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Pueblo, E.C. 121, and Beyond: A Suggested Analysis

Cover Page Footnote
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I. Introduction

The downing of a reconnaissance aircraft by the North Koreans, as well as their prior seizure of the U.S.S. Pueblo, suggests that we may be entering upon another long night on the Asian continent. The increasing tension between the United States and North Korea means that many difficult foreign policy choices lay ahead; choices which, if they are to rise above the harsh regime of power politics, must be guided by meaningful jural principles. For if those decisions are to be conducive to lasting peace, they must be based upon advice which objectively evaluates the issues as much as it provides legal arguments to defend desired choices. Yet, such an objective is difficult to realize.

One obstacle is the fact that advocacy is an integral part of scholarship ostensibly devoted to the establishment of international law. Given the existence of a vital national interest, one can assume that the energies of most international lawyers will be devoted to the marshaling of legal argumentation in favor of existing foreign policy. In some measure, such partialities are defensible. International jurists cannot—indeed should not—completely separate themselves from their national origins. Moreover, the extreme complexity of most global conflicts provides a leeway which one can, in good faith, develop in a manner most advantageous to one’s country.

But such an attitude is a significant barrier to the development of world order. One of the most unpalatable principles of international law is that its rules are dependent upon general consensus rather than limited assent. The de facto economic and military superiority of the United States vis-à-vis many other nations makes it psychologically difficult for the American international lawyer to bring to his work such a universal spirit. The Hickenlooper Amendment, purporting to recite as a rule of international law a private property standard which is manifestly without general acceptance, illustrates the difficulty at the political level. Unfortunately, the same proclivity to generalize particular precepts prevails in the world of legal scholarship. Much of the debate surrounding the Vietnam War in legal journals, with some conspicuous excep-
tions,\textsuperscript{3} reflects this national-interest mentality. Such advocacy is detrimental because it runs against the fundamental purpose of ideas, which is to transcend contingencies and provide a broad basis for the appraisal of particular events.

Selection of applicable legal rules depends upon a prior characterization of the relevant issues. Professor Falk has demonstrated how preliminary identifications of adversary conduct as "aggression" made available the legal norms needed to legitimize American policy in Vietnam.\textsuperscript{4} The same psychology of issue preference and selection has already been used in our conflicts with the North Koreans and it is imperative that such a priori forms of analysis be moderated, if we hope to approximate a clear juridical understanding of the relative rights and responsibilities. Secretary Rusk’s invocation of the Geneva Convention on the Law of the Sea as a source of relevant norms in the \textit{Pueblo} incident\textsuperscript{5} reflected the desirability, from the perspective of national interests, of characterizing the problem in terms of the laws of peace. In fact, however, the fundamental relationship between North Korea and the United States lies somewhere between war and peace, and a failure to refer to this twilight status as a starting point for legal analysis impairs the value of the subsequent juridical argumentation.

\textbf{II. The Jural Consequences of the Korean War}

Korean hostilities began on June 24, 1950, when North Korean forces crossed the 38th parallel and entered South Korea. The United States met the attack and sought a condemnation by the United Nations' Security Council. The Council determined that the invasion constituted a breach of the peace and called for an immediate termination of hostilities.\textsuperscript{4} Subsequent resolutions recommended that members of the United

\begin{itemize}
  \item[4.] See Falk, International Law and the United States Role in the Viet Nam War, 75 \textit{Yale L.J.} 1122 (1966).
  \item[5.] "Let me point out something that is quite important here. Warships on the high seas—according to the 1958 conventions on the law of the sea—warships on the high seas have complete immunity from the jurisdiction of any state other than the flag state.

  "Now, let's assume just for a moment what is obviously not true from the testimony from all sides, including the North Korean side, that this ship was picked up in territorial waters, or in waters claimed by North Korea to be territorial waters. Even there, under the convention of the law of the sea, 1958, article 23, it makes it quite clear that if any warship comes into territorial waters, the coastal state can require it to leave. It does not obtain a right to seize it." Secretary Rusk and Secretary of Defense McNamara Discuss Viet-Nam and Korea on "Meet the Press", Feb. 4, 1968, in \textit{58 Dep't State Bull.} 261, 265 (1968).
  \item[6.] 5 U.N. SCOR, 474th meeting 4 (1950) (footnote omitted).
\end{itemize}
Nations furnish South Korea with necessary assistance, and that the contributing forces be unified under a command led by the United States. These actions by the Security Council occurred in the absence of the Soviet Union's representative. Upon his return, the Soviet member, Mr. Malik, challenged the legality of the resolutions, primarily on the ground that the conflict was a domestic civil war beyond the purview of United Nations' jurisdiction. A Soviet veto prevented the passage of a further draft proposal submitted by the United States which would have condemned North Korean defiance of the earlier resolution. The General Assembly then assumed jurisdiction of the controversy, established a Commission for the Unification and Rehabilitation of Korea, and, in the famous Uniting for Peace Resolution, sought to sustain the power of the United Nations to make appropriate recommendations to its members for the maintenance of international peace.

