Study Series 20-01

The Peace Agreement on the Korean Peninsula: Legal Issues and Challenges

Kyung-ok Do
Jun-hyeong Ahn

Korea Institute for National Unification

Kyung-ok Do
Research Fellow, Korea Institute for National Unification

Jun-hyeong Ahn
Professor, Korea National Defense University

Study Series 20-01

The Peace Agreement on the Korean Peninsula: Legal Issues and Challenges

Kyung-ok Do
Jun-hyeong Ahn

Korea Institute for National Unification

The Peace Agreement on the Korean Peninsula:
Legal Issues and Challenges

Printed	August 2020
Published	August 2020
Published by	Korea Institute for National Unification (KINU)
Publisher	Yu-hwan Koh, President
Editor	Yeowon Lim, External Affairs and Public Relations Team
Registration number	No.2-2361 (April 23, 1997)
Address	217 Banpo-daero(Banpo-dong), Seocho-gu, Seoul 06578, Korea
Telephone	(82-2) 2023-8208
Fax	(82-2) 2023-8298
Homepage	http://www.kinu.or.kr
Design	Designintro Co. Ltd (82-2) 2285-0789
Print	Hancompany Co. Ltd (82-2) 2269-9917
ISBN	979-11-6589-002-5 93340 : Not for sale

The Peace Agreement on the Korean Peninsula: Legal Issues and Challenges

This English translation is a summarized and edited version of the research paper "*The Peace Agreement on the Korean Peninsula: Legal Issues and Challenges*" by Kyung-ok Do and Jun-hyeong Ahn (Seoul: Korea Institute for National Unification, December 2019). The analysis, comments, and opinions contained in this paper are those of the authors and do not necessarily represent the views of the Korea Institute for National Unification.

CONTENTS

1. Introduction

A. Research Background and Objective

Article 4 Clause 60 of the Korean Armistice Agreement[1] concluded on July 27, 1953 stated that "in order to insure the peace 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 negotiation the questions of the withdrawal of all foreign forces from Korea, the peaceful settlement of the Korean question, etc." However, the follow-up political conference held at Geneva from April 26, 1954 to June 15 of the same year met with little success. Ever since, involved parties including the two Koreas have continuously discussed the issue of establishing a peace regime in the peninsula, only to be reminded of the stark disparity among their opinions. The parties especially conflicted sharply over the problem of who are the parties to the peace agreement, the withdrawal of the U.S. Armed Forces in South Korea, and the sequencing between denuclearization and the transition to a peace regime. Nonetheless, the parties have taken gradual steps overtime toward a consensus. Particularly, as a result of the Inter-Korean Summit at the Panmunjom on April 27, 2018, the Panmunjom Declaration on Peace, Prosperity and Reunification of the Korean Peninsula

1) The agreement is officially termed the "Agreement between the Commander-in-Chief, United Nations Command, on the one hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's volunteers, on the other hand, concerning a military armistice in Korea."

(hereinafter referred to as "4.27 Panmunjom Declaration") specified that "the two sides agreed to […] actively promote the holding of trilateral meetings involving the two sides and the United States, or quadrilateral meetings involving the two sides, the United States and China with a view to replacing the Armistice Agreement with a peace agreement and establishing a permanent and solid peace regime." This joint declaration holds significance as it has

resolved the long-heated controversy of whether South Korea should be a party to a peace agreement.

Conventionally, declaring the end of war and establishing a peace regime entails various problems of extensive scope. The Korean Peninsula seems to face various impediments before it can see a peace regime established, considering 1) the conceptual difficulty in prescribing the Korean War as either a war defined by international law or a civil war defined by domestic law, 2) the multi-stakeholder nature of the problem, 3) the dual characteristic of the status quo: the legal state of war but the state of peace in reality, and 4) the special relationship between the two Koreas not as separate countries but as being in the process of two entities striving for the common goal of unification. In addition, North Korea's denuclearization problem further complicates the transition to a peace regime. Hence, the problem of transitioning to a peace regime calls for multifaceted and in-depth approaches.

