup> Patrick M. Norton, “Ending the Korean Armistice Agreement: The Legal Issues,” (The NAPSNet Policy Forum Online, 1997.3).

<sup>16</sup> The questions that need to be explored in this context would be how to characterize the role of the United Nations in the Korean War under collective right of self-defense as provided for under Article 51 of the UN Charter and customary international law.



porary” in nature, much like the temporary division of Korea in 1945, but has endured as the sole legal document that purported to “end” the Korean War. Even under generally accepted principles of customary international law, an armistice agreement does not terminate the state of war. The express assumption is that the agreement is a military agreement that serves to provide a temporary cessation of on-going hostilities until the armistice is superseded by an appropriate agreement at the political level. This is made clear in the preamble of the Armistice Agreement which provides in relevant part “the objective of establishing an armistice which will insure a complete cessation of hostilities and of all acts of armed force in Korea until a final peaceful settlement is achieved”. During what was envisioned to be a temporary period pending “attainment of a peaceful settlement through the holding by both sides of a political conference of a higher level,”<sup>17</sup> the armistice created the framework for overseeing the long-term cessation of hostilities, including the establishment of two other commissions: the Neutral Nations Supervisory Commission (NNSC) to monitor the prohibition of foreign reinforcements and armaments into the DMZ, and the Military Armistice Commission (MAC) to supervise and maintain the armistice. However, no such “final peaceful settlement” at the political level as envisioned in the Armistice Agreement materialized and efforts at the Geneva Conference proved to be “an exercise in futility, though a necessary exercise” in an attempt to reach a political resolution to the war.<sup>18</sup> The failure of the Geneva Confer-

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<sup>17</sup> See Article 13 of the Armistice Agreement

<sup>18</sup> Quoting Sydney D. Bailey, *The Korean Armistice* (New York: St. Martin's Press, 1992), p. 150. See also, Rosemary Foot, *A Substitute for Victory: The Politics of Peacemaking at the Korean Armistice Talks* (Ithaca, N.Y.: Cornell University Press, 1990).

ence at reaching a final settlement amplifies the limitations and failures of the legal order of this bi-polar period.

What then are the consequences under international law to a temporary end to the Korean War that has lasted for over 60 years? More relevant is the question what is the legal effect of the Armistice Agreement today? Can it be argued that passage of more than 60 years from what had originally been envisioned as a temporary agreement has transformed the temporary nature of the armistice to that of a *de facto* peace treaty? Would the absence of an open war lend support to the proposition that this agreement has been superseded and hence the need for a formal peace treaty—or political agreement—is no longer a requirement? A relevant legal issue regarding this argument would have to be whether continued state of aggression and acts of continued military provocations such as the recent Yeonpyeong Island shelling or the sinking of the *Cheonan*, or even the failed assassination attempts at President Park Chung-Hee in 1974 and the Rangoon bombing during President Chun Doo-Hwan's visit in 1983 would negate any support to such a theory. In relation to this, even if there were to be a peace treaty or political agreement that would directly supersede the Armistice Agreement, who would be the proper parties to such an agreement? The 1953 Armistice Agreement was signed by “*the Commander-in-Chief, United Nations Command, on the one hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's volunteers, on the other hand*”. While it is clear that the actual belligerent parties to the Korean War was undoubtedly South Korea, the United States and North Korea, would the absence of South Korea in the signing of the Armistice Agreement or the status of the Chinese People's volunteers as a signatory to the agreement have any bearing

on determining who would be the actual belligerents to which the armistice applies? While this question is generally a moot point as it relates to South Korea and the United States, further inquiry is required as to determining the status of present day China in any future peace treaty that would supersede the Armistice Agreement.

The uncertain nature of the Armistice Agreement that has not been superseded by a formal peace treaty or other binding legal instrument brings to the forefront very fundamental questions relating to defining the nature of legal relations between North and South Korea. The San Francisco Treaty (Peace Treaty with Japan) stands in stark contrast to the unfinished state of the Korean War in that this treaty served to formally and legally end World War II as it related to Japan whereas the Armistice Agreement failed to this day to provide a formal and legal end to the war. The San Francisco Treaty also served to clarify Japan's relationship with the Allied powers and the international community in a post war system as a non-imperial power. However, one of the failures of the San Francisco Treaty was the ambiguity regarding the territorial dispute between Korea and Japan relating to Dokdo. The conclusion of the San Francisco Treaty in 1952 during the height of the Korean War where the outcome of the conflict was less than certain with may have contributed to the hasty rewording of the treaty to exclude any direct references to the ownership of Dokdo.<sup>19</sup>

In spite of the lack of clarity of the Armistice Agreement, should the

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<sup>19</sup> Kimie Hara, "50 Years from San Francisco: Re-Examining the Peace Treaty and Japan's Territorial Problems," *Pacific Affairs*, Vol. 74, No. 3 (Autumn, 2001), p. 372. See also, Kimie Hara, *Cold War Frontiers in the Asia-Pacific: Divided Territories in the San Francisco System* (New York: Routledge, 2007), pp. 14-49.

two Korea be considered two distinct and separate sovereign states? Perhaps another way to phrase the same question would be to ask whether the two Koreas should be considered two temporarily divided sovereign states. Framing the correct definition of the nature of the relationship between North and South Korea takes on a special meaning in this context as the Armistice Agreement did little to end the Korean War and with the passage of time might have inadvertently create a de facto ‘legalization’ or perpetuation of the division of Korea. Lacking a meaningful frame of reference for defining the legal relations between the two Koreas, the two countries therefore have had to create and rely on a “legal fiction” as the basis of establishing their relationship.<sup>20</sup> As will be evident during the Fourth Period (1993~2005) and beyond, North Korea’s repeated declarations that the Armistice Agreement is null and void adds another layer to the complexity surrounding how best to define the relationship between the two Koreas.

### **Third Period (1972~1992): Limits of Legal Order in an era of “Bilateral-Multilateralism”**

The Third Period is notable for bilateral efforts by North and South Korea to attempt to clarify the legal ambiguities left as a result of the lack of a formal resolution to the Armistice Agreement. This period marks the first attempt to formulate a legal definition to the

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<sup>20</sup> Jeong-Ho Roh, “The Legal and Institutional Approach to Inter-Korean Relations,” Samuel K. Kim (ed.), *Inter-Korean Relations: Problems and Prospects* (New York: Palgrave Macmillan, 2010), pp. 164~165.

relationship between the two Koreas and also attempts to come to an agreement or understanding regarding the issue of reunification. The landmark communiqué which was signed on July 4, 1972 provides the first ever bilateral understanding between the two Koreas in this regard. Although the communiqué lacks the formal force of law as in a treaty or agreement, it nonetheless is important for the symbolic start of a dialogue towards a definition of the relations between the two countries. In the communiqué, the two Koreas declare three basic principles for Korean unification: “(1) unification shall be achieved independently, without depending on foreign powers and without foreign interference; (2) unification shall be achieved through peaceful means, without resorting to the use of force against each other; and (3) a great racial unity as one people shall be sought first, transcending differences in ideas, ideologies, and systems.” However this understanding between the two Koreas does not provide the impetus for a change in the relationship until roughly 20 years later when the two Koreas sign what appears to on first blush two agreements that purport to establish a formal and legal expression of the void created by the Armistice Agreement. Moreover, it is interesting to note that in the 1972 amendment to the North Korean constitution previous reference to the capital of “Korea” as being Seoul is deleted and replaced with Pyongyang. Whether this amendment has any legal significance is unclear but serves as an example of North Korea’s attempts in reformulating its identity *vis-a-vis* South Korea.

The “Agreement on Reconciliation, Nonaggression and Exchanges and Cooperation between the South and the North” contains broad statements regarding reconciliation and non-aggression including a clause that both sides will abide by the Armistice Agreement until

firm state of peace is realized. For the first time, the Agreement recognizes that the two states “not being a relationship as between states, is a special one constituted temporarily in the process of unification.” The second document “Joint Declaration of South and North Korea on the Denuclearization of the Korean Peninsula” outlines an agreement “not to test, manufacture, produce, receive, possess, store, deploy, or use nuclear weapons; to use nuclear energy solely for peaceful purposes; and not to possess facilities for nuclear reprocessing and uranium enrichment.” Although from a purely legal point of view, these two documents contain sufficient legal language to support the argument that the two Koreas have created a firm basis for a new relationship, much of the bilateral achievements are illusory when viewed in the context of events following North Korea’s accession to the Nuclear Non-Proliferation Treaty (NPT) in 1985.

Under Article III of the NPT, North Korea was given 18 months to conclude a Safeguards Agreement with the International Atomic Energy Agency (IAEA). By mid 1987, the IAEA learns that it has mistakenly sent the wrong type of safeguards agreement document to North Korea and, as a result of this error, North Korea is given another 18 months in which to negotiate and sign a safeguards agreement with the IAEA. Amid suspicions of a North Korea nuclear program and the looming deadline of having to sign a safeguards agreement with the IAEA, North Korea issues a statement in August 1989 declaring in “clear terms” that it does not develop nuclear weapons.<sup>21</sup> Two months following this statement, North Korea announces that the establishment of the Korean Peninsula as a

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<sup>21</sup> *Korean Central News Agency*, August 4, 1989, (FBIS-EAS-89~149).

nuclear-weapons-free zone is a precondition to signing the IAEA safeguards agreement. In what would amount to an unmistakable exercise in duplicity and feet dragging over the signing of the safeguards agreement, in February 1990 North Korea expands its lists of demands to include removal of all U.S. nuclear weapons from South Korea, a halt to the U.S.-South Korean Team Spirit exercises and that North Korea be allowed to declare the safeguards agreement “null and void, depending on [its] evaluation of the attitudes” of nuclear weapons states.<sup>22</sup> Over the course of the next year, North Korea continues to expand on its demands to include a “legal guarantee” that the United States will not pose a nuclear threat against it, that actual inspections will be contingent upon verification of the removal of U.S. nuclear weapons in South Korea. On September 27, 1991, ten days after the both South Korea and North Korea accede to the United Nations, President George Bush announces withdrawal of all U.S. tactical nuclear weapons based in South Korea. President Roh Tae-Woo also announces that South Korea will become a part of the nuclear-weapons-free zone on the Korean Peninsula and that it will not “manufacture, possess, store, deploy or use nuclear weapons.” On January 30, 1992, more than six years after signing the NPT North Korea finally concludes a comprehensive safeguards agreement with the IAEA.

If the story had ended there, the Third Period would have signified the period in which the legal order enabled success in bilateral relations to play an important and parallel role in bringing forth success in a multilateral setting. The two agreements entered into by the Koreas would probably have had far more significance in

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<sup>22</sup> Yong-Son Song, *Sindong-A* (Seoul), August 1990, pp. 206~215.

terms of providing the legal basis upon which to advance the unification debate regarding finding a mutually suitable alternative to the Armistice Agreement. Instead, this period ends in the opposite manner. The discrepancies found in the initial declaration made by North Korea regarding its program on reprocessed plutonium and the subsequent refusal to submit to special inspections by the IAEA culminates in an announcement by North Korea on March 11, 1993 of its intent to withdraw from the NPT.

#### **Fourth Period (1993~2005): *Limits of Legal Order in an era of “Multilateral-Bilateralism”***

The Fourth Period begins with the 1993 announcement by North Korea of its initial intent to withdraw from the NPT and ends prior to the October 9, 2006 declaration that it had conducted its first nuclear test. The significance of this period that distinguishes it from the Third Period is the importance of multilateral relations as the key mover in an effort to resolve the North Korean nuclear issue. During this period, as opposed to the Third Period where the primary focus was on an attempt to define the legal nature of bilateral relations, bilateralism becomes ancillary to the impetus provided by the multilateral effort. The Summit meeting between the two leaders of Korea in June 2000 which resulted in a joint declaration regarding an agreement to resolve the question of unification, while important in itself, nonetheless did not create a major shift in the legal analysis of the period.

The announcement of its intent to withdraw from the NPT, however,



sets into motion a legal scheme involving primarily the United States but also a multilateral effort through a newly created consortium called KEDO (Korean Peninsula Energy Development Organization). The Agreed Framework of 1994 which came at the heels of the death of Kim Il-Sung earlier in the year is a significant departure from the prior extent of relations between the United States and North Korea. Since the Armistice Agreement, no significant legal linkage existed between the United States and North Korea and the Agreed Framework would provide first significant legal links between the two countries. While there is debate regarding whether the Agreed Framework is an enforceable and binding legal document having the force of law since it had not been ratified by Congress, it nonetheless contained important legal *quid pro quos* which were unprecedented. Important to the North Korean side was Article II of the Agreed Framework which provided for both sides to “move toward full normalization of political and economic relations.” In addition, Article III contained a clause that the United States would “provide formal assurances to the DPRK, against the threat or use of nuclear weapons.” These two points had been of particular interest to North Korea, perhaps even more so than the provision of two light water reactors as promised under the agreement. Conversely, of particular interest to the United States was the mothballing of North Korea’s existing nuclear facilities and the obligation that North Korea “remain a party to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and will allow implementation of its safeguards agreement under the Treaty.” It also obligated North Korea to “consistently take steps to implement the North-South Joint Declaration on the Denuclearization of the Korean Peninsula.” South Korea, although not a party to the Agreed Framework agrees to play a “leading role” in this

endeavor and funds approximately 70% of the cost of the project in return for a Korean company assuming the role of prime contractor for the project. The uncertain state of the Denuclearization Declaration entered into earlier between the two Koreas became elevated to the status of a key component of the agreement between the United States and North Korea. In effect, an interesting by product of the Agreed Framework was the way in which “bilateralism” between the two Koreas (Denuclearization Declaration) is strengthened through multilateral efforts stemming from the Agreed Framework and the establishment of KEDO.

KEDO which served as the vehicle with which to implement the terms of the Agreed Framework is significant from a legal standpoint during the Fourth Period in that it provided a potential model for the structure of what a successful international cooperative effort would look like. However, the inauguration of George Bush as the new President followed by the “axis of evil” speech in 2002 began a sequence of events that ultimately resulted in the end of the Agreed Framework. In October of that year, the United States announces that North Korea had admitted to having a clandestine program to enrich uranium for nuclear weapons in “violation of North Korea’s commitments under the Agreed Framework as well as under the nuclear Nonproliferation Treaty, its International Atomic Energy Agency safeguards agreement, and the Joint North-South Declaration on the Denuclearization of the Korean Peninsula.” Later that year North Korea orders all IAEA inspectors out of the country and on January 10, 2003 announces its withdrawal from the NPT, effectively withdrawing the “suspension of the withdrawal” it had made ten years earlier. The successive rounds of Six-Party Talks comprised of China, United States, Japan, Russia and South Korea fail to bring

resolution to the nuclear issue. This period witnesses a rise in and ultimate failure of multilateralism and highlights a distinct legal limitation in the nuclear non-proliferation regime as Article X of the NPT allows for withdrawal “if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country.” In particular, a system whereby a handful of countries are permitted to possess nuclear weapons and the majority is not underscores the challenges in keeping a country like North Korea within the international legal regime.

### **Fifth Period (2006~): Limits of Legal Order in an era of “New Political Order”**

North Korea’s test of its first nuclear device in October 2006 marks the start of the final Period.<sup>23</sup> The significance of North Korea’s underground test and the reason that this event marks the start of a new period from a legal order perspective is that North Korea has now joined the ranks of a handful of countries like India and Pakistan as nuclear weapons capable countries outside the framework of the NPT system. This event, and the subsequent tests in 2009 and 2013, changes the legal order paradigm on the Korean Peninsula, not only as they relate to inter-Korean relations and the debate on unification, but more broadly to the effects on the international community as a whole. In conjunction with parallel progress in its

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<sup>23</sup> “DPRK Successfully Conducts Underground Nuclear Test,” *Korean Central News Agency*, October 9, 2006, <[www.kcna.co.jp/index-e.htm](http://www.kcna.co.jp/index-e.htm)> (accessed: December 10, 2014).

missile delivery technology, the debate has shifted to focus on means available to the international community under the current legal regime to address this new threat. Under the existing legal system, the only means available to the international community has been the use of the sanctions system, in addition to the expressions of strong condemnation. The limitations of the existing legal regime becomes apparent in the North Korean case as the legal tools available to the international community have proven to be largely ineffectual in curbing the behavior of North Korea or adequately addressing the nuclear threat. The lack of an effective legal system has further emboldened North Korea since the beginning of this period resulting in a declaration by North Korea in 2013 that “inter-Korean relations have naturally entered the state of war,” threatening that all future issues between the two Koreas would be resolved in a “wartime manner.”<sup>24</sup>

A nuclear armed North Korea that is provocative, unpredictable and largely outside the sphere of influence of the international community suggests the need for a different approach. The succession of approaches taken during the Second to Fourth Periods do not appear to provide a useful frame of reference, especially in light the recent emergence of China as a military and economic power in the region. What form would a permanent peace regime then take with a nuclear capable North Korea and a non-nuclear South Korea? Although the preconditions of a permanent peace regime must first legally terminate the war in Korea and ensure that such

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<sup>24</sup> “North-South Relations Have Been Put at State of War: Special Statement of DPRK,” *Korean Central News Agency*, March 30, 2013, <[www.kcna.co.jp/index-e.htm](http://www.kcna.co.jp/index-e.htm)> (accessed: December 10, 2014).

arrangements are legally binding, it is difficult to envision from a traditional approach what conditions must be satisfied in order to achieve such a state given the imbalance of power due to nuclear capability of the counterparty. The more troubling question is how to ensure that any such agreement is binding not only on the two Koreas but on all stakeholders concerned. If we are to posit that China and United States should be considered along with South and North Korea as the stakeholders in ending the Korean War, then the immediate question becomes how effective would a bilateral agreement between the two Koreas be in creating legally binding effect on China and the United States? The rise of China's power during this period coupled with the lack of clear direction in inter-Korean relations has added yet another layer of complexity to the debate over unification. Then in what way might the paradigm change in the unification debate? If the First Period can be described as Korea being caught in the struggle for hegemony between Japan and the United States, to what extent may a similar analogy be made for the proposition that during the Fifth Period China and the United States holds unification in abeyance pending formulation of a new legal paradigm to address a new political order? The Fifth Period stands as a period in which taking a critical look at the past may provide valuable reference points and clues as to what kind of new legal order will emerge in the future on the Korean Peninsula.

## REFERENCES

- Baik, Bong. *Kim Il-Sung Biography (II)*. Dar Al-Talia, 1973.
- Bailey, Sydney D. *The Korean Armistice*. New York: St. Martin's Press, 1992.
- Beasley, W.G. *Japanese Imperialism 1894~1945*. New York: Oxford University Press, 1987.
- Cumings, Bruce. *The Origins of the Korean War Volume II, The Roaring of the Cataract 1947~1950*. Princeton, N.J.: Princeton University Press, 1990.
- Dobbs, Charles M. *The Unwanted Symbol: American Foreign Policy, the Cold War, and Korea, 1945~1950*. Ohio: The Kent State University Press, 1981.
- Duus, Peter. *The Abacus and the Sword: The Japanese Penetration of Korea, 1895~1910*. Los Angeles, C.A.: University of California Press, 1995.
- Foot, Rosemary. *A Substitute for Victory: The Politics of Peacemaking at the Korean Armistice Talks*. Ithaca, N.Y.: Cornell University Press, 1990.
- Haas, Michael (ed.). *Korean Unification: Alternative Pathways, 2nd ed.* Los Angeles, C.A.: Publishing House for Scholars, 2012.
- Hara, Kimie. *Cold War Frontiers in the Asia-Pacific: Divided Territories in the San Francisco System*. New York: Routledge, 2007.

- Matray, James Irving. *The Reluctant Crusade: American Foreign Policy in Korea, 1941~1950*. Hawaii: University of Hawaii Press, 1985.
- Millett, Allen R. *The War for Korea, 1945~1950: A House Burning*. Kansas: University Press of Kansas, 2005.
- Olsen, Edward A. *Toward Normalizing U.S.-Korea Relations: In Due Course?*. Boulder, C.O.: Lynne Rienner Publishers, 2002.
- Stueck, William. *Rethinking the Korean War: A New Diplomatic and Strategic History*. Princeton, N.J.: Princeton University Press, 2002.
- Wolff, David and John W. Steinberg (ed.). *The Russo-Japanese War in Global Perspective: World War Zero*. Volume 2. Boston, M.A.: Brill Publishers, 2005.
- Chay, J. "The Taft-Katsura Memorandum Reconsidered." *Pacific Historical Review*. Vol. 37, No. 3, 1968.
- Hara, Kimie. "50 Years from San Francisco: Re-Examining the Peace Treaty and Japan's Territorial Problems." *Pacific Affairs*. Vol. 74, No. 3, 2001.
- Roh, Jeong-Ho. "The Legal and Institutional Approach to Inter-Korean Relations." Samuel K. Kim (ed.). *Inter-Korean Relations: Problems and Prospects*. New York: Palgrave Macmillan, 2010.
- Norton, Patrick M. "Ending the Korean Armistice Agreement: The Legal Issues." (The NAPSNet Policy Forum Online, 1997.3).

*Korean Central News Agency.*

*Sindong-A.*

*The American Mercury.*





# Legal Approaches to Korean Security in the Early Stages of Unification: The Armistice Agreement and the NLL

**Leon V. Sigal**

Legal realism<sup>1</sup> is an approach many states take to international law and international institutions—and none more so than the DPRK. It uses international law and institutions if it concludes they might advance its national interests and ignores or repudiates them when they would not.

Also, more than most developing states, the DPRK regards international law and institutions as products of a colonialist and imperialist past and hence as discriminatory rather than fair or impartial. As a revolutionary state, it favors radical change in the international legal status quo.

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<sup>1</sup> “What ... officials do about dispute is, in my mind, law itself” is how legal realism was summed up by its originator, Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (New York: Oceana Publications, 1930). The use of the term in this paper goes beyond that formulation.