Hostilities continued, intensified by the intervention of Chinese Communist troops in November, 1950. The painful conflict persisted until, following the personal attention of President Eisenhower, a settlement was finally agreed upon. Following agreements relative to the repatriation of prisoners of war, a military Armistice was signed at Panmunjom, Korea, on July 27, 1953, between the United Nations Command and representatives of the Korean People's Army (North Korea) and the Chinese People's Volunteers.

What is the jural significance of these events? To what extent do they provide a frame of reference for assessing the reciprocal responsibilities of the participants? It is upon the total effect of these events that a basis must be discovered for determining the ongoing juridical relationship between the United States and the North Koreans.

7. Id. at 5.
8. 5 U.N. SCOR, 476th meeting 10 (1950).
10. 5 U.N. SCOR, 479th meeting 10 (1950).
13. Agreement Between 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, Concerning a Military Armistice in Korea, in Letter Dated 7 August 1953 From The Acting United States Representative To The United Nations Addressed To The Secretary General, Transmitting A Special Report Of The Unified Command On The Armistice In Korea In Accordance With The Security Council Resolution Of 7 July 1950 (S/1598), U.N., Doc. A/2431 (1953) [hereinafter cited as Armistice (as reprinted in 47 Am. J. Int'l L. 186 (Supp. 1953))].
An armistice is a means of abating hostilities between belligerents.\textsuperscript{14} In analyzing the significance of the Panmunjom document, it is necessary to first determine whether the prior relationship between the parties should properly be characterized in terms of belligerency. The difficulty arises from the fact that the allied military operations were carried on under the aegis of Security Council recommendations. Thus, a preliminary issue arises as to whether action by members of the United Nations against an entity branded as a peace-breaker by that Organization can properly be identified by a state of war.

Assuming the illegality of the North Korean invasion, it is not inconsistent to refer to the resulting military action as a war. Any relation of armed violence may properly be so designated, not to avoid attributions of fault, but to promote a stabilization of the conflict. Applying the laws of war to uses of force brings to bear upon the conflict a body of jural precepts designed to reduce the inevitable suffering and to clarify the relationship between the participants and other members of the international community.\textsuperscript{18} During early stages of the Korean conflict, suggestions that the Unified Command could, acting under the auspices of the United Nations, selectively apply the laws of war were repudiated by the commander in the field, and at the time of the armistice all combatants were applying considerable portions of the rules of war to their treatment of prisoners.\textsuperscript{16}

There are other considerations which militate against structuring the United States-North Korean relationship in terms of a sanctioning process against an aggressor. The Security Council's initial determination that the North Korean attack constituted a breach of peace was an act of great moral significance. Yet, it should not be forgotten that it was done in the absence of the Soviet Union, a political fact which weakens the operative force of the resolution. More importantly, the Unified Command's action was not, in any meaningful sense, the action of the United Nations. The participating states' involvement was voluntary, which makes a juridical link between their activities and the United Nations'...
implausible. Further, the absence of meaningful direction from the United Nations, together with the de facto United States control of the military operation, make accurate Professor Baxter’s observation that “the Unified Command is the United States.”

One further obstacle to adopting the status of belligerency should be considered. It has been argued that the United Nations Charter has abolished war. Consequently, participants in an international conflict are no longer permitted to conduct themselves as belligerents. The argument is ethically attractive, but when put forth in unconditional form it is not convincing. The primary difficulty with the theory is that an effective supra-national authority simply does not exist. In light of this elementary fact, it may be preferable, for humanitarian purposes, to refer to a relationship of conflict in terms of the rules of war. The question is a pragmatic one. In some contexts, reliance upon a status of belligerency may be incompatible with the quest for peace, but it would be dogmatic to assert that the measurement of any international conflict in those terms is improper.

