
Haunting Phantom on the Way to the Korean Reunification? The Chinese People's Volunteer Army in the Korean War and Its Legal Questions

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Although relationships among the former belligerent parties of the Korean War have changed drastically over the decades, the parties still remain under the armistice system because the Korean War is not over legally. The primary purpose of this research is to analyze questions related to the Chinese People's Volunteer Army in the Korean War from an international legal perspective. As a new topic, this is intended to be a precautionary examination of an issue that could haunt the eventual process of peacemaking on the Korean peninsula. The main text of this article consists of three parts. The first examines whether the Chinese People's Volunteer Army's entering the Yalu River was self-defense under Article 51 of the UN Charter. The second part covers various legal questions relating to armed hostilities in the Korean War under international law. The third part discusses the legal questions around an armistice negotiation.

Keywords

CPVA, Korean War, Armistice, POWs, 38th Parallel, Self-Defense, UN Forces, MacArthur, Peng Teh-Huai

*China and Korea are neighboring countries, as closely related as lips and teeth.
If the lips are gone, the teeth are exposed to the cold.*

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I. Introduction

Sixty years have passed since the Korean Armistice Agreement was concluded. Over the past decades, relationships among the former belligerent parties have changed dramatically; China has become the largest trading partner of South Korea with firm diplomatic ties and the US is building a new strategic partnership with China. Despite such seemingly flourishing exchanges and cooperation, the parties still remain under the armistice system because the Korean War is not over legally. Entering the new millennium, the relevant parties began trying to build permanent peace in the Korean peninsula, the first step of which should be replacing the current Armistice Agreement with a true peace treaty. As South Korean President Park Geun-hye declared an initiative for peaceful unification of Korea at Dresden, Germany on March 28, 2014,¹ the peacemaking process between the two Koreas is expected to be accelerated. In this course, however, the Chinese position as a signer of the Armistice may be questionable due to her highly political stance to the military actions, especially through volunteers during the Korean War.

This research aims to analyze questions regarding the Chinese People's Volunteer Army ("CPVA") in the Korean War from an international legal perspective. As a newly tackled topic, it is intended to provide a precautionary examination of an issue that could haunt the eventual process of peacemaking on the Korean peninsula. This article consists of five parts including Introduction and Conclusion. Part two will examine the international legal causes of the Chinese military's intervention in the unusual form of volunteers. Whether the CPVA entering Korea was 'self-defense' will be analyzed here. Part three will cover various legal questions relating to armed hostilities in the Korean War. The CPVA's offensives, declaration of war, and belligerent status will be tackled in terms of international law. Part four will discuss the legal questions in the armistice negotiation. The POW-related issues and the CPVA's position in relation to the People's Republic of China ("PRC") in the Armistice will be analyzed.

This paper has been written as of today, sixty years after the Armistice Agreement. However, international law, especially the law of war invoked here is mainly that of 1953. Additionally, this research will be carried out 'positively' with an international legal viewpoint. The author has endeavored to exclude any political or ideological views regarding the Korean War and the CPVA in this research.

¹ Tae-gyu Kim & Min-uck Chung, *Park hints at flexible approach in aid to NK*, KOREA TIMES, Mar. 28, 2014, available at http://koreatimes.co.kr/www/news/nation/2014/03/113_154245.html (last visited on May 1, 2014).

II. Casus Belli: Self-Defense?

In the beginning, the Chinese leaders did not want a deep commitment to Korean affairs. Beijing considered just limited involvement, including the transfer of about 12,000 native Koreans from the Chinese People's Army to the North Korean Army in 1950² and some moral support, such as propaganda.³ Even the Indian Ambassador to China, K.M. Panikkar expressed that Mao viewed Korea as "a distant matter."⁴ However, the changing situations on the battlefield finally led China to full-scale intervention in the Korean War. The Chinese side would advocate the volunteers' march for Korea as self-defense under international law, which means the inherent right of State to defend its physical security by force against imminent armed attack from the outside.⁵ What were the factual grounds for their cause for self-defense?

A. UN Forces beyond the 38th Parallel

The first and most direct cause of their intervention may have been the United Nations Force ("UNF")'s rolling back the communist forces to the north of the 38th parallel. In mid-September of 1950, the Chinese leadership began to seriously consider full-scale military support to North Korea when General MacArthur ordered his ground forces to cross the 38th parallel just after the successful amphibious landing at Inchon.⁶ The Chinese leaders recognized those actions as a critical menace to its physical security, especially to Manchuria, its main industrial base.⁷ For the Chinese, if the US "establish[es] a hostile regime on the Korean peninsula and deploys its troops along the Sino-Korean border to insert military pressure, it would constitute a grave threat to northeastern China, the industrial heartland of the country."⁸ Mao was convinced that such a confrontation was a matter of time. He suggested that: "If Korea [was] occupied by Americans, ... it

² A. WHITING, CHINA CROSSES THE YALU: THE DECISION TO ENTER THE KOREAN WAR 44 (1968).

³ *Id.* at 50.

⁴ N. Y. TIMES, July 15, 1950, at 3, col. 6.

⁵ B.-O. Bryde, *Self-Defense*, 4 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 361-363 (R. Bernhardt et al. eds., 2000)

⁶ JIAN CHEN, CHINA'S ROAD TO THE KOREAN WAR: THE MAKING OF THE SINO-AMERICAN CONFRONTATION 158-164 (1994).

⁷ Chen Xiaolu, China's Policy towards the United States 1949-1955, a paper presented at the Conference on Sino-American Relations 1945-55 (Oct. 19-25, 1986) at 12-13, *recited from* Yufan Hao & Zhihai Zhai, *China's Decision to Enter the Korean War: History Revisited*, 121 THE CHINA Q. 104 (Mar. 1990).