To secure the longevity and stability of the Korean peace regime, establishing a solid legal structure is of utmost importance. In this respect, this study will provide in-depth analysis on the potential legal issues surrounding the Korean peace regime, especially the Korean Peace Agreement that will become the legal and institutional foundation for the peace regime.

B. Underlying Premises of Discussion

First, this study is grounded on the premise that the Korean War is an ongoing event and, as a result, the Korean Peninsula is technically still at war. Opinions on the legal status of the Korean Peninsula are divided largely into two strands. Grounded on a traditional definition of armistice, the first strand asserts that the Korean Peninsula is still legally at war. Grounded on an alternative, post-World War II definition of armistice, the other strand asserts that the war in the peninsula essentially ended either by the conclusion of the Korean Armistice Agreement itself or by the lengthy duration after the conclusion of the Korean Armistice Agreement. This study follows the former logic that the peninsula is still at war and focuses on the fact that parties to the Korean War have the will to transition from an armistice regime to a peace regime, and that the rules on the military demarcation line and the demilitarized zone coded under the Korean Armistice Agreement have been fixating over time as the objective, realistic legal order of the region.[2] Furthermore, even if the state of the war could be considered to have ended, it is necessary to take into account the need for a reconciliatory process among the parties to the conflict since peace certainly has not consolidated in the region.

Second, this study is grounded on the premise that the Korean Peninsula Peace Process will evolve over several stages and that the conclusion of a peace agreement is at the core of the entire peace process on the peninsula. Regarding this, it is worth mentioning

2) Sun Pyo Kim, "A Study on the Legal Implications of a Proclamation on Termination of War on the Korean Peninsula under Special Relations between South and North Korea," *The Korean International Law Review*, vol. 27, pp. 121-122. (in Korean)

that the legal and institutional foundations of a peace regime are not necessarily formulated only by the conclusion of peace agreement, and that precedents exist on transitioning to peace regimes without concluding peace agreements. For instance, the U.S. and China normalized their relations in 1979 by signing the Joint Statement on Establishing Diplomatic Relations, and South Korea and China transformed their relations to a peace state in 1992 via the same route. However, the special relationship between the two Koreas makes it difficult to replicate these cases. While both are recognized as legitimate, sovereign states according to international law, they do not recognize each other as legitimate states. Since establishing diplomatic relations is premised on the recognition of the other party as the state, the two Koreas are not likely to follow in the footsteps of South Korea-China and the U.S.-China in terms of the establishment of diplomatic relations as long as they want to maintain the special relationship even after transitioning to a peace regime. Some have suggested revising and supplementing the Korean Armistice Agreement as a way to transition to a peace regime, but revising the Korean Armistice Agreement requires a legal act, which is not realistically a simple and viable option. Others have suggested revising the Inter-Korean Basic Agreement,[3] but this is also limited in that it reduces the issue of transitioning to a peace regime into a problem solely between South and North Korea. Overall, it cannot be denied that the circumstances surrounding the Korean Peninsula leave the conclusion of peace agreement as the most efficient and viable option.

3) Formally called the "Agreement on Reconciliation, Nonaggression, and Exchanges and Cooperation between the South and the North."

2. Formats for Concluding the Korean Peace Agreement

A. The End-of-War Declaration as a Preceding Step toward a Peace Agreement

The termination of war can be achieved through various means. Although concluding a peace agreement is considered the most traditional and ideal to put an end to a war, but it is not the only available means. Other means include armistices, implied mutual consents, unilateral declarations, *debellatio* and the cessation of hostile acts or normal termination of military operation.[4] In this light, cases that can be considered as "declaring the end of war" are the following.[5] First, provisions on war termination conventionally included in a peace agreement can be viewed as end-of-war declarations. Second, warring parties officially terminating the war in the form of joint declarations can also be viewed as an end-of-war declaration. Third, an apparent winner of a war declaring the end of war against the defeated can be viewed as an end-of-war declaration. Fourth, warring parties politically declaring the end of war domestically and internationally can be viewed as an end-of-war declaration. To recapitulate, an end-of-war declaration is a comprehensive term connoting all acts of declaring the end of war, and it can be categorized as either a legal or political declaration depending on whether there exists the legal effect. The former type includes the ending of a war through a peace agreement, a joint declaration by warring parties upon the official termination of the