Moving beyond these general considerations, what was the juridical effect of the Armistice signed at Panmunjom? If it assumed a prior relationship of belligerency, what effect did the Armistice have upon that relationship? It is possible for an armistice to be a final resolution of an armed conflict. Whether or not such is the case depends upon the intention of the parties as determined by an examination of the document. The Korean Armistice was clearly designed to suspend hostilities rather than constitute a final treaty of peace. The Preamble recites the pledge of the parties to bring an end to the bloodshed as a means of working towards a future settlement:


20. By resolution of September 1, 1951, the Security Council held that visit and search operations being conducted by Egypt were incompatible with the General Armistice Agreement then in effect. 6 U.N. SCOR, 558th meeting 56 (1951). The value of the resolution as a general precedent is limited by the fact of its reference to the Armistice concluded with extensive United Nations involvement, and by the consideration that Security Council members apparently treated the resolution as a “political” rather than a “legal” act. See the discussion in R. Baxter, The Law of International Waterways 224-36 (1964).

The undersigned, 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, in the interest of stopping the Korean conflict, with its great toll of suffering and bloodshed on both sides, and with 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 do individually, collectively, and mutually agree to accept and to be bound and governed by the conditions and terms of armistice set forth in the following Articles and Paragraphs, which said conditions and terms are intended to be purely military in character...  

During the period that an armistice is in effect, the weight of authority is that the state of war continues and its rules govern the belligerents' conduct. What is permissible conduct is primarily determined by reference to the agreement; the signatories must refrain from the conduct prohibited by its terms. Under the terms of the Korean armistice, the parties agreed to a cessation of all hostilities by armed forces under their control; ground, naval, and air forces were obliged to respect the physical and coastal areas under the control of their adversaries.

Espionage activities would be lawful both under an interpretation of the armistice and under general rules of warfare. An armistice suspends only those belligerency rights which it expressly proscribes. The Korean document is aimed at prohibiting active military operations and the related issues for balance of forces. Moreover, intelligence gathering is considered lawful by tradition in international conflict in light of the grave importance of learning of the entire disposition of forces within enemy territory. The more difficult questions arise in determining the extent to which espionage can be considered protected conduct and the corresponding rights and responsibilities of the target state.

III. The Belligerents' Rights and Privileges Relating to Espionage Activities

Much of the legal argumentation developed during the Pueblo incident was designed to characterize the seizure as illegal because of an alleged

22. Armistice at 186-87.
23. M. Greenspan, supra note 16, at 325; Levie, supra note 14, at 884. But see Baxter, supra note 18 for the argument that belligerency is incompatible with an armistice agreement.
25. Convention With Respect To The Laws And Customs Of War On Land, 32 Stat. 1803 (1902), T.S. No. 960. "Ruses of war and the employment of methods necessary to obtain information about the enemy and the country, are considered allowable." Id. at 1818. Under Article 29 of the Convention one is a spy who "acting clandestinely, or on false pretences, . . . obtains, or seeks to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party." Id. at 1818-19. See also M. Greenspan, supra note 16, at 325; 2 L. Oppenheim, International Law § 159 (8th ed. 1958); J. Stone, supra note 14, at 563-64. Greenspan is also of the opinion that espionage need not be discontinued during an armistice. M. Greenspan, supra note 16, at 340.
violation of the provisions of the 1958 Convention on the Territorial Sea and the Contiguous Zone. As intelligence gathering has become a widespread practice among states not at war, it has become necessary to measure the relationship to some degree by those territorial and jurisdictional concepts which are an essential part of the law of peace. Their use in relations with the Soviet Union has apparently yielded successful results, and an effort has been made to apply these norms to the Korean situation. Thus, it was argued that if the Pueblo was within North Korean territorial waters, the only proper response would have been to escort her to the high seas. But such forms of evaluation lose their force as prime standards of judgment in the question of espionage vis-à-vis North Korea because the relationship, if not strictly one of belligerence, is more realistically conceptualized in those terms than upon assumptions of peaceful relations.

Moreover, the stability which such concepts seek to achieve does not necessarily lead to that result. Insistence upon such precise standards is premised upon the belief that they give a clear indication of permissible behavior, thus minimizing the potentials for violent confrontation. Yet, strict jurisdictional standards can also make it possible for the participants to exaggerate the situation once the line is crossed. This is especially true when the underlying relationship between the parties is one of intense hostility. The North Koreans claimed that the Pueblo had penetrated their territorial waters and that, therefore, the United States was guilty of aggression. Similarly, some Americans argued that the attack was an act of war, a judgment premised upon the belief that the ship was on the high seas when it was intercepted.