⁸ *Id.*

would be disadvantageous to the whole East [of China].”⁹ The Chinese decided to intervene into the Korean War to “safeguard their own country,” not to help North Korea to unify the peninsula.¹⁰ For China, this operation was self-defense for her physical security.¹¹ China eventually had two perspectives: one was to secure the center of their heavy industry, and the other was to defend their sovereignty from foreign aggression, which was deeply rooted in their minds due to historical trauma. Indeed, “[A]nyone wanting to annex China must first occupy its Northeast and that to occupy the Northeast he must first seize Korea.”¹²

On October 14, 1950, the CPVA began covertly infiltrating about 180,000 men across the Yalu River south of which the UNF dominated the air, ground, and sea of the Korean battlefield.¹³ They successfully carried out the infiltration through a nocturnal march with ‘incredible camouflage’ against aerial reconnaissance.¹⁴

Soon after the CPVA entered Korea, the UN General Assembly passed Resolution 498 stating that: “China itself has engaged in aggression in Korea” by giving direct aid and assistance to those who were already committing aggression in Korea and by engaging in hostilities against United Nations forces.¹⁵ The General Assembly called upon China to withdraw its forces from Korea and “all states and authorities to continue to lend every assistance to the UN action in Korea.”¹⁶ The General Assembly also recommended that “every state embargo the shipment of arms, ammunition, or implements of war to PRC.”¹⁷

Did the Chinese military intervention constitute an “act of aggression” under international law? In customary international law, ‘aggression’ means the “conduct of a State that either initiates war against another State or brings about a situation in which the victim is (or may be) driven to war.”¹⁸ Such a customary concept was

⁹ See SELECTED WORKS OF CHAIRMAN MAO ON MILITARY AFFAIRS 345 (Beijing), *recited from* Hao & Zhai, *supra* note 7, at 108.

¹⁰ Chen Ping, *Scholars Take Stock of Korean War: 50th Anniversary of the War to Resist against US Aggression and Aid Korea* (2000), available at <http://www.china.org.cn/e-America/features/scholar.htm> (last visited on May 2, 2014).

¹¹ See Statements of the PRC delegate to the Security Council, Wu Hsiu-ch'an, on Nov. 28, 1950, U.N. Doc. S/PV. 527, at 96-97; U.N. Doc. A/C. I/661 (Dec. 16, 1950).

¹² See Resisting US Aggression, Aiding Korea and Defending Peace (*recited from* SELECTED WORKS OF ZHOU ENLAI, vol. II on Oct. 24, 1950): 50th Anniversary of the War to Resist against US Aggression and Aid Korea (2000), available at <http://www.china.org.cn/e-America/historical/zhou.htm> (last visited on May 2, 2014).

¹³ J. O'SHAUGHNESSY, THE CHINESE INTERVENTION IN KOREA: AN ANALYSIS OF WARNING 68 (Nov. 1985) 2 (n. 9), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA165286> (last visited on May 2, 2014).

¹⁴ *Id.* at 4.

¹⁵ G.A. Res. 498(V), GAOR, 6th Sess., Supp. 20A, U.N. Doc. A/1775/Add.1 (Feb. 1, 1951) at 1.

¹⁶ *Id.*

¹⁷ *Id.* at 2.

¹⁸ Y. Dinstein, *Aggression*, 1 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 201 (R. Wolfrum et al. eds.,

embodied by the Definition of Aggression (“DoA”) annexed to the UN General Assembly Resolution 3314 (XXIX).¹⁹ Article 1 of the DoA defines aggression as:

the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

Article 2 of the DoA refers to “the first use of armed force” as “*prima facie* evidence of an act of aggression.” ‘Aggression’ in an international legal sense shall eventually consist of initiating an armed attack against another State(s) in a positive manner.

General Assembly Resolution 498 regarded the Chinese military engagement as ‘aggression’²⁰ on the premise that the CPVA’s infiltration was a violation of Security Council Resolutions 82, 83, and 84 to repel the armed attack [of North Korea] and to restore international peace and security in this area (the Korean peninsula).²¹ However, the Security Council’s authorization to the UNF was geographically limited to the 38th parallel. The Council did not authorize the UNF to enter into North Korea after Resolution 84, either.

In the initial stage of the Korean crisis, even the US decided upon a limited involvement so as not to antagonize the communist side. President Truman did not want to be deeply committed in Korea.²² He even denied “Air Force requests to conduct photo-reconnaissance” outside Korea in order “not to start a general Asiatic war.”²³ Truman earnestly intended to confine the armed conflict within the peninsula to the point when North Korean army should be repelled to the north of the 38th parallel. Despite this desire, the Korean crisis was being escalated into a general war. MacArthur was on the other side. On September 29, 1950, President Truman finally authorized General MacArthur to carry the war beyond the 38th parallel (into North Korea).²⁴ Breaking through the 38th parallel was crossing the bridge of no return. “An entirely new war” had started.²⁵

As mentioned above, the UNF’s entering North Korea was not authorized by the

2012).

¹⁹ G.A. Res 3314(XXIX), U.N. Doc. A/RES/29/3314 (Dec. 14, 1974)

²⁰ *Supra* note 15.

²¹ U.N. Doc. S/1501 1511, 1588.

²² H. TRUMAN, 2 MEMOIRS BY HARRY S. TRUMAN: YEARS OF TRIAL AND HOPE 341 (1956).

²³ J. GOULDEN, KOREA: THE UNTOLD STORY OF THE WAR 104 (1982), *recited from* O’Shaughnessy, *supra* note 13, at 38. *See also id.* at 347.

²⁴ *Supra* note 22, at 361.

²⁵ J. SCHNABEL, 3 UNITED STATES ARMY IN THE KOREAN WAR: POLICY AND DIRECTION: THE FIRST YEAR 275 (1972).

Security Council, but solely directed by the US President Truman under pressure from General MacArthur. The CPVA's crossing the Yalu River in October 1950 would be a military reaction to the US military operation to the north of the 38th parallel rather than a violation of the Security Council Resolutions 82, 83 and 84. Although the General Assembly Resolution 498 recognized the CPVA's infiltration as 'aggression,' it would not have any legal binding force, but a nominal declaration because only the Security Council has primary responsibility for maintaining the peace and security of the international community.²⁶ Thus, in accordance with a strict legal interpretation, the CPVA's crossing the Yalu River might be regarded as "pre-emptive self-defense"²⁷ responding to the UNF crossing the 38th parallel, without a full-scale armed attack on Chinese territory yet. Whether the CPVA's offensive was proportional to the UNF's military threat is a question, however. The full conditions for the self-defense would be completed with the following two incidents.