That said, even when it transgresses international law, the DPRK is sometimes careful to acknowledge it. Similarly, although it disparages international institutions, it still tries to use them to further its aims. For example, after South Korea's probe that found the DPRK responsible for sinking the *Cheonan*, the DPRK Ambassador to the United Nations wrote a letter to the Security Council President asking the Council to "take measures that can lead the U.S. and South Korea to receive the inspection group of the National Defense Commission as already proposed by the DPRK, the victim, to help verify the 'investigation result' and find out the truth."<sup>2</sup> Similarly, before launching satellites in violation of Security Council resolution 1718, as interpreted by the President of the Security Council in an April 2009 statement, and later by U.N. Security Council resolution 1874, both of which it rejected, the DPRK invoked the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and Other Celestial Bodies, and the Convention on Registration of Objects Launched into Outer Space in asserting its right to launch. In the run-up to its April 2009 and April 2012 rocket launches, the DPRK provided formal notice of the path of the launch to the International Maritime Organization and the International Civil Aviation Organization, as required under international law, in order to warn ships and aircraft to stay out of the area, as well as to invite foreign observers to witness the launch. In the 2012 instance, it was also careful to rebut a U.S. assertion that the launch was "an abrogation" of the Leap Day agreement. DPRK First Vice Foreign Minister Kim Gae-Gwan, in a letter to U.S. Special Representative on North Korea Policy Glyn Davies on March 20,

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<sup>2</sup> Louis Charbonneau, "North Korea Urges U.N. Council to Back New Cheonan Probe," *Reuters*, June 30, 2010.

2012, wrote, “I had made very clear that the moratorium on long range missile launch did not include our peaceful satellite launch and that provided us with a fundamental base for our deal.” He went on to contend that U.S. suspension of nutritional assistance was a “clear violation” of the accord.

For its part, the United States often acts like a legal realist, too. At the same time, it also takes a legalistic approach to international relations. As the preeminent state in the international system for over a half century, it has been in an influential position to advance its national interests by writing the rules and shaping the world’s institutions and to use international law and institutions to mobilize other states. A case in point is its use of the nuclear Non-Proliferation Treaty (NPT), the International Atomic Energy Agency (IAEA), and the U.N. Security Council to rally international opposition to the DPRK’s nuclear program.

Yet whenever Washington went beyond using international law and institutions to mobilize others and tried to impose the law on the DPRK, it failed. It adopted this crime-and-punishment approach when it pressed the IAEA to seek a special inspection of the nuclear waste site at Yongbyon and to threaten to refer the issue to the Security Council. In response, the DPRK warned it would renounce the NPT unless “the IAEA secretariat returns to its principle of independence and impartiality.”<sup>3</sup> Similarly, each time that the U.N. Security Council, with U.S. and Chinese backing, voted to impose sanctions, the DPRK responded with a nuclear test.

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<sup>3</sup> “Statement of the DPRK Government Declaring Its Withdrawal from the NPT,” *Korean Central News Agency*, March 12, 1993.

To the extent that the DPRK is willing to follow international law and participate in international institutions, it may be amenable to other states' influence. In these cases, the legal process may prove useful in reaching common decisions by "adjusting" the interests of the DPRK and others.<sup>4</sup> That suggests the need to look for situations where the DPRK may be amenable to a legal approach instead of trying to enforce the law.

## **Status Quo vs. Revolutionary Approaches to International Order**

Sensitivity to the Korean geopolitical context is critical to any attempt to apply a legal approach to the DPRK. Pivotal to that context is the rise of China.

China's rise has important implications for international law and institutions. While it is commonplace in Washington to stress how much China has benefited from international law and institutions, the view in Beijing is not as sanguine. Like other developing states, China often chafes at rules that others wrote and institutions that others shaped, especially when it regards them as putting it at a disadvantage. The difference in perspectives was evident when the U.S. Treasury Department imposed so-called financial measures against the DPRK, threatening to deny corresponding relations with U.S.

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<sup>4</sup> The idea of legal process was developed in reaction to legal realism in Abram Chayes, Thomas Ehrlich, and Andreas Lowenfeld, *International Legal Process, I* (New York: Little Brown & Co (T), 1968), p. xi.

financial institutions to any bank in the world doing business with DPRK entities. That raised Chinese concern about extraterritoriality and gave impetus to Beijing's effort to create new international financial institutions in Asia less subject to U.S. influence.

In this sense, while the United States acts like a status quo power, China acts like a revolutionary state in seeking radical change in the international legal order. So does the DPRK.

They are not alone. From Beijing's vantage point, the United States itself acts like a revolutionary state in its global approach to democratization and human rights while China is a status quo state. That suggests why China has supported the DPRK in blocking U.N. Security Council action on human rights.

## **The Relevance of International Law to Korean Reconciliation**

International law and institutions may facilitate Korean reconciliation, as well as peace and denuclearization on the peninsula, which is the focus of this paper. International law and institutions can also promote economic and political cooperation in Korea and the region and even the rights of North Koreans. Yet the difficulties that a legal approach may pose for the United States and South Korea should not be underestimated.

For instance, in the economic arena, the DPRK signed and faithfully observed a number of legal protocols with the Korean Peninsula Energy Development Organization (KEDO), some of which served

as precedents for subsequent transactions with foreign entities in other contexts. A number of legal agreements and contracts govern operations at the Kaesong Industrial Complex. The DPRK has signed a number of legal accords with China and Russia that govern commerce and other cross-border interactions, which could provide useful precedents in the inter-Korean context. More comprehensive inter-Korean agreements were concluded in 1972, 1991, 2000, and 2007. Perhaps the most significant was the 2007 summit agreement signed by Kim Jong-il himself, which gave it the writ of law - and much more - inside the DPRK. Case studies comparing when the DPRK adhered to these agreements and contracts to when it did not may prove useful in considering what future accords might facilitate reconciliation.

Even in the area of human rights, the DPRK, despite its appalling record, has not only signed the Convention of the Rights of Persons with Disabilities, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child, but has also taken modest steps to implement them. In its response to the *Report of the Commission of Inquiry on Human Rights in the DPRK*, Pyongyang noted its interest in the conventions, which may provide useful openings to improve the lives of ordinary North Koreans in the course of reconciliation.

In the area of security, the DPRK has also had a decidedly mixed record in its approach to international institutions and international law. A major case in point is the Armistice Agreement and the so-called Northern Limit Line (NLL).

## The Korean Armistice Agreement and the NLL

The Armistice Agreement signed on July 27, 1953 was quite specific about the military demarcation line (MDL) on land, but not at sea. The Armistice Agreement only enjoined the sides to “respect the waters contiguous to the demilitarized zone.” These waters were never defined because the United Nations Command (UNC) claimed a three-nautical-mile zone for South Korea, then the international standard, while the DPRK insisted on a 12-n.m. zone, later to become the international standard. The Armistice Agreement also stipulated that five islands located north of the MDL in the West Sea—all within 13 n.m. and one within 1.3 n.m. of DPRK territory—“shall remain under the military control of the Commander-in-Chief, UNC.”

President Rhee Syng-Man, who opposed terminating the war short of unifying the peninsula, refused to sign the Armistice Agreement. Shortly thereafter, on August 30, the U.N. commander at the time, General Mark Clark, concerned that South Korean forces might venture further north, promulgated the northern patrol limit line as a military control line in the West Sea to bar such action. The line was formally reaffirmed in 1960. As a January 1974 C.I.A. report makes clear, “The sole purpose of the NLL was to avoid incidents by forbidding UNC naval units to sail north of it without special permission; in at least two places, however, it crosses waters presumed to be under uncontested North Korean sovereignty.” The NLL, it added, “has no legal basis in international law, nor does it conform along some of its length to even minimal provisions regarding the division of territorial waters.”<sup>5</sup>

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<sup>5</sup> Central Intelligence Agency, “The West Coast Korean Islands,” (Wilson Center Digital Archive, 1974.1), p. 2, <<http://digitalarchive.wilsoncenter.org/document/114023>>.



Although the DPRK had never accepted the NLL, it did not formally contest that demarcation line until December 1, 1973 during the 364th meeting of the Military Armistice Commission. Having stepped up naval patrols nearby, it asserted a territorial claim to the waters surrounding the five islands and demanded permission to navigate in them. In response, Washington decided “to limit US/UNC positions to interpretations of and assertion of rights under Armistice Agreement and to avoid unnecessary and possible provocative involvement in territorial disputes. In this regard, care should be exercised to avoid basing our position on support of ROK claims to or rights in ‘territorial sea’ or ‘territorial waters’ around islands which terms under international law connote sovereignty and raise complex Law of the Sea issues.”<sup>6</sup> Ever since, the U.S. position has been careful to distinguish its rights under the Armistice Agreement and the territorial claims of the two Koreas.

One consequence of the location of the NLL, however, is that DPRK merchant ships must detour north of Baekryeong Island from the port of Haeju before entering the West Sea, at a cost of additional time and fuel. The NLL also inhibits fishing, especially for the prized blue crabs that migrate across the NLL, which occasionally leads to clashes over North, South, and Chinese trawlers that cross the line.

The first such clash in “international” waters, in the “recollection” of the U.S. command, came on the night of February 26~27, 1975. When small North Korean fishing boats “strayed” south of the NLL and South Korean navy vessels fired warning shots, the U.S. embassy in Seoul reported, “two larger armed North Korean vessels were sent

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<sup>6</sup> “Joint State/Defense Message to Embassy Seoul, Questions Regarding Northern Limit Line,” (Wilson Center Digital Archive, 1973.12.21), <<http://digitalarchive.wilsoncenter.org/document/114021>>.

south to direct them back north. At no point in our records of incident did larger armed vessels head toward South Korean territory.” After the fishing boats were rammed, the North responded by sinking one South Korean fishing boat and capturing another and flying aircraft across the NLL. The embassy called the DPRK reaction “unique and uncharacteristic,” perhaps an attempt “to even the score” for the loss of two of its own vessels on February 15.<sup>7</sup> A February 28 State Department cable was also explicit about the NLL’s legal status and U.S. policy: “Northern patrol limit line does not have international legal status. NPLL was unilaterally established and not accepted by NK. Furthermore, insofar as it purports unilaterally to divide international waters, it is clearly contrary to international law and USG Law of the Sea position.” It added, “We do not, repeat not, view legitimate function of either UNC, under Armistice and pertinent Security Council resolutions, or USG, under Mutual Security Treaty, as including armed enforcement of ROK fishing claims, especially in areas we regard as international waters beyond Armistice zone.”<sup>8</sup>

On June 21, 1977, the DPRK declared a 200-mile economic exclusion zone and on August 1, 1977 a 50-mile military boundary zone. These zones, along with the NLL, are subject to dispute under the United Nations Convention on Law of the Sea, which the DPRK has signed but not yet ratified.

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<sup>7</sup> “Yellow Sea Incident between North and South, February 26~27,” (Wilson Center Digital Archive, 1975.2.27) <<http://digitalarchive.wilsoncenter.org/document/11032>>; Cf. Memorandum to Richard Smyser, NSC, from Deputy Assistant Secretary of Defense Morton I. Abramowitz, “26~27 February Yellow Sea Incident,” (Wilson Center Digital Archive, 1975.3.14) <<http://digitalarchive.wilsoncenter.org/document/114059>>.

<sup>8</sup> “Summary Public Affairs Aspects of North Korea Boat/Aircraft Incident,” February 28, 1975.

The NLL took on more formal legal status in December 1991 when the two Koreas concluded the Agreement on Reconciliation, Non-aggression and Exchanges and Cooperation between the South and the North, commonly known as the Basic Agreement. Article 11 stipulates, “The South-North demarcation line and areas for non-aggression shall be identical with the Military Demarcation Line specified in the Military Armistice Agreement of July 27, 1953 and the areas that have been under the jurisdiction of each side until the present time.” In the 1992 “Protocol on the Implementation and Observance of Chapter II, Nonaggression of the Basic Agreement,” this commitment is further spelled out, “Until the decision on the maritime demarcation line is final, the nonaggression areas of the sea shall be those that have been followed by each side until the present time.”

In 1999, nevertheless, there was another deadly clash in the West Sea. On June 7 about 20 fishing boats from the North crossed the NLL, accompanied by six naval patrol boats. The South Korean navy hailed them. When signal flags, radio and voice communication failed to get them to reverse course, it moved to interdict them, ramming several of the boats and damaging a few before they returned north. President Kim Dae-Jung then ordered ROK ships not to fire unless fired upon first. The clashes continued until June 11 when the Korean People’s Army (KPA) demanded that South Korea withdraw “all warships” from what it called its “territorial waters” and “apologize” for the “intrusion.”<sup>9</sup> Ships continued to cross the NLL from the north, and on June 15 more than a dozen fishing boats

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<sup>9</sup> “Statement of Spokesman for KPA Mission in Panmunjom,” *Korean Central News Agency*, June 11, 1999.

crossed, followed by a few patrol boats. After the South began ramming operations, a KPA Navy torpedo boat opened fire and South Koreans returned it. In the ten-minute exchange, several of the North Korean boats were damaged and two KPA naval vessels sunk.

That September 2 the KPA General Staff announced it had unilaterally drawn its own demarcation line and was prepared to defend it by “various means.”<sup>10</sup> Yet behind the scenes, high-level talks began which would culminate on June 15, 2000 with the first-ever North-South summit. At the summit the DPRK renewed its long-standing demand for a peace treaty but reiterated its 1992 commitment to abide by the Armistice Agreement and observe the NLL until such a treaty was signed. The West Sea remained becalmed for two years.

In June 2002, a deadly clash again roiled those waters. The timing was especially inopportune. On June 13, 2002, the United States agreed to resume high-level talks long sought by the DPRK and South Korea was hosting the World Cup. The proposed July 10 date for those talks was not yet confirmed on June 29 when two North Korean patrol boats approached South Korean fishing boats that had been crabbing north of the NLL. Challenged by eight South Korean naval vessels and rammed by one, they opened fire and sank a speedboat, leaving five dead and 19 wounded. The South Koreans returned fire, disabling one North Korean craft and causing an unknown number of casualties.<sup>11</sup> The North, acting as if nothing untoward had happened, congratulated the South a day later on its

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<sup>10</sup> “Special Communique of KPA General Staff,” *Korean Central News Agency*, September 2, 1999.

<sup>11</sup> Jang-Jin Hwang, “Military Acknowledges Communications Blunder,” *Korea Herald*, July 8, 2002; “The Truth about the West Sea Battle,” <[www.kimsoft.com/2002/westsea2a.htm](http://www.kimsoft.com/2002/westsea2a.htm)>.

World Cup team's soccer performance. Four days later it reassured Seoul it would "smoothly promote dialogue and cooperation."<sup>12</sup> In a telephone call to Panmunjom on July 25, the North said it "regretted the unexpected armed clash" and asked for cabinet-level talks with the South.<sup>13</sup> Those talks soon led to the start of construction to restore rail and road links across the DMZ, a reunion of divided families, and military-to-military talks on confidence-building measures.

Seven years would pass before the next fatal engagement in the West Sea. The political context was a significant catalyst. Six-party talks had yielded the September 2005 Joint Statement, a potentially far-reaching accord which included a provision that "the directly related parties will negotiate a permanent peace regime on the Korean Peninsula at an appropriate separate forum." That provision was elaborated at the second North-South summit meeting held on October 2~4, 2007, where the two Koreas agreed to "terminate the existing armistice regime and to build a permanent peace regime." They further pledged "to discuss ways of designating a joint fishing area in the West Sea to avoid accidental clashes and turning it into a peace area and also to discuss measures to build military confidence." They also "agreed to create a 'special peace and cooperation zone in the West Sea' encompassing Haeju and vicinity in a bid to proactively push ahead with the creation of a joint fishing zone and maritime peace zone, establishment of a special economic zone, utilization of Haeju harbor, passage of civilian vessels via direct routes

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<sup>12</sup> "North Korea Vows to Push for Dialogue with South Korea," *Agence France Presse*, July 4, 2002.

<sup>13</sup> Ji-Ho Kim, "North Proposes Resumption of Dialogue with S. Korea," *Korea Herald*, July 26, 2002.

in Haeju and the joint use of the Han River estuary.” A four-party working group chaired by China was supposed to commence work on the peace regime soon thereafter, perhaps kicked off by a meeting of the six-party foreign ministers. Assistant Secretary of State Christopher Hill put it just right when he told reporters in Seoul on November 2, 2007, “Our position, which we’ve had for a long time and continue to have, is that upon substantial disablement ... we would hope we could begin a peace negotiation process that would conclude, and that we could reach a final peace arrangement when the North finally abandons its nuclear weapons and nuclear programs pursuant to the September 2005 agreement.”<sup>14</sup>

These hopes were soon dashed. Less than two months later, Lee Myung-Bak was elected president of South Korea. Within days of his election, his transition team backed away from the summit accord, and specifically the provision for a zone of peace in the West Sea.<sup>15</sup> Lee later backed away from the 2000 summit accord as well, which had committed the North to abide by the NLL until permanent borders were drawn. The moves drew a bristling response from Pyongyang. After building up its shore artillery near the disputed waters, it accused South Korean vessels of violating “its” territory and fired short-range missiles into those waters, underscoring the risks of leaving the issue unresolved. At the same time, Pyongyang urged that the Armistice Agreement be replaced with a permanent peace treaty as part of six-party talks on denuclearization, a step that Lee was loath to take. A heated war of words erupted. On January 17,

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<sup>14</sup> U.S. Department of State, “Press Availability at MOFAT Lobby,” Seoul, November 2, 2007.

<sup>15</sup> Sung-Ki Jung, “Peace Zone Project Faces Derailment,” *Korea Times*, December 30, 2007.

assailing the South's defense minister "for making full preparations for the possible third West Sea skirmish," a North Korean military spokesman warned, "[W]e will preserve ... the extension of MDL in the West Sea already proclaimed to the world as long as there are ceaseless intrusions into the territorial waters of our side in the West Sea."<sup>16</sup> Not to be out-muscled, South Korea's defense minister told the National Assembly a month later that it "will clearly respond to any preemptive artillery or missile attack by North Korea" in the contested waters.<sup>17</sup> The message to navies on both sides was to shoot first and ask questions later.

In August 2009 Pyongyang reached out to re-engage with Seoul and Washington, but President Lee, mistaking the gesture as a sign of weakness, spurned the invitation. With little to show for his efforts to re-engage, Kim Jong-Il turned up the heat. On October 15 the DPRK navy accused the South of sending 16 warships into the disputed waters, according a report by Korean Central News Agency, which went on, "The reckless military provocations by warships of the South Korean navy have created such a serious situation that a naval clash may break out between the two sides in these waters."<sup>18</sup> Shortly thereafter just such a clash took place. On November 9 a KPA Navy patrol boat crossed the NLL and a South Korean vessel fired warning shots at it. The North returned fire and the South opened up, severely damaging the North Korean vessel, killing the

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<sup>16</sup> "Principled Stand of the KPA to Defend Socialist Country as Firm as Iron Wall Clarified," *Korean Central News Agency*, January 17, 2009.

<sup>17</sup> "S. Korea to Strike Back If N. Korea Provokes Armed Clash: Defense Minister," *Yonhap*, February 20, 2009.

<sup>18</sup> "Halt to Intrusion of S. Korean Warships into DPRK Waters Demanded," *Korean Central News Agency*, October 15, 2010.

captain and causing an unknown number of casualties.

On November 12, after Pyongyang's demand for an apology went unanswered, *Rodong Shimun* spoke of avenging the attack: "The South Korean forces will be forced to pay dearly for the grave armed provocation perpetrated by them in the waters of the north side in the West Sea of Korea."<sup>19</sup> Five days later, according to North Korean accounts, Kim Jong-Il went to a naval base with his high command and ordered the training of a "do-or-die unit of sea heroes."<sup>20</sup> That order was carried out on March 26, 2010, with the attack on the *Cheonan*.

That led to yet another deadly clash. Joint U.S.-R.O.K. naval exercises were conducted in the West Sea, purportedly to reinforce deterrence and to demonstrate the risk to China of not going along with pressure on North Korea.<sup>21</sup> That did not placate Seoul, which was determined to conduct its own live-fire exercise in the West Sea as part of a large-scale Hoguk exercise despite U.S. misgivings. On November 23 the DPRK representative at the North-South general level military talks used an inter-Korean military hotline to demand that the artillery exercises be suspended. Ignoring the warning, the South commenced firing less than two hours later. After four-and-a-half hours, over 2,000 shells had splashed down in the contested

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<sup>19</sup> "S. Korea Will Be Forced to Pay Dearly for Armed Provocations," *Korean Central News Agency*, November 12, 2009.

<sup>20</sup> Naval officer Kim Kwang-Il, interviewed on Korean Central Television, April 25, 2009, quoted in Young-Jong Lee and Myo-Ja Ser, "Fleet Officer Says Kim Intensified Navy Training after Nov. 10 Defeat," *JoongAng Ilbo*, May 6, 2010.

<sup>21</sup> Admiral Robert F. Willard, commander of the U.S. Pacific Command, quoted in Elizabeth Bumiller, "U.S. and South Korea Plan Naval Drill as A Message," *New York Times*, July 21, 2010, pp. A-8.



waters, then the North began firing at Yeonpyeong Island and adjacent waters and the South ceased fire. After the North fired 170 shells, the South returned fire, this time aiming at coastal batteries in the DPRK. How many of the 80 shells, if any, hit their target is not known, but some seem to have landed on a KPA barracks, causing a number of casualties. The North paused briefly, and then resumed firing and so did the South.<sup>22</sup> At what point in the exchange were four South Koreans on Yeonpyeong fatally struck is also not clear.

## **Legal Approaches to the NLL**

Leaving the NLL dispute unresolved is certain to lead to further deadly clashes as both sides resort to force to bolster their rival claims and try to deter the other from doing so. The bloody history of confrontation in the West Sea suggests the desirability of exploring legal ways out.

One possibility is international mediation or arbitration. South Korea is unlikely to accept either remedy because the chances of a legal judgment in its favor are remote, and the DPRK is likely to prove unyielding otherwise. Jon Van Dyke, a leading legal specialist on the issue, has carefully enunciated principles of law of the sea that found the NLL “contrary to the principle of ‘non-encroachment because it blocks North Korea’ access to the ocean in this region.” An additional consideration against the South’s claim is

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<sup>22</sup> John Delury and Chung-In Moon, “Analytical Failure and the North Korean Quagmire,” *38North*, April 7, 2011.

that islands are not equal to land masses. The five islands “would be ignored in drawing the main maritime boundary. ... [B]ecause they are all so close to the North Korean coast, and crowded among each other, this geographical situation might be one that requires a smaller territorial sea.”<sup>23</sup> Van Dyke’s analysis informs the conclusion of Terence Roehrig, a specialist at the U.S. Naval War College, “If the issue ever went before an international tribunal for mediation or adjudication, many elements of international law support a decision that would change the line in North Korea’s favor moving the NLL south of its current location but not fully complying with the DPRK’s wishes.”<sup>24</sup>

Another approach is direct negotiation between the two Koreas of a permanent border. However desirable that may be, it seems unlikely unless preceded by prolonged efforts to reconcile and to address less politically fraught issues. On the one hand, fixing a permanent border seems at odds with the very idea of unification because it implies the existence of two separate states. Even though it is the case that the two Koreas each have their own seats in the United Nations and are recognized by many other states, both sides still seem resistant to a permanent border, as well as to cross-recognition of each other. Consistent with their view that theirs is a “special relationship,” they tend to conduct business through the Ministry of Unification and its DPRK counterpart or through their intelligence agencies rather than through their respective diplomats. On the other hand, the DPRK is

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<sup>23</sup> Jon M. Van Dyke, “The Republic of Korea’s Maritime Boundaries,” *The International Journal of Marine and Coastal Law*, Vol. 18, Issue. 4 (2003).

