

Bridging the Divide Between Armistice and Peace Treaty: Using Just War Theory to End the Korean War

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In international law, an armistice agreement provides for a cessation of hostilities in order for the combatants to pursue a permanent peace, usually via a peace treaty. This process remains incomplete for the two Koreas. This article focuses on bridging the divide between the current armistice agreement and a future peace treaty by utilizing just war theory. Specifically, a prong of just war theory that has more recently emerged, *jus post bellum* (justice after war), provides a beneficial lens by which to achieve a better peace by focusing on both addressing past issues as well as accounting for prospective opportunities for future engagement. This paper argues that a peace treaty influenced by elements of *jus post bellum* informs the framework necessary for meaningful rapprochement on the Korean Peninsula and a much needed denouement to the Korean War.

Keywords: Armistice Agreement, *jus post bellum*, just war theory, Korean War, peace treaty

We must be patient—making peace is harder than making war.

Adlai E. Stevenson II

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I. Introduction

On March 21, 1946, a few months following the conclusion of World War II, Adlai E. Stevenson II gave a speech at the Chicago Council on Foreign Relations. A journalist and a lawyer as a civilian, Stevenson had spent the latter months of World War II as a member of the American contingent helping to establish the United Nations. A gifted speaker and communicator, Stevenson was on the cusp of commencing a distinguished career in public service¹ that would include a term as governor of Illinois, two unsuccessful bids to become president of the United States, and appointment as Ambassador to the United Nations where he achieved notoriety for confronting the Soviet Union's Valerian A. Zorin during the Cuban Missile Crisis.²

Before his future as a statesman unfolded, Stevenson stood before the Chicago Council on Foreign Relations, where he had served as president prior to World War II. As he considered a post-war world that was still trying to lay the foundation of peace in both Europe and Asia, Stevenson likely contemplated the purpose and role of the United Nations, an organization he had helped create, in the context of a soon to be dubbed Cold War.

Just a few weeks prior, on March 5, 1946, an already prominent statesman, Winston Churchill, had delivered a speech at Westminster College in neighboring Fulton, Missouri. Churchill's speech, titled "The

1 Stevenson served as governor of Illinois from 1949 to 1953. In 1952 and 1956, Stevenson was the Democratic Party's candidate for president, however, he was defeated by Dwight D. Eisenhower both times.

2 Awaiting Valerian A. Zorin's reply to his question of whether the Soviet Union had placed missiles in Cuba, Stevenson famously stated, "I am prepared to wait for an answer until Hell freezes over, if that is your decision. I am also prepared to present the evidence in this room."

"Records of Adlai Stevenson, Ambassador to the United Nations, Now Available to View Online," Seeley G. Mudd Manuscript Library Blog: News from the Princeton University Archives & Public Policy Papers Collection, <<https://blogs.princeton.edu/mudd/2013/06/records-of-adlai-stevenson-ambassador-to-the-united-nations-now-available-to-view-online/>> (date accessed April 15, 2020).

Sinews of Peace,” reverberated around the world as he outlined his view of the Communist threat, expressed by the imagery that “an iron curtain has descended across the Continent.”³ Given the timing, Churchill’s booming voice and his dire warning of the rising Communist specter must have rumbled through Stevenson’s mind as well.

It is within this milieu that Stevenson delivered his Chicago speech stating, “We must be patient-making peace is harder than making war.” Undoubtedly, Stevenson’s comments were focused on Germany and Japan, enemies that would soon become friends, and the Soviet Union, an ally now turned foe. Korea was far from Stevenson’s mind that day, and despite the dual difficulty of waging war and the patience required for peace in the context of Germany and Japan, Stevenson’s words were most prophetic when applied to the Korean Peninsula. A conflict extending beyond 70 years with no denouement in sight continues to testify to Stevenson’s prescience about the difficulty of making peace.

This paper explores how to overcome the difficulty of making peace by applying aspects of just war theory to constructing a permanent peace regime on the Korean Peninsula. Using just war theory, important insights can be gained into the key role a peace treaty plays in transitioning to a stable peace regime after weapons are formally laid down. Specifically, a newer prong of just war theory, *jus post bellum*, or justice after war, provides insights that are relevant for a peace treaty that not only ends the Korean War, but also provides avenues for further rapprochement between the two Koreas.