B. Blockade of the Taiwan Strait

The question of Taiwan was another cause for the Chinese intervention into the Korean conflict. Both Korea and Taiwan were points of related contention between China and the United States in East Asia.²⁸

Shortly after war broke out in the Korean peninsula, on June 27, 1950, US President Harry Truman instantly ordered the US Navy's Seventh Fleet to blockade the Taiwan Strait.²⁹ Although the main objective of this action was seemingly to 'neutralize' the Strait for the US,³⁰ the seal-off would lead the Americans to discard the disengagement policy and intervene in Chinese domestic affairs again.³¹ It was

²⁶ UN Charter art. 24(1). Due to this limitation, the General Assembly adopted the so-called Uniting for Peace Resolution on November 3, 1950 which stated that: "...if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security..., the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for Collective measures..." See G.A. Res. 377A(V), GAOR, 1st Sess., Supp. 20(A/1775) at 10-12, available at <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf> (last visited on May 2 2014). For details, see ERIC YONG JOONG LEE, LEGAL ISSUES OF INTER-KOREAN ECONOMIC COOPERATION UNDER THE ARMISTICE AGREEMENT 23-24 (2002).

²⁷ P. MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 311-314 (7th ed. 1997). See also C. Greenwood, *Self-Defense*, 9 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 111-113 (R. Wolfrum et al. eds., 2012).

²⁸ See OPPOSE U.S. OCCUPATION OF TAIWAN AND "TWO CHINAS" PLOT 5-6 (Chinese People's Institute of Foreign Affairs ed., 1958). For details, see *supra* note 2, at 53-54, UNCERTAIN PARTNERS: STALIN, MAO, AND THE KOREAN WAR 148-149 (S. Goncharov et al. eds., 1993); *supra* note 6, at 96-102.

²⁹ See Department of State Bulletin, vol. 22, no. 574, 5 (July 3, 1950); Statement by the President on June 27, 1950, recited from *supra* note 22, at 339.

³⁰ *Supra* note 22, at 339.

³¹ Hao & Zhai, *supra* note 7, at 100.

due to the basic position of the US regarding Taiwan as “an unsinkable aircraft carrier” connecting the American defense line in East Asia from Vladivostok to Singapore.³² The blockade of the Taiwan Strait stimulated the Chinese leadership very much who planned to annex Taiwan, “the Nationalists’ sanctuary.”³³ They criticized the American action as “armed aggression against the territory of China”³⁴ and “additional confirmation of their (American) view.”³⁵ Upon the blockade, Premier Mao Tse-tung and Foreign Minister Zhou En-lai indicated that “the fact that Taiwan is part of China will remain unchanged forever” and [they would] “certainly fight to... liberate Taiwan.”³⁶

The American blockade of the Taiwan Strait during the Korean War is the key to understanding the legal characteristics of the Chinese intervention in the Korean War. A ‘blockade’ is a “belligerent operation to prevent vessels and/or aircraft of all nations from entering or exiting specified ports, airports, or coastal areas belonging to, occupied by, or under the control of an enemy nation.”³⁷ Blockades are established “to deny the enemy the use of enemy and neutral vessels or aircraft to transport personnel and goods to or from enemy territory.”³⁸ If the Taiwan Strait was sealed off by the US Navy, it would be thus a belligerent operation against China, considering it as an enemy of the US. In fact, the main purpose of the blockade was to prevent China from landing on Taiwan, an important ground of strategic interest of the US in East Asia. Moreover, the US Navy’s Seventh Fleet was disposed along the southeast coast of the continent. No wonder China would recognize it as ‘grave threat’ against her territorial integrity. Considering that Taiwan and Korea were closely connected with each other along the frontline between China and the US, eventually, the Chinese leadership decided to respond to the blockade of Taiwan by attacking the UNF in Korea with the military option, the other side of erupting US-China armed conflict in East Asia. The CPVA’s military engagement in this context would be thus understood as ‘individual self-defense’ under Article 51 of the UN Charter.³⁹

³² *Supra* note 2, at 96.

³³ *Supra* note 13, at 33.

³⁴ R. MacFarquhar (ed.), *SINO-AMERICAN RELATIONS 1949-71*, 83-83 (1978).

³⁵ TANG TSOU, *AMERICA’S FAILURE IN CHINA: 1941-50*, 563 (1963).

³⁶ *Id.*

³⁷ W. von Heinegg, *Blockade*, 1 *THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 960 (R. Wolfrum ed., 2012). *See also* DoA art. 3(c).

³⁸ *Id.* at 961.

³⁹ B. SIMMA ET AL., EDS., 1 *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 792-794 (2002). *See also* Greenwood, *supra* note 27, at 109-110. On the individual self-defense, *see*, Military and Paramilitary Activities in and against

C. US Air Attack against Chinese Soil

From late August 1950, the US carried out several air attacks in Manchuria – near the northern part of the Yalu River – where two Chinese Field Armies were present.⁴⁰ The air attacks from August 27 to August 29 caused at least three deaths, 21 injuries, and considerable damage in Antung, China.⁴¹ These attacks, which the US claimed to be the results of navigation errors, are presumably not due totally to pilot mistakes, considering that they continued to attack Chinese soil until the end of October 1950. Between August 27 and October 23, 1950, US air fighters reportedly flew over Chinese airspace at least 12 times and attacked Chinese soil, leading to human and material losses.⁴²

On September 24, 1950, Zhou En-lai sent the UN a formal protest for the US air attacks. He said: “military aircraft of the United States forces had flown over Chinese territory and dropped bombs on the city of Antung, causing damage to property and wounding a number of people...”⁴³ These air attacks would provide *de facto* grounds for the Chinese to maintain its military intervention as an act of self-defense.