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27. See, e.g., Aldrich, Questions of International Law Raised by the Seizure of the U.S.S. Pueblo, 1969 Proceedings of the Am. Soc'y of Int'l L. 2. This paper by the Assistant Legal Advisor of the Department of State is illustrative. It reasons that if one assumes arguendo that the Pueblo was within the North Korean territorial sea, the remedies of evacuation provided by Article 23 would be applicable. See also the subsequent paper by Butler, The Pueblo Crisis: Some Critical Reflections, 1969 Proceedings, supra, at 7, which displays a better grasp of the complexities. It should be noted that North Korea claims a 12 mile territorial sea, while United States practice is generally to recognize only a three mile limit plus extensions for limited purposes such as fisheries. North Korea is not a party to the 1958 Convention. However, its prescriptions could be applied as customary rules. The present argument is that the body of rules known as the international law of the sea rests upon premises of peace which cannot realistically be applied to the antagonistic relationship between the United States and North Korea. The release of the crew of the Pueblo is documented in 8 Int'l Legal Materials 198 (1969).

28. See the positions reported in the N.Y. Times, Jan. 24, 1968, at 1, col. 8; id., Jan. 25, 1968, at 1, col. 6. Statements by Dean Rusk that the seizure was an act of war are reported in 58 Dep't State Bull. 191 (1968). Ambassador Goldberg referred to the North Korean action as "nothing less than a deliberate, premeditated armed attack on a United
The allocation of rights and duties can be more accurately gauged once the form of characterization is in terms of belligerency. Indeed, that is how the parties have chosen to characterize their conduct by the terms of the Armistice Agreement. Considered as a question of belligerent, or quasi-belligerent relations, it would be improper to restrict the right of interdiction to the perimeters of territorial jurisdiction which form the basis of peaceful intercourse. Some more flexible test would be more appropriate. Whether or not the Pueblo and the EC 121 were interdicted at a point within reasonable proximity to the coast of North Korea is a question which does not, on available information, admit of a definitive answer. Even so, a great amount of juristic effort should not be expended in seeking the answer, for the more important question is the nature of the remedy rather than the right of a target state to interfere with intelligence gathering.

Traditionally, the right of one belligerent to gather information has been matched by a corresponding privilege in the target state to apply whatever punishment to a captured spy it deems appropriate. Generally, the penalty has been death, a supreme measure justified by the danger posed to a nation by having its military plans discovered by an adversary. Whatever the cogency of these justifications in the past, they do not seem to be persuasive in the present context of the requirements of human dignity and world order.

Implicit in the theory that surveillance or spying constitutes dangers of sufficient magnitude to permit extreme penalties are assumptions about the range of legitimate belligerent activities which cannot be reconciled with prevailing attitudes toward war. While a status of belligerency has not been eliminated from global power processes, there is a widespread viewpoint that the active use of military force across frontiers is proscribed unless such operations can be justified as a measure of immediate self-defense. Conceding the difficulties surrounding a definition of aggression, the apparent desire of nations—from the Kellogg-Briand Pact, Nuremberg Trials and the regime of the United Nations Charter—is to severely restrict the extent to which belligerency can be equated with full discretion to engage in armed violence. These restrictions upon the

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29. See note 28 supra.
30. See Q. Wright, A Study of War 372 (1942); Stone, The Problem of Definition of
legitimate uses of force undercut much of the rationale behind the positive rule that a danger to a belligerent's operational plan is a sufficient reason to allow him to apply maximum penalties to a captured spy.

Another reason why the traditional license to apply maximum penalties is unpersuasive is because it is not sufficiently responsive to the human values at stake. What is often forgotten is that the laws of war are designed to protect persons affected by violence rather than to expand the capacity of belligerents to extend the inevitable suffering. More precisely, questions of rights and duties in the context of belligerency must be considered more in the light of persons affected than in terms of an inflated state power offended by intelligence gathering.

Part of the traditional reason espionage activities have been deemed legitimate is because of the deference given to the patriotic motivations of those who engage in espionage. Yet, heretofore, such activities have not gained protection beyond an abstract assurance that such activities are lawful. Those participating, without meaningful protection, are designated as "unprivileged" belligerents. Whether the crews of the Pueblo and E.C. 121 should be considered spies is debatable. Let us assume the most adverse characterization to emphasize the wrongfulness of the North Korean response. To place the situation into a more balanced perspective, it should be noted that those who participate in such activities may well be promoting the interests of a much wider community than their own nationality would superficially reveal.