To consider how just war theory, and in particular *jus post bellum*, might be applied in the Korean context, this paper will begin by providing background on the genesis and the current state of the Korean War through the lens of international law before focusing on understanding the relationship between an armistice agreement and a

3 Winston Churchill, “The Sinews of Peace” (speech, Westminster College, Fulton, Missouri, March 5, 1946), International Churchill Society, <<https://winstonchurchill.org/resources/speeches/1946-1963-elder-statesman/the-sinews-of-peace/>> (date accessed April 13, 2020).

peace treaty. With this backdrop in place, the paper will then turn to unpacking three tenets of just war theory, *jus ad bellum* (the justification for war), *jus in bello* (conduct during war), and *jus post bellum* (justice after war). The following section will then apply concepts of *jus post bellum* to the current state of the Korean conflict. Recommendations will then be offered that focus on how *jus post bellum* principles applied through a robust peace treaty to end the Korean War can make significant contributions to laying the foundation for a permanent peace regime on the Korean Peninsula.

II. Traversing Between Armistice and Peace Treaty

1. Setting the Stage of the Korean War and Its Elusive Peace

The Korean War is unique in many ways. With North Korean forces surging southward on June 25, 1950, the United Nations was propelled into the midst of a burgeoning Cold War. As events dramatically unfolded in Korea, the initial salvos of another front opened in the chambers of the United Nations Security Council. Due to the Soviet Union's ongoing absence to protest Communist China's exclusion from the Council, two critical resolutions were passed in quick succession without the risk of Soviet veto.

The first resolution, Security Council Resolution 82, which passed on the same day that North Korea breached the border en masse, unequivocally described the events of that fateful day as an "armed attack on the Republic of Korea by forces from North Korea," and "that this action constitutes a breach of the peace..."⁴ The explicit use of the phrase *breach of the peace* is important to note since it triggers a series of possible actions under Chapter VII of the Charter of the United Nations. Specifically, Article 39 in Chapter VII gives the Security Council the authority to "determine the existence of any threat to the peace, breach

4 S.C. Res. 82, U.N.Doc.S/RES/1501 (June 25, 1950).

of the peace, or act of aggression..."⁵ Once such a breach of peace has been determined, then the Security Council can avail itself of Article 41, which allows for the use of diplomatic, economic, and other non-military measures to remedy the situation.⁶ Additionally, the Security Council can also reference Article 42 to call on member states to use military force to "restore international peace and security."⁷

With an awareness of Chapter VII's provisions⁸ and North Korean forces on the verge of overrunning Seoul, the Security Council passed Resolution 83 to recommend "that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area."⁹ The resolution's brevity belies its historical significance. This was the first time that the United Nations would invoke the concept of collective security.

The actions of that summer would also lead to a series of other unexpected outcomes. It would be the first time that the principal Cold War combatants would face each other as Chinese and Soviet forces engaged their American counterparts on the cratered canvas of the Korean Peninsula and in aerial combat overhead. The grinding conflict would also lead to no clear victor and consequently no surrender by a defeated party, thus muddling a clear path to signing a peace treaty.

Consequently, pursuing the Armistice Agreement would result in the longest cease-fire negotiation in history, a process that lasted over two years and spanned hundreds of meetings, all to return the respective Korean forces to essentially their original starting positions.¹⁰

5 U.N. Charter art. 39.

6 U.N. Charter art. 41.

7 U.N. Charter art. 42.

8 Nigel D. White, "From Korea to Kuwait: The Legal Basis of United Nations' Military Action," *The International History Review*, vol. 20, no.3 (1998), p.597, 613.

9 S.C. Res. 83, U.N.Doc.S/RES/1511 (June 27, 1950).

10 Rosemary Foot, *A Substitute for Victory: The Politics of Peacemaking at the Korean Armistice Talks* (Ithaca, New York: Cornell University Press, 1990), pp. ix.

In retrospect, the length and difficulty of the Armistice negotiations also portended the Armistice's current dubious honor as the world's longest running cease-fire, a symbol of a decades long stalemate that continues unabated today.

2. Armistice

The Armistice Agreement was signed on July 27, 1953.¹¹ Its signing brought a cessation to brutal, fratricidal warfare, while also ending the tedious and laborious negotiation process mentioned above. The Agreement's completion also heralded a focus on a heretofore intractable process to answer the political questions that remained about the status of the two Koreas. This fact was not lost on the negotiating parties. Near the end of the Armistice Agreement, in Article IV, the delineation between military and political matters is clearly expressed:

"In order to ensure the peaceful settlement of the Korean question, the military Commanders of both sides hereby recommend to the governments of the countries concerned on both sides that, within three (3) months after the Armistice Agreement is signed and becomes effective, a political conference of a higher level of both sides be held by representatives appointed respectively to settle through negotiations the questions of the withdrawal of all foreign forces from Korea, the peaceful settlement of the Korean question, etc."¹²