III. Clash

A. Five CPVA Offensives

The CPVA crossed the Yalu River on October 18, 1950. They unexpectedly clashed with the South Korean Army on October 21. Subsequently, the CPVA had five consecutive offensives against The UNF. The first began on October 25, driving the US, British, and South Korean troops back to the Chungcheon River and Dukcheon area in North Korea.⁴⁴

Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 103, ¶ 195 (June 27).

⁴⁰ See 50th Anniversary of the War to Resist against US Aggression and Aid Korea: War Crimes of the US Air Force Committed in Northeast China before the Chinese People's Volunteer Army's Entry into the War, available at <http://www.china.org.cn/e-America/historical/data1.htm> (last visited on May 2, 2014).

⁴¹ *Id.*

⁴² *Supra* note 12, at 2.

⁴³ U.N.Y.B.(1950) at 287.

⁴⁴ See 50th Anniversary of the War to Resist against US Aggression and Aid Korea: Peng Dehuai: Five Campaigns in Korea (Oct. 30, 2000), available at <http://www.china.org.cn/e-America/features/peng.htm> (last visited on May 2, 2014). See also H. Crocker, Chinese Intervention in the Korean War 56-63 (2002) (an unpublished thesis M.A. at Louisiana State University), available at http://etd.lsu.edu/docs/available/etd-1031102-055140/unrestricted/Crocker_thesis.pdf (last visited on May 2, 2014).

The second CPVA offensive was initiated in November 1950 as a counterattack to the UNF's campaign on November 20. The combat between the two sides around the Changjin (Chosin) reservoir in the horribly cold winter nights and the evacuation of the US Marines were vividly reported to the world by the international press.⁴⁵ It was so successful for the Chinese that the CPVA pushed the UNF to the 38th parallel after recovering Pyongyang, the capital of North Korea. Here, the CPVA adopted the tactics they had practiced in the anti-Japanese War, with small units using grenade and bayonets. It was a totally unknown pattern of battle to the UNF.⁴⁶ The following offensives to the end of next March resulted in "the longest retreat in the US military history," leading to the "loss of nearly fifty thousand personnel within the UNF and annihilation of several large allied units."⁴⁷ General MacArthur realized it as "an entirely new war" and informed the US Joint Chiefs of Staffs that his plan was "to pass to the defensive."⁴⁸

On New Year's Eve, 1951, the third offensive was started. The CPVA crossed the 38th parallel, seized Seoul and Incheon and finally drove The UNF back to the 37th parallel. The UNF collected four divisions of new reinforcements, concentrating them on a defense line along the Nakdong (Luodong) River. The UNF counterattacked the frontline as well, landing on North Korea's coastal flanks to cut off the retreat of the CPVA.⁴⁹

The CPVA launched its fourth offensive in late January against the UNF's leadoff attack. The Volunteers clashed against troops from the US, France, Belgium, Luxemburg and South Korea.⁵⁰ The CPVA's fifth offensive was ignited to repulse the UNF's major northward offensive from the Nakdong (Luodong) River in mid-February, 1951. In the first half of the fifth offensive, continuing for about 40 days, The CPVA was pushed back to the 38th parallel and then drove the UNF close to Seoul. The second half of the fifth offensive was staged along the eastern frontline. The CPVA approached almost to the 37th parallel, but retreated back due to poor logistics. The fifth offensive was a grand campaign that mobilized over one million

⁴⁵ WANG SHU ZENG, CHAO XIAN ZHAN ZHENG 445-553 (trans. into Korean by Geulhangari Publishers, 2013), *See also* Crocker, *supra* note 44, at 64-72.

⁴⁶ *Id.* For Mao's military strategy, *see* M. Hunt, *Beijing and the Korean Crisis*, 7 POL. SCI. Q. 465-469 (1992).

⁴⁷ *See* Command Report, Nov. 1950, GHO, FEC, UNC, Record Group 407, National Archives and Record Service 30 (Nov. 1950), *recited from supra* note 13, at 2 (n. 9).

⁴⁸ *See* Hearings on the Military Situation in the Far East, at 3495, *recited from* D. ACHESON, PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT 469 (1969).

⁴⁹ *See* 50th Anniversary of the War to Resist against US Aggression and Aid Korea: The Chinese push into South Korea, *available at* <http://www.fsmita.com/h2/ch24kor6.htm> (last visited on May 2, 2014).

⁵⁰ XIAOBING LI ET AL. EDS., MAO'S GENERALS REMEMBER KOREA 35 (2001).

forces on each side.⁵¹

The CPVA's five offensives can be divided into two periods from an international legal perspective. The first half is from the entering the Korean peninsula to the drive to the 38th parallel. This was until the end of 1950. The two CPVA military offensives in this period would be regarded as 'self-defense' because the original purpose of this armed intervention was to repel the UNF to the south of the 38th parallel for her national defense. Given the whole picture of the Korean War, along with the blockade of the Taiwan Strait, nobody could deny absolutely that the UNF crossing the 38th parallel would be a grave menace to Chinese territorial security. As noted above, furthermore, the Security Council neither authorized nor approved retroactively the UNF to operate in North Korea.

The second half starts from its third offensive on New Year's Eve of 1951 when the CPVA began crossing the 38th parallel. This offensive went beyond the original purpose of its military intervention to repel the UNF to the 38th parallel and to defend Chinese security. The status of the CPVA to the south of the 38th parallel was as analogous to that of the UNF to the north of the 38th parallel. Both were operating without legitimate grounds in the other's side. The latter three offensives of the CPVA would thus not be evaluated as 'self-defense' under Article 51 of the UN Charter or customary international law.⁵² These may be understood in terms of political and military causes.

B. No Declaration of War?

China did not officially declare war against the UNF. The absence of an official declaration of war would raise a question as to whether the CPVA carried out a lawful military operation or a certain hostile action.