<sup>24</sup> Terence Roehrig, “Korean Dispute over the Northern Limit Line: Security, Economics or International Law,” *Maryland Series in Contemporary Asian Studies Series*, Vol. 3 (2008), p. 5.

not averse to dealing with the ROK's Ministry of Foreign Affairs and Trade in six-party talks and other venues and has hinted recently at expanding these more traditional diplomatic contacts to peace mechanism and unification matters as well.<sup>25</sup>

Short of negotiating a permanent border, the possibility of an international peacekeeping force to patrol both sides of the DMZ and NLL is another option. The problem is that the United Nations' role in authorizing intervention in the Korean War leaves it suspect in Pyongyang's view, which has long called for the end of the United Nations Command under whose auspices such a force in theory could legally be deployed.<sup>26</sup>

On occasion DPRK diplomats have hinted at an alternative peacekeeping force. They have spoken of U.S. troops standing "in a neutral position on the DMZ, listening with one ear toward Pyongyang and the other ear toward Seoul." That may have been more than mere metaphor. On another occasion a DPRK diplomat Korean saw no incompatibility between a U.S. role as peacekeeper and continuation of the U.S.-R.O.K. Security Treaty: "You can have two allies, why just one." Retaining the alliance preserves the prerogatives of the combined forces commander, a U.S. general. As Kim Jong-Il told Kim Dae-Jung at the June 2000 summit, "American forces can prevent you from invading the North."<sup>27</sup> Such a fundamental change in the U.S. role is unlikely without more thoroughgoing reconciliation between Pyongyang and Washington, not to mention between

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<sup>25</sup> "DPRK Foreign Ministry Memorandum," January 14, 2013.

<sup>26</sup> For example, "DPRK Foreign Ministry Issues Memorandum," *Korean Central News Agency*, January 14, 2013.

<sup>27</sup> *JoongAng Ilbo*, June 20, 2000.

Pyongyang and Seoul.

If the possibility of directly applying international legal and institutional means to resolve the NLL issue seem remote, a more indirect and interim approach may be warranted.

## **An Indirect Legal Approach**

As the deadly clashes in the West Sea demonstrate, the very steps that each side in Korea takes to bolster deterrence increase the risk of deadly clashes. In short, deterrence alone will not preserve morning calm on the peninsula. The way to reduce the risk of further clashes is a peace process in Korea. Pyongyang has long said it wants a peace treaty formally ending the Korean War. Probing whether it means what it says is in South Korean and U.S. security interests, especially as long as the DPRK is nuclear-armed.

A peace treaty is unlikely without a more conducive political climate. One way to nurture that climate is a peace process, using a series of interim peace agreements as stepping stones to a treaty, as envisioned in the six-party September 19, 2005 Joint Statement. Conducted in parallel with steps toward denuclearization on the Korean peninsula, such a peace process might involve a series of legal agreements providing for military confidence-building measures—trust-building. There is ample legal precedent for such measures in recent European experience.

What might the DPRK see in such peace agreements? Any formal document that it signs with the United States and the R.O.K. con-

stitutes token recognition of its sovereignty. The DPRK has always taken such tokens seriously. If so, they might provide inducements to gradual denuclearization.

The DPRK has long sought a peace process in one form or another. A notable example came on June 16, 1998, when North Korea made public an offer to negotiate an end to its export, testing, and production of ballistic missiles. With that offer came a threat to resume tests, a threat the North carried out on August 31, 1998, when it launched a three-stage Taepo Dong-I in a failed attempt to put a satellite into orbit. The June 16 statement said, “The discontinuation of our missile development is a matter which can be discussed after a peace agreement is signed between the DPRK and the United States and the U.S. military threat [is] completely removed. If the U.S. concern about our missiles is truly related to the peace and security of Northeast Asia, the United States should immediately accept the DPRK-proposed peace agreement for establishment of a durable peace mechanism on the Korean Peninsula.”<sup>28</sup>

By “peace agreement” the DPRK may not mean a peace treaty, but a declared end to enmity and a pledge to respect each other’s sovereignty. Nor is “the U.S. military threat” synonymous with the U.S. military presence. Only a fundamental change in the DPRK’s political relationship with the United States—reconciliation—would remove the threat as Pyongyang perceives it; withdrawal of U.S. armed forces would not, since the North would remain at risk from U.S. armed forces based offshore. The “peace mechanism” entails a military-to-military channel that Pyongyang has sought to replace

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<sup>28</sup> “Nobody Can Slander DPRK’s Missile Policy-KCNA Commentary,” *Korean Central News Agency*, June 16, 1998.

the Military Armistice Commission set up to monitor the cease-fire at the end of the Korean War. On August 25, 2000, in the aftermath of the historic North-South summit, Kim Dae-Jung reportedly took a half-step toward the North's position by publicly referring to the need for a new peace mechanism.<sup>29</sup>

The new three-way peace mechanism sought by Pyongyang would do more than resolve disputes like the shooting down of a U.S. reconnaissance helicopter in 1996 after it strayed across the DMZ, the repeated incursions of North Korean spy submarines, or fire-fights in the NLL. Pyongyang also saw the military-to-military channel as a venue for negotiating various confidence-building measures (CBMs) to forestall such clashes. Such measures could be the subject of other peace agreements.

Such a channel was envisioned in Article 12 of the December 13, 1991 Agreement on Reconciliation, Nonaggression and Exchanges and Cooperation, which established a South-North Joint Military Committee that “shall discuss and carry out steps to build military confidence and realize arms reductions.” Neither party did much to implement that provision.

Establishment of a new military-to-military channel could be the subject of a separate peace agreement. Who would be involved in setting up such a channel? The venue for a peace process—the shape of the negotiating table—has long been a contentious issue. One possible venue is four-party talks. Such a venue was established in 1996, but never functioned. Yet the DPRK preferred

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<sup>29</sup> Shi-Yong Chon, “Kim Calls for Measures to Ease Military Tensions on Peninsula,” *Korea Herald*, August 25, 2000.

three-party talks, including the ROK but omitting China, in part to signal its desire to reduce its dependence on its neighbor.<sup>30</sup> The September 2005 joint statement, which called for “the directly related parties” to negotiate a peace regime, was a concession to its view, leaving China’s role unstated. In Pyongyang’s view, such talks would be the venue for agreeing on the political principles for easing tensions.

The military-to-military channel is distinct from the venue to negotiate political principles. In the past Seoul has had a preference for a two-party channel, where the North and South could work out confidence-building measures like military or naval hotlines on their own. Yet some CBMs lend themselves to a three-way venue that involves all three parties with forces in Korea. They include advanced notification and mutual observation of military exercises, data exchanges, and military-to-military exchanges.

Starting in 1996, DPRK officials privately expressed interest in CBMs. They soon underscored their words with deeds. After an armed clash in the DMZ on July 16, 1997, according to a South Korean military briefing, the KPA began providing advance notice that “a certain number of their soldiers will go out for routine reconnaissance at a certain time and a certain location in the DMZ.”<sup>31</sup> In

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<sup>30</sup> The North first proposed three-party talks, with the United States and South Korea, on force reductions on July 23, 1987. The South preferred two-party talks on conventional forces, instead. To break the deadlock, the United States proposed four-party talks. President Kim Young-Sam turned them down. He grudgingly came around to accepting four-party talks in 1996 only after President Clinton held up a planned visit to Seoul that April. South Korea wanted the United States and China to convene the talks and then leave it alone to deal with the North. The North is prepared to talk to the South, but only if the United States is a party to the talks as well. That makes sense since all three parties have forces on the ground in Korea and no party can make binding agreements on behalf of another.

the spring of 2000, the DPRK accompanied acceptance of a North-South summit with a pullback of FROG-7 rockets from the DMZ and Silkworm missiles from the NLL, as well as a reduction in operating tempo of its naval patrols.<sup>32</sup> All three acts were confidence-building gestures of sorts. More recently, in a military-to-military meeting on October 15, 2014, one week after an exchange of fire in the West Sea, the DPRK proposed that “warships of both sides sailing to ‘intercept illegal fishing boats’ should display promised markings to prevent accidental firing beforehand.”<sup>33</sup>

What CBMs might help build trust and ease tension in the NLL? One is to improve communication by setting up a hotline between the local naval commands on each side, linking the naval chiefs on each side with another hotline, and installing direct communications between naval vessels on each side. A second is to draw up joint search-and-rescue procedures. A third is to demark sea routes for merchant shipping from Haeju by buoys. Another is to anchor buoys just south of the NLL to delineate patrol zones that would keep the two sides’ navies separate while not being identical to the NLL itself.<sup>34</sup> Yet another is to spell out naval “rules of the road” in the West Sea, for instance, forbidding fishing vessels from entering the

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<sup>31</sup> “N.K. Gives Prior Notice for DMZ Reconnaissance,” *Korea Herald*, September 8, 1997, p. 3.

<sup>32</sup> “Two Koreas Set to Hold Crucial Talks for Summit, Military Tension Eases,” *Agence France Presse*, April 26, 2000.

<sup>33</sup> “KCNA Discloses S. Korean Authorities’ Acts of Chilling Atmosphere for Improving Ties,” *Korean Central News Agency*, October 16, 2014.

<sup>34</sup> Jason Kim and Luke Herman, “War and Peace in the West Sea: Reducing Tension along the Northern Limit Line,” *CSIS Issues and Insights*, Vol. 12, No. 13 (December 2012), pp. 10~12.



contested waters without prior notice to the other side, barring KPA naval vessels from accompanying them or going south of the NLL as well as prohibiting South Korean naval vessels from entering the contested waters without prior notification and limiting the number and types of vessels from entry at any one time, moving KPA artillery out of range of Yeonpyeong island and barring South Korean artillery from the island. More far-reaching would be to establish a joint monitoring center that would share identification and location of all ships of the two sides in or near the contested waters, an “open skies” arrangement to facilitate aerial reconnaissance of the area, or joint patrols to escort shipping in the areas near the buoys.

Modest confidence-building measures, however reassuring they may be, cannot by themselves defuse the toe-to-toe standoff along the DMZ, but they may be useful as part of an indirect legal approach to reconciliation between the North and the South, as well as an inducement to denuclearization.

## REFERENCES

Chayes, Abram, Thomas Ehrlich, and Andreas Lowenfeld. *International Legal Process, I*. New York: Little Brown & Co (T), 1968.

Llewellyn, Karl N. *The Bramble Bush: On Our Law and Its Study*. New York: Oceana Publications, 1930.

Kim, Jason and Luke Herman. "War and Peace in the West Sea: Reducing Tension along the Northern Limit Line." *CSIS Issues and Insights*. Vol. 12, No. 13, December 2012.

Roehrig, Terence. "Korean Dispute over the Northern Limit Line: Security, Economics or International Law." *Maryland Series in Contemporary Asian Studies Series*. Vol. 3, 2008.

Van Dyke, Jon M. "The Republic of Korea's Maritime Boundaries." *The International Journal of Marine and Coastal Law*. Vol. 18, Issue. 4, 2003.

"DPRK Foreign Ministry Memorandum." January 14, 2013.

*Agence France Presse*.

*JoongAng Ilbo*.

*Korea Herald*.

*Korea Times*.

*Korean Central News Agency*.

*New York Times.*

*Reuters.*

*Yonhap News Agency.*

38 North. <<http://38north.org>>.

Wilson Center Digital Archive. <<http://digitalarchive.wilsoncenter.org>>.



# III

## **Legal Aspects of Inter-Korean Cooperation and Human Rights**



# Legal Perspective and International Cooperation on World Peace Park in DMZ between South and North Korea

*Hyo-Won Lee*

## Introduction

Created based on the Military Armistice Agreement of July 27th, 1953, the Demilitarized Zone in Korean Peninsula, the DMZ, lies between Republic of Korea and Democratic People's Republic of Korea. It ranges 2 kilometers each to north and south, with the Military Demarcation Line (MDL) located in the middle. The Military Armistice Agreement was signed by the United Nations' Command on one side, and Chief Commander of North Korea and Chief Commander of China on the other. While the symbol of military tension and the Cold War, the DMZ is also a valuable natural resource. Since 1970s, international organizations such as the UNEP have proposed that the DMZ should be fully made use of. South Korea also tried to have the DMZ designated as a biosphere zone by UNESCO since 2000, while suggesting that a peace · ecology · tourism park be set up in the area.

On May 8th, 2013, the President of South Korea introduced the idea of creating a World Peace Park in DMZ, when she was speaking in the Congress of U.S.A. After this, the discussion began in earnest, and a special organization for the World Peace Park in DMZ was created under Ministry of Unification. Creating a World Peace Park in DMZ would stimulate peaceful atmosphere between North and South Korea, and relieve the mood of military tension and conflicts. Since the DMZ is created according to the international law system, domestic law and international law do oppose against each other within the issue of DMZ. Thus, it is necessary that North and South Korea agree with the plan firstly. Then, legal relation regarding the DMZ should be systematized to eliminate legal obstacles against the project. International bond and cooperation is also critical, and international law principles should be protected and pursued.

## **Normative Basis on the World Peace Park**

DMZ is 248 kilometers long and approximately 4 kilometers wide with the MDL standing in the middle. The area being 907 square kilometers, DMZ includes Gyeonggi Province and Gangwon Province in South Korea, Gaesung City and Gangwon Province in North Korea. The Military Armistice Agreement states that “a military demarcation line should be set and each party move 2 kilometers away from the line, creating a demilitarized area. The demilitarized area will act as a buffer between the two parties and thus prevent any occurring of offensive behaviors” (Article 1 Clause 1). DMZ is established according this Article. However, in reality, the area is

heavily armed by both sides, and weapons such as mortars, antitank guns, and multiple rocket guns are installed. Also, the area has been reduced in its extent, because both sides competitively advanced forward to get geographical advantage with ceasefire line. North Korean representatives of the Military Armistice Commission withdrew in April 1994, and North Korea declared the Military Armistice Agreement invalid in March 2013. These actions weakened the actual regulatory power of the agreement, which is the normative basis of the DMZ.

World Peace Park in DMZ has a constitutional and legal normative meaning, in addition to political, ecological and economical meaning. That is, creating a World Peace Park in DMZ correspond to our constitutional principle. In specific, constitution states peaceful unification as basic principle (the preamble, Article 4, and Article 66), and clarifies world peace and international pacifism (the preamble and Article 5). Constitution of both Koreas define that the whole Korean Peninsula should be their own territory, while in reality, territorial supremacy is divided with the MDL in the middle. International society also approves both Koreas, and mentioning 'peaceful unification' as a principle would mean that both constitutions also accept the divided reality. As such, DMZ has a very special and exceptional legal status, and no domestic or international law can act as a sole legal norm in DMZ. The theory of Special Relationship between North and South Korea should be able to provide normative standard to solve legal contradictions and conflicts with this issue. The Military Armistice Agreement and its jurisdiction on DMZ (international law), North Korean domestic law, and South Korean domestic law, can be comprehensively considered to build a stably systematized legal relation on DMZ. This is an important prerequisite needed for the World Peace Park in DMZ.



# Legal System Regulating the DMZ<sup>1</sup>

## Military Armistice Agreement

The Military Armistice Agreement is the norm that regulates the DMZ directly. Consisted of the preamble and 5 Articles and 63 Clauses, the agreement states what DMZ is, who are allowed and not allowed to enter the area, which actions are prohibited within DMZ, and more. The United Nations Command has the jurisdiction over the southern part of the DMZ, and Chief Commander of North Korea and Chief Commander of China together over the northern part. Thus, special permit from the Committee for Military Armistice or the United Nations Command is necessary when entering the DMZ from South Korea. Another special permit is needed when crossing the MDL, and entering the northern part asks for the permit from the Chief Commander of North Korea and Chief Commander of China.

Diverse opinions exist about the legal aspect of the Military Armistice Agreement, regarding who the direct parties are, whether the parties have strong will to follow the agreement or not, whether the war can be thought to have ended or only temporarily stopped.<sup>2</sup> South Korea is not a direct party of the Military Armistice Agreement, but as a practical party of the war, does have the role to implement the

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<sup>1</sup> This section largely depends on the summarized contents of Hyo-Won Lee, *Understanding Unification Law* (Seoul: Parkyoungsa, 2014), pp. 331~342.

<sup>2</sup> For more information on the legal aspect of the Military Armistice Agreement, Cheol-Young Choi, "Korean Armistice Agreement, Dead or Alive?-From the View Point of South and North Korean Subsequent Agreement," *SungKyunKwan Law Review*, Vol. 16, No. 2 (2004), pp. 483~489

armistice status. The Inter-Korean Basic Agreement (Article 5, Article 12) and the agreement between the United Nations Command and North Korea when opening the DMZ partially both declare the Military Armistice Agreement valid. This shows that the Military Armistice Agreement is practically valid and that the agreement shall act as the most important norm regarding the DMZ.

### **Inter-Korean Agreements**

An inter-Korean agreement would be necessary in order to build a World Peace Park in DMZ, and this agreement shall accord with previous agreements settled by both Korea. By December 2014, more than 240 agreements have been signed between the two Korea. While none of them regulate the DMZ in whole, the DMZ is mentioned throughout many agreements including the Inter-Korean Basic Agreement. The Basic Agreement states that “North and South together should do their best to change current truce status into a stable peace status, and follow current Military Armistice Agreement until then” (Article 5) and that “North and South will discuss and carry forward peaceful usage of DMZ through Joint Military Committee” (Article 12). These articles indirectly regulate DMZ. After 2000, while building up the transportation infrastructure between North and South, the DMZ was regulated through an agreement for the first time, although partially.

On November 6th, 2000, the UN forces and North Korea agreed that the administrative authority on the southern part of the DMZ shall be transferred from the UN forces to South Korea. On the next day, ‘Agreement between the UN forces and North Korean troop on open-

ing a part of the DMZ' was signed. This agreement introduced the concept of 'administration' on the control zone between South and North Korea, which differs from the 'jurisdiction' on DMZ. Through this, the Committee for military Armistice allow both Korea to have the collaborative administrative authority on limited part of DMZ, while continuously possessing the jurisdiction on the whole DMZ.

Several agreements between North and South Korea are signed under this principle; 'Agreement on establishing the control zone between South and North Korea in East-sea region and West-sea region and on settling military guarantee in linking North and South Korea with train rail and roadway' (September 17, 2002), 'Basic agreement on vehicle transportation between North and South Korea' (December 6, 2002), 'Basic agreement on train transportation between North and South Korea' (April 13, 2004), and 'Agreement for military guarantee of entry, communication, customs clearance through the control zone between South and North Korea in East-sea and West-sea region' (December 13, 2007). These agreements do not regulate the DMZ in whole but only partially in certain related fields. They do act as a regulating norm on DMZ, but without prior consent of the National Assembly and direct regulation on the right and duty of the people, they cannot be approved to have legal validity.

## **Law in South Korea**

### *Natural Environment Conservation Act*

Natural Environment Conservation Act states that "Natural reserved land (includes) ... DMZ for 2 years after Republic of Korea obtain the jurisdiction over the area" (Article 2-13). Here, DMZ is considered as

natural reserved land in that no human approach is practically possible and thus the ecosystem is protected from damage. However, 'jurisdiction' in the act can be understood as 'administrative authority' when considering the reality and the fact that this law is South Korean domestic law. This means, the DMZ would be designated as Natural reserved land for 2 years since the administrative authority was transferred to South Korea. Since DMZ has valuable ecosystem preserved and is resource to be preserved by both Koreas together, it is rational that this law regulates the DMZ. However, the DMZ is not yet a Natural reserved land, as the administrative authority on whole DMZ is not yet transferred to South Korea but only partially.

### ***Protection of Military Bases and Installations Act***

Protection of Military Bases and Installations Act aims to protect military base and installation, and smoothly conduct military operations (Article 1). As DMZ is a part of military base and installations' protective area, this law also applies to DMZ. This law divides military base and installations' protective area into control protective area and restrict protective area. The northern part of the civilian access control line, including the DMZ, is part of control protective area, and civilian's approach is prohibited. Exceptional areas can be designated as restrict protective area and following this Act, the World Peace Park site can be freed from control protective area regulation. The problem would be that this Act is legislated for military purpose and this may not fit fully to the project of World Peace Park.

## *Others*

Diverse Act regulating our territory including Framework Act on the National Land, National Land Planning and Utilization Act, and Environmental Impact Assessment Act do not specify any exceptional special area of territory. Then, these domestic laws should be able to regulate the DMZ of southern part, while according to the theory of Special Relationship between North and South Korea, not the northern part of the DMZ. Meanwhile, Special Act on Supporting Border Areas may be considered, but the DMZ is not designated as border area and thus is not the object of this Act.

## **Legal Issues on the World Peace Park in DMZ**

### **Necessity of Legislation**

International law and domestic law are overlapped in regulating the DMZ currently. The Military Armistice Agreement is the international law that directly regulates the DMZ and Protection of Military Bases and Installations Act is the domestic one. Acts related to the national territory, including the Framework Act on the National Land, regulates the southern part of the DMZ but not the northern part. Natural Environment Conservation Act may be applied to the part of the DMZ, of which administrative authority is transferred to South Korea. Agreements between the two Koreas also designate some areas of DMZ, where the both Koreas can exercise administrative authority restrictively. These areas include train railway and vehicle roadway sites for special projects such as the Gaesung Industrial Complex.

Protection of Military Bases and Installations Act is the only legal Act that regulates the DMZ directly. However, it aims to prohibit and restrict actions in military purpose, rather than to foster peace as the World Peace Park aims to. Diverse administrative law such as the Natural Environment Conservation Act also is not appropriate because they only regulate the southern part of DMZ. Agreements between North and South Korea only partially regulate the DMZ through the agreement for train railway and vehicle roadway. No North Korean Act regulating DMZ has been identified until now, which is thought to be necessary for the World Peace Park project.