Historically, the substance of armistice agreements have taken different forms depending on the conflict and context. Accordingly, armistice agreements themselves can embody various levels of complexity subject to the disposition of combatant forces at the time of negotiation, the number of parties involved in the negotiation process, and if the status of prisoners of war pose a sensitive issue. For instance, one key reason that the Korean Armistice Agreement required so much

11 Korean War Armistice Agreement, July 27, 1953.

12 Korean War Armistice Agreement, Article IV: Recommendation to the Governments Concern on Both Sides, July 27, 1953.

time to negotiate centered around the repatriation of prisoners of war, some of whom did not wish to return to their home countries.¹³

Despite whatever idiosyncrasies an armistice agreement may have, its core purpose is to halt hostilities to allow political negotiations to occur so hopefully a path towards peace can be found by political leaders. This connection between armistice agreements and peace treaties has a history in international law. And this particular legacy of armistice agreements would not have been lost on the military and political leaders of the parties involved in the Korean War nor the United Nations or other relevant stakeholders.

The end of World War I perhaps best exemplifies this relationship between cease-fire and peace agreement. When the Armistice of Compiègne was signed on November 11, 1918, this caused a cessation of hostilities.¹⁴ Subsequently, the Treaty of Versailles was signed on June 28, 1919, which then formally ended World War I. Unfortunately, the conditions of the Treaty of Versailles laid the foundation for the turbulent interwar years, and the hope of a lasting peace was short-lived.

A more contemporary example of armistice agreements that likely lingered in the minds of at least some of the Armistice Agreement interlocutors were the series of armistice agreements signed by Israel and a number of Arab countries following the 1948 Arab-Israeli War. With the British withdrawal from managing the Mandate for Palestine, Israel declared itself a sovereign state and came under attack from a coalition of its neighbors, including Egypt, Lebanon, Syria, and Transjordan (present-day Jordan).

After a period of combat from roughly May 1948 to March 1949, Israel signed individual armistice agreements starting with Egypt

13 Sydney D. Bailey, *The Korean Armistice* (London: Palgrave Macmillan, 1992), pp. 85-112.

14 Armistice with Germany, November 11, 1918.

(February 24, 1949),¹⁵ Lebanon (March 23, 1949),¹⁶ Transjordan (April 3, 1949),¹⁷ and finally Syria (July 20, 1949).¹⁸ A byproduct of these agreements was the use of United Nations sponsored Mixed Armistice Commissions, which were responsible for observing if the conditions of the various armistice agreements were being fulfilled. The concept of similar commissions would find itself represented in the Korean Armistice Agreement through the Military Armistice Commission¹⁹ and the Neutral Nations Supervisory Commission²⁰.

Though Israel and its neighbors would engage in combat multiple times again, namely the Six-Day War in 1967 and the Yom Kippur War in 1973, Israel eventually signed a peace treaty with Egypt in 1979²¹ on the back of the Camp David Accords and with Jordan in 1994.²² A lull in hostilities ultimately provided the necessary space for the pursuit of a peace treaty, which is the normative function of an armistice.

3. Peace Treaty

Broadly, there are two paths to negotiating a peace treaty. The first is through surrender. Once a combatant surrenders, then the terms of peace are largely dictated by the victors and reflected in the peace treaty. For instance, Japanese forces in World War II officially surrendered on September 2, 1945,²³ but it was not until September 8, 1951 that the Treaty of San Francisco was signed, formally bringing a close to the

15 Israel-Egypt Armistice Agreement, February 24, 1949.

16 Israel-Lebanon Armistice Agreement, March 23, 1949.

17 Israel-Jordan Armistice Agreement, April 3, 1949.

18 Israel-Syria Armistice Agreement, July 20, 1949.

19 Korean War Armistice Agreement, Article II, B: Military Armistice Commission, July 27, 1953.

20 Korean War Armistice Agreement, Article II, C: Neutral Nations Supervisory Commission, July 27, 1953.

21 Israel-Egypt Peace Treaty, March 26, 1979.

22 Israel-Jordan Peace Treaty, October 26, 1994.

23 United Nations, Treaty Series, "Treaty of Peace with Japan. Signed at San Francisco," September 8, 1951. No. 1832.

Pacific theatre of World War II. The Treaty of San Francisco addressed relevant reparations and similar post-war matters. The Treaty of San Francisco also served to end the formal occupation of Japan by the Allied Powers and restore its sovereign status. Consequently, the United States signed a security agreement with Japan that would allow its forces to remain based in Japan following the signing of the Treaty of San Francisco.²⁴ Interestingly, an unfortunate effect of Korea's division was that neither Korea was a signatory to the Treaty of San Francisco since it was clearly in dispute which of the Koreas should sign on behalf of the Korean nation.