4) Since peace agreements entail both a negative aspect (the termination of war) and a positive aspect (normalization of relations), they are not completely equivalent to other means of war termination. In other words, problems surrounding the conclusion of peace agreements can still remain important despite a termination of war.

5) Kyung-ok Do, "A Two-phased Approach of the End-of-War Declaration and Peace Agreement." *Unification Policy Studies,* vol. 29, no. 1, pp. 31-34. (in Korean)

war, and unilateral declarations by the winner of the war.

The format of related parties on matters of the Korean Peninsula consider is a political declaration of the end of the Korean War. Though a politically grounded end-of-war declaration is not a necessary condition for the process of establishing a peace regime, it is not that such a declaration is forbidden. However, the end-of-war declaration initiative for the Korean Peninsula exhibits a few special aspects. First, it sets out to separate 'the end-of-war declaration' as a distinct political statement amidst the expectation of the subsequent conclusion of peace agreement as stipulated in the 4.27 Panmunjum Declaration. Second, there may be a considerable time gap between the end-of-war declaration and the peace agreement if denuclearization and peace regime issues proceed in an interlocked manner. *The National Security Strategy of the Moon Jae-in Administration*, published in December 2018, states that "Declaration of the end of war will be pursued following North Korea's initial denuclearization measures and concluding of the peace agreement will proceed once the denuclearization issue is fully resolved."[6)]

The peculiarity of the two-step design of the end-of-the war declaration and a peace agreement ought to be understood on the grounds of the peninsula's special contexts. Normally, peace agreements are concluded in a relatively short period after the conclusion of the armistice agreement. The Korean case for transitioning to a peace regime is distinct compared to any other peace regime transition cases in that the armistice status on the peninsula has prolonged for over 60 years unlike usually

6) Office of National Security, *Moon Jae-in Government's National Security Strategy* (Seoul: Office of National Security, December 2018), p. 40. (in Korean)

short-lived armistice status. In addition, the case has been further complicated by the denuclearization issue. Planning the end-of-war declaration in the Korean Peninsula has come out of the realistic consideration for the need to take a step-by-step approach when it comes to the establishing of the peace regime; the two deeply distrusting parties need to proactively build trust first and, in the meantime, denuclearization requires various procedures in the process. In other words, the end-of-the war declaration in the Korean Peninsula is meaningful not as a step in a conventional peace process but as a step in the so-called "process for denuclearization and peace on the Korean Peninsula."

However, North Korea has objected to linking the end-of-war declaration with the issue of denuclearization. North Korea has been taking an active, positive position on the end-of-war declaration since the 4.27 Panmunjum Declaration. For instance, North Korea's Foreign Ministry Spokesperson made a remark on July 7, 2018 stating that adopting the end-of-war declaration would be "the first step to easing tensions on the Korean Peninsula and for establishing a concrete peace and security regime, as well as a prerequisite for fostering trust between the U.S. and North Korea, and it would also be the historical task of ending the war conditions of the Korean Peninsula that have been around for 70 years." Also, in August 2018, it emphasized the need for an end-of-war declaration through the Rodong Sinmun on various occasions. However, on October 2, 2018, North Korea declared through the Korean Central News Agency that "end-of-war declaration is not some gift to be exchanged," implying that it will not cling to the end-of-war declaration and that the end-of-war declaration cannot be a quid pro quo in exchange for

denuclearization. In this manner, North Korea, at least in face value, emphasizes the end-of-war declaration as a pathway to the peace regime while declining to link the declaration with denuclearization. Realistically, however, the end-of war declaration of political nature does not seem likely to happen when it is in disjunction with the denuclearization process. In this sense, South Korea should comprehensively weigh the costs and benefits of the declaration, gauging to what extent it will be useful in precedently building trust and inducing denuclearization and whether there will be potential worsening of domestic dissention in the form of South-South conflict.