Legislation for the World Peace Park in DMZ should be run under certain principles. First, the project should contribute to exchange and cooperation of both Koreas, and eventually peaceful unification. Second, the process should respect international law principle and foster world peace. Third, the process should consider the special relation of North and South Korea. For this legislation work, land ownership of the park site needs to be fixed, related agreement should be signed between North and South Korea, and a special Act for the World Peace Park needs to be enacted.

### **Clarifying the Land Ownership**

It is difficult to clarify land ownership of the DMZ site, because of the confusion during and after the war. This land ownership issue has to be clarified in order to prevent any land ownership conflict and thus proceed the project stably.

First, land ownership of the site has to be clarified. There are two ways being considered. One is to nationalize the park site, and

the other is to accept private ownership but restrict its practical use and disposal. Our constitution states that “Property rights can be expropriated, used and restricted when it according to public needs. Appropriate indemnification should be made. Expropriation, usage, restriction and indemnification should be made according to the related law” (Article 23 Clause 3). This means that government should compensate expropriated properties if their expropriation exceeds social obligation and limits. It seems reasonable that the site should be nationalized to run the project efficiently and stably. Building and running a World Peace Park in DMZ does not mean that the nation is using and making profit of the site. This allows the Committee of Military Armistice maintain jurisdiction on DMZ as mentioned in the Military Armistice Agreement, and no legal conflict or contradiction occur against Protection of Military Bases and Installations Act.

Second, specific method to nationalize the site should also be discussed. Three ways can be considered. One is to expropriate the site, another is to allow the owners the right to claim for purchase, the other is to purchase the site from the owners through contract. Expropriation is thought to be the most appropriate way of nationalization. The Constitutional Court has declared that expropriation is not arbitrary or disproportionate when done with reasonable grounds and appropriate indemnification.<sup>3</sup> Meanwhile, a disproportionate case which did not offer appropriate indemnification and still excessively violated land ownership was declared unconstitutional by the Constitutional Court.<sup>4</sup> Thus, when nationalizing the

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<sup>3</sup> Constitutional Court, 2010.02.25, 2008HeonBa6.

<sup>4</sup> Constitutional Court, 1998.12.24, 89HeonMa214.

park site, appropriate legal basis should be prepared and reasonable indemnification should be offered, so that it does not violate land ownership which the Constitution protects (Article 23 Clause 3).

Third, land ownership of the northern part of the site would be another issue to solve. On one side, the northern part is already nationalized by the North Korean government in 1946 and respecting it, this part of the site does not need any further action. On the other side, although the northern part, the right of property and land ownership should be protected. This is directly related with the issue of how we should understand and solve the land ownership problem of the North Korea region after the unification. Thus, this issue should be very carefully discussed, since it can act as an important precedent afterwards. Considering economic order in unified Korea, it would be appropriate to indemnify in certain extent when a South Korean resident is identified to have owned the northern site.

Fourth, in the process of nationalization, it may also be problematic when the land owner could not be identified. Ministry of Justice found out that 78% of the DMZ area in Paju and Yeoncheon in Gyeonggi Province is unclaimed, while 16% is private-owned and 6% is state-owned. This is mainly due to massive loss of related paper during the Korean War.<sup>5</sup> Three opinions are raised to solve this problem. One is to recover cadastral record of the site and register the state as the land owner, through Registration of Real Estate Act, Act on Land Survey, Waterway Survey and Cadastral Records, and 'Guideline of investing uncertain land and registering cadastral record near the DMZ' of Ministry of Land, Transport and Maritime

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<sup>5</sup> Eun-Jin Park, "Funding for Nature Conservation of the DMZ Area-Focusing on the Ecosystem Conservation Fund," *Policy Research*, Vol. 1 (2009), p. 80.



Affairs. Another is to understand the site as property without its owner and nationalizing through State Property Act. The other is to deposit the compensation and expropriate, through the Act on the Acquisition of Land, etc. for public works and the compensation therefor. The third way seems to be appropriate to fully secure the park site.

### **Agreement between North and South Korea**

Agreement between North and South Korea is a necessary process in establishing a World Peace Park in DMZ. When signed, the agreement should be legally valid and effective. However, agreements signed until now have been neither fully valid nor effective and this problem should not be repeated. That is, in its procedure, consent of the National Assembly seems to be essential, following the constitution (Article 6 Clause 1) and Development of Inter-Korean Relations Act (Article 21 Clause 3). Also, depositing the agreement in UN may reinforce international cooperation and correspondence to international law principle, although it is not mandatory.

The agreement should state the basic principle of the park project, a joint management system, basic procedure of the system's work, its members and guarantee of their status, and its financial affairs. Specially, the duty of building and enforcing the comprehensive plan should be declared. Since the park site includes both northern and southern part of the DMZ, it is difficult to define which laws do or do not have regulation on the park site. Thus the agreement should also mention to whom or to which extent the related law can be applied. This will act as a standard to solve legal conflicts and con-

traditions between different legal system of North and South Korea. Four different opinions are suggested related to this issue. First, the joint committee can enact a new legislation to regulate this issue. Second, either North Korean or South Korean law can be decided to be applied. Third, following the territorial principle, North Korean law would be applied in northern area and South Korean in southern area. In case of conflict and contradiction, international law principle would be applied. Fourth, following the personal principle, North Korean law would be applied to North Korean resident and South Korean law to South Korean resident. The third way seems to be realistic in today's current situation. Still, a joint management system may additionally support the legal system.

Legal system to solve legal conflicts reasonably and efficiently should be prepared, including strong guarantee of personal security, an order keeping battlalion and a dispute resolution organization. This should be mentioned in the agreement, since diverse legal conflicts are expected to occur within the park opening and operating process. Personal security is especially a very important issue to deal with, since the park site includes both North and South Korean region and since even foreigners are to stay there. Then, certain administrative and financial support has to be mentioned in the agreement. These include protecting and supporting development and investment, protecting and supporting installations such as social overhead capital, supporting unification education, and protecting the ecosystem. Also, exceptional rule should be provided regarding the Inter-Korean Exchange and Cooperation Act, to alleviate the difficulty when exchanges are made. The exceptional cases would include personal exchange including visits and stay, posts and electronic communication within the northern part and south-

ern part of the park, and also material and transportation exchange in and out from the park to other parts of Korea.

### **A Special Law to Support the World Peace Park in DMZ**

A certain normative standard is essential when creating a World Peace Park in DMZ, as this will act as an important precedent in using the DMZ peacefully and designing the blueprint of unified Korea. The basic frame would be stated in the agreement, but separate law is needed to practically implement the process. Act on the Support of Gaeseong Industrial District, which supports companies in Gaeseong Complex administratively and financially, would be a good reference. The law would be South Korean domestic law, and it may be claimed that North Korea should similarly enact a special law that accord with South Korea's.

Three ways are proposed to arrange law for the World Peace Park. One is to enact a special law, another is to enact a basic law that regulates the peaceful usage of DMZ in whole, and the other is reform current law that regulates the DMZ to include the World Peace Park project. Enacting a special law is thought to be appropriate in that legislation is needed and that it is the most efficient way.

The special law should be based on national consensus, deduced through an open and clear public procedure. In its content, it should declare how the World Peace Park in DMZ should be managed and operated. It should also provide legal basis for the project in whole, including the comprehensive plan, its enforcement and administrative organization to support it. This is because the special law should do the role of the normative standard of this World Peace Park proj-

ect, regulating the comprehensive management and preservation of the park. The special law should also accord with the agreement between North and South Korea, and harmoniously pursue basic human rights of the individuals and ecological common good.

## **International Cooperation for the World Peace Park in DMZ**

### **Jurisdiction on DMZ**

South Korea or the two Koreas should be approved to autonomically exercise the jurisdiction on DMZ, or at least the park site. This is because the DMZ sites are under the jurisdiction of the Committee of Military Armistice, and the UN and North Korea is exercising the authority. It is expected that the park site will include both northern and southern part of the DMZ, though further discussion with the UN and the two Koreas is needed. In this case, the World Peace Park project of South Korea or the two Koreas must ask for the permission of the Committee, UN, and North Korea, because they are the holders of the jurisdiction. This would make a successful and efficient process difficult.

There are two opinions about how to adjust the jurisdiction. One is to designate certain extent of land and adjust the jurisdiction on that limited area. The other is to adjust the jurisdiction on the whole DMZ. This issue rightly should be decided by the related parties of the UN Command, North Korea, China and South Korea, but when limited to this issue of the World Peace Park in DMZ, the first

option seems to be realistic. There are various reasons to say so; the park site is expected to be a very small part of the whole DMZ, this project basically has its ground on the Military Armistice Agreement, current inter-Korean relation is not yet appropriate to replace the Military Armistice Agreement with a peace treaty. Of course, this jurisdiction adjustment can be extended in the future to regulate the whole DMZ, when it is found resultful and when inter-Korean relation gets mature.

How the jurisdiction should be adjusted is also an issue. Four ways can be considered to solve this problem. First, the UN and North Korea can agree that the jurisdiction on the park site should be transferred to South Korea, and then an inter-Korean agreement about military security in the area can be signed based on it. Second, the UN, North Korea, and South Korea can together sign an agreement which can act as a special law against the Military Armistice Agreement. Third, North and South Korea can sign an agreement and have UN assure or verify it. Fourth, direct parties of the Military Armistice Agreement (UN, North Korea and China) and practical party of it (South Korea) can together revise the Military Armistice Agreement. Here, the first way seems realistic. This is because a precedent of an agreement on partial military security exists, and because the first way seems to be the way to respect the Military Armistice Agreement and obtain the jurisdiction at the same time.

## **Removal of Mines and Other Military Installations**

Although DMZ should be 'demilitarized', heavy weapons are installed in this area, as well as a considerable amount of mines that were buried after the Korean War. While it is necessary to remove military installations including the mines in order to build the World Peace Park, there are currently no legal ground to carry this out. The Military Armistice Agreement stated that the mines and other dangerous objects should be removed within 45 days after the effectuation of the agreement (Article 2 Clause 13), it was not done properly.

In creating a World Peace Park in DMZ, military installation including mines must be removed in the park site and in the path area. In legal aspect, this job can be done either under the administration of the Committee of Military Armistice or the UN and North Korea to respect the Military Armistice Agreement, or under an agreement between North and South Korea. As discussed in the issue of jurisdiction adjustment, signing an agreement between North and South Korea that also considers ecological aspect and following it seems to be appropriate. Meanwhile, practically, technical problems are also raised as an obstacle when removing the mines.

## **UN's Sanctions on North Korea and its Relation with North Korea**

Diverse forms of personal and material exchange will take place between North and South Korea in the process of establishing a World Peace Park in DMZ. UN's sanctions on North Korea may affect these exchanges. The United Nations' Security Council Resolution is

restraining North Korea in several aspects because of diverse reasons including the nuclear experiment. The Charter of the UN states that all UN members are bound to the Security Council Resolution (Article 25), and both North and South Korea are members of the UN. Current sanctions on North Korea by the UN are done mainly in three ways. First, material that can be used to develop genocidal weapons, including conventional arms, and luxury items, are not to be imported or exported. A member nation may conduct a search when a plane or a ship is suspicious. Second, financial assets of North Korea are frozen and providing loan or cast to North Korea is prohibited. Third, certain personage related to development of genocidal weapons are not allowed to access to international society.

In the process of creating and running the World Peace Park, material and capital of South Korea can be offered to North Korea, or North Korean personnel may enter the park. It can be pointed out that these cases would alleviate the effectiveness of UN sanctions. Thus, personal and material exchange within the park project should accord with UN sanctions and in case of need, exceptional resolution of the Safety Council which allows a special measure may be asked.

## **Conclusion**

DMZ is the living consequence of the war and division, while obvious hope of peace and unification in Korea. The World Peace Park in DMZ should act as the passage toward peace and integration, constitutional virtue or unified Korea, and world peace. A World Peace Park in DMZ, firstly fits to our constitution, in that it seeks for

a peaceful unification. Secondly, it enhances the normative power of the Military Armistice Agreement and thus strengthens international cooperation. Thirdly, it strengthens the ecological and cultural power of unified Korea. This project should include consideration of diverse fields of society, such as the political and military aspect, societal and economic aspect, and ecological and cultural aspect. For this, it is necessary to build a legislative infrastructure, in order to solve legal contradictions and conflicts regarding the DMZ.

The theory of the special relation between North and South Korea understands the DMZ as South Korean territory according to the constitutional (Article 3), and at the same time, as a special area where in exceptional cases the territory authority of North Korea can be accepted. Currently, jurisdiction on DMZ belongs to the Committee of Military Armistice according to the Military Armistice Agreement, the international law. Protection of Military Bases and Installations Act, the domestic law, regulates the DMZ in military purpose. Then, some agreements between North and South Korea partially regulate the DMZ. However, they do not provide obvious validity or system. To build and run the World Peace Park stably, legal obstacles should be removed, legal infrastructure for preservation and peaceful usage should be built. Legislation should be made to contribute to peaceful unification and world peace. At the same time, it should be designed to reflect the special relation of North and South Korea and thus to contribute unification rather than to fixate division status.

One prerequisite for removing legal obstacles would be clarifying the land ownership of the site and nationalizing it. A practically valid and effective agreement between North and South Korea



should be signed to build up the legal infrastructure. A special law would be needed to implement the agreement and process the World Peace Park project. International cooperation which can allow jurisdiction or administrative authority to both Koreas is also crucial. Additionally, military installations such as mines should be safely and ecologically removed.

## REFERENCES

Lee, Hyo-Won. *Understanding Unification Law*. Seoul: Parkyoungsa, 2014.

Choi, Cheol-Young. “Korean Armistice Agreement, Dead or Alive?- From the View Point of South and North Korean Subsequent Agreement.” *SungKyunKwan Law Review*. Vol. 16, No. 2, 2004.

Park, Eun-Jin. “Funding for Nature Conservation of the DMZ Area-Focusing on the Ecosystem Conservation Fund.” *Policy Research*. Vol. 1, 2009.

“Constitutional Court.” 2008HeonBa6, 2010.2.25.

“Constitutional Court.” 89HeonMa214, 1998.12.24.



# Plan for the Internationalization of the Kaesong Industrial Region and the Resolution of Its Commercial Disputes

*Jea-Hyen Soung*

## **Introduction**

### **Significance of the Kaesong Industrial Region (KIR)**

KIR is a fusion of South Korean capital and technology and North Korean land and labor, a work of coexistence. It serves as a pathway to lead North Korea towards learning the basics of the market economy, and serves to relax military tensions between the North and South by opening the Kaesong region, a military standoff area, to both parties. It has been seen as a stepping stone towards a united Korean economy, a touchstone for North-South economic cooperation, and the last escape for South Korean small businesses. It also functions as a barometer for foreign investors, as they instinctively observe whether the KIR is operational or not when tensions rise in the Korean Peninsula.

KIR employs 53,000 North Korean workers, and is essentially feeding the city of Kaesong and its surrounding regions. It is believed that North Korea managed to pursue Naseon and Hwanggeumpyung districts mainly because of the lessons they learned in KIR.

North Korea's original plan for KIR was to gradually go from labor-oriented companies to tech companies (stages 2 and 3), with Kim Jong-Il reportedly persuading the military personally on this plan. However, the KIR has remained at stage 1 (labor-heavy) to this point, a result which has left both sides dissatisfied.

Internationalization has been suggested as a method to overcome the inherent instability of the KIR, which happens due to the political tensions between the two Koreas. However, internationalization would take a lot of work and require a lot of situations to be resolved, as will be seen below.

## **Timeline and Current Status of KIR, and the Meaning of Internationalization**

### **Timeline of KIR**

Hyundai Group President Jung Ju-Yeong's march to the north marks the spiritual beginning of KIR. After discussion over which place would be industrialized, North Korea unexpectedly offered Kaesong as a suggestion. Although the Kaesong plan went in motion, the death of President Jung in 2001 and regional tensions placed a halt to said plans. Re-discussion began in April 2002, with the KIR groundbreaking ceremony taking place on June 30, 2003.

## **Development of KIR**

15 companies were selected for preliminary entry in May 2004. The first product manufactured within KIR was kitchenware produced by LivingArt.

24 companies were selected for first entry in March 2005, and expansion happened in June 2006. Electricity and communications lines were re-established, and South Korean automobiles and labor readily crossed the DMZ.

In 2006, even as North Korea experimented with missiles and nuclear weapons, KIR flourished. Over 10,000 employees were working in the region, and production was nearly 5 times the production of the previous year.

Following the nuclear situation in North Korea, the second entry took place in April 2007. 183 companies, including 3 foreign companies, were awarded the right to move into KIR. Initial steps for train freight were established.

However, Keumgang Mountain tourism stopped in July 2008, after a tourist was shot by North Korean forces. This led to North Korea restricting land access to KIR in December.

North Korea restricted access to KIR again in March 2009, as they took exception to the Key Resolve joint exercises between South Korea and the United States. North Korea declared in May that they would remove all amenities for KIR companies, while continuing to test missiles and nuclear devices. North Korea also asked for increase in pay for North Korean workers and a 31-fold increase in rent fees.

The sinking of the Cheonan in 2010 was a huge blow. The Lee Administration restricted further entry and investment into KIR, and began withdrawing workers (May 24th Resolution). There has been no further development of the area since then, especially after the shelling of Yeonpyeong Island in November 2010. It was not until February 2012, when parliament representatives visited the KIR, that any positive signs for KIR were seen.

### **KIR Shutdown and Restart**

2013 was a dark time for the KIR. On April 3, North Korea barred South Korean workers from entering the region, as regional tensions ran high due to North Korea's 3rd round of nuclear testing. North Korea shut down the KIR five days later and withdrew all its workers. It was not until August that an agreement was made to restart the KIR, and in September, the KIR was re-opened.

KIR's output in 2012 was nearly \$470 million, and its accumulated total output is around \$1.97 billion. As of February 2014, there are over 53,000 North Korean workers employed by KIR, and these workers' minimum wage has risen steadily from 2007 to \$67 per month. The average pay of a North Korean worker in KIR, factoring in overtime pay and other elements, was about \$134 per month.

### **Implications of Internationalization of KIR**

The KIR shutdown of 2013 raised concerns that there was no safety mechanism regarding KIR. Internationalization of the KIR is one solution that has been suggested to fill that vacuum.

Internationalization means accepting investment by foreign corporations into KIR, fostering an environment where corporations from all over the world can operate in a stable manner. President Park made this a focal point of her election campaign and has reinforced that notion by placing the task as the fourth task in a nine-task list delineated to the Reunification Department, so the discussion did not originate simply as a reaction to the shutdown of KIR.

KIR workers' wages are about half the wages of Chinese or Southeast Asian workers, and products manufactured in KIR can be immediately exported via the port and airport in Incheon, reducing shipping fees by about 1/3. Thus, the internationalization of KIR would have a profound economic effect on both the North and the South, and its operation within a framework of international cooperation would stabilize the peninsula by reducing tensions between the two sides.

Internationalization would work as a safety pin in the sense that the North cannot unilaterally shut down the KIR if international companies are in place, and it would also open up discussions about applying wage and labor standards to KIR workers that are in line with global standards.



# **Strategies for Internationalization of KIR**

## **The Stances of the North and South**

### *South Korea's Stance*

South Korea's stance has always been about the “gradual normalization” of KIR, and the North accepted many of South Korea's conditions as the shutdown of the KIR had placed a significant financial burden on the North. It was during those sessions that the subject of internationalization and its two aspects—as a “safety pin” and as a way to raise KIR to match international standards—was broached by the South.

### *North Korea's Stance*

In June 2013, as talks discussing the restart of KIR were ongoing, the North's reaction to the idea of internationalization was chilly. North Korea's state broadcasting arm criticized the idea as “a criminal way to bring in foreigners to warp the discussion.”

Only when North Korea became desperate did it somewhat accept the idea of internationalization. However, ever since KIR's restart, talks discussing the idea have gone mostly nowhere. It seems that the North is in no hurry to attempt internationalization of KIR, as it would erode the North's advantages within the region and could shake North Korea's governmental foundation.

## **Issues which must be Resolved for Internationalization to Happen**

### *Guaranteed Operation of KIR Regardless of Peninsula's Political Situation*

There are concerns that North Korea would simply use a political reason to shut down KIR, despite North Korea and South Korea agreeing to keep the operation of KIR separate from politics. As many potential foreign investors are more concerned about political risk than economic opportunity, it is imperative that political risk be minimized.

#### *KIR policy reform*

##### (1) Guarantee of physical safety, safe passage and stay

The purpose is to protect South Korean and foreign investors' physical safety when it comes to entering and exiting the KIR, as well as staying within it. Clarification of concepts such as "gross violation" and "basic rights," as well as for procedures regarding issues such as criminal incidents and power of attorney, is necessary.

##### (2) Resolving communication, travel and customs process issues

Free access to the KIR, electronic monitoring of entry to and exit from KIR, establishing communication lines (Internet and cellular phone) between KIR and companies HQ's, streamlining of customs processes, and other issues are at the heart of this problem.

##### (3) Investor protection and management issues

Foreign companies are sensitive about guarantees for their investment. Thus, devices for stable management are required.

## ***Resolution of International Sanctions against North Korea***

For KIR to develop, sanctions against North Korea need to be relaxed; of course, the impetus for those sanctions to be relaxed must come first from North Korea. The United States Congress has pointed out that efforts to expand the KIR may come into conflict with US measures to tighten sanctions against North Korea, and stated that it could be a test of the relationship between the US and South Korea.

## **Methods for Internationalization of KIR**

### ***Assurance of Conditions in line with International Standards***

#### **(1) Freedom for foreign companies to operate independently**

Control of North Korean workers lies with the North Korean government, not with the companies that employ them. This would be seen as a violation of a company's rights to deal with its workforce, and thus North Korea would have to change its policies to match those of capitalist countries with regard to the operation of companies.

#### **(2) Investor assurance and dispute resolution mechanisms**

This includes discussions such as how to protect investors in cases such as another unilateral shutdown of KIR. Also covers investigation procedures in cases of legal violations, as well as reparation mechanisms. This will be covered in more detail later.

#### **(3) Improving North Korean workers' skill level**

Foreigners are concerned that North Korea workers skill levels are unsatisfactory, which may necessitate training protocols.

### ***“Made in South Korea,” Preferential Tariffs and International Competitiveness***

An area of dispute is marking of product origin. For domestic use, “made in Korea” was used with no problem, but that cannot be used while exporting. Thus, there is a need to improve the international competitiveness of KIR. This can only be achieved if headway is made into the international market, and this means that products made in the KIR must be labeled as “made in Korea,” not “made in North Korea.”