The second path to negotiating a peace treaty is through an armistice or in some situations, its cognate, a cease-fire. When compared to a surrender, however, it is not always clear how to navigate from stopping bullets on a battlefield to signing a treaty. On one hand, an armistice may in substance represent a surrender. As discussed earlier, the Treaty of Versailles was preceded by the Armistice of Compiègne, which brought a pause and then, eventually, an end to World War I. Though an armistice was used to stop fighting between Germany and the Allied nations, the terms of the Armistice of Compiègne were akin to a surrender as Germany was no longer in an effective position militarily or politically to continue the war. Though disputes existed amongst the Allies regarding specific demands and negotiating points, the terms of the Armistice of Compiègne were essentially dictated by the Allied powers to Germany as was the Treaty of Versailles.

Conversely, there are conflicts, like the Korean War, where an armistice is a result of a stalemate on the battlefield. This was the stark reality that former general and now president-elect of the United States, Dwight D. Eisenhower, faced when he visited Korea at the end of November 1952. After winning the presidential election, Eisenhower kept his campaign promise to visit Korea to figure out an end to the war. Flying over the stagnated battlefield in a spotter aircraft, he received a

24 Treaty of Mutual Cooperation and Security between the United States and Japan, September 8, 1951.

bird's-eye view of the difficulty of the task ahead.²⁵

It was clear that a military solution could only be achieved at severe cost of life and only by broadening the scope of the war, including the possible use of nuclear weapons. Though the threat of nuclear attack had been raised before, the reality is that this was an untenable outcome for a variety of reasons. The United States faced opposition amongst its Unified Command allies to the use of nuclear arms.²⁶ Additionally, expanding the first hot war of the Cold War into a global, nuclear conflagration raised the peril of a possible third World War, which was ultimately unpalatable to many, including Eisenhower. Consequently, the Korean question moved away from an outcome decided by military force and became relegated to a political question, which still awaits a final answer.

Though the long-awaited transition from armistice to peace regime in Korea faces a number of stumbling blocks, the cornerstone issue was that there was never a surrender in any form. Unlike a humbled Japan, which rendered a formal surrender in WWII, or a weakened Germany that abandoned its aggression via armistice in WWI, the Korean combatants entered their truce in a state of sustained impasse as relative equals. This parity reduced any negotiating leverage a party might have had to pursue a peace treaty to address the "peaceful settlement of the Korean question."²⁷ Despite South Korea's economic advantage over the North, the relative strategic equivalence between the two Koreas will continue to remain a key obstacle in any peace treaty negotiation.

A peace treaty is the principal gateway to transition to a meaningful and sustainable peace regime. Unlike an armistice agreement, a peace treaty substantively serves to lay the foundation for peace and future engagement between the parties. If executed successfully, a peace treaty

25 Edward C. Keefer, "President Dwight D. Eisenhower and the End of the Korean War," *Diplomatic History*, vol. 10, no.3 (1986), pp.267–289.

26 Sydney D. Bailey, *The Korean Armistice* (London: Palgrave Macmillan, 1992), pp. 94, 128.

27 Korean War Armistice Agreement, Article IV: Recommendation to the Governments Concern on Both Sides, July 27, 1953.

can reconcile even seemingly intractable enemies and help them find grounds for dialogue and collaboration.

The case of Israel and Jordan is important to cite here. Though Israel continues to have tensions with its neighbors, particularly Lebanon and Syria, the peace treaty between Israel and Jordan has not only consolidated peace between the two countries but also led to economic exchange as well as the sharing of resources such as energy²⁸ and water.²⁹ In the following sections, the paper will explore how just war theory can be used to show the way a peace treaty can potentially provide a robust architecture to secure a meaningful peace between erstwhile enemies.

III. Just War Theory: A Brief Overview

A brief overview of just war theory is necessary before proceeding further. For some, it might be odd to consider that a war could be just, but jurists, philosophers, and religious scholars have struggled with this question for centuries. Though there are even earlier treatments, many initially point to Christian theologian Augustine of Hippo's work, *City of God*, which was finished in 426 AD, where he employed the phrase 'just war.'³⁰ Augustine expounded that using violence in some situations was not only justified, but in certain circumstances could even be morally

28 Suleiman Al-Khalidi, "Jordan gets first natural gas supplies from Israel," *Reuters*, January 2, 2020, <<https://www.reuters.com/article/jordan-israel-gas/jordan-gets-first-natural-gas-supplies-from-israel-idUSL8N2960Q9>> (date accessed June 2, 2020).