In the classical international law period, "a declaration of war by means of unequivocal expression of intention [to the other party] was required as one of the conditions of lawful war."⁵³ In modern times, however, "no particular form is required for the declaration of war. A conditional ultimatum, which calls upon the other party to bring about or remove a particular state of affairs within a period of time [or from a region] is deemed a kind of declaration."⁵⁴

China actually delivered a series of 'conditional ultimatums' to the UNF, and

⁵¹ *Id.* at 32-37.

⁵² Simma, *supra* note 39, at 805-806.

⁵³ W. Meng, *War*, 4 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 286 (R. Bernhardt et al. eds., 1982).

⁵⁴ *Id.* at 287.

especially to the US, mainly through statements by Prime Minister Zhou En-lai that the UNF's entering the north of the 38th parallel would be a *casus belli* for Chinese intervention. On August 20, 1950, Zhou En-lai cabled to the UN, warning that: "Any continuation of the Korean War will lead inevitably to a widening of the conflict."⁵⁵ Soon after this, <Beijing Radio> indicated that: "China would not tolerate provocative acts by the US and intervene if there was no diplomatic settlement."⁵⁶ A communist organ, <World Culture> also stated that: "American action in Korea seriously threatens the security of China... it is impossible to solve the Korean problem without the participation of its closest neighbor, China...."⁵⁷ On September 30, Zhou En-lai mentioned in a speech to the Central People's Government Council that: "The Chinese people absolutely will not tolerate foreign aggression, nor will they supinely tolerate seeing their neighbors being savagely invaded by imperialists."⁵⁸ On October 2, Zhou En-lai reconfirmed the warning to the US via the Indian Ambassador K.M. Panikkar that: "Should US troops invade North Korean territory, China would enter the war."⁵⁹ He also added: "The South Koreans did not matter, but American intrusion into North Korea would encounter Chinese resistance."⁶⁰

These warnings, however, were completely discounted by General MacArthur.⁶¹ On October 7, the first Cavalry Division under the US Eighth Army finally crossed the 38th parallel. MacArthur ordered his commanders to "drive forward with all speed and full utilization of their forces"⁶² to the Yalu River, the North Korea-China borderline in accordance with his plan for "Home by Christmas."⁶³ It was also in violation of Washington's policy directive that authorized only the South Korean Army to operate in the northern province of Korea.⁶⁴ On October 11, the Chinese Ministry of Foreign Affairs issued its final verbal warning as the ultimatum to the US regarding the UNF (US)'s crossing of the 38th parallel as "a serious menace to the security of China."⁶⁵

⁵⁵ *Supra* note 2, at 70. *See also supra* note 13, at 47.

⁵⁶ N. Y. TIMES, Aug. 27, 1950, at 10, col. 5.

⁵⁷ *Supra* note 13, at 46.

⁵⁸ *Supra* note 2, at 108.

⁵⁹ YAO XU, FROM YALU RIVER TO PANMUNJON 17-18 (1985), *recited from* Hao & Zhai, *supra* note 6, at 102.

⁶⁰ K.M. PANIKKAR, IN TWO CHINAS 110 (1955). *See also supra* note 22, at 362.

⁶¹ *Supra* note 22, at 366.

⁶² Acheson, *supra* note 48, at 462.

⁶³ *Supra* note 22, at 371-393.

⁶⁴ Acheson, *supra* note 48, at 462.

⁶⁵ CMFA stated that: "Now that the American forces are attempting to cross the thirty-eighth parallel on a large scale, the

These continuous warnings from China were released to the outside by the international media. Even the New York Times reported China's hard-line policy against MacArthur's actions.⁶⁶ They were thus sufficient to serve as a notification of military action in the modern sense. MacArthur and Secretary Acheson, however, ignored the warnings from China⁶⁷ and intelligence reports, including many hints of its military intervention.⁶⁸

C. Belligerent Status of the CPVA

China insisted that she was not a belligerent State in the Korean War under international law because its armed forces engaged in the conflict in the form of 'volunteers.'⁶⁹ By this unusual form of military action, China neither confronted the all States of the UNF in a "state of war," nor expanded the regional scope of its armed hostilities outside the Korean peninsula.⁷⁰ Consequently, China's intention to fade the political color of the armed conflict succeeded, with the acquiescence of most members, except for General Assembly Resolution 498.⁷¹ Even the Armistice is "purely military in character"⁷² because it was concluded just between "the military commanders of both sides"⁷³ to "ensure a complete cessation of hostilities and of all acts of armed force in Korea until a final peace settlement is achieved."⁷⁴ Peng Teh-Huai signed as the Commander of the CPVA, which participated in the belligerent action, rather than a representative of the People's Republic of China.

In customary international law, war is "a state of things in which each party uses the maximum force to impose its will on the other."⁷⁵ In an international legal sense, war would begin when the laws of war replace the law of peace in the relations

Chinese people cannot stand idly by with regard to such a serious situation..." See *supra* note 25, at 233.

⁶⁶ N. Y. TIMES, July 2, 1950, at 5, col. 3; July 11, 1950, at 20, col. 3; July 13, 1950, at 4, col. 3.

⁶⁷ In response to the Chinese position, Acheson said: "It would be sheer madness" for them to intervene. See N. Y. TIMES, Sept. 11, 1950, p. 1, col. 5.

⁶⁸ *Supra* note 22, at 372-376.

⁶⁹ For details on the legal status of volunteers, see I. Brownlie, *Volunteers and the Law of War and Neutrality*, 5 INT'L & COMP. L.Q. 570 (1956).

⁷⁰ P. Norton, Ending the Korean Armistice Agreement: The Legal issues 7, available at http://www2.law.columbia.edu/course_00S_L9436_001/2005/2a_armisticelegal_norton.html (last visited on May 2, 2014).

⁷¹ G.A. Res. 498(V).