On the whole, KIR products are classified as “made in North Korea,” and this means that tariffs are much higher because North Korea is not a WTO member. This is even worse when one considers that the US, which considers North Korea a terrorist state, levies tariffs close to 100% on KIR products while limiting access to the US market, making things incredibly difficult. The situation is similar with markets like the EU and Japan, thus pricing KIR products out of competition.

Solutions for this problem have been suggested in the form of Free Trade Agreements (FTAs). As an example, the South Korea-Singapore FTA circumvents the problem by classifying products made in KIR as equivalent to being made in South Korea, thus qualifying them for tariff exemption. Other FTAs have provisions where certain products produced in the KIR can be classified as being made in South Korea by having the Korea Customs Service provide proof of place of origin; however, according to parliamentary records, there have been no occasions where this condition has been exercised, primarily due to the limited scope of products that this condition

applies to. The South Korean government is working to include the aforementioned equivalency condition in FTAs that are currently being pursued, such as the Korea-China-Japan FTA, the Korea-China FTA, the Korea-EU FTA 'COPZ' and the Korea-US FTA 'COPZ.'

All these efforts can only be successful if the North shows signs that they are willing to reform, specifically with regards to the nuclear disarmament of North Korea, the promotion of KIR as a relaxant in the political climate of the Korean Peninsula, and economic cooperation between the two Koreas.

### *Attracting Foreign Companies*

#### (1) North and South efforts to attract foreign companies

Attracting foreign companies can raise the profile of KIR and stabilize its operation. Article 3 of the legislation concerning KIR allows foreign companies to invest in the region, and step 3 of the KIR developmental plan has attracting foreign investment as a goal. In 2007, over 110 foreign companies visited the region, and Kimberly-Clark showed interest in investment at the time.

#### (2) Specifics

In April 2007, one German and two Chinese affiliates had registered for entry into KIR, but they never commenced operations and have now all pulled out of the area due to incidents like the sinking of the Cheonan. Attempts to attract foreign companies that were operational within South Korea were made in September 2013, but the investment briefings that were planned for October 2013 were cancelled due to investor concerns over the political situation between the two Koreas. The South Korean government has contin-

uously made attempts to attract foreign investors for the KIR, and it should focus on creating a legal infrastructure in tandem with North Korea to reduce the risk that potential foreign investors feel like they would be taking.

### ***Adoption of International Standards Regarding Labor Management, Taxes, Wages and Insurance***

Peterson Institute Vice President Marcus Noland commented, in a report about hiring North Korean workers and labor standards applied to said workers, that 94% of the companies within KIR are supplied with workers who have been screened by the North Korean government based on factors such as class. With the North Korean government so deeply involved in many aspects of KIR's operation and staffing, including taking much of the workers' earnings for use by the North Korean government, foreign investors would not be enthusiastic about investment in KIR. Noland raised the example of the "Sullivan principles," where South African companies had to adhere to conditions set forth to reduce unfair labor practices and segregation or face disinvestment, as a possible analogy. Adherence to international standards of labor are important for the attraction of foreign investment.

## **Resolution of Commercial Disputes**

### **Overview**

There have been no commercial disputes between North and South companies that have been resolved by a mediating institution; this suggests that things are done on an ad hoc basis without a formed procedural pattern, and has served to hamper South Korea's attempts to establish commerce with North Korea.

There has been progress made to define the resolution process, with several agreements.

### **4 Points of North-South Economic Cooperation Agreement**

In December 2000, four agreements—"Agreement on Procedural Resolution of Commercial Disputes Between North Korea and South Korea" (hereupon referred to as "Dispute Resolution Agreement"), "Agreement on North-South Investment Protection" (referred to as "Investment Protection Agreement"), "Agreement to Prevent Double Taxation On Income Between North Korea and South Korea," and "Agreement on North-South Settlement Payment"—were signed. They took effect on August 20, 2003.

Here are some key points from the agreements:

- "Commercial disputes between North and South should initially be dealt with between the two parties involved, and if matters are not settled, arbitration is the next step." (Dispute Resolution Agreement)

- “...If dispute is not resolved by agreement, the investor can present the dispute to a North-South Commercial arbitration Committee collectively decided by North Korea and South Korea for resolution.” (Article 7, Investment Protection Agreement)

## **Establishment of North-South Commercial Arbitration Committee**

The North-South Commercial Dispute Arbitration Agreement on Committee Construction and Management (“Arbitration Committee Agreement”) was signed in October 2003, and came into effect on August 5, 2005. However, the committee was not formed within the 6 months designated by agreement. Thus, companies dealing with North Korea have shown a tendency to compromise or make concessions to North Korea in order to resolve disputes.

### ***Annex Agreement for Formation and Operation of North-South Commercial Arbitration Committee Within KIR***

The agreement was signed on September 11, 2013. The agreement narrowed the scope of the original committee idea, with the committee becoming the North-South Commercial Arbitration Committee for Matters within KIR. Suggested committee member lists were exchanged in December, and talks were had in March regarding more specific elements of committee formation.



## **Committee Purview**

The Committee's overall purview is "commercial disputes related to KIR," with Article 1 of the agreement stating it as "commercial disputes which take place within KIR." Article 46 of the Kaesong Industrial District Act defines disputes as "differences of opinion regarding KIR's development, management and industrial operation." Actors within KIR are South Korean residents, companies residing within KIR, the KIR governing committee ("Governing Committee"), North Korea residents, and the North Korean government (primarily the Central Special District Development Agency, hereupon referred to as "the Agency").

Most of the disputes within KIR are currently being handled by the tandem of the Governing Committee and the Agency, via Article 9 of the Kaesong Industrial District Act. When a company within KIR has a conflict with either North Korean workers or the North Korean government, if the matter cannot be settled amongst themselves, the parties notify the Governing Committee, and the Governing Committee confers with the Agency to remedy the problem. The following section will look at specific types of disputes that occur within KIR.

## **Specific Dispute Types**

### *Commercial Dispute*

The term covers any disputes that arise during the commercial process. As an example, North Korea insurance laws mandate fire, gas and automobile insurance (Article 6) and violators are to be fined

\$10,000 (Article 26). In the case of automobile insurance, there may be a discrepancy between what the North Korea insurance companies are issuing and what the victim claims he/she is owed. With fire insurance, due to the presence of many clauses that absolve the insurance company of responsibility, the company may refuse to pay insurance claims.

### ***Administrative Disputes***

There are various North Korean agencies within KIR. Agencies that directly deal with South Korean residents and companies within KIR include the North Korea Immigration Agency, the KIR Tax Office, and the KIR People's Security Department. While there are other agencies within KIR that do not directly deal with South Korean residents, the following section will deal primarily with the three aforementioned agencies.

#### ***North Korea Immigration Agency's Refusal to Permit Entry/Exit***

In order to enter the KIR, in addition to receiving permission from the Ministry of Unification, one must also obtain an entry pass (or residency registration form) from the North Korea Immigration Agency. The Immigration Agency exercises wide discretion in that regard. As conditions for accepted entry are unclear, South Korean companies are having difficulties with access to the region.

While some complain directly to the North Korea government, those on good terms with the Immigration Agency handle these matters themselves by going through the Governing Committee to state the dispute to the Immigration Agency.

### ***North Korea Tax Office's Tax-Levying***

North Korea has no taxes; KIR is North Korea's first time doing tax-related duty. South Korean companies will ask for arbitration in cases where a new tariff item is arbitrarily confirmed and levied, where the Tax Office accuses a company of doctoring its records to evade taxes and levies additional taxes, where the Tax Office restricts the export of parts needed for repairs and impacts the production of a company that has not paid taxes, and other cases. The North Korean government is predicted to request arbitration in cases where resident companies diminish the toll processing on their reports, where companies do not pay their taxes, and other cases.

### ***Security Concerns***

The Security Office has managed the security of the KIR since its inception. Disputes involving the office include the unauthorized occupation of a section of KIR to check whether materials were being exported to North Korea, and a traffic officer arbitrarily applying the law and levying fines.

### ***Labor Disputes***

There could be a variety of disputes regarding labor. From the standpoint of South Korean companies, random reassignment of labor (e.g. North Korean government assigns specialized labor from one company to another with no consultation), organized refusal to come to work or work extra hours (a worker that was a labor representative refused to work extra hours, resulting in production problems), work stoppage due to participation in North Korean events (e.g. North Korean workforce, without notice, does not come to

work because of North Korean holiday, resulting in production issues) and restriction of human resources authority (hiring workers, North Korea, government arbitrarily changing worker representative, random assignment of workers) would be cases where they would seek arbitration.

From the North Korean worker or government perspective, cases where a resident company (or an exited one) refuses to pay its North Korean workers, where there are constant requests to raise the minimum wage, where it is requested that wages be scaled according to occupation type, function or level of education, and where worker's compensation is requested would probably be the cases where they would request arbitration.

### ***Are Labor and Administrative Disputes Eligible for Arbitration?***

One viewpoint is that only commercial disputes are eligible for arbitration. Proponents of this view argue that it would match with the title "Commercial Arbitration Committee," and cite as evidence Article 1 of the agreement for forming said committee, which explicitly states "commercial disputes which take place within the KIR." By adhering to a strict interpretation, it is natural that labor and administrative disputes would not be eligible for arbitration.

The opposing viewpoint is that both labor and administrative disputes should be eligible for arbitration, along with commercial disputes. This view interprets the committee as being broader instrument for resolving disputes between North Korea and South Korea, argues that North-South agreements and North Korean laws can be applied broadly, and points out that a separate mechanism for resolving labor and administrative disputes does not exist within KIR.

Looking at the latter view more closely, Article 8, Section 2 of the “Dispute Resolution Agreement” states that the Commercial Arbitration Committee can oversee disputes, and those disputes are defined by Article 7, Section 1 of the “Investment Protection Agreement.” In this case, a dispute involves investment; thus, they can be interpreted to include administrative and labor disputes. Furthermore, Article 46 of North Korea’s Kaesong Industrial Region Law states that “differences of opinion regarding the region’s development, management and industrial activity should be resolved between the relevant parties. If the parties involved cannot come to an agreement, it is to be resolved by a dispute resolution mechanism or arbitration mechanism agreed upon by the North and the South.” A labor dispute can be interpreted as something defined by Article 48 of North Korea’s “Kaesong Industrial Region Labor Regulations,” but there are no provisions for a mechanism to explicitly handle labor disputes. As “industrial activity” in the aforementioned Article 46 can be interpreted to include labor-management relations, there needs to be a mechanism within KIR to resolve disputes between said parties.

Upon observation, by interpreting the original purpose of the committee, the agreements between North and South Korea and North Korea’s own laws on the matter, it can be said that the view which says labor and administrative disputes are within the purview of the committee is more appropriate.

## **Enacting Arbitration Regulations**

Regulations that apply to the KIR include South Korean law, North Korean law and agreements. There may be disagreement regard-

ing the enactment of arbitration regulations, as there are some who argue for those regulations to be legislated into North Korean law, and there are those who argue for a North-South agreement with the powers of a set of regulations.

Those who argue for the regulations to be legislated into North Korean law argue that the arbitration regulations can be seen as subsidiary regulations of the Kaesong Industrial District Act, that Article 3 of the Dispute Resolution Agreement uses the term “regulations,” and that legislating the regulations into North Korean law can educate North Korea about the legal structures of a market economy. There has been commentary that the legislative experiences of the KIR had an impact on the laws that govern Hwanggeumpyung and Naseon District. However, this poses the danger that there is no way to stop North Korea from simply legislating laws unilaterally or changing specific details in North-South agreements after said agreements have been agreed upon.

Another method is North Korea and South Korea drafting an agreement. The argument for this goes that the arbitration regulations are “rules” of the KIR Commercial Arbitration Committee, which was co-founded by the North and South, and the Committee possesses sole legislative powers regarding the laws governing the region. The Commercial Arbitration Committee is independent from the North Korean and South Korean governments, and the arbitration regulations are a different set of rules from North Korea’s laws. According to this logic, North Korea could not arbitrarily change the contents of the laws, and proponents of this view argue that legislation into North Korean law is not necessary to educate the North about the workings of a market economy. However, some obstacles for this

view include the fact that an agreement has an unclear standing in how it applies as domestic law, the fact that an agreement could take a long time to develop, and that it may not be flexible to amendment.

Seeing as how the regulations are for arbitration and that they are to be provided by the Commercial Arbitration Committee, the second viewpoint seems more appropriate.

### **Qualifications and Selection of Arbitrators**

The two sides are to each select 30 members for the arbitration committee and exchange the lists of names. While the conditions only state that a candidate must be experienced in law and international trade investment, it is questionable just how many such people exist in North Korea, which does not have any recorded instances of commercial dispute resolution.

#### ***Composition of Arbitration Committee and Arbitration Methods, Significance of Committee Composition and Head Arbitrator Selection***

The Dispute Resolution Agreement states that the arbitration committee consists of three arbitrators determined by the parties involved in the dispute (Article 1). If the parties cannot come to an agreement on the choice of arbitrators, each party chooses one arbitrator from the list; those two arbitrators then choose a name from the list and that person becomes head arbitrator (Article 2). However, the interests of the involved parties may prevent resolution of the conflict. There is also criticism that even if an agreement is reached, the three-person arbitration committee, consisting of two arbitrators from the North Korea list, may choose North Korean law

as the basis for adjudication and decide as such, which would lead to South Korean investors becoming wary and skeptical of arbitration within KIR.

As such, there may be cases where the dispute parties cannot agree upon an arbitrator or head arbitrator. Therefore, the above agreement states that if a arbitrator is not selected within 50 days of the arbitration request being submitted, an involved party may request that their arbitration committee chair select one; if a head arbitrator is not selected, the chairs of both arbitration committees must confer and agree on selecting a name from the members list. This process may be done in a turn-taking format. Selecting a arbitrator must take place within 30 days of such a request being received (Article 3). If a head arbitrator is not selected according to Article 3, a committee chair can request that the International Center for Settlement of Investment Disputes select a head arbitrator (Article 4).

## **Arbitration Procedure**

Article 13 of the Dispute Resolution Agreement outlines the procedure of arbitration. A arbitration verdict is reached via a majority vote by the arbitrators. The verdict must list the facts and evidence confirmed at the proceedings, orders for resolution of the incident, the law that served as basis for the verdict, and the date the verdict was announced. All arbitrators must sign the verdict.



## **Choosing and Applying a Law to Serve as Basis for Arbitration**

Like any court case, the choice of law to serve as a basis for a commercial dispute resolution cases can have significant impact. The arbitration committee, according to Article 12 of the Dispute Resolution Agreement, uses law that has agreed upon by the parties in the dispute as the basis for judgment. If there has been no agreement, choices available as base law are relevant North and South Korean legislation, general principles of international law, and customs of international trade. The arbitrators are ultimately responsible for determining which set of laws take precedence. In cases where there has been no pre-agreement on the choice of law for use as basis in a arbitration case, the principle of private autonomy must be respected so as to recognize the parties' preferences, the choice of law must be closely relevant to the issue at hand, and considerations for compulsory law must be taken into account.

Regarding the issue of basis law, there have been criticisms that the operation of North Korean law is done behind closed doors and is thus inaccessible, that it has many clauses that are different from South Korean law, and that North Korean civil and foreign contract law have many unclear concepts. Thus, the critics continue, there are concerns that if North Korean law is used as a basis for arbitration, South Korean investors may be inclined to avoid arbitration altogether, which may lead to investors becoming hesitant to invest in the region.

## **Enforcement**

It is vital that dispute resolutions have binding legal and administrative power. Article 16 of the Dispute Resolution Agreement covers the implementation, approval and enforcement of dispute verdicts. The parties involved must carry out their responsibilities designated by the verdict (Article 1); if a party does not do so or is not carrying out its responsibilities in good faith, the opposing party may request enforcement of the verdict to a legal institution whose jurisdiction covers the area in question (Article 2); North and South Korea must consider arbitration verdicts as being binding except in “special circumstances,” must enforce said verdicts as being equal in force to a legal verdict issued by the regional court, and the aforementioned “special circumstances” are to be determined by the arbitration committee (Article 3).

However, North Korean foreign trade organizations, unlike other manufacturers, do not have fixed assets and usually operate via the likes of bank loans. Thus, they do not have much in terms of assets, and most other North Korean foreign trade organizations only possess economic assets that the North Korean government has designated for their use, along with any profits they obtain via their operation. This means that even if such an organization is authorized to perform foreign trade (including trade of their own products), a national entity attempting to enforce a verdict on such an organization may find it difficult to request collateral or compel it to a certain action. The only eligible thing for use as collateral to a creditor would be financial assets. Therefore, the question of how this would work in a compulsory execution scenario is still unanswered.

## Conclusion

The South Korean government has, ever since KIR was temporarily shut down last year, attempted to internationalize KIR by bringing in foreign companies. Approximately 20 foreign companies have been consulted, and it is reported the 3 or 4 companies from Germany, China and other countries are actively contemplating investing in KIR.

On March 28, America's Radio Free Asia reported that North Korea and Russia had agreed to discuss Russian companies entering KIR. The South Korean government issued a statement which welcomed Russia's involvement from the perspective of internationalizing KIR. The Ministry of Unification stated that "a Russian fishing company's president visited the KIR Project Support Directorate and submitted a business plan in mid-February," so it is possible to infer that a Russian company has discussed entering the KIR with the South Korean government as well.

On May 2, 29 members of the Overseas Korean Traders Association (OKTA), South Korean entrepreneurs who operate in foreign land, made a group visit to the KIR. This was the first time OKTA visited KIR. This was significant in that both the North and South permitted their visit in the midst of a tense political situation on the peninsula, as rumors of additional nuclear testing were circulated.

On May 22, the Ministry of Unification stated that the Norwegian embassy's personnel, including Norwegian Ambassador to South Korea Torbjorn Holthe, and a number of entrepreneurs would visit the KIR the following day. It was reported that the Norwegian companies represented were those working in the shipbuilding, shipping and fishing industries.

Will such acts give the internationalization of KIR momentum? The aforementioned 20-ish companies from Germany, China and Russia, while interested in investing in KIR, have delayed their final decision while waiting for improvements to KIR such as the installation of internet infrastructure and better access to the region. In response, both North and South Korea have pushed forward agendas such as bringing in internet infrastructure and installing the commercial arbitration committee. As mentioned above, KIR is a meaningful enterprise for both North and South Korea. Thus, it would be best to come together to find a way that will allow for coexistence.



# The Report of the UN Commission of Inquiry (COI) on North Korean Human Rights: Some International Legal Analyses

*Jung-Hyun Cho*

## Introduction

After almost a year-long investigation, the Commission of Inquiry (COI) on Human Rights in the Democratic People's Republic of Korea (DPRK), established by the United Nations Human Rights Council (UN HRC) in March 2013, presented its final report<sup>1</sup> in Geneva on 17 February 2014. The COI's report provided a large volume of supporting materials and legal analysis, based on which it concluded that a range of human rights violations perpetrated in North Korea constitute crimes against humanity under international criminal law. Crimes against humanity are one of the four interna-

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<sup>1</sup> "Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea," *UN Doc. A/HRC/25/63*, February 7, 2014; "Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea," *UN Doc. A/HRC/25/CRP.1*, February 7, 2014.

tional crimes under the jurisdiction of the International Criminal Court (ICC), and are directly linked to the principle of the responsibility to protect (R2P). In addition, they could directly or indirectly affect the transitional justice measures, which would be implemented once the Korean peninsula is reunified. In this regard, the following sections will examine the activities of the UN COI on North Korean human rights and the main contents of the report, and based on this analysis, provide brief assessment and policy considerations for Korea.

## **The Establishment and Activities of the COI**

### **Establishment of the COI**

On 21 March 2013, the UN HRC in Geneva adopted a resolution<sup>2</sup> regarding human rights situation in North Korea and established the Commission of Inquiry (COI) on Human Rights in the Democratic People's Republic of Korea (DPRK) by consensus of its 47 member States. This goes to show how serious international community views the human rights situation in North Korea. In fact, since March 2012, both the UN General Assembly and the Human Rights Council have adopted the resolutions regarding the North Korean human right violations without a vote. The establishment of the inquiry mechanism has usually been applied to situations of armed conflicts, such as Libya, Côte d'Ivoire, and Syria. This time, how-

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<sup>2</sup> *UN Doc. A/HRC/RES/22/13*, April 9, 2013.

ever, the inquiry mechanism has been applied to a country that is not engaged in armed conflict, which shows the grave concerns of the international community regarding the issue.

Establishment of an inquiry mechanism to investigate the North Korean human rights situation is an initiative that had been advocated by the Human Rights Watch (HRW), the Amnesty International (AI), as well as other domestic and international civic groups for many years. These organizations together formed the International Coalition to Stop Crimes against Humanity in North Korea (ICNK) and collectively pressured the international community to take action. Such a call for action was further supported by the UN High Commissioner for Human Rights, Navi Pillay, in January 2013, and again reiterated by the report of the UN Special Rapporteur on the situation of human rights in the DPRK to the 22nd session of the HRC in March 2013, leading eventually to the creation of the COI on North Korean human rights. The establishment of the COI illustrates that the North Korean human rights situation is no longer a concern for a small group of related parties or states, but an issue of interest to the whole world. It also serves as a good example of how the international NGOs can take the lead in making substantive achievement despite the inaction of relevant countries due to political reasons.

What distinguishes the COI's activities from the rest of the international discussions on the North Korean human rights issue is that the COI approaches the subject with a view to ensuring international criminal punishment. This requires the fact-finding to be in greater detail and the legal analysis to be more professional. Certainly, not all final reports of international COIs automatically lead to the crim-



inal prosecution process. However, the COIs on Sudan, Libya, and Côte d'Ivoire have actually led to issuance of arrest warrants to the major international criminal suspects including the incumbent president, some of whom are currently standing trials. The Special Rapporteur on the situation of human rights in the DPRK has been in post for over a decade since 2004, however, achievements have been limited due to various practical constraints. Against this backdrop, the establishment of the COI on North Korean human rights has the following comparative advantages. First, it ensures a systematic support from the UN. A large pool of personnel and material resources provided by the Office of the High Commissioner for Human Rights (OHCHR) enhances the quality of investigation as well as collected information. Furthermore, collaboration of many experts produces a more detailed and accurate report with in-depth legal analysis. This will naturally lead to having a greater impact on the international public media as well as the international organizations' activities, and the greater emphasis on the need for criminal penalty will eventually raise the likelihood for the report to be reflected in the activities of the Security Council which makes binding decisions. Also, the information collected during the investigation can serve as legal evidence in the event that actual trials are carried out by a competent organ of justice such as the ICC.