29 Though issues related to water have historically been a difficult issue and continue to remain sensitive for countries in the Jordan River Basin, Israel and Jordan continue to cooperate on water initiatives. Sharon Udasin, "Israeli, Jordanian officials signing historic agreement on water trade," *The Jerusalem Post*, February 26, 2015, <<https://www.jpost.com/israel-news/new-tech/israeli-jordanian-officials-signing-historic-agreement-on-water-trade-392312>> (date accessed June 2, 2020).

30 Augustine of Hippo, *City of God*, Translated by Henry Bettenson (London: Penguin Classics, 2003).

required.³¹ A more formal exposition of just war theory by Thomas Aquinas emerged in the 13th century, which essentially continues to serve as the foundation for many aspects of just war theory today.³²

Traditionally, just war theory is comprised of two separate, sequential strands: *jus ad bellum* and *jus in bello*. *Jus ad bellum* refers to the reason or justice for waging war. Typically, *jus ad bellum* is evaluated by reference to six factors: just cause, legitimate authority, right intention, proportionality, reasonable prospect of achieving success, and necessity (last resort).³³ In its purest form, a proposed war should satisfy such requirements to be considered just, and over time, many of these principles from philosophy have been incorporated into relevant aspects of international law.

The second prong of the theory, *jus in bello*, relates to how the war is carried out, justice in fighting the war, and normally focuses on three factors: discrimination (such as not targeting civilians), necessity (minimal force necessary to achieve the objective), and proportionality.³⁴ If actions by combatants consistently violate these principles, then the manner in which the war is being prosecuted could be determined unjust though the original justification for going to war (i.e., *jus ad bellum*) might have initially been legitimate.

As the nature of warfare has changed dramatically since Aquinas opined on the nature of just war, aspects of just war theory have been subject to criticism. For example, Aquinas believed that legitimate authority, one of the principles of *jus ad bellum*, rested only with sovereign states and consequently they alone reserved the power to wage war. Accordingly, traditional aspects of just war theory struggle to account for the rise of non-state actor combatants such as terror groups

31 *Ibid.*

32 Thomas Aquinas, *The Summa Theologica of St. Thomas Aquinas*, Translated by Fathers of the English Dominican Province (New York: Christian Classics, 1981).

33 Gary J. Bass, "Jus Post Bellum," *Philosophy & Public Affairs*, vol. 32, no. 4 (2004), pp. 384-412.

34 *Ibid.*

or independence movements.³⁵ Similarly, the legal nature of war has changed from the latter half of the 20th century since most modern conflicts have not entailed a formal announcement or declaration of war.³⁶ This would have been inconsistent with Aquinas's view of just war crafted in the Middle Ages. Additionally, modern day arsenals that include nuclear, biological, and chemical weapons can quickly seem out of place in traditional just war theory.

Despite any criticisms, just war theory remains an important philosophical and legal tool, which continues to evolve, especially around *jus post bellum*, justice after war.³⁷ *Jus post bellum* has emerged as a third key strand attached to just war theory. The underlying notion being that "the aftermath of war is crucial to the justice of the war itself."³⁸ It is this pursuit of justice following war that Augustine identified when he stated that "peace is the desired end of war."³⁹ Ultimately, for a war to be deemed just, a lasting, substantive peace should ensue that "vindicates the human rights of all parties to the conflict" otherwise the sacrifice of so many might be rendered meaningless.⁴⁰

Some treatments of *jus post bellum* outline foundational elements, which are not entirely settled yet, but frequently include the following six principles: retribution, reconciliation, rebuilding, restitution,

35 Jennifer Easterday, "Remarks by Jennifer Easterday What is Jus Post Bellum?," *Proceedings of the Annual Meeting (American Society of International Law) Confronting Complexity*, vol. 106 (2012), pp. 336-337.

36 Jann K. Kleffner, "Towards a Functional Conceptualization of the Temporal Scope of Jus Post Bellum," in *Jus Post Bellum: Mapping the Normative Foundations*, eds. Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (Oxford: Oxford University Press, 2014), pp. 287-288.

37 Carsten Stahn, "Jus Post Bellum: Mapping the Discipline(s)," *American University International Law Review*, vol.23, issue 2 (2007), pp.314-315, 320-321.