⁷² Korean Armistice Agreement pmbl, available at <http://news.findlaw.com/cnn/docs/korea/kwarmagr072753.html> (last visited on May 2, 2014).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Supra* note 53, at 283.

between the State parties.⁷⁶ Following the conventional definition of war, the legal characteristic of the armed hostilities in Korea has not been accepted as a ‘general war’ by a conventional definition, but an internal ‘civil war’ or *de facto* war.⁷⁷ The “troop-contributing States” to the UNF regarded their military operations in Korea as ‘police actions,’⁷⁸ while China maintained her armed intervention in the form of ‘volunteers’ to assist a neighboring country. China argued that no foreign force could properly intervene and the UN had no legitimate role in such a civil war.⁷⁹ China carried out a dual strategy in Korea, i.e., separating military actions from diplomatic questions. The Central People’s Government maintained a neutral status, while the volunteers’ army conducted actual military actions against the UNF. China enjoyed these two grounds simultaneously. As China was seemingly neutral, the UNF avoided attacking Chinese territory directly, although there were several breaches.⁸⁰

IV. Closing

In 1951, the Korean War reached an impasse such that both sides hoped to stop the armed hostilities. Truce talks began in July 1951 following the suggestion of J. Malik, the Soviet Union’s representative to the Security Council. During the 2-year negotiations, both sides debated many subjects. The following are critical legal questions among them.

A. POWs

During the Korean War, 7,245 American soldiers were reportedly captured or interned by the communist side. Among them, 2,806 died in captivity, 4,418 were

⁷⁶ *Id.* at 286.

⁷⁷ D. Constantin, *Korean War (1950-53)*, 6 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 601 (R. Wolfrum ed., 2012).

⁷⁸ N. Y. TIMES, June 30, 1950, at 1. In a press conference on June 29, 1950, President Truman said, “We are not at War.” See L. Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT’L L. 33-34 (1995). The British government also denied that the conflict was a war. See 502 Parl. Deb. H. C. (5th ser.) (1950), 292; H. Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT’L L. 221 (1953); A. McNair, *THE LEGAL EFFECTS OF WAR* 51 (1966).

⁷⁹ See The Polish note of June 30, 1950, to the Secretary General, U.N. Doc. S/1545. See also *supra* note 70.

⁸⁰ P. Norton, *Between the Ideology and the Reality: The Shadow of the Law of Neutrality*, 17 HARV. INT’L L. J. 266-267 (1975).

released to the US, and 21 chose to go to China.⁸¹ More than 3,700 South Korean combatants were captured by the CPVA.⁸² The UNF also captured about 20,000 CPVA.⁸³ The repatriation of POWs was a critical point at issue in the course of armistice negotiations between the two sides. It accordingly left many problems from not only a humanitarian, but also an international legal perspective.

The POW question was heavily debated between the two sides. The negotiation went on for more than one and a half years. The repatriation of POWs in the Korea War was negotiated basically following the 1949 Geneva Convention relative to Treatment of Prisoners of War [hereinafter Geneva Convention III], which had been developed through the Brussels Declaration (1874),⁸⁴ the Hague Convention concerning the Laws and Customs of War on Land (1907),⁸⁵ and the Convention relative to the Treatment of Prisoners of War (1929).⁸⁶ The UNF negotiators who were mainly US officers might also consider the Instructions for the Governments of Armies of the United States in the Field adopted in 1863 [hereinafter Lieber Code].⁸⁷

There are three major legal questions regarding the POWs in the Korean War, especially in connection with the CPVA. The first is whether the CPVA fighters captured by the UNF qualified as POWs under international law despite of China's intervention into the Korean War without an official declaration of war by a volunteer army whose belligerent status was ambiguous under international law. Article 4 of the Geneva Convention III provides "members of volunteer corps" with

⁸¹ L. Onesto, *U.S. POWs during the Korean War*, GLOBAL RESEARCH, Sept. 3, 2008, available at <http://www.globalresearch.ca/u-s-pows-during-the-korean-war/10050> (last visited on May 2, 2014).

⁸² KOREA RESEARCH INSTITUTE FOR STRATEGY, *HISTORY OF THE CHINESE COMMUNIST ARMY IN THE KOREAN WAR* (중국군의 한국전쟁사) 361-394 (2002), translated into Korean by Kyu-yeol Oh from the original Chinese version: *History of the War to Resist against US Aggression and Aid Korea* (军事科学院军事历史研究所 抗美援朝战争史).

⁸³ 50th Anniversary of the War to Resist against US Aggression and Aid Korea: Data on the Korean War (Oct. 24, 2000), available at <http://www.china.org.cn/e-America/historical/data0.htm> (last visited on May 2, 2014).

⁸⁴ Project of an International Declaration concerning the Laws and Customs of War On military authority over hostile territory signed on August 27, 1874, available at <http://www.icrc.org/ihl/INTRO/135> (last visited on May 2, 2014). For details, see K. Goecke, *Brussels Declaration (1874)*, 1 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1069-1071 (R. Wolfrum ed., 2012).

⁸⁵ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land signed on October 18, 1907, available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=4D47F92DF3966A7EC12563CD002D6788> (last visited on May 2, 2014). For details, see U. Beyerlin, *Hague Peace Conferences of 1899 and 1907*, in 3 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 210 (R. Bernhardt ed., 1982).

⁸⁶ Convention relative to the Treatment of Prisoners of War, signed on July 27, 1929, available at <http://www.icrc.org/ihl.nsf/INTRO/305?OpenDocument> (last visited on May 2, 2014). For details, see R. Chesney, *Prisoners of War*, 8 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 439-440 (R. Wolfrum ed., 2012).

⁸⁷ *Id.* at 437-438.

POW status when captured “operating outside their territory.”⁸⁸ To be a POW, such volunteers must fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates, (b) that of having a fixed distinctive sign recognizable at a distance, (c) that of carrying arms openly, (d) that of conducting their operations in accordance with the laws and customs of war.⁸⁹ The CPVA combatants fully satisfied terms (a), (b), and (c); however, term (d) would be debatable. Considering that the CPVA determined to abide by *jus in bello* in the conflict and asked the UNF to do so,⁹⁰ the Chinese were supposed to follow the laws of war. Consequently, the captured volunteers might be qualified as POWs under international law.