We have already insisted that the basic conflict should be characterized as a relationship of belligerency between the United States and North Korea. Such a characterization seems required because the Unified Command is, in substance, a military operation of the United States. Moreover, the Command is not an organ of the United Nations. But such a description, while necessary for proper legal analysis, does not preclude an appraisal of the participants' actions in the light of general community values. The Pueblo crew and the aviators on the EC 121 were involved in an effort to serve their national interests. But, from the perspective of world power processes, they sought to detect and, thus help to deter, activities which might endanger world peace.

It is in the light of these value positions—the very limited interests which North Korea could legitimately protect and the value to all peoples


31. See note 25 supra.

which the surveillance was designed to promote—that the North Korean response to our intelligence gathering must be measured. And in both situations their reactions were disproportionate.

Given the proximity of the Pueblo to the coastline, it is arguable that the Koreans acted within the scope of their belligerency rights in seizing the ship and retaining it pending an apology. Yet, their treatment of the crew was reprehensible, involving threats and torture tactics which violated all precepts of common humanity. Given the consciousness of the value of human dignity, the fact that the conduct of the prisoners may not have been within the technical range of the Geneva Conventions should not be conclusive of an authoritative evaluation of the treatment.

In addition, the shooting down of the unarmed reconnaissance plane cannot be justified, especially if it were known to be such, and if it were, as alleged by President Nixon, fired upon while leaving or flying away from Korean territory. Upon such a factual hypothesis it would be morally impossible to legitimize the use of force which sent thirty-one men to their death.

IV. THE PROBLEM OF FUTURE POLICY

In considering future policy toward North Korea, what takes immediate prominence are justified measures of self-defense. Given the explicit recognition of the Republic of South Korea by the United Nations, our assistance to her defense against overt uses of force is consistent with accepted global policies. Comparable rights are available

33. It is the opinion of Professor Baxter that the unprivileged status of spies was not removed by the Geneva Convention Relative To The Treatment of Prisoners of War of August 12, 1949, July 14, 1955, [1956] 6 U.S.T. 3317, T.I.A.S. No. 3364, 75 U.N.T.S. 135. See Baxter, supra note 32, at 328-29. It is arguable that the officers and crew of the Pueblo would fall within the terms of the Convention since at the time of capture they were acting as naval personnel, i.e., as "members of the armed forces of a party to the conflict" within the language of Article 4. Whatever doubts exist about the applicability of the Convention's standards should, in light of the interests at stake, be resolved in favor of their application. The Convention, to which North Korea is a signatory, expressly prohibits, in Article 130, torture or inhuman treatment and the willful infliction of injury to body and health. For a discussion of the motivations behind the Convention, see Levi, supra note 16. The North Korean reservation to Article 85 of the Geneva Convention For The Amelioration Of The Condition Of The Wounded And Sick In Armed Forces In The Field Of August 12, 1949, July 14, 1955, [1956] 6 U.S.T. 3115, T.I.A.S. No. 3362, 75 U.N.T.S. 31, which sought to insure application of the Convention to prisoners prosecuted for acts committed prior to capture, does not excuse the treatment of the Pueblo crew. See Reservations Made By The Democratic People's Republic Of Korea Upon Accession, 278 U.N.T.S. 263 (1957). There is no rational basis for evaluating the intelligence gathering activities as "war crimes" or "inhumane offences" and if guilty, it would not excuse the cruelties inflicted during incarceration.

under the terms of the Armistice Agreement. But it would be erroneous
to conclude that an exclusively defensive posture exhausts our duties to
the international community. A careful examination of the history
of the Korean people reveals expectations which cannot be reconciled
with a solidification of the status quo.

Because of their strategic geographical position, the Koreans have
always been frustrated in their efforts to gain national cohesion. A brief
period of unity, about 600 A.D., was shattered by the periodic interven-
tions of Mongol and Chinese war lords. By the eighteenth century, Japan
had become a major contender for Korean hegemony and, after defeating
the Chinese in the latter half of the nineteenth century, gained a con-
trolling interest on the Korean peninsula.