38 Bass, "Jus Post Bellum," pp. 384-412.

39 *Ibid.*

40 Robert E. Williams Jr. and Dan Caldwell. "Jus Post Bellum: Just War Theory and the Principles of Just Peace," *International Studies Perspectives*, vol. 7, no. 4 (2006), p. 317.

reparations, and proportionality.⁴¹ Expanding beyond a prescriptive perspective, however, Easterday advocates a more holistic approach that provides for a broader conception of *jus post bellum* that moves beyond a rigid body of law. She advocates that:

“The application of *jus post bellum* norms would be done according to particular policy goals—shaped by an interpretive framework based on *jus post bellum* norms and principles that include, inter alia, fostering sustainable peace. It would play a transformative role in society.”⁴²

This more expansive view of *jus post bellum* utilizes a mosaic perspective to draw a path to peace by engaging, “A comprehensive concept of *jus post bellum* [that] would also include informal arrangements, non-state actors, and other practices and sources of norms and governing power not typically encompassed under traditional understandings of ‘international law.’”⁴³ It is this more expansive perspective of *jus post bellum* that can inform creation of a robust peace treaty to end the Korean War and provide a peace that can vindicate the sacrifice of so many. With *jus ad bellum* and *jus in bello* in the distant past, pursuing *jus post bellum*, justice after war, is the onus that falls on those that seek a permanent peace for the Korean Peninsula. How the concept of justice after war might be applied to the Korean War will be considered in the next section.

IV. Janus Approach: Past and Future When Applying *Jus Post Bellum* to the Korean War

In what is generally considered the most influential modern work

41 Larry May, *After War Ends: A Philosophical Perspective* (Cambridge: Cambridge University Press, 2012), p.1.

42 Jennifer S. Easterday, “Peace Agreements as a Framework for *Jus Post Bellum*,” in *Jus Post Bellum: Mapping the Normative Foundations*, eds. Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (Oxford: Oxford University Press, 2014), p. 381.

43 *Ibid.*, p. 382.

on just war theory, *Just and Unjust Wars*, philosopher Michael Walzer does not specifically refer to *jus post bellum*, though his thoughts on the Korean War connect to the broader concept of the importance of justice after war.⁴⁴ Citing British military strategist Lidell Hart, who stated that “The object in war is a better state of peace,” Walzer opines that in many circumstances such a better peace must be qualitatively different than the “status quo ante bellum” to be just.⁴⁵ This raises a foundational question of whether the proto-peace of post-armistice Korea rises to the level of a better peace that Walzer envisioned? Perhaps this question can really only be answered once peace is defined by a formal, substantive peace treaty.

As alluded to earlier, the concept of *jus post bellum* is still a developing area of philosophy, international law, and international relations. A late addition to the just war tradition, it still has roots in traditional notions of warfare and as such struggles on two fronts. Foremost, as Gary J. Bass frames in his work, many view *jus post bellum* through the initial lens of victor and defeated.⁴⁶ Consequently, many of the key variables that are considered in *jus post bellum* are influenced by this path dependency with a focus on war crimes trials, reparations, repatriation of prisoners of war, and the conditions by which economic and political reconstruction of a defeated enemy are warranted and morally acceptable.⁴⁷ Besides the question of prisoners of war, which was a pervasive concern during Armistice Agreement negotiations, the foregoing variables do not provide much guidance if a war ends in a stalemate where there is no clear victor such as the Korean War.

Related to the above, the second thread where *jus post bellum* struggles is not focusing sufficiently on the future. Certainly, the pre-existing conditions of a conflict and its immediate consequences are critical first-order considerations and as reviewed above, just war theory

44 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 5th edition (New York: Basic Books, 2015), p. 117.

45 *Ibid.*, p. 121.

46 Bass, “Jus Post Bellum,” pp. 384-412.

47 *Ibid.*

does this well due to the traditional victor versus defeated party paradigm. In situations, however, where there is no clear winner or when significant time has passed between cessation of hostilities and formalizing peace, an inordinate focus on the past is not helpful. This is the situation in which the Koreans find themselves. Thus, parties to a peace treaty being concluded under such circumstance should augment *jus post bellum*'s conventional foci with increased consideration for the future, especially for issues that may not directly emanate from the conflict. Implementing such a Janus-like approach allows for a more comprehensive strategy to achieving peace that does not over allocate attention to the past and also creates sufficient chances to consider engagement and partnership opportunities for an oft-elusive better peace, which is a necessary condition for a better future.