B. Parties to the Peace Agreement and Its Formats

4.27 Panmunjum Declaration states that "the two sides agreed to declare the end of war […] and actively promote the holding of trilateral meetings involving the two sides and the U.S., or quadrilateral meetings involving the two sides, the U.S. and China," suggesting a framework for a multilateral negotiation on establishing a peace regime in the Korean Peninsula. Thereafter, leaders of both South and North Korea mentioned that a peace regime should be formulated through multilateral negotiations. In this sense, there is a consensus on the idea that states related to the Korean War or the Korean Armistice Agreement are the participants in the peace regime discussion, and that the two Koreas and the U.S. are included in that equation.

To discuss the scope of who will be participants in the multilateral talk beyond those three parties, one must first consider the party issue regarding the Korean Armistice Agreement. Until

now, diverging views existed on who the parties are on the Korean Armistice Agreement. Some views only include the U.S. and North Korea; some include South Korea, the 16 participant countries of the Korean War, North Korea, and China; some include the UN, North Korea, and China; some include South Korea, the UN, North Korea, and China as parties. By definition, the *parties* to a treaty are the agents of international law bound by the treaty while the *signatories* of a treaty are the representatives who sign the treaty on behalf of the parties. Therefore, the concept of a party and a signatory should be distinguished. The Supreme Commander of the Korean People's Army and Chinese People's Volunteer Army Commander were signatories representing North Korea and China, respectively, so not much controversy remains in the idea that North Korea and China are the parties to the Korean Armistice Agreement. Main controversy is with how to view the signature of the United Nations Command (UNC) commander in chief. The UNC commander in chief Mark Wayne Clark, who commanded the South Korean army and the troops from the 16 participating countries, negotiated and signed the agreement on their behalf. Hence, it seems reasonable to concur with the majority view in the international legal studies community in South Korea that the parties to the Korean Armistice Agreement include South Korea, the 16 participating countries, North Korea, and China. This view is also supported by the fact that South Korea, the 15 war participating countries (excluding South Africa), North Korea, China, and, though less directly involved, Soviet Union (a total of 19 countries) have all participated in the 1954 Geneva Political Conference.

The Korean Armistice Agreement states in Article 62 that "the

Articles and Paragraphs of this Armistice Agreement shall remain in effect until expressly superseded either by mutually acceptable amendments and additions or by provision in an appropriate agreement for a peaceful settlement at a political level between both sides." According to this statement, the Korean Armistice Agreement can be replaced with a peace agreement through the mutual agreements of the involved parties – South Korea, the 16 participating countries, North Korea, and China. However, from the current standpoint, the fact that the 16 participating countries have established diplomatic relations with China and that 14 of them (excluding the U.S. and France) have established diplomatic relations with North Korea should be taken into account. Establishing diplomatic relations is tantamount to legally establishing a peacetime relationship between the agreeing parties; replacing the Armistice Agreement with a peace agreement holds no real meaning for parties under normalized relationships. This suggests that the relevance to the Armistice Agreement in setting the scope of participation in a multilateral peace agreement to replace the Agreement has a relatively limited meaning in a case like an armistice regime on the Korean Peninsula that has prolonged with a multi-party involvement.

In the end, the issue of the peace regime cannot be discussed only from the perspective of the relevance to the Armistice Agreement. Instead, the issue of the peace regime is largely determined by other complicating factors. Until now, discussions on the involved parties of the peace regime included intent of the involved parties, adhering to the principal of resolving the Korean Peninsular issues between direct parties with limited outside intervention, feasibility of the peace regime, securing the force of

guaranteeing the peace, the possibility of intervention when peace is disrupted, and inducing effective international cooperation. Taking all these factors into account, a four-party discussion by South and North Korea, the U.S., and China seems the most adequate. However, a four-party discussion does not necessarily mean that the four parties become the parties to the peace agreement; "party" here means "direct first party." Out of many options on how to conclude the peace agreement, below will mainly explicate two methods on concluding the peace agreement: 1) the two Koreas concluding the peace agreement with the U.S. and China supporting and guaranteeing the agreement and 2) the four parties concluding the agreement as an equal party.