During all these vicissitudes, the Koreans’ aspirations for national
freedom persisted. The United States was naturally sympathetic with
these desires for independence. Our interest waned, however, after the
Russo-Japanese War of 1904 revealed the magnitude of Japan’s strength.
In the ensuing settlement, the subservience of Korea to Japanese power
was accepted in exchange for a recognition of our position in the Philip-
pines. Korean patriots were outraged by what they considered to be a
“sell out,” yet realpolitik prevailed, and in 1910, Japan formally annexed
Korea as part of her growing, and ominous, empire.35

With the outbreak of World War II, the Korean movement for inde-
pendence gained a new impetus and an international policy toward a
Korean future began to emerge slowly. In the famous Cairo Pledge of
1943, President Roosevelt, Prime Minister Churchill, and Chiang Kai-
Shek affirmed their common desire to prosecute the Pacific War and re-
corded their conviction that Korea should attain her liberty.36

At first, an international trusteeship was planned, but efforts to develop
this policy were suspended by the dropping of the atomic bomb, which
brought Russia into the Pacific War. Soviet troops were soon in northern
Korea. At the time of the Japanese defeat, the thirty-eighth parallel was
designed as a convenient reference point for the surrender of troops to
the respective Russian and American commands. There was no thought
of final permanent division of the nation.37

At the Moscow Conference of 1945, a joint Soviet-American commis-
sion on unification was established.38 But efforts to implement the pro-
posals proved unsuccessful, especially in light of Russian efforts to ex-
clude Syngman Rhee from participation in the political processes and

36. The aforesaid three great powers, mindful of the enslavement of the people of Korea,
determined that in due course Korea shall become free and independent. Korea’s Inde-
pendence, Dep’t State Publication No. 2933, at 16-17 (1947).
37. See C. Berger, supra note 35.
38. Id.
their evident intention to impose a minority government upon the entire country. Moreover, the increasing Cold War made practical accord virtually impossible.

In September, 1947, the United States referred the issue to the General Assembly of the United Nations. In the subsequent political maneuvering, the Russians dramatically called for troop withdrawal, while the United States insisted upon the priority of national elections.\textsuperscript{89} In November, the Assembly established a temporary commission on Korea\textsuperscript{40} which was refused permission to enter the territory north of the parallel. The commission was then ordered to observe elections where it had access and, in its final report, gave its opinion that elections in the South were a valid expression of free choice by the people. The Assembly then recognized the Republic of Korea as the only lawful government in Korea and established a new commission on Korea to assist in the unification of the entire area.\textsuperscript{41} In October, 1949, it prophetically requested the new commission to "observe and report any developments which might lead to or otherwise involve military conflict in Korea."\textsuperscript{42}

On June 24, 1950, North Korean troops crossed the parallel and the Korean War began. After a bloody conflict of three years, a military armistice was signed on July 27, 1953. As previously noted, the Agreement did not constitute a final settlement, but rather suspended hostilities so as "to facilitate the attainment of a peaceful settlement through the holding by both sides of a political conference at a higher level."

This painfully complex mosaic of ethnic aspirations, geopolitics, and juridical expectations, reflects the authoritative background against which the future United States' policy relative to Korea must be measured. The diverse mixture of law and politics which is Korean history constitutes a judgment of the world community that Korea is fundamentally a single nation whose present division is an accident of world power processes. Given this premise, it then becomes imperative that the possibilities of approximating that ideal be thoroughly examined.

It is commonplace to attribute the failure of reunification to the obstructionism of the North Koreans and their allies. Such a charge obviously contains a great deal of truth. The historical record since 1945 is replete with incidents in which communist objectives of minority control and suppression of individual freedom made any rapprochement impossible.\textsuperscript{44} Yet, the hope of ultimate reunion requires that we constantly

\textsuperscript{39.} Korea 1945-48, Dep't State Publication No. 3305, at 48-51 (1958).
\textsuperscript{43.} Armistice at 188.
\textsuperscript{44.} See C. Berger, supra note 35.
keep open the possibility that ideological strategies may be replaced with
good faith negotiation. For our part, we are obliged to examine with
whatever objectivity we can muster, the underlying reasons put forth by
our adversaries to justify their positions. The essence of justice in this
wounded world is, as Tillich remarked, the ability to listen.