When considering peace on the Korean Peninsula, returning Korea to its ante bellum status quo is clearly neither practical nor desirable. Despite intervening periods of hostility, many of the traditional factors of *jus post bellum* may have minimal relevance for a Korean War peace treaty since sustained combat ended when the Armistice Agreement was signed almost seventy years ago. With no clear victor and the ensuing passage of time, many traditional claims that might normally accompany a peace treaty such as reparations or compensation of war victims may be less operative in the context of the two Koreas. Of course, time alone would not necessarily render such claims stale, evidenced by ongoing litigation against Japan related to its World War II era system of military sexual slavery⁴⁸ and forced industrial labor.⁴⁹ But

48 The issue of Japanese military sexual slavery pre-dates the formal start of World War II. Hyun-ju Ock, "First hearing in 'comfort women' case held three years after lawsuit filed," *Korea Herald*, November 13, 2019, <<http://www.koreaherald.com/view.php?ud=20191113000873>> (date accessed June 4, 2020); "Military Sexual Slavery, 1931-1945," *Columbia Law School Center for Korean Legal Studies*, <<https://kls.law.columbia.edu/content/military-sexual-slavery-1931-1945>> (date accessed June 4, 2020); Yoshiaki Yoshimi (translated by Suzanne O'Brien), *Comfort Women: Sexual Slavery in the Japanese Military During World War II* (New York: Columbia University Press, 2001).

49 Sang-hun Choe and Motoko Rich, "The \$89,000 Verdict Tearing Japan and South

unlike claims against Japan, a clearly defeated aggressor, the viability of any such extant claims connected to the Korean War would be considerably less clear because of the points mentioned earlier.

Given the above, for *jus post bellum* to apply more fully to ending the Korean War, it is necessary to recast its standard retrospective approach and adopt a broader frame. This requires a theoretical expansion to also account for how pursuing justice after war can shape the future with justice serving as the organizing principle to guide the transition from Armistice Agreement to a peace regime. A peace treaty that encompasses Janus-like components of embracing both a tragic history and optimism for the future is necessary. A lasting peace and the nascent framework for the future of the Korean Peninsula can be embodied in such a peace treaty.

V. Recommendations to Achieve a Better Peace

The rhetoric of a peace treaty is not new. Even as early as 1962 and again in 1974, North Korea raised the aspirational goal of a peace treaty, though it may be questionable how sincere or serious any such overtures might have been.⁵⁰ This notwithstanding, short of a collapse and absorption scenario, the two Korean nations will likely eventually find themselves architecting a formal peace at some point. With this possibility in mind, drawing on the foregoing background and discussion, this paper proposes three principal recommendations that utilize *jus post bellum* ideas to facilitate the end of the Korean War and achieve a better, lasting peace on the Korean Peninsula. The recommendations are based on the

Korea Apart," *New York Times*, February 13, 2019, <<https://www.nytimes.com/2019/02/13/world/asia/south-korea-slave-forced-labor-japan-world-war-two.html>> (date accessed June 3, 2020); Sang-hun Choe, "South Korea Court Orders Mitsubishi of Japan to Pay for Forced Wartime Labor," *New York Times*, November 29, 2018, <<https://www.nytimes.com/2018/11/29/world/asia/south-korea-wartime-compensation-japan.html>> (date accessed June 3, 2020).

50 Ha-young Choi, "Can a Peace Treaty End the Korean War? It's Complicated," *NK News*, May 24, 2016, <<https://www.nknews.org/2016/05/can-a-peace-treaty-end-the-korean-war-its-complicated/>> (date accessed April 1, 2020).

assumption that North Korea continues to exist in a capacity similar to its current state.

First, maintaining a strategic perspective that also accounts for the past as well as the future during the process of negotiations and crafting of a peace treaty is critical. The issues facing the Korean Peninsula are challenging and include pressing concerns such as the North Korean nuclear weapons program, the human rights situation in North Korea, regional security concerns, and the vitality of the United States and South Korea alliance relationship to enumerate just a few. Many of these issues are interconnected, which increases the complication, thus engaging them on a piecemeal basis can create structural obstacles to progress. This is not to say that all of these issues need to be addressed in order to sign a peace treaty, nor do they all need to be resolved in a peace treaty. There is a very real possibility that some of these issues will continue for a time even after a peace treaty is signed. Despite that, what is key is to maintain a holistic perspective on these concerns and their linked nature to better inform the scope and parameters of a possible peace treaty.