The first option of so-called "2+2"—the two Koreas concluding a peace agreement with the U.S. and China supporting and guaranteeing the agreement—can be further classified into two different ways of supporting and guaranteeing the agreement. First, the two Koreas can conclude the agreement and the U.S. and China can sign it, creating a single document. Second, the two Koreas can conclude the agreement and the U.S. and China can adopt a separate declaration or protocol to support and guarantee the peace agreement, producing two documents in total. The second method may cause controversy by leaving the role of the U.S.-China and meaning of their signature vague. More specifically, problems may arise regarding whether the U.S. and China are first parties or third parties, whether they hold any rights and obligations under the Korean Peace Agreement, whether the two Koreas hold any rights and obligations not only toward each other but also the U.S. and China, whether the U.S. and China can take an action against breaches of the peace agreement done by either

South or North Korea, and what kind of reactive measures ought to be taken in such circumstances. In other peace agreements, a certain government or international organization signed a peace agreement as a mere signatory, or signed it as a witness, guarantor, observer, and moral guarantor. However, what remains vague is the legal meaning of such signature, and the definition of and the distinctions between the different roles (witness, guarantor, observer, or moral guarantor, etc.). Even scholars diverge in opinion on these issues.

Meanwhile, the second option of four-party (South, North Korea, the U.S., and China) concluding a peace agreement as an equal party could relatively strongly bind the U.S. and China into the agreement and clarifies the rights and obligations they hold as parties for peace on the Korean Peninsula. In this sense, the four-party option seems to be more adequate. Some worry that the four-party option might institutionalize the internationalization of the Korean Peninsula problem. Their concern is that there might be excessive intervention in peace on the Korean Peninsula by powerful countries and that it entails the danger of being under too much foreign influence regarding the issue of unification.[7] However, whether viewing the inclusion of the U.S. and China that were direct participants of the Korean War and the parties to the Korean Armistice Agreement as "foreign intervention" is questionable since the objective of the conclusion of peace agreement is the termination of war and the normalization of relations. Also, considering that unification is essentially a separate issue that needs

7) Sungho Jae, *Seeking Peace on the Korean Peninsula: Focusing on the Normative Approach* (Seoul: Jipyung Publication, 2000), p. 311. (in Korean); Myunglim Park, "Peacebuilding on the Korean Peninsula through the North-South Korea Peace Agreement," *Democratic Legal Studies*, vol. 25 (2004), p. 286. (in Korean)

to be dealt with between the two Koreas, concluding the peace agreement among the four parties would not necessarily work negatively against the unification issue. In fact, including unification issues in the four-party peace agreement will provide a firm ground for receiving support and guarantee from the U.S. and China on the unification issue. However, it should be considered that certain provisions of the peace agreement may not be appropriate under the four-party structure given the bilateral nature of certain pledges if the four parties were to conclude the peace agreement as equal parties.

3. The Conclusion of Korean Peace Agreement and the South-North Korea in Special Relations

A. Legal Nature of the Peace Agreement

Domestically, concluding a Korean Peace Agreement raises legal issues because the current South Korean legal system functions under a dualized structure between a treaty under the Constitution and the South-North Korean agreements under the Development of Inter-Korean Relations Act. According to Article 4 of Development of Inter-Korean Relations Act, South-North Korean agreements are defined as "all agreements concluded in the form of documents between the two Koreas." Also, Article 23 paragraph (1) states that "South-North Korean agreements shall be only applicable to inter-Korean relations." The South Korean National Assembly has discussed this provision and concluded that the South-North Korean agreements are essentially bilateral treaty in nature. In this sense, South-North Korean agreements under the Development of Inter-Korean Relations Act should only include agreements concluded strictly between the two parties. Hence, under the current legal system, concluding the four-party peace agreement with equal standings for all (South, North Korea, the U.S., and China) leaves South Korea with no other option but to recognize the peace agreement as the treaty under the Constitution. This would mean constitutionally recognizing North Korea's status as a legitimate party of the treaty under the Constitution.