### **Activities of the COI**

The mandate of the Commission was to investigate the systematic, widespread and grave violations of human rights in the DPRK. More specifically, the Commission had been mandated to comprehensively investigate nine substantive areas of human rights violations

as outlined in the report<sup>3</sup> of the Special Rapporteur submitted to the UN HRC in February 2013. They include: (1) violation of the right to food, (2) violations associated with prison camps, (3) torture and inhuman treatment, (4) arbitrary detention, (5) discrimination, (6) violations of freedom of expression, (7) violations of the right to life, (8) violations of freedom of movement, and (9) enforced disappearances, including in the form of abductions of nationals of other States. It was further specified that the inquiry aimed at ensuring full accountability, in particular where these violations may amount to crimes against humanity.

On 7 May 2013, Michael Kirby, former Justice of the High Court of Australia, Marzuki Darusman, the incumbent Special Rapporteur on the situation of human rights in the DPRK, and Sonja Biserko, Serbian human rights activist, were appointed to serve as members of the COI. The inquiry process was launched with the first meeting held in Geneva on 1 July 2013. The Commission's repeated attempts at engagement with North Korea and China, for example, to visit the related sites, have failed as they refused to cooperate. Alternatively, the Commission decided to obtain first-hand testimony through public hearings, which were then, conducted in Seoul (20~24 August, 2013), Tokyo (29~30 August, 2013), London (23 October, 2013), and Washington, D.C. (30~31 October, 2013). Also, over 240 confidential interviews were held with individual witnesses. The Commission collected and studied all available resources and information, including the satellite images of the sites mentioned in

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<sup>3</sup> Marzuki Darusman, "Report of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea," *UN Doc. A/HRC/22/57*, February 1, 2013.

the report. The Commission's mid-term report was delivered in the form of oral updates to the 24th session of the UN HRC on 17 September 2013 as well as to the 68th session of the General Assembly. On 17 February 2014, the written report was circulated to the general public, and the same report was officially reported to the 25th session of the HRC on March 17.

## **Main Contents of the UN COI Report**

### **Various Human Rights Violations in North Korea**

The report concluded that systematic, widespread and gross human rights violations have been and are being committed by North Korea. The main perpetrators were found to be officials of the State Security Department, the Ministry of People's Security, the Korean People's Army, the Office of the Public Prosecutor, and the judiciary, who act under the control of the Workers' Party of Korea, the National Defence Commission, and ultimately, the Supreme Leader of North Korea. The particular nature of human rights violations in North Korea was interpreted as being attributable to the State's political system, which is based on a totalitarianism headed by a single Supreme Leader.

The Commission categorized its findings of human rights violation cases in North Korea into six major areas, out of the nine specific areas that it had been mandated to investigate upon the Commission's creation. The six principal findings of the Commission are as following: (1) North Korea almost completely denies citizens' rights

to freedom of thought, conscience and religion, as well as of the rights to freedom of opinion, expression, information and association, (2) discrimination is pervasive in all areas of society rooted in the State-assigned *songbun* system, (3) the State denies citizens' freedom of movement or of choosing the place of residence within the country, not to mention the freedom of travelling abroad, (4) the State's denial of the right to food to its citizens, rooted in the discriminatory food distribution system of the State, has caused the mass starvation in the 1990s and is also linked to the violation of the right to life, (5) human rights violation acts such as arbitrary detention, torture, and executions are being committed in a large network of prison facilities including the political prison camps, and lastly, (6) North Korea has engaged in the systematic abductions and enforced disappearances of persons of other countries such as South Korea and China not only during the period of the Korean War, but also between the 1960s and 1980s. It is interesting to note that violations of the right to food and the right to life have been put under one category, while arbitrary detention and torture were categorized with human rights violations committed in political prison camps and other detention facilities. Such categorization appears to be related to establishing that crimes against humanity have been committed in North Korea as stated below.

## **Crimes against Humanity**

The mandate of the COI had been to investigate whether the human rights violations in North Korea amount to crimes against humanity so as to ensure full accountability on the international crime committed in North Korea. Nonetheless, since the COI is neither a judicial

body nor a prosecutor, instead of applying a “beyond reasonable doubt” standard of proof required for validating a criminal conviction, the Commission has toned down the extent of the standard of proof to “reasonable grounds,” similar to that applied when determining refugee status.<sup>4</sup> This was to ensure that the findings serve as reasonable grounds for a criminal investigation to be conducted by a competent national or international judiciary body, taking into account the COI’s limitations that it cannot carry out forcible investigation.

According to that standard, the Commission found that the body of testimony and other information it received establishes that crimes against humanity have been committed in North Korea pursuant to policies established at the highest level of the State. First, the Commission found that a systematic and widespread attack is being perpetrated to persons detained in political and other prison camps, those who try to flee the State, and Christians. More specifically, the various elements of crime included extermination, murder, enslavement, torture, imprisonment, rape and other sexual violence, persecution, and the forcible transfer of populations, in accordance with the definition of crimes against humanity provided for in Article 7 of the Rome Statue of the ICC. Second, the Commission found that North Korea’s failure to actively address starvation of its ordinary

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<sup>4</sup> The ‘reasonable grounds’ test used in the COI activities seems to be similar to the ‘reasonable possibility’ test used in the refugee status determination. This lower standard, not only than ‘beyond reasonable doubt’ test in criminal proceedings, but than ‘probability’ test in civil cases as well, can also be called ‘reasonable likelihood,’ ‘reasonable chance,’ ‘substantial chance,’ ‘substantial grounds,’ ‘serious likelihood,’ ‘serious possibility,’ ‘good reason,’ ‘good grounds,’ ‘valid basis,’ ‘real chance,’ ‘real possibility,’ ‘real likelihood,’ or ‘realistic likelihood’ test.

citizens, and instead, use of inadequate state budget allocation, discriminatory resource distribution, and restrictions on delivery of international aid as means to sustain the political system, resulting in the death of much of the population, formed a systematic and widespread attack against the civilian population, and amounted to extermination and murder. Third, the Commission found that North Korea has engaged in the systematic abductions and enforced disappearances of foreign nationals on a large scale, and that they entail crimes against humanity. Of these three, the first crime involving operation of political prison camps, and the last one related to abduction of foreign nationals are crimes that one would easily assume as forming crimes against humanity. On the other hand, the fact that the Commission determined the starvation of populations, particularly after the mid-1990s, as crimes against humanity is an illustration that the COI on North Korean human rights has serious concerns for not only the violations of civil and political rights such as political prison camps, but also other various economic and social rights violations being perpetrated in North Korea, such as denial of right to food.

## **Referral to the International Criminal Court (ICC)**

Although the COI on North Korean human rights did not provide a specific list of suspected individuals, it mentioned the government bodies that are responsible for the crime, namely, the Workers' Party of Korea and the National Defence Commission, and the institutions under their control, including the State Security Department, the Ministry of People's Security, the Korean People's Army, the Office of the Public Prosecutor, and the judiciary, and thus, alluding that the

senior officials of these organizations could be penalized. At the press conference held in the UN headquarters in Geneva on 17 February, Commissioner Kirby stated that there may be over hundreds of them. Along the same line, the Commission pointed out the personal responsibilities to be borne by the Supreme Leader at the highest level of the State, i.e., Kim Il-Sung, Kim Jong-Il, and Kim Jong-Un. Especially, concerning the current Supreme Leader Kim Jong-Un, the Commission sent a warning in a letter dated 20 January 2014 which drew to his attention the principle of command and superior responsibility, according to which military commanders and civilian superiors can incur personal criminal responsibility for failing to prevent and repress crimes against humanity committed by persons under their effective control. The Commission did not reveal the names of the perpetrators that it had found during the investigation, and the database is said to be kept under seal.<sup>5</sup>

On the basis of such conclusions, the Commission recommended that the Security Council refer the situation to the ICC. For the State that is not a party to the Rome Statute, the ICC can have jurisdiction to investigate alleged crimes in the country only if the UN Security Council refers the situation to the ICC by adopting its own resolution. In other words, considering that a majority of the recent situations of mass human rights violations have taken place in countries that were not parties to the Rome Statute, the roles of the Security Council may be deemed as absolutely important. The same principle would apply to North Korea, since North Korea is also not

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<sup>5</sup> It can be expected that the UN OHCHR field-based structure, which will be established in Seoul early next year, can make use of this database and will play an important role in managing and developing this database.

a party to the Rome Statute. For the readers' information, the ICC does not have temporal jurisdiction on crimes committed before 1 July 2002, when the Rome Statute came into force.

The COI on North Korean human rights has reviewed the option of setting up an *ad hoc* international tribunal for North Korea just as the ones previously established for former Yugoslavia and Rwanda. While such an *ad hoc* tribunal has an advantage that it could be provided with jurisdiction dating back before July 2002, this option also has drawbacks in that creating it would require substantial amount of time and effort as well as for the UN Security Council to adopt the related resolution. Certainly, there was a case for Cambodia where the General Assembly took a role in the establishment of the *ad hoc* tribunal there, called the Extraordinary Chambers in the Courts of Cambodia. However, the Cambodia Tribunal was created based on an agreement between the UN and the government of Cambodia. When it comes to the establishment of an international tribunal by an enforcement measure without an agreement of the country concerned, it is, in the end, the Security Council that needs to play a decisive role.

## **Responsibility to Protect (R2P) Principle**

In addition to the recommendation of the Security Council's ICC referral, the Commission stressed the importance of the international community's responsibility to protect (R2P) in its final report. The R2P consists of three foundation pillars as follows. Pillar one stresses that each State has a 'primary' responsibility to protect its populations from genocide, war crimes, ethnic cleans-



ing and crimes against humanity. Pillar two addresses that simultaneously the international community has a responsibility to ‘assist’ the State to fulfill its primary responsibility, especially in terms of prevention and capacity building so that the State can protect the populations from genocide, war crimes, ethnic cleansing and crimes against humanity. Pillar three focuses on the international community’s responsibility to take ‘timely and decisive response’ to prevent and halt the four crimes above, when a State is ‘manifestly failing’ to protect its populations from them. In such a case, the international community has the responsibility to first use ‘peaceful’ measures, however, should these measures have failed, it may take ‘collective action’ in accordance with the UN Charter, even including ‘Chapter 7’.

The establishment of the UN COI on North Korean human rights and the international community’s various types of cooperation and assistance programs with North Korea can be seen as falling under the second pillar of the R2P.<sup>6</sup> On the other hand, the ICC referral and imposing of sanctions by the Security Council fall under the R2P’s third pillar, which focuses on more forcible measures at the international level. This point is also reaffirmed in the conclusion of the Commission’s report, which urged the international community to accept its responsibility to protect the people of North Korea, since the government of North Korea has manifestly failed to do

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<sup>6</sup> Establishment of the COI can be under both pillar two and pillar three of the R2P principle. “Report of the Secretary-General, Responsibility to Protect: Timely and Decisive Reponse,” *UN Doc. A/66/874-S/2012/578*, July 25, 2012, para. 12. See, Marzuki Darusman, “Report of the Special Rapporteur on the Situation of Human Rights in the Democratic People’s Republic of Korea,” para. 30.

so.<sup>7</sup> This is the very first time where an authoritative international organization in the field of human rights in North Korea has applied the principle of R2P to the issue, and therefore, the Commission's report sends a strong message to the North Korean authorities whether or not its recommendations can be actually put to implementation. Nonetheless, given the dire economic situation of the general population in North Korea, the Commission proposed that the Security Council adopt targeted sanctions against those who are most responsible for crimes against humanity, rather than imposing sanctions targeting the North Korean population or the economy as a whole, which may be deemed as somewhat limited but "smart" sanctions, as opposed to the military sanctions or full-fledged economic sanctions.

## **Transitional Justice?**

The report also raises the need to review the transitional justice process in relation to the international crimes committed by North Korea. Transitional justice refers to measures implemented at a point of political transition from an authoritarian or totalitarian regime to a democratic society, in order to restore legacies of various human rights abuses and war crimes committed under the previous regime or during the civil war and conflicts, so as to build a permanent peace, harmonization and integration for the State and its people.

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<sup>7</sup> "Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea," para. 86. See, "Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea," paras. 1204-1210.

States in times of transition usually face a situation of mass human rights violations of the past regime which cannot be fully addressed by the current judicial and non-judicial structures. In such cases, they need to build a future of national harmony and integration by using various mechanisms of transitional justice, such as criminal prosecutions, truth and reconciliation commissions, reparation for victims, and various kinds of institutional reforms including vetting. The situation after the reunification of Germany in 1990 had often been discussed under the traditional title of “liquidation of illegality”. Transitional justice is an attempt to move beyond this traditional perspective and to actively seek more diverse mechanisms for addressing the past in the context of creating balance between justice and reconciliation/integration. Truth and Reconciliation Commission (TRC) set up in South Africa is an example of the result of such efforts.

However, the COI on North Korean human rights determined that creation of a truth and reconciliation commission as in the case of South Africa is not suitable for North Korea. This is because unlike in South Africa, the human rights situation in North Korea is showing no sign of improvement. In addition, amnesty for the crimes against humanity is not permitted by international law, and even if it were, giving amnesty to perpetrators would have adverse effect on prevention of future crimes in North Korea. On the other hand, since international trials can ensure accountability for only a limited number of main culprits, once changes are brought to the situation in North Korea through internal political reforms, the domestic community must consider measures of accountability other than criminal punishment for the mid- and lower-level officials. Reviewing the feasibility of such options would be desirable also for the sake of social integration once the unification of the Korean peninsula is realized.

## Concluding Observations

The report produced by the COI on North Korean human rights is significant in that it represents an authoritative and comprehensive documentation covering collective discussions and information on the North Korean human rights issues to date, and that it was drafted after just a year's investigation through joint collaboration of three members of the Commission and some 20 staff members of the UN. Also, the Commission's activities are notable for having presented an in-depth analysis on the human rights situation that includes detailed review in light of international criminal law, beyond the simple monitoring of the situation. Findings and information regarding international crimes committed in North Korea including the crimes against humanity will serve as useful evidence in the future for the referral of the situation to the ICC as well as for application of the international community's R2P principle. It may also be related to the transitional justice question after the Korean reunification.<sup>8</sup>

On the other hand, the report not only contained information on a somewhat aggressive international intervention, but also pointed out the need to pursue various constructive and combined approaches to address the situation, such as human rights dialogues, technical cooperation and humanitarian assistance. This should be properly considered as well.

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<sup>8</sup> The statute of limitations rule generally does not apply to international crimes such as crimes against humanity. This implies that, any time in the future, the relevant criminals may be punished at an appropriate forum, international or domestic, or hybrid. In the transitional justice context, the persons who are responsible for that kind of international crimes cannot be immune from prosecution, for example by way of some blanket amnesty based on domestic consensus or agreement, according to relevant international law.

The issue of human rights in North Korea is unlikely to be resolved quickly due to non-cooperation of North Korea. Nonetheless, at a time when the international community including the UN as well as domestic and international NGOs has increased their attention on the gravity of the problem of North Korean human rights situation, the Korean government should also approach the issue in the context of universal human rights and be more resolute and consistent in expressing its opinions regarding the North Korean human rights issue. Furthermore, it will need to develop concrete measures to bring diverse and effective ways to resolve the situation, with close cooperation and coordination with the international community.

## REFERENCES

“Report of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea.” (UN Doc. A/HRC/25/63, 2014.2.7).

“Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea.” (UN Doc. A/HRC/25/CRP.1, 2014.2.7).

“Report of the Secretary-General, Responsibility to Protect: Timely and Decisive Reponse.” (UN Doc. A/66/874-S/2012/578, 2012.7.25).

“Report of the Special Rapporteur on the Situation of Human Rights in the Democratic People’s Republic of Korea.” (UN Doc. A/HRC/22/57, 2013.2.1).

(UN Doc. A/HRC/RES/22/13, 2013.4.9).



# North Korea's Response to the UN Commission of Inquiry (COI) Report on the Situation of Human Rights in the Democratic People's Republic of Korea

*David Hawk*

A decade of credible and detailed accounts from North Korean refugees who fled through China to South Korea, a decade of detailed reports by non-governmental organizations, research institutes and scholars, a decade of reports to the Human Rights Council and General Assembly by the UN Special Rapporteur on human rights in the DPRK and the UN Secretary-General, and a decade of resolutions at the UN General Assembly and Human Rights Council on human rights violations in the DPRK yielded no response from North Korea other than straight forward rejection. The repeated North Korean rejection of these reports and resolutions were accompanied by DPRK's longtime and oft-repeated assertion that the human rights issue was 'non-existent' and that 'there could be no human rights problems in their people-centered socialist system.'



However, February 2014 *Report of the detailed findings of the commission of inquiry on human rights in the DPRK*,<sup>1</sup> and the endorsement by the March 2014 session of the Human Rights Council (HRCouncil)<sup>2</sup> of the findings and recommendations of the UN Commission of Inquiry (COI) on North Korea resulted in a remarkable series of North Korean counter-measures. These counter-measures intensified as the 2014 General Assembly took up the findings and recommendations of the Commission of Inquiry.

The Commission of Inquiry itself is described in the accompanying chapter by Dr. Cho Jung-Hyun. This chapter examines the DPRK responses to the findings and recommendations of the COI. These responses include:

- official written rebuttals;
- active diplomatic counter-initiatives;
- the threat of an improved and/or expanded nuclear weapons arsenal;
- actual and proffered cooperation with UN human rights programs; and
- responses on-the-ground in North Korea.

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<sup>1</sup> *UN Doc. A/HRC/25/CPR.1*, February 7, 2014.

<sup>2</sup> “Situation of Human Rights in the DPRK,” *UN Res. A/HRC/25L.17*, March 26, 2014.

## The Context and the Setting of the DPRK Reactions

Before detailing the extraordinary North Korean responses to the COI it is useful to note the specific measures that set off the DPRK reactions: the COI finding that a number of North Korea's severe and gross human rights violations exceeded the high threshold for constituting crimes against humanity, and the recommendation that those responsible for these crimes under international law should be held accountable, including through a referral to the International Criminal Court (ICC).

At the March 2014 HRCouncil, the language of the resolution on North Korean human rights changed from expressions of “*serious concern*” about gross violations to “*condemnation in the strongest terms*” of the crimes the DPRK is committing against its own citizens.<sup>3</sup> And, as recommended by the COI, the HRCouncil resolution<sup>4</sup> urged the General Assembly to consider recommending to the UN Security Council that it refer North Korea to the “appropriate international criminal justice mechanism” a diplomatic expression commonly understood to include a referral to the International Criminal Court.<sup>5</sup>

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<sup>3</sup> The COI also denotes as criminal acts the kidnappings (abductions) of foreign nationals, and their secret, unaccounted-for deportation to North Korea.

<sup>4</sup> By a vote of 30 “yes” to 6 “no” (with 11 abstentions).

<sup>5</sup> Technically, a criminal justice mechanism could include a UN-created *ad hoc* tribunal comparable to the *ad hoc* tribunals for Rwanda and the former Yugoslavia, as an alternative to an ICC referral. This option was discussed in the COI report because the temporal jurisdiction of the ICC only starts in July 2002, when the Rome Statutes of the ICC entered into force, whereas the crimes detailed in the COI report had been going on for decades, and because a Security Council-created mandate for an *ad hoc* tribunal could be extended to include criminal acts committed prior to 2002.

The HRCouncil, as a subsidiary organ of the General Assembly, cannot itself make a recommendation to the UN Security Council. By the provisions of the UN Charter, it is the GA itself that can make a recommendation to the Security Council. But the HRCouncil vote was the first step in a process that could lead to a referral to the ICC for an indictment for crimes against humanity (unless a referral motion is vetoed by one or more of the five Permanent Members of the Security Council).

At the General Assembly, at the urging of many members of the European Union, the resolution language was made more specific: “a referral to the ICC.” (The EU and Japan are the “primary co-sponsors” of the DPRK human rights resolution. Other Member States can join as “co-sponsors”, but it the primary sponsors that are responsible for drafting and/or revising the language of a resolution.)

It is commonly assumed that China and/or Russia would veto an ICC referral, though China has not said so explicitly (and would not until there was a formal referral motion on the table). But even discussion of such an action by the official organs of the United Nations is regarded and described by the North Koreans as an intolerable insult to the dignity of the esteemed and respected Leader.<sup>6</sup>

It does not automatically follow that the Security Council (SC) will act upon a recommendation of the General Assembly (GA). Putting

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<sup>6</sup> When the COI sent an advance copy (prior to publication) of its report to the DPRK Mission to the UN in Geneva, the COI did so under a letter from the chair of the COI directly to Kim Jong-Un, advising him that the COI was recommending an ICC referral and that he himself could be the subject of an indictment.

an item on the SC agenda requires the support of nine of the fifteen members of the Security Council, although, it should be noted, this is a procedural matter, not subject to veto by one of the “Perm Five.” The current composition of the SC indicates the availability of the requisite nine votes. This prospect set off the multi-faceted North Korean counter-initiatives described below.

North Korea began its responses to the COI immediately following the springtime vote of the HRCouncil. Those responses escalated as the autumn session of the General Assembly approached. At the GA consideration begins with the Committee on Humanitarian, Social Affairs and Cultural Affairs, one of the five GA “committees of the whole,” commonly referred to as the “Third Committee.” At the Third Committee, several weeks are set aside for consideration of human rights matters, often initiated by written and oral reports from relevant “Special Rapporteurs” to which any and all UN Member States can respond to or comment on.<sup>7</sup>

Several weeks later, resolutions on the previously discussed matters are presented, debated, and voted up or down. The Special Rapporteur on the situation of human rights in the DPRK, Marzuki Darusman, presented his report on October 28.<sup>8</sup> The Third Committee voted on November 18, and the resolution passed by a vote of 111

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<sup>7</sup> Special Rapporteurs are experts serving in an individual, voluntary capacity. They are appointed by the President of the HRCouncil, but they are independent investigators, that is, they are not “under instructions” by the UN Secretary-General or the foreign ministry of a UN Member State.

<sup>8</sup> Mr. Darusman is the former Attorney General of Indonesia, and one of three members of the COI.

“yes” to 19 “no” (with 55 abstentions).<sup>9</sup> The final step in this process is a formal vote by the General several weeks later. But this vote almost always follows closely the outcome of the vote at the Third Committee. The formal General Assembly vote on December 18 was 216 “yes”, 20 “no” (with 53 abstentions).