A major obstacle to the settlement of the Korean question has been
the communist participant's refusal to recognize the competence of the
United Nations to supervise the political processes by which reunification
is to occur. As previously noted, in 1948, it refused to permit a United
Nations' electoral commission access to its territory, with the result that
the General Assembly certified the Republic of South Korea as the only
legitimate government on the Korean peninsula.\textsuperscript{46} Following the armis-
tice, the North and its allies have consistently refused to permit United
Nations' involvement in either an interim or final solution.

Difficulties have also surrounded the composition of the interim gov-
ernment. At the Geneva Conference of 1954, the North Korean repre-
sentative, Nam Ik, proposed that an All Korean Commission be estab-
lished to prepare the machinery needed to administer national elections
which would establish a new Korean government. Composition of the
commission would include appointees from the present Assemblies of
North and South as well as "Democratic social organizations." This plan
was rejected because it gave the North an equality of power within the
commission in spite of its smaller population.\textsuperscript{46}

At the Geneva Conference, Chou En-Lai stated with emphasis: "This
conference has nothing to do with the United Nations."\textsuperscript{47} This has been
the position of the Communist bloc ever since. While the judgment is
extreme, it does contain some elements of truth which have not been
adequately considered. It should not be forgotten that United Nations' involvement in the Korean political processes began at the height of the
Cold War, when the resolutions of the General Assembly were partic-
ularly susceptible to the ideological power struggles between Western
democracies and the Soviet Union.\textsuperscript{48} These factors diminish the extent to
which the determination of the United Nations to involve itself in the
Korean question was truly the reflection of an international consensus.
Moreover, there is something anomalous in attempts by an international
organization which is itself unrepresentative to insist upon representative
government at a national level. It is especially bizarre in the Korean
situation where major participants are not members of the organization.

\textsuperscript{46} The Korean Problem at the Geneva Conference, Dep't State Publication No. 5609,
at 11 (1954). Rejection was also premised upon United States insistence that the United
Nations observe electoral processes of the North.
\textsuperscript{47} Id. at 66.
\textsuperscript{48} See, e.g., notes 40-42 supra.
Indeed, the real tragedy of Korea is the fact that the United Nations, incapable of fulfilling its primary mission of security, has restricted its official function to abortive attempts to supervise the political processes of the conflict. By so doing, it has strengthened arguments that it is being involved in matters of domestic jurisdiction, and has weakened its general authority.

Also, the North Korean plan on interim procedures for reunion is not without rational support. North Korea has all the requisites of statehood. It has received recognition by a number of existing states, and is a participant in international agreements. The determination by the General Assembly that the Republic of South Korea was the only legitimate government in Korea is not conclusive of the issue because United Nations' competence in matters of statehood is decisive only with respect to questions of membership in the organization. Moreover, the reality of statehood is independent of recognition, and there is nothing in the United Nations Charter to suggest that the United Nations is empowered to condition the fact of statehood upon its approval of the means by which a particular state came to exist. Prior practice within the Security Council has demonstrated the importance of acknowledging such realities if the organization wishes to perform its functions. As a state, North Korea is entitled to deal with other states in the international community on a basis of juridical equality regardless of its population. Indeed, the United Nations is itself organized upon such a principle. It does not seem unreasonable that an interim commission in Korea be so organized, provided that the All Korean Government finally established be reasonably representative of the population. This is, in substance, the position of the North Koreans.

The present general policy of the United Nations relative to Korea is


50. For example, the 1947 Indonesia case where the Council, after debate, agreed to the participation of a representative of the Republic of Indonesia following hostilities between Indonesian forces and troops of the Netherlands. Opposition was based upon an argument that Indonesia was not a sovereign state.

51. See Dep't State Publication, supra note 46, at 120-23, where the North Korean representatives responded to the criticism of their plan. In a memorandum of the Democratic People's Government submitted by the Representative of the U.S.S.R. to the United Nations, the North Koreans insisted that reunification was an internal matter which should be accomplished "by way of establishing a unified all-Korea government represented by all sections of the population through free and democratic North-South general elections by the Korean people themselves . . . " U.N. Doc. A/370 at 1 (1966). If elections are not now feasible, the memorandum recommends the establishment of a confederation with equality of power to organize economic and cultural matters, retaining the existing independence of the two regimes, but acting as a single nation in the realm of international affairs.
the realization, by peaceful means, of an independent unified Korea under a representative form of government. It is the means to the end which is subject to dispute. The specific stumbling block revolves around interim procedures, the United Nations' commission insisting upon a population based interim government, the North Korean government demanding an equal voice in any transitional arrangements. In the light of the unrepresentative character of the United Nations and the juridical reality of North Korea, insistence upon United Nations' intervention into the political processes of transition is unwarranted. Indeed, it is doubtful whether direct United Nations' supervision of final elections, if any, is indispensable to the achievement of its stated goals. Some form of accounting may be desirable, but immediate supervision can be accomplished by neutral nations acceptable to both North and South.