The second question is related to their repatriation conditions; whether their free decision of where to go should be respected. The communist side insisted on repatriating the POWs unconditionally to their home countries,⁹¹ while the UNF side maintained that they should have a free right to choose where to go.⁹² Both finally agreed to “repatriate and hand over in groups all those prisoners of war in its custody who insist on repatriation to the side to which they belonged at the time of capture.”⁹³ Those remaining prisoners of war, “who are not directly repatriated, from its military control and from its custody,” would be handed over to “the Neutral Nations Repatriation Commission for disposition.”⁹⁴ The South Korean President, Syngman Rhee, however, was not satisfied with these conditions; he unilaterally released about 27,000 anti-communist POWs from its camps on June 18, 1953.⁹⁵ The truce talks reached a deadlock with his stunning political initiative, which has been both criticized and admired by the international community. This impasse was resolved by political compromise between the two sides and the ceasefire negotiation resumed. Both sides, however, debated again the interpretation of Article 118 of the Geneva Convention III, which provides that POWs should be repatriated ‘without

⁸⁸ Geneva Convention III art. 4(A)(2).

⁸⁹ *Supra* note 86, at 439.

⁹⁰ Lauterpacht, *supra* note 78, at 223. *See also* I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 400 (1963).

⁹¹ N. Y. TIMES, Dec. 12, 1951. *See also* J. Mayda, *The Korean Repatriation Problem and International Law*, 47 AM. J. INT’L L. 415 (1953). For the Chinese position of POW repatriation, *see* SHU GUANG ZHANG, MAO’S MILITARY ROMANTICISM: CHINA AND THE KOREAN WAR 1950-1953, 239 (1995).

⁹² *Id.* at 416-417.

⁹³ The Korean Armistice Agreement, § 51(a)

⁹⁴ *Id.* §51(b)

⁹⁵ N. Y. TIMES, June 19, 1953. *See also*, The President of the Republic of Korea (Rhee) to the Commander in Chief, United Nations Command (Clark), The US Department of State Office of the Historian, *available at* <http://www.history.state.gov/historicaldocuments/frus1952-54v15p2/d607> (last visited on May 2, 2014).

delay' after the cessation of active hostilities except for those who are under criminal proceedings for an indictable offence. The phrase, 'without delay' implies that belligerent parties should transfer POWs detained in each party's military control back to their home country immediately without applying any other terms than humanitarian considerations.⁹⁶ There is no possibility under international law for a detaining country to decide the final destinations of POWs according to ideology. No example has been found in the past, either. A neutral country can accommodate only the wounded or sick POWs who might recover within a year if transferred or who might suffer serious harm from continued detention.⁹⁷ The Geneva Convention III refers only to "mental or physical fitness" as grounds for transferring POWs to a neutral country.⁹⁸ Such a new practice could be thus understood following the fundamental principles of the UN Charter and the Universal Declaration of Human Rights ("UDHR"), which respected the freedom of thought, conscience, and movement for everyone.⁹⁹

The third question is whether the POWs were treated appropriately under international law. Immediately after the armistice, the US raised the question of atrocities committed against the American POWs in the Korean War. On October 6, 1953, the US Senate established a special subcommittee, chaired by Senator Charles E. Potter, to inquire into the nature and extent of communist war crimes committed against American personnel during the war time. In total, 29 witnesses appeared before the subcommittee in public hearings on December 2, 3, and 4, 1953. Among them, 23 were American servicemen who were either survivors or eyewitnesses of communist war crimes.¹⁰⁰ Upon hearing the testimony of all witnesses and studying the documentary evidence submitted, the subcommittee advised that the North Korean and Chinese Communist armies were guilty of the following war crimes and crimes against humanity committed against American personnel during the conflict in Korea: (a) Murder; (b) Attempted murder; (c) Malicious and aggravated assaults; (d) Various acts of torture; (e) Starvation; (f) A

⁹⁶ See J. Horowitz, *Transferring Wartime Detainees and a State's Responsibility to Prevent Torture*, 2 AMERICAN UNIVERSITY NATIONAL SECURITY LAW BRIEF 48 & 50 (2012), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1036&context=nsib> (last visited on May 2, 2014). For details, see Mayda, *supra* note 91, at 430-432; J. Charnatz and H. Wit, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 YALE L. J. 401-405 (1953).

⁹⁷ Geneva Convention III art. 110.

⁹⁸ *Id.*

⁹⁹ U.N. Charter pmbl & art. 1(3); UDHR arts. 13, 18 & 19.

¹⁰⁰ See Atrocities against American POWs in Korean War, Text of Senate Report No. 848 (83d Congress, 2d Sess.), available at http://www.b-29s-over-korea.com/POWs-In-Korean-War/POWs-In-Korean-War_1.html (last visited on May 2, 2014).

deliberate policy of fostering starvation; (g) Experimental medical operations; (h) Coerced communist indoctrination; and (i) Bayonetting.¹⁰¹ The subcommittee also concluded that: “The Communist government in China is equally responsible and guilty as the Communist government in Korea for war atrocities committed against Americans.”¹⁰² The report pointed out that virtually every provision of the 1929 Geneva Convention governing the treatment of war prisoners, as well as Article 6 of the Charter of the Nuremberg International Military Tribunal, was purposely violated or ignored by the North Korean and Chinese forces.¹⁰³

However, these reported atrocities have been partly denied by the Chinese side. Li Onesto said that when the CPVA entered Korea at the end of 1950, the Volunteer Army was initially unprepared for the task of dealing with thousands of the UNF POWs.¹⁰⁴ The so-called ‘death marches’ were, in fact, simply the means of moving POWs to temporary camps in the north. Li added that it was just a mistake that should not have happened; they moved to correct this.¹⁰⁵ From the end of 1951, the CPVA built eight permanent POW camps in North Korea. A fact sheet of the US Department of Defense refuted this, as follows:

Through most of 1951, despite established camps, casualties continued to mount. Prisoners were fed what North Korean peasants lived on and medical supplies were unavailable to the doctors.¹⁰⁶

The US fact sheet also said that: “Soon, food and medical supplies were provided and conditions improved for the rest of the war.”¹⁰⁷ From the end of 1951, actually, the CPVA did build eight permanent POW camps in North Korea and the serious situation was improved.