While awaiting the formal final vote of the General Assembly, on December 5, ten Security Council Member States wrote to the President of the Security Council that the North Korean violations enumerated in the COI report “threaten to have a destabilizing impact on the region and the maintenance of peace and security” and formally requesting that this agenda item be considered in the month of December.<sup>10</sup>

Additional venues for discussion at the UN are termed “side events”, public meetings sponsored by one or more Member States. Australia, Panama and Botswana hosted a “side event” on October 21 at which former Australian High Court Judge Michael Kirby, the chair of the COI, and two former DPRK political prisoners made remarks.<sup>11</sup>

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<sup>9</sup> The reason for the large number of abstentions is that the Non-Aligned Movement (NAM), a large group of African, Asian and Latin American nations that was organized during the Cold War to create geopolitical space between the rival alliances of the U.S. and the U.S.S.R (notwithstanding that some members of the NAM were allied to either the Americans or the Russians). The NAM opposes all “country-specific” resolutions at the UN. Thus a core group of NAM members abstain on all resolutions at the Human Rights Council or General Assembly that single out a particular UN Member State, although there are a number of NAM members that regard North Korea as exceptional and vote either for or against the DPRK-specific resolution.

<sup>10</sup> The signers of the letter were the Permanent Representatives to the UN from Australia, Chile, France, Jordan, Lithuania, the Republic of Korea, Rwanda, the United Kingdom, the U.S. and the Charge’ d’affaires, a.i. of Luxembourg. (China, Russia, Argentina, Chad and Nigeria did not sign the letter.)

<sup>11</sup> Mrs. Kim Hye-Sook, who was imprisoned for 28 years at Camp 18, and Mr. Jung Gwang-Il who was imprisoned for three years at Camp 15.

DPRK diplomats attended this event (which never happened at previous “side events” at the GA or HRCouncil, which North Korea ignored) and engaged in a spirited debate with Judge Kirby. The DPRK held its own public briefing on October 7 where Deputy Ambassador Ri Tong-Il and officials from Pyongyang discussed and distributed the DPRK counter-COI report described below.

The United States held a “high level side event” on September 23 where US Secretary of State Kerry, South Korean Foreign Minister Yun Byung-Se, and two former North Korean victims of human rights violations<sup>12</sup> made opening remarks expressing support for the COI findings and recommendation and calling on North Korea to close its political prisoner camps. (At the UN, “high level” means “higher” than Ambassadors or Permanent Representatives, namely foreign minister level for above, a diplomatic signal that the issue discussed is important to political decision makers. This high level side event was attended by the Foreign Ministers of Japan and Botswana,<sup>13</sup> and the newly appointed UN High Commission for Human Rights, former Jordanian UN Ambassador, Zeid bin Rad.

North Korean Foreign Minister, Ri Su-Yong, attended the UN General Assembly for the first time in 15 years, an indication of how seriously this year’s DPRK resolution was considered by Pyongyang. Foreign Minister Ri had sought to participate the Kerry high-level side event, a request that was denied, and about which the North

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<sup>12</sup> Mr. Shin Dong-Hyuk, 24 years a prisoner at Camp 14, and Ms. Lee Hyeon-Seo, a young former North Korean who is now a college student in Seoul.

<sup>13</sup> Following the publication of the COI report, Botswana broke diplomatic relations with the DPRK, a pointed, blunt indication that the COI report was causing a very serious shift in international opinion about North Korea.

Korean's later strongly complained.<sup>14</sup> Acceptance of Ri's request would have ruled out participation in the US-sponsored side event by two previously invited North Korean "defectors" as the Foreign Minister would certainly not appear on the same stage—even the same room—as former Camp 14 prisoner Shin Dong-Hyuk.<sup>15</sup>

Lastly, there are frequently informal events associated with UN meetings, often occasioned by the plethora of important personalities who attend the annual opening sessions of the GA. A high-ranking DPRK diplomat, Ambassador Jang Il-Hun, spoke about human rights in North Korea and took questions at the Council on Foreign Relations in New York where he made, it would appear, under instruction, remarks, discussed below, threatening an expansion of the DPRK's nuclear weapons production, a threat made more explicitly during the GA debates.<sup>16</sup>

These, then, are the context and settings at the United Nations that led to the series of extraordinary DPRK responses examined below. Some of these responses will likely prove ephemeral. Some of the responses may have serious consequences. Some of the responses may, in time, contribute to actual progress in the human rights situation in the DPRK. But, without doubt, it is now clear that the concern

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<sup>14</sup> "Detailed Report on Secret behind Anti-DPRK Human Rights Resolution," *Korean Central News Agency*, November 28, 2014.

<sup>15</sup> Shin was in the US for several weeks on projects with Human Rights Watch (HRW). He attended the session of Third Committee during the voting. DPRK diplomats sought to have UN security officers expel Shin from the Chamber, only to find that Shin was a fully-credentialed participant, officially listed as a member of the HRW delegation to the General Assembly.

<sup>16</sup> See "Ambassador Jang Il-Hun on Human Rights in North Korea: A Conversation with Jang Il-Hun," October 20, 2014, Council on Foreign Relations for both transcript and video of proceedings.

of the “outside world”, a common term in North Korea for the “international community, about the human rights conditions inside North Korea is something that the DPRK authorities no longer ignore.

## **North Korea’s Official Rejoinders to the Commission of Inquiry**

An examination of the variety of actions taken by the DPRK in response to the COI Report and UN Member State endorsement of the findings and recommendation of the COI starts with the official DPRK responses: the “Report of the DPRK Association for Human Rights Studies” and the “Detailed Report on Secret behind Anti-DPRK ‘Human Rights Resolution.’”

### **Report of the DPRK Association for Human Rights Studies**

In mid-September, on the eve of the opening of the General Assembly, North Korea published an official report presenting its considered defense of the situation of human rights in the DPRK. Roughly 75 pages long, this report was issued in the name of a previously existing but rather obscure ‘association’ that is obviously a controlled organ of the Korean Workers Party. It is worth describing in some detail as it is a self-portrait that reveals a great deal about how a powerful governing organ of the North Korean state sees itself and the world. The substance and the style of the Studies Association Report might well be an embarrassment to many North Korean diplomats



and government officials. But it probably reflects the worldview and mentality of the very powerful DPRK state security organizations as well as that of the ruling Workers Party.

Few governments submit to, or circulate at, the UN declaratory self-descriptions of their human rights policies and practices that highlight or underscore their own human rights violations or problems. However, the DPRK Human Rights Study Association assembles almost every Workers Party trope and propaganda cliché known to readers of KCNA, North Korea's official news agency. Pyongyang is presented as the epicenter of the first ancient state in East Asia, opening up a 'new era of civilization.' Kim Il-Sung liberated Korea from the Japanese occupation. The U.S. started the Korean War, but in a 'world-startling feat' the Korean people won it. The imperialist colony of 'south Korea' is still under U.S. occupation. There are separated families on the Korean peninsula because North Koreans fled to the south out of fear of a U.S. nuclear attack on the DPRK.

The Studies Association Report identifies the UN COI as a 'marionette' of the US and its satellite forces, and claims that this fabricated report is based on the testimonies of 'human scum' and 'terrorist' 'riffraff' who have betrayed their homeland where people enjoy a genuine life and happiness.

Some eight pages detail the 'hostile policy' of U.S. and its 'followers' (the EU and Japan) as the main obstacle to promoting human rights in the DPRK. The Congressionally-mandated Department of State's annual country-by-country human rights report is described as a vicious political provocation slandering

and insulting sovereign states as a prelude to aggression. North Korea now needs its own nuclear weapons because of the density of U.S. nuclear weapons deployed in 'south Korea.' And when the U.S. found it impossible to overthrow the people-centered system of the DPRK through political and military threats and economic blockade, it raised a smear campaign 'clamoring' about the 'non-existent human rights issue.'

The Studies Association Report purports to detail North Korea's human rights policy and practice. Relevant laws and institutions are outlined. But often accompanied by propaganda overlays. For example, everybody is fully provided the right to choose and follow their own religion, but every citizen of the DPRK follows *Juche*. And 'Especially, the Government prevents religion from being used to draw in foreign forces or harm the state and social order... the moves of the US and Western countries to instill reactionary and degenerated ideas and culture into our people...' Freedom of assembly and association are fully allowed, but 'Associations with the purpose of committing hostile acts against the State are absolutely prohibited.' The new criminal law of the DPRK 'strengthens the class struggle against anti-socialist crimes while thoroughly frustrating the ideological and cultural infiltrations and psychological smear campaigns of the US to disrupt the country from within.' That 100% of voters support the nominated candidates is 'an expression of absolute support and trust of all voters in the DPRK Government.'

The passages above are taken verbatim from the Studies Association report. There are other official DPRK submissions to the UN that

detail North Korea's constitutional provisions, institutions and laws, human rights policies and practice without the heavy overlay of crude Worker's Party cliché.<sup>17</sup>

But when North Korea wanted to present to the international community its counter-report to the COI on October 7, the Permanent Mission of DPRK to the UN formally presented and distributed the report to all UN Member State Missions as well as UN-accredited journalists and NGOs, as part of its diplomatic counter-offensive against the COI Report, the North Korean diplomats distributed the Studies Association Report indicating the importance that the top echelons of the DPRK attach to the jaundiced worldview and political mindset of the Workers Party and the DPRK security organs that sustain the North Korean police state.<sup>18</sup>

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<sup>17</sup> See for example, "National Report in accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: Democratic People's Republic of Korea," *UN Doc A/HRC/WG.6/19/PRK/1*, January 30, 2014. Notwithstanding the non-descriptive title, this 17 page document, submitted earlier this year by North Korea, for the consideration by other UN Member States as part of the mechanism known as the Universal Periodic Review, is a straight forward self-description of North Korea's "Legislative and Institutional Measures for the Promotion and Protection of Human Rights," its "Achievements in Protecting and Promoting Human Rights," and its "Challenges and Future Goals." One can dispute the claims and assertions in this self-description. But it is a serious presentation, just not the one considered to express the fundamental viewpoint of the DPRK's leading political authorities.

<sup>18</sup> This document also needs to be considered in conjunction with the DPRK threat, described below, to expand its nuclear weapons arsenal, a course of action prohibited by existing UN Security Council resolutions, and an unprecedented Member State response to a critical General Assembly resolution.

## **Detailed Report on Secret behind Anti-DPRK ‘Human Rights Resolution’**

Following the vote at the Third Committee, on November 28, the DPRK published its follow-up, 8 page “Detailed Report on Secret behind Anti-DPRK ‘Human Rights Resolution.’” This is North Korea’s description and analysis of recent events at the UN. Again, this “Detailed Report” deserves attention, as it is the DPRK’s formal public response to the post-COI developments at the UN:

“A draconian anti-DPRK resolution on the human rights aimed at seriously hurting its dignity was railroaded through the Third Committee of the 69th UN General Assembly... The U.S. and other forces hostile to the DPRK fabricated the “resolution” peppered with misinformation malignantly abusing the genuine human rights policy and, not content with this, even asserted that the DPRK’s human rights situation should be referred to the International Criminal Court. This was the most vivid expression of the U.S. hostile policy towards the DPRK,... a policy to bring down the socialist system centered on the popular masses under the pretext of human rights. Such hostile actions of the U.S. and its followers are naturally compelling the army and people of the DPRK to launch the toughest counteraction to cope with them.”

The “Detailed Report” goes on to enumerate—some correctly, some misleadingly—North Korea’s previous interactions with the UN human rights conventions’ implementation review committees, meetings with Amnesty International in 1992 and 1995, the abor-

tive 2001 start-up of human rights dialogue with the EU, and the more recent sign-on to human rights conventions and protocols.<sup>19</sup> The report proceeds to chastise the 2004 U.S. North Korean Human Rights Act for “legalizing its interference in the internal affairs of the DPRK and its scenario to bring down its social system under the pretext of ‘human rights protection.’” The COI is described as the US response to the DPRK successful nuclear test and satellite launch.

The COI report itself is misrepresented and castigated, for not visiting North Korea or taking testimony from DPRK citizens. The “Detailed Report” dishonestly asserts that the COI had no intent to visit North Korea, and only visited hostile countries like the US and Japan.<sup>20</sup> Shin Dong-Hyuk (transliterated as “Sin Tong-Hyok”) is singled out for individual castigation, as is the biography detailing his escape from Camp 14, because Secretary of State Kerry had stated that he was ‘touched’ by this ‘fictional novel.’<sup>21</sup> A variety of foreigners such as a Swiss businessman and the vice-president of the Party for Free Motherland of Brazil are cited for exposing the lies of North Korean defectors and describing the COI as a ‘servant of Obama faked up a nazi report against the DPRK.’

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<sup>19</sup> N.B. On November 10, the Supreme People’s Assembly formally ratified the Optional Protocol to the Convention on the Rights of the Child that prohibits child trafficking, child prostitution and child pornography.

<sup>20</sup> The COI report itself, and numerous presentations by COI Commissioners attest to their various attempts to seek to visit Pyongyang, and requests to Pyongyang to submit information to the Commission.

<sup>21</sup> The reference is to Blane Harden, *Escape from Camp 14: One Man’s Remarkable Odyssey from North Korea to Freedom in the West* (London: Penguin Books, 2013). Of particular interest to the present author, the “Detailed Report” notes that satellite images of “management office” combined with “victim testimony” are “hard to believe” without onsite corroboration. “Management place” is a literal translation of the Korean term “*kwan-li-so*” commonly translated into English as political prison camps, which, in that translation, the North Koreans deny exist.

The “Detailed Report” recounts that North Korea sought renewed dialogue with the EU, invited the Special Rapporteur to visit Pyongyang, and invited the Office of the High Commission to provide technical assistance to the DPRK.<sup>22</sup> The “Detailed Report” contends that the DPRK had the understanding of many EU members. But that U.S. pressure forced the Special Rapporteur and EU members to fall back into line. And that many African and Asian countries actually supported the DPRK but were forced to abstain or vote “yes” by threats of losing American and Japanese foreign aid.

This official publication by North Korean authorities concludes:

“The recent farce orchestrated at the UN is a shameless political chicanery to put down justice with injustice, and conceal truth with lies and the height of brazenfaced burlesque to deceive the world with intrigues and fabrications. The U.S. and its followers are trying hard to bring down the man-centered socialist system chosen by the Korean people, the cradle which they regard dearer than their lives. This is lashing them into great fury. Growing stronger are the voices calling for dealing merciless sledge-hammer blows at those who hurt even the dignity of the supreme leadership of the DPRK fully representing its people, which cannot be bartered for anything. The DPRK will make every possible effort to shatter all ‘human rights’ rackets kicked up by the U.S.

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<sup>22</sup> These offers were made conditionally in exchange for dropping the ICC referral reference in the GA resolution. That was not acceptable to the resolution co-sponsors. Whether or not the offered invitations remain on the table is not known at this point.

and other hostile forces and defend the socialist system where the people are the masters and their genuine human rights are guaranteed on the highest level.”<sup>23</sup>

## **Linking Human Rights, Peace and Security: North Korea’s Threat to Expand Its Nuclear Weapons Arsenal**

The fuller variety of the North Korean diplomatic counter-offensive is outlined below. But first, in line with the worldview displayed in the Human Rights Study Association reports described above, is North Korea’s own attempt to link human rights and international peace and security.

At the tail end of one of the associated meetings occasioned by the GA consideration of the recommendations of the COI, an important North Korea diplomat, Ambassador Jang Il-Hun,<sup>24</sup> speaking at the Council on Foreign Relations, linked human rights issues to North Korea’s pursuit of nuclear weapons capabilities. Coming at the tail

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<sup>23</sup> Dated November 28, by-lined Pyongyang, the full text of the “Detailed Report” is available on <<http://kcnawatch.nknews.org>>, November 29, 2014.

<sup>24</sup> Ambassador Jang is the North Korean link of what is often referred to as the “New York channel.” As there is no DPRK embassy or ambassador in Washington DC, the U.S. government, and U.S.-based scholars, humanitarian aid and other non-governmental organizations, communicate with DPRK through Ambassador Jang. He reports to the ‘American department’ of the Foreign Ministry in Pyongyang. His nominal superior in New York, the Permanent Representative of the DPRK to the UN, is responsible for UN-related matters, and probably reports to the Pyongyang equivalent of the ‘International Organizations’ section of the DPRK Ministry of Foreign Affairs.

end of a question and answer session, as the meeting was being brought to a close, Jang interjected a final remark that obliquely, but unmistakably, threatened a nuclear weapons test if the resolution under consideration at the GA did not remove the clauses that insulted the dignity of the North Korean leadership.

Jang asserted that the DPRK had only agreed to stop developing and even disband its nuclear weapons program, “the denuclearization of the Korean peninsula,” on the assurances that the U.S. had no “hostile intent” toward North Korea. As the racket to raise “fictitious” human rights violations was a very hostile plot by the U.S. to “have regime change” and overthrow the social system, there would be no further denuclearization considerations and, in which case, the DPRK will take “all countermeasures indefinitely.”<sup>25</sup>

On November 18, on the floor of the Third Committee during the debate on the EU/Japan sponsored resolution, a North Korea diplomat in charge of human rights and UN affairs, Choe Myong-Nam, made the threat explicit following the GA rejection of the Cuban amendment to delete the references to crimes against humanity and the referral to the ICC.<sup>26</sup> Charging the EU and Japan with “subservience and sycophancy” toward the U.S., Choe averred “unpredictable and serious consequences” if the resolution went ahead, stating, baldly, that the attempt to punish North Korea for human rights

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<sup>25</sup> Jang’s October 20, 2014 revealing remarks are available in transcript and video on the Council of Foreign Relations website.

<sup>26</sup> The Cuban amendment is discussed below.



violations “is compelling us not to refrain any further from conducting nuclear tests.”<sup>27</sup>

Making sure this threat was not missed or undervalued, on November 25, the DPRK Permanent Representative wrote the UN Secretary-General requesting circulation to both the General Assembly and Security Council members a formal statement from the DPRK Ministry of Foreign Affairs that concludes:

“Now that the United States hostile policy towards the DPRK compels the latter not to exercise restraint any longer in conducting a new nuclear test, its war deterrence will grow stronger unlimitedly to cope with the armed intervention of the United States.”<sup>28</sup>

It is unlikely that threat to test additional nuclear weapons, made on the floor of the UN Third Committee, changed any votes by UN Member States. However, the joining of human rights and security issues by North Korea may have considerable implications going forward. Up to now the Security Council has not considered any human rights issues regarding North Korea. Up to early Decem-

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<sup>27</sup> The present author was present at the GA when Choe’s threat was made. Press accounts are available in Carra Anna, “UN Push against North Korea on Rights Moves Ahead,” *The State*, November 18, 2014; Rick Gladstone, “United Nations Urges North Korea Prosecutions,” *The New York Times*, November 18, 2014.

<sup>28</sup> Annex, *UN Doc No. A/69/616—S/2014/849*, November 25, 2014 (The Foreign Ministry statement earlier notes, “History vividly remembers the Yugoslav war unleashed by the United States in 1999 under the pretext of protecting human rights...” It is unclear from the text if this is a reference to a future “armed intervention” or to U.S. troops long stationed, without DPRK approval, south of the armistice line separating the two Koreas.)

ber 2014, only strictly, traditionally defined security related issues regarding the DPRK have been taken up at the Security Council: nuclear weapons programs, longer range missile tests (the preferred delivery mechanism for nuclear warheads), and North Korea's attack on the Cheonan, a South Korean naval vessel.

Human rights advocates hope that, following the recommendation of the General Assembly, the Security Council will consider the North Korean human rights situation, at least to the extent of formally discussing the COI's findings and recommendations. It is not clear, as of early December 2014, that the Security Council will do this.

However, it is clear that the Security Council will take action in the event of another North Korean nuclear weapons test. In such a case, the General Assembly request for an ICC referral and additional sanctions on human rights-related grounds remains operative recommendations to the Security Council. It is very much in the North Korean "style" to respond to perceived pressure by actions often considered to be highly provocative. But if the threats of a fourth nuclear test are indeed carried out, the geopolitics of further Security Council deliberations will be different from previous Security Council discussions.

That is not to say that the Chinese and/or Russians would not try to separate out the issue of an ICC referral from additional security-focused sanctions in the event of another North Korean missile or nuclear weapons tests. But the possibility of an abstention rather than a veto would seem to be marginally greater than if an ICC referral is considered entirely on its own. It is now clear to all how much North Korea detests even discussion of the possibility that its leadership might be indicted by the International Criminal Court for committing crimes against its own people. Going forward, the Security Council

may choose to leave this possible prospect open for North Korea's consideration. All of the Permanent Members of the Security Council strongly oppose any further development of the DPRK's nuclear weapons and missile programs as these threaten peace and stability in Northeast Asia. It might well now be the case that North Korean human rights and Northeast Asia security issues are conjoined.

### **Post-COI Cooperation with the UN Human Rights Mechanisms: A Big Change and the Prospect of More to Come?**

In contra-distinction to the truculent belligerency of the DPRK Human Rights Study Association report and the threats to expand their nuclear arsenal, the North Koreans also responded in Geneva and New York with positive and forward looking reversals of their previous posture toward human rights promotion and protection. Following the March 2014 HRCouncil resolution endorsing the recommendations of the COI, and as the General Assembly approached, inside and outside the UN, North Korea took a number of surprising initiatives raising the prospect of much greater DPRK willingness to cooperate with the United Nations in the field of human rights.

Such cooperation is mandated in the UN Charter for all UN Member States. Article 1.3 of the Charter posits "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" to be one of four purposes of the United Nations. In Articles 55 and 56 "All Members pledge themselves to take joint and separate action in co-operation

with the Organization for the achievement of ... universal respect for, and observance of, human rights and fundamental freedoms....”

While reviewing the post-COI DPRK offers of cooperation with the UN human rights mechanisms involves technical discussion of those mechanisms, what is important to note at the outset, is that, *if* North Korea had previously cooperated with the UN in the area of human rights and demonstrated that it was attempting to address the concerns of the international community—and hopefully also improve the situation on the ground—in all likelihood there would not have been a Commission of Inquiry. Along with the growing body of testimony depicting severe violations in great detail, it was DPRK’s long insistence that the human rights issue was ‘non-existent,’ and the DPRK’s contemptuous rejection of cooperation with the UN human rights procedures and mechanisms that led to Human Rights Council to initiate the rarely-used appointment of a COI.

This is not a matter of past history. North Korea’s human rights situation is now a high level concern of the international community. North Korea’s willingness, or not, as the case may be, to cooperate with the UN in the area of human rights will have, going forward, a considerable impact on the international community’s overall approach to the DPRK.