Second, entering into a treaty is one of the greatest expressions of authority for a sovereign nation. Thus, it is important that any such peace treaty includes the proper parties. If the goal for a peace treaty is to create a better peace, then such a treaty should at minimum include the parties most directly responsible for creating and benefitting from such a peace. Despite different ideas that others might have voiced previously, a peace treaty to end the Korean War must at minimum include both Koreas.⁵¹ Though South Korea was not a signatory to the Armistice Agreement, this is no longer Syngman Rhee's South Korea, and Seoul will have significant obligations under any proposed peace treaty. Ultimately, the form and substance of Korea's future must be decided in Korea, by Koreans, and the greatest expression of this reality is that both Koreas are bound together in this project.

Third, a peace treaty also offers an inflection point to create

51 *Ibid.*

meaningful, engaged partnerships across a variety of domains. For example, the peace between Israel and Jordan demonstrates that identifying issue areas that can be mutually explored as part of a better peace is vital. For those two countries, collaboration on water and energy needs have given them opportunities for dialogue and partnership beyond the end of violence.

Similarly, a Korean War peace treaty should incorporate issue areas that can foster collaboration, interaction, and ultimately engender greater trust on the Korean Peninsula. Some areas of cooperation worth considering in the context of constructing a better peace include agriculture, the environment, health and medicine, and of course visits for divided families. Additionally, partnering on infrastructure projects may present a compelling opportunity. For instance, the North Korean transportation network relies heavily on trains with greater than 90% of domestic freight estimated to be transported via rail, yet North Korea's rail system is in dire need of modernization.⁵² Following the May 2018 summit between South Korean President Moon Jae-in and North Korean leader Kim Jong-un, both sides collaborated on efforts, including an initial survey, to facilitate the eventual reconnection of railways between the two Koreas.⁵³ There are significant opportunities to expand such initiatives under the aegis of a peace treaty.

The above recommendations are certainly not exhaustive but do represent a starting point to incorporate aspects of *jus post bellum* with the hope of creating a better peace for Korea. They also do not answer some of the pressing questions that will undoubtedly arise, such as the

52 Vincent Koan and Jinwoan Beom, "North Korea: The Last Transition Economy?" (OECD Economics Department Working Papers no. 1607, Organisation for Economic Co-operation and Development, Paris 2020), <<https://www.oecd.org/economy/north-korea-the-last-transition-economy-82dee315-en.htm>> (date accessed May 15, 2020).

53 Hyonhee Shin, "Two Koreas study possible rail link as ties get back on track," *Reuters*, November 28, 2018, <<https://www.reuters.com/article/us-southkorea-northkorea-railway/two-koreas-study-possible-rail-link-as-ties-get-back-on-track-idUSKCN1NX0SD>> (date accessed June 5, 2020).

status of United States forces in South Korea following a peace treaty or the competing narrative that both Koreas employ to lay claim as the only legitimate government on the Korean Peninsula. These questions, and others like them, are undoubtedly important but also can be better addressed through a lens that incorporates *jus post bellum*.

VI. Conclusion

Over the next approximately two years, it is very likely that there will be significant North Korea related activity. With President Moon entering the latter part of his term he will be keen on continuing his administration's engagement with North Korea. Saved from early lame duck status by his party's strong showing in South Korea's April 2020 National Assembly elections, where they secured a considerable majority, Moon may feel he has a mandate to act.⁵⁴ Additionally, there is the possibility that the United State may select a new president near the end of 2020, which could further bolster Moon's plans to engage the North.

Whatever the outcome, hopefully meaningful steps can be taken towards a better peace. For over a century, the Korean Peninsula has been under occupation or endured some state of conflict. Though both Koreas lay claim as the rightful and legal government of the Korean people, pursuing a peace treaty on their terms that considers what a future Korea will look like, allows the Korean people to express a sovereignty over their affairs that has eluded them multiple times during the 20th century. Paradoxically, the process of acknowledging and further formalizing that there are two Koreas is perhaps the first necessary step towards the long road to unification.

54 Sang-Hun Choe, "In South Korea Vote, Virus Delivers Landslide Win to Governing Party," *New York Times*, April 15, 2020, <<https://www.nytimes.com/2020/04/15/world/asia/south-korea-election.html>> (date accessed April 16, 2020).

A peace treaty is a significant step on this long journey. By using just war principles that incorporate *jus post bellum*, a better peace can be imagined and created. French theologian, François Fenelon is quoted as stating that “All wars are civil wars, because all men are brothers.” The reality of this statement is tragically applicable to Korea, and by pursuing justice after war, the frayed threads of this fraternity can be mended to construct a permanent peace regime.

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