Treaties today do not necessarily have to be concluded between countries. In the same token, the special relationship between South and North Korea did not have to be inevitably connected to the issues of treaty regarding the South-North Korean agreements.[8)]

8) Jong In Bae, *The Constitution of the Republic of Korea and the Conclusion of Treaty* (Seoul: Samwoo Publishing co., 2009), pp. 238-239. (in Korean)

In other words, recognizing North Korea's status as a party to treaty under the Constitution does not trigger any changes in the special relationship between South and North Korea. However, the dualized structure between a treaty under the Constitution and the South-North Korean agreements under the Development of Inter-Korean Relations Act came about out of the concerns that concluding a treaty with North Korea might be construed as indirectly or implicitly recognizing the statehood of North Korea. If South Korea were to conclude the four-party peace agreement and thus recognize North Korea's status as a legitimate party of a treaty under the Constitution, it would need to fundamentally review maintaining the dualized structure itself.

Even if North Korea's status can be recognized as a party to a treaty under the Constitution, concerns may still linger in that if that treaty is a 'peace agreement,' it could generate the effect of recognizing the other party as a state given the fundamental nature of the peace agreement. This worry will be dealt with in the next section.

B. Recognition of State

As stated above, since states do not have monopoly in concluding treaties, doing so would not directly translate into implicit recognition of state. For instance, in 1920, prisoner exchange treaties were concluded between the United Kingdom and the Soviet Union and between France and the Soviet Union. However, both United Kingdom and France only recognized Soviet Union as a state years later. Israel and the neighboring Arab states also concluded numerous armistice agreements, but many Arab

states have not recognized Israel as a state. Still, treaties specifically intended to govern a bilateral relationship comprehensively for an indefinite period of time can only be devised between states and have been considered as implying that concluding such a treaty means recognizing the other party as a state. Treaties of Friendship, Commerce and Navigation or Treaties on Basic Relations are exemplary of such treaties.[9] Treaties of Friendship, Commerce and Navigation establishes the rights and obligations on commerce and navigation between states of friendly relations, regulating the entrance, residence, business of citizens and the exchanges of consul representatives. Treaties on Basic Relations establish basic political and diplomatic relations between states. In addition, some argue that concluding peace agreements is an implicit act of the recognition of state.[10] Such an argument can be interpreted as viewing the conclusion of a peace agreement as the conclusion of a treaty that comprehensively governs relations for an extended period between parties since a peace agreement not only terminates a war but also marks the beginning of the establishment or recovery of friendly relations between parties.

However, peace agreement cases of the past do not typically exhibit a standardized format. In other words, peace agreements take various forms depending on the environment and circumstances under which the agreement was concluded. In this sense, concluding a peace agreement itself does not necessarily lead to the recognition of state; the more appropriate view would be that it may or may not be considered to be the implicit recognition of

9) Robert Jennings and Arthur Watts, eds., *Oppenheim's International Law, vol.* I (London: Longman, 1992), p. 174.

10) Yoram Dinstein, *War, Aggression and Self-Defense*, 6th ed. (Cambridge: Cambridge University Press, 2017), p. 38.

state depending on the environments and circumstances under which the agreement was concluded. The Korean Peace Agreement exhibits a peculiarity in that the two divided states are included as parties to the peace agreement. Hence, the format and content of the Korean Peace Agreement are bound to exhibit a peculiarity due to the special premise – a divided state. In the divided Korean Peninsula, the conclusion of a peace agreement comprehensive enough to imply a mutually implicit recognition of state is highly unlikely. Still, if the parties wish to clarify their stances on this issue upon