Reviewed over previous decades, the DPRK’s cooperation with the UN mechanisms and procedures to promote and protect human rights had been spotty, inconsistent, and lackadaisical at best.<sup>29</sup> Since

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<sup>29</sup> For an extended discussion of this history see, David Hawk, “International Human Rights Law and the DPRK: The UN Roadmap for Human Rights Improvement in North Korea,” Bae and Ku (eds.), *China’s Internal and External Relations and Lessons for Korea and Asia* (Seoul: KINU, 2013).

the turn of the millennium, as North Korea came under review at the UN Commission on Human Rights (in 2006 renamed the UN Human Rights Council) the DPRK became truculently uncooperative. Human rights dialogue with the European Union (EU) was abruptly terminated as it was just getting started. North Korea refused to cooperate with the Special Rapporteur on the situation of human rights in the DPRK. It refused cooperate with the Special Rapporteur on the right to food, even at a time when UN agencies were providing food assistance to almost a third of the North Korean population. It refused to cooperate with the High Commissioner for Human Rights. And it refused in early 2010 to complete the most vital, core element of a recent addition to the UN human rights system termed the “Universal Periodic Review.”

### **The Revised North Korean Approach to the Universal Periodic Review**

The Universal Periodic Review (UPR) is a major development in the UN human rights system. Over a repeated four-year cycle each and every UN Member State presents a written and oral report to the Human Rights Council describing the situation of human rights in that country. During the oral report, a delegation of officials outlines the country’s approach to human rights. Following this presentation, on the basis of the written and oral reports, other Member and Observer States publicly recommend to the reporting government suggested measures that could be taken to improve human rights policy and practice.

The next steps in this process are the crucial measures. The visiting officials take the recommendations from their fellow governments back to their home government for further consideration. Then, at the next session of the Human Rights Council, the representatives of the previously reviewed nation-state announce which of the recommendations his or her government has accepted and agreed too.

In December 2009, a delegation from Pyongyang presented its first UPR report to the Human Rights Council.<sup>30</sup> The Member States then made some 167 recommendations to the DPRK. But at the following session, in early 2010, during the second part of the UPR for North Korea, the DPRK Permanent Representative, pointedly under questioning, refused to accept any of the proffered recommendations for improving human rights previously made by other governments. The DPRK was the only UN Member State during the first cycle of the UPR to refuse to accept any recommendations for improving human rights, an omission duly and critically noted in subsequent UN resolutions on human rights in the DPRK.

Following the publication of the COI report, in May 2014, on the eve the second cycle UPR review of North Korea, the DPRK published—three years behind the UN scheduled deadline—a detailed response to the 167 first cycle recommendations according to the following categories: 50 recommendations rejected out-of-hand or “on the ground” because they “slandered the country”; 15 recommendations that were considered but rejected; 81 recommendations accepted (and it was claimed currently being implemented); 6 par-

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<sup>30</sup> It was at this presentation, attended by the present author, that the DPRK spokesman proclaimed to the UN that the term ‘political prisoner’ was not in their vocabulary and that the so-called ‘political prison camps’ did not exist.

tially accepted; and 15 taken note of, meaning “recommendations that are difficult to accept under present circumstances, but are reserved for consideration in the future.”<sup>31</sup>

The Special Rapporteur on Human Rights in the DPRK, Marzuki Darusman, a former Attorney General of Indonesia and member of the COI, immediately welcomed the DPRK’s dramatically new approach to the UPR, encouraging all concerned parties, including the UN human rights system and civil society, “to seize the opportunities for engagement that the latest developments in the [UPR] have created,” particularly regarding cooperation with UN human rights mechanisms; violence against women and the rights of vulnerable groups; structural reforms regarding the rights to food, health and education; and family reunions.<sup>32</sup>

During the second cycle of the UPR, on May 6, following a presentation by a delegation from Pyongyang, North Korea’s fellow governments made 268 recommendations to North Korea that it should take to advance human rights. At the following session of the Human Rights Council in September 2014 the DPRK responded, again using the categories of its belated response to the first cycle recommendations: 67 recommendations rejected out-of-hand for “slandering the country”; 113 recommendations that “enjoy the support” of the Government of the DPRK; 4 “partially accepted” recommendations;

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<sup>31</sup> “Position of the DPRK on the Recommendations Received During Its First Cycle UPR.” As it was submitted way past the deadline, this publication received no UN Doc. Number or designation, but it is available on the UN website, <[www.ohchr.org/EN/HRBodies/UPR/Pages/KPSession19.aspx](http://www.ohchr.org/EN/HRBodies/UPR/Pages/KPSession19.aspx)>.

<sup>32</sup> “Report of the Special Rapporteur on the Situation of Human Rights in the D.P.R.K.,” *UN doc. No. A/HRC/26/43*, June 13, 2014, paras. 25~35, pp. 9~12.

58 “noted” recommendations (meaning held for future consideration); and 10 recommendations that, after consideration, “do not enjoy the support of the Government of the DPRK.”<sup>33</sup>

A review of the kinds of recommendations in each of these categories is beyond the scope of the present paper.<sup>34</sup> Needless to say, the repressions that the Special Rapporteur and COI term gross violations of internationally recognized human rights and crimes against humanity are rejected out-of-hand as “slandorous” category. However, in contradistinction to the propaganda-satiated Studies Association report reviewed above, the DPRK’s response to the second-cycle UPR recommendations is a considered and serious portrait of the DPRK’s human rights policy.

The full listing of accepted and rejected recommendations merits careful review. In the event that a human rights dialogue with North Korea can ever be had, these responses are the guide to what can, and what likely cannot, be productively discussed. In the event that it is ever possible to do human rights work on the ground in North Korea (by diplomats, UN officials agencies or international and/or domestic civil society groups) these official DPRK responses to the second-cycle UPR provide the available starting points.

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<sup>33</sup> “Report of the Working Group on the Universal Periodic Review: Democratic Peoples Republic of Korea—Addendum: Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review,” *UN doc A/HRC/27/10Add.1*, September 12, 2014.

<sup>34</sup> For samples taken from each category see, David Hawk, “North Korea Responds to the UN Commission of Inquiry,” *38 North*, October 16, 2014. An annex to this article “38 North UPR Working Group DPRK Response,” provides the full text of all 268 recommendations, arranged according to the DPRK categories of acceptance or rejection. *38 North* is a website of the U.S.-Korea Institute at the Johns Hopkins School of Advanced International Studies (SAIS), Washington, DC.



## **The Counter-Initiatives to the COI: DPRK's Human Rights Diplomacy**

While the threat to resume nuclear weapons tests was the most strategic or geopolitically charged response by North Korea to the COI report, as the General Assembly approached, at the UN in New York and in external events related to the UN, the DPRK undertook a series of high level diplomatic initiatives. Kang Sok-Ju, a very high level diplomat, was sent off to the EU in Brussels with offers of renewed dialogue. As noted, Foreign Minister Ri Su-Yong visited the General Assembly, marking the first time a DPRK Foreign Minister has attended the GA in 15 years. The DPRK Permanent Representative to the UN hosted the public meeting to discuss and distribute the Human Rights Studies Association report described above.

On October 6, the DPRK Permanent Representative Ja Song-Nam wrote a letter to all other Permanent Missions to the UN in NY informing his fellow ambassadors that the DPRK would be submitting its own General Assembly resolution on the situation of human rights in the DPRK. Ambassador Ja's letter covered an annex outlining the main elements in the forthcoming DPRK draft resolution on its own human rights situation, emphasizing North Korea's willingness to cooperate with the UN human rights procedures.

This would have been, in effect, a counter-resolution to the GA resolution on DPRK human rights (since 2005) primarily sponsored by the EU and Japan. Technically, competing resolutions on the same topic are not permitted, and the EU hurried to ensure their resolution was filed first. Substantively, the proffered North Korean counter-resolution went nowhere, as the Association of South East

Asian (ASEAN) states, an important bloc within the Non-Aligned Movement (NAM) group of states, explained to the North Koreans that, if the “non-aligned” position is to oppose all “country-specific” resolutions, they would have to oppose the DPRK “country specific” resolution, as well as the EU/Japan “country-specific” resolution.

Procedurally, Cuba, the leader of the “non-aligned” group of states, stepped forward to rescue DPRK’s purposes, by sponsoring a hostile amendment to the EU/Japan resolution. But, first, the DPRK, astonishingly, requested two meetings with Marzuki Darusman, the Special Rapporteur on the situation of human rights in the DPRK. Previously, the DPRK had adamantly and contemptuously spurned all requests by Darusman, and his predecessor for a meeting.<sup>35</sup>

DPRK diplomats offered Darusman a long-sought-after invitation to visit North Korea, if the EU and Japan would delete the ICC-referral provision from their resolution. (Technically, the wording of resolutions falls within the competence of Member States, not UNO officials. Informally of course, UN officials are regularly consulted by all sides, as resolutions obviously have enormous consequences for the UN Organization.)

Further, the DPRK held out the prospect of a “technical cooperation” project by the Office of the High Commissioner for Human Rights (OHCHR) on-the-ground inside North Korea. “Technical Cooperation” is the UN terminology for a variety of human rights education, training and information programs that the OHCHR carries out in a

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<sup>35</sup> The initial Special Rapporteur on the situation of human rights in the DPRK Vitit Muntarbhorn, a Thai international and constitutional law professor. Special Rapporteurs are limited to two three-year terms. After his term of office expired, Prof. Muntarbhorn was succeeded by Marzuki Darusman.

variety of countries. Almost always, these programs are enabled by a resolution of the Human Rights Council. Always, such programs, like the work of all UN agencies, programs and funds, require the explicit and detailed approval of the Member State in which UN projects take place.

Previously, what was reportedly on offer by the DPRK was a deal that if the EU and Japan withdrew their annual resolutions in their entirety, North Korea would engage in dialogue with the “thematic rapporteurs” but, obviously, not the “country specific” rapporteur for North Korea.<sup>36</sup> (Thematic rapporteurs deal with broad human rights issues across a range of countries.<sup>37</sup> These thematic “mandate holders”, as they are termed at the UN, can name specific countries where their particular human rights theme is problematic. But no particular country is singled out.) The mandate of the country-specific rapporteur for human rights for the DPRK is renewed annually by a resolution at the Human Rights Council. If the EU/Japan resolution on North Korea were to be discontinued, the post of the Special Rapporteur would be necessarily terminated.

Previously, the DPRK had contemptuously dismissed an OHCHR technical cooperation program for the North Korea on the grounds that this idea was proposed in the EU/Japan resolution. Further, there was no need for human rights education, training and infor-

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<sup>36</sup> To my knowledge, this “offer” was intimated orally by North Korean diplomats in Geneva. I am not aware of any such proposal made in written or formal communication.

<sup>37</sup> For example, there are thematic rapporteurs on torture, freedom of religion, human rights defenders, enforced disappearances, and so on. (Some thematic rapporteurs are grouped together such as the Working Group on Arbitrary Detention.)

mation, North Korea insisted, because the human rights issue was “non-existent.” And because human rights and fundamental freedoms were fully guaranteed by the benevolent rule of their Respected Leader and fully realized through the ‘people-centered socialist system’ of the DPRK.

The dramatically revised DPRK position as the General Assembly debate unfolded was that (1) human rights dialogue would be pursued (2) an invitation to the Special Rapporteur would be issued, and (3) an OHCHR technical cooperation project in North Korea would be exchanged for dropping the ICC referral clause, not the dropping of the entire EU/Japan resolution.

With the obvious support of the DPRK, these three elements were picked up by Cuba, and formally proposed, along with dropping specific references to crimes against humanity and an ICC referral, as an amendment to the EU/Japan resolution. Procedurally, proposed amendments are debated and voted on before the resolution itself. Over the weekend and the day before the Tuesday vote, the EU agreed to incorporate into the text of its resolution the references to human rights dialogue, the potential visit by the Special Rapporteur, and an OHCHR technical cooperation project—the specifics of DPRK’s newly offered cooperation with the UN in the field of human rights.

On the day of the vote, on the floor of the Third Committee, Cuba orally withdrew these references from its amendment, which then only included deleting the crimes against humanity and ICC referral provisions of the EU/Japan resolution. The

Cuban resolution was handily defeated.<sup>38</sup> And the EU/Japan resolution passed overwhelmingly.<sup>39</sup>

Following the vote, the DPRK delegation castigated the EU, saying that the EU was not worth talking to. Notwithstanding, the elements of human rights dialogue, and cooperation with the Special Rapporteur and OHCHR are now on the table. When, in late December 2014, the full GA votes to reaffirm the Third Committee resolution, and if, in December, 2014, the Security Council formally considers the COI report and the situation of human rights in the DPRK, that will not be the end of it. North Korea's willingness to extend cooperation in the human rights area will be an important part of the international community's handling of this matter in the future.

## **DPRK Responses to the COI: On-the-Ground in North Korea**

In addition to North Korea's series of actions at the UN and its environs in response to UN Member State support for the COI findings and recommendations, the DPRK undertook a series of actions in Pyongyang and elsewhere in North Korea. These actions were also likely aimed at international public opinion. But undoubtedly, these actions targeted a domestic audience and situation as well.

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<sup>38</sup> "Cuba: Amendment to Draft Resolution," *A/C.3/69/L.28*, November 13, 2014. By a vote of 77 'no', 40 'yes', with 50 abstentions.

<sup>39</sup> "Resolution on the Situation of Human Rights in the DPRK," *A/C.3/69L.28/Rev.1*, November 14, 2014. By a vote of 111 'yes', 19 'no' with 55 abstentions.

## Verbal Attacks on U.S. Imperialism

Anticipating that it would become known to the Korean people inside Korea that the UN General Assembly was condemning the crimes committed by the regime against its own people, and that the UN Security Council might consider referring North Korea to the International Criminal Court for prosecution for crimes against humanity, the DPRK media outlets—TV, newspapers, KCNA and likely radio and public loudspeaker systems—unleashed a series of repeated verbal attacks on the UN, the COI, the former North Koreans who testified to the COI, the EU, Japan, and mostly the U.S.

Too numerous to itemize, one example will suffice. Kim Jong-Un visited the Sinchon Museum, south of Pyongyang, where the American troops killed civilians during the Korean War. Calling for increased anti-American ideological education, KCNA quoted Kim Jong-Un declaring “The massacres committed by the U.S. imperialist aggressors in Sinchon evidently showed that they are cannibals and brutal murders seeking pleasure in slaughter.”<sup>40</sup>

## Mobilizing the Citizenry

And, according to KCNA, 100,000 fist pumping North Korean demonstrators flocked to Kim Il-Sung Square following the UN vote to denounce the UN resolution and “vow to mercilessly retaliate against

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<sup>40</sup> Cited in Sang-Hun Choe, “North Korean Leader Assails American ‘Aggressor’,” *New York Times*, November 25, 2014. See also, “N. Korean Leader Launches Outspoken Attack on U.S.,” *Yonhap News Agency*, November 25, 2014.

the U.S. and its allies,” such “riffraff” as the EU, Japan and the “Park Geun-Hye group in south Korea.”<sup>41</sup>

## **DPRK’s Personal Attacks on Shin Dong-Hyuk**

Shin Dong-Hyuk is a young former North Korean, who, through the best selling, widely translated biography, *Escape from Camp 14*, has become a leading voice and symbol of the cruel political prison-labor camps in the DPRK. Shin testified to the COI, and, as noted above, he spoke in English at the September 23 high-level side event sponsored by Secretary of State John Kerry. Several years back, fearing that his father might have been executed in retaliation for Shin’s escape, or because of his human rights advocacy after he arrived in Seoul, Shin sought to communicate with DPRK officials through UN thematic rapporteurs to ascertain if his biological father was still alive.

The DPRK never responded to UN inquiries on Shin’s behalf regarding his biological father’s fate or whereabouts. Following Shin’s appearance at the Kerry side event described above, the North Koreans pulled Shin’s father out of the prison camp and put him on television proclaiming that everything Shin said was a lie. Shin has confirmed that the person in the North Korean TV video is his father. The North Koreans also produced another TV video featuring a

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<sup>41</sup> “N. Koreans Denounce UN Resolution Condemning Country’s Human Rights Conditions,” *Yonhap News Agency*, November 25, 2014. At that rally, reportedly, General Sa Ryong-Nam told the assembled crowd, “The U.S. Imperialists Should Bear in Mind that We Have the Option to Launch a Pre-emptive Nuclear Strike,” *Ibid.* See also, Alasdair Gale, “North Korea Goes on Anti-U.S. Propaganda Binge After Human Rights Censure,” *Wall Street Journal Real Time*, November 25, 2014.

young woman claiming that Shin assaulted her.<sup>42</sup>

Perhaps such attacks have domestic resonance inside North Korea. But internationally, as with DPRK descriptions of its former victims as “human scum,” the personal attacks on Shin are counter-productive. Diplomats, reporters, scholars and others who meet personally with defectors such as Shin are even more persuaded of the authenticity and trustworthiness of their testimony.

### **Releasing Americans Detained in Pyongyang**

In the run-up to the GA deliberations, North Korea received U.S. spy-master James Clapper, the Director of National Intelligence, in Pyongyang, allowing him to escort Kenneth Bae and Matthew Todd Miller back to the United States.<sup>43</sup> Perhaps these releases would have happened sooner or later anyway, as the U.S. finally met North Korea’s terms for their release.<sup>44</sup> However, it is also possible to include these prisoner releases as part of what is frequently termed North Korea’s “charm offensive” to ward off UN condemnation and the ICC referral.

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<sup>42</sup> These video clips had been available on YouTube. Attempts to provide specific reference for this paper produced the online notation: “This video is no longer available because the YouTube account associated with this video has been terminated.”

<sup>43</sup> A third American detained in Pyongyang, Mr. Jeffrey Fowler, had been released several weeks earlier.

<sup>44</sup> That the US official sent to Pyongyang to escort them back be current office holder (not a former President or former U.S. Ambassador to the UN), of higher ranking than Ambassador Robert King, specifically a cabinet-level, current official with direct contacts with the President.



## Closure of Prison Camp 15?

Sometime after the February 2014 publication of the COI report, satellite photographs indicated that the dormitories for single prisoners in the So-rim-chon section of Camp 15 (also called Yodok Camp, after the name of the nearest town) had been demolished, as had the electrified barbed-wire fence surrounding the So-rim-chon section of the prison camp. These satellite images were confirmed by Mr. Jung Gwang-Il, the former prisoner at Camp 15 who testified to the COI and spoke at the October 22 side event with former COI head Michael Kirby sponsored by Australia, Botswana and Panama. A short press account in the November 11 *DailyNK*, cited a source inside North Korea reporting that Camp 15 had been entirely broken up and all the former prisoners transferred to Camps 14 and 16.<sup>45</sup>

It is not possible to account for the closing of a major prison camp on the basis of a three sentence anonymous source reporting surreptitiously and dangerously from an illegal cell phone connection inside North Korea. Hopefully future examination of high-quality, time-dated satellite images of Camp 15, will enable a more dispositive descriptive account of the present situation at Camp 15, or the *former* Camp 15, as the case may be.<sup>46</sup>

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<sup>45</sup> “Camp 15 Gone But No Liberty for Prisoners,” *DailyNK*, November 8, 2014.

<sup>46</sup> See David Hawk, “Hidden Gulag: Interpreting Reports of Changes in the Prison Camps,” Committee for Human Rights in North Korea, 2013 for a discussion of these and related issues.

The ebb and flow of North Korea's prison camps, obviously its own internal domestic logic over their half-century existence. But human rights advocates have long been concerned that significant international pressure on the DPRK to close the camps might lead the North Korea authorities to erase the evidence without either freeing the prisoners, or providing an accounting of the fate and whereabouts of the former prisoners in the camps. North Korea denies the "prison camps" exist, making an official accounting entirely unlikely, unless and until, somehow, someday the regimes falls.<sup>47</sup>

With the Human Rights Council and General Assembly condemnations of the prison camps as a central component of the DPRK's crimes against humanity, it is likely that the international community will continue to insist on an accounting of the prison camps and their former prisoners. However, in the interim, if satellite photography comes to confirm the closure of the known remaining prison camps, with or without an accounting, this would be the most significant DPRK response to the findings and recommendations of the UN Commission of Inquiry.

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<sup>47</sup> There was some confusion in recent press accounts, because in one of the DPRK side events at the UN, its diplomat acknowledged the existence of "reform-through-labor" detention facilities. Some press accounts thus headlined that North Korea admits to prison camps. What the diplomat had actually specified was the existence of different reform-thru-labor facilities, known in Korean as *kyo-hwa-so*, *jip-kyul-so*, and *no-dong-dan-ryeon-dae*, that are recognized in the DPRK Criminal Code. What the diplomat did not acknowledge are the clandestine, "off-the-books" prison camps known in Korean as *kwon-li-so*, which previously in the 1990s were estimated to hold some 150,000 to 200,000 prisoners, but which the COI posited to now, in the second decade of the 21st century, hold some 80,000 to 122,000 persons forcibly deported to the camps for entirely political offences. (The prison-labor facilities specified in the DPRK Criminal Code hold persons charged and convicted of criminal as well as persons imprisoned without trial for essentially political offenses.)

## REFERENCES

- “Letter from the Permanent Representative of the DPRK to UN General-Secretary, Annex.” (UN Doc. *A/69/616/--S/2014/849*, 2014.11.25).
- “Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the DPRK.” (UN Doc. *A/HRC/25/CPR.1*, 2014.2.7).
- “Cuba: Amendment to Draft Resolution.” (UN Doc. *A/C.3/69/L.28*, 2014.11.13).
- “Report of the Special Rapporteur on the Situation of Human Rights in the DPRK.” (UN Doc. *A/HRC/26/43*, 2014.6.13).
- “Report of the Working Group on the Universal Periodic Review: Democratic People’s Republic of Korea-Addendum: Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review.” (UN Doc *A/HRC/27/10Add.1*, 2014.9.12).
- “Resolution on the Situation of Human Rights in the DPRK.” (UN Doc. *A/C.3/69L.28/Rev.1*, 2014.11.14).
- “Report of the DPRK Association for Human Rights Studies.” (Pyongyang, 2014.9)
- “Situation of Human Rights in the DPRK.” (UN Doc *A/HRC/25L.17*, 2014.3.26).

*Daily NK.*

*Korean Central News Agency.*

*New York Times.*

Council on Foreign Relations. <<http://www.cfr.org>>.

Office of the High Commissioner for Human Rights. <<http://www.ohchr.org>>.



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Analysis and Implications