The basic policy of the CPVA towards the UNF POWs was political education with leniency.¹⁰⁸ The Americans have severely criticized this as ‘brainwashing’ and ‘mind control.’ The Chinese, however, refuted that the political education was just to reveal the lies that the American POWs had been told.¹⁰⁹ On this debate, John Toland

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Supra* note 81.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Supra* note 50, at 79-85.

¹⁰⁹ *Id.* at 7.

said:

At the first mass meeting, a Chinese indoctrinator assured the prisoners that he was not angry at them for being in Korea. He realized the Americans and others had been duped by warmongers and Wall Street imperialists. He assured the men that Chairman Mao had given orders they should be treated with fairness.... The barn in which they were indoctrinated was decorated with two Christmas trees, wreaths, candles, red paper bells and a sign: 'Merry Christmas.' The food would be a healthy combination of sorghum seed, bean curd, soya-bean flour, and cracked corn. For a Christmas treat, they were to receive rice, boiled fatty pork, candy, and peanuts....¹¹⁰

According to Toland's interview, the POWs were allowed to keep bibles and religious articles, and were even permitted to hold religious discussions. Clarence C. Adams, an American POW who chose to go to China also recalled the life in the camp: "There wasn't too much friction between prisoners and captors who were the Chinese."¹¹¹ The lenient treatment of the CPVA to POWs in the Korean War may have been in keeping with Premier Mao's idea.¹¹²

Both sides have maintained diametrically opposite positions on the treatment of the American POWs during the Korean War. Wrapping up the debates, it was arguably not until mid-1951 that the CPVA started operating its POW policy according to international law, with the construction of permanent camps in the North. Some violations happened before then. The US Senate Report No. 848 does not contain any clear evidence that the CPVA 'alone' perpetrated wrongdoings against the POWs. Whether those confirmed violations before mid-1951 constituted 'war crimes' or, more specifically, 'crimes against humanity' is still legally controversial.

B. Signing the Armistice Agreement

The Korean Armistice Agreement was signed by three military commanders of the belligerents: (1) Mark Clark of the UNF; (2) Kim Il Sung of North Korea; and (3) Peng Teh-Huai of the CPVA. Because China did not officially declare war against the UNF, Peng Teh-Huai signed the Armistice as commander of the CPVA, which was "purely military in character," and whose primary objective was to stop the on-going

¹¹⁰ J. TOLAND, *IN MORTAL COMBAT: KOREA 1950-1953* (1991), *recited from Id.*

¹¹¹ *Supra* note 81, at 9.

¹¹² *Supra* note 50, at 79.

armed hostilities.¹¹³ The Chinese strategy was to separate military engagement from diplomatic reaction in the Korean crisis. The former was led by Peng Teh-Huai of the CPVA, while the latter was controlled by Zhou En-lai of the Ministry of Foreign Affairs. After signing the Armistice, Peng Teh-Huai came down from the stage and Zhou En-lai took over the role from a political dimension.

This ambiguous position of China, however, would raise a question of legal uncertainty when the Armistice is replaced by a peace treaty.¹¹⁴ On which legal grounds could China sign a peace treaty replacing the Armistice if she was not a belligerent and the CPVA no longer exists? The most reasonable and probable way would be such a package deal between the former belligerent parties concerned, the two Koreas, China, and the US, that the peace treaty has the effect of replacing the Armistice at the same time.

V. Conclusion

This article has investigated legal questions related to the CPVA, all of which are hidden, but critical issues for establishing a permanent peace regime on the Korean peninsula. The second part has addressed the international legal status of Chinese military engagement via the ‘volunteers.’ Considering the *casus belli*, just crossing the 38th parallel of the UNF’s beyond the authorization of the Security Council resolutions, the blockade of the Taiwan Strait, and the actual air attacks on Chinese soil, crossing the Yalu River would be qualified as ‘self-defense,’ given a strict meaning under Article 51 of the UN Charter. The third part has checked the aspects of actual armed hostilities between the two sides. Among the five offensives of the CPVA, the third and the fourth offensives were beyond the scope of self-defense under international law because the primary purpose of the Chinese armed intervention was to repel the UNF to south of the 38th parallel. Armed attacks by the CPVA to south of the 38th parallel could not be argued to be self-defense, just as those by the UNF to the north of the 38th parallel were not legitimized without the authorization of the Security Council. The third part has discussed the closing stage of the Korean War. There were two legal questions in the negotiation table for armistice. One was the repatriation conditions of the POWs. In spite of long and

¹¹³ *Supra* note 50, at 230-232

¹¹⁴ Korean Armistice Agreement § 62.

harsh debates, they did not find the best solution, but made a political compromise leaving many critical questions untouched. Many visible and invisible problems shall be resolved in the course of their peacemaking now and in the future. The other was the legal status of the CPVA in the closing stage of the Korean War. Although China did not officially declare war against the UNF following the two-tier (military and diplomatic) strategy, the volunteers' status was recognized under international law as a belligerent party in the battlefield. Peng The-huai finally signed the Armistice Agreement as the military commander of the volunteers.

When I took the undergraduate program at the University of Washington, Seattle, one of my professors who had a deep interest and wide range of theoretical and physical experiences in China complained: "Why is China so anxious about the stimuli along the northeastern part of her borderline?" I was quite embarrassed at such a misunderstanding of a top-level American political scientist regarding China, expected to be a rival of the US within a generation. While reviewing primary sources on the CPVA in the Korean War for this research, I got a similar feeling that, during the Korean War, the American leaders never understood China, either. Even today, I am afraid that policymakers in Korea and the US will have difficulties reaching a consensus with their Chinese counterparts. There is no future for people who easily forget lessons from past history. Hopefully, this international legal research on the CPVA can be a humble steppingstone to building permanent peace on the Korean peninsula.