For the United Nations to make its involvement with Korea credible, it should reduce its concern with overall electoral processes and concentrate upon the specific human rights questions which will undoubtedly arise in any effort to reconcile this divided country. While ethnically one, the Koreans are separated by differing visions of the purposes of human life. Contrary conceptions of human freedom, the organization of the economy, the function of the state, must somehow be practically reconciled, and this is only possible where protections of basic freedoms are insured by some international authority. Freedom of speech, for example, is a crucial consideration and, unless it is respected by both sides, a final reunification is impossible. Rather than attempt to exercise jurisdiction upon dubious notions of electoral supervision, the United Nations, with its Declaration of Human Rights as a general standard, should seek to preserve freedom throughout the processes of transition.

While these considerations of authoritative policy have been directed principally toward the United Nations, it is not impossible to reconcile American foreign policy with the overall objectives of the world community. This is especially true when Korean issues are viewed in relation to our position in Vietnam. We do not insist upon an examination of the

52. See generally L. Sohn, supra note 9, at 58-74.
53. The Commission report includes as the means to reach the final objective "that elections for representatives to a National Assembly that may establish a national government of Korea be held on the bases of adult suffrage, by secret ballot; that the number of representatives from each voting area or zone be proportionate to the population; and that the elections should be under the supervision of the Commission." U.N. Comm'n for the Rehabilitation and Unification of Korea, Report, G.A. Res 1964, 20 U.N. GAOR Supp. 12, at 2, U.N. Doc. A/6012 (1963). Given the disparities of population (of a total Korean population of approximately forty-three million, nearly thirty million live below the thirty-eighth parallel) such a process would, in effect, destroy North Korea as a viable entity.
54. Such was the suggestion of Communist China at the Geneva Convention of 1954. See Dept State Publication, supra note 46, at 117 (Statement of Chou En-Lai).
political basis of North Vietnam or the National Liberation Front as a condition to our acknowledging their reality. There is no plausible reason to maintain a contrary policy within the United Nations vis-à-vis North Korea. And as we are willing to accept the ideological outcome of general elections in Vietnam, we should not obstruct the political activity needed to resolve the issues of Korea's future.

North and South Korea are ideologically divided; they also hold different conceptions about the role of the United States in that part of the world. While our right to assist the Republic of South Korea from attack is compatible with international law, all our activities in that area are subservient to the overall goal of reunification of the Korean peoples. In the light of these final objectives, North Korean demands for the removal of United States troops as a prerequisite to national elections cannot be summarily dismissed. We are inclined to smile at suggestions of freedom in Soviet occupied Czechoslovakia, yet we miss the possible analogy in South Korea. Given the mobility of our sea and air power, a physical withdrawal from the South Korean territory may be compatible with overall security. Again, our Vietnam policies will have a bearing upon our Korean strategies.

V. CONCLUSION

If international law is to contribute to our future Korean policy, the fundamental relationship between the participants must be grounded upon a juridically realistic foundation. What should be emphasized is the fact that interactions between the United States and North Korea are more realistically conceptualized in terms of belligerency than in rhetorical references to rules designed for peaceful intercourse. Such insistence upon belligerency is by no means fatalistic. Within such a framework it is possible to evaluate claims, such as those relative to intelligence gathering, in a measure which adequately protects our vital interests and the human values at stake.

But, more importantly, emphasis upon the belligerent quality of our relations with North Korea draws attention to the incompleteness of our policy. An armistice has suspended armed hostilities; it looks forward to final settlement. Such a structuring of the problem should move us from the realm of defensive strategy toward the difficult problems of negotiating a permanent peace. To reconcile future policy with the aspirations of mankind we must faithfully evaluate the hopes and convictions of our adversaries as well as be on guard against their proclivities to aggression. Only by so doing can we hope to attain that broad consensus upon which a regime of international law and peace must ultimately rest.

56. The North Koreans have proposed that an agreed level of forces of 100,000 or less be decided between themselves and South Korea after United States withdrawal. It has also proposed mutual renunciation of military pacts with foreign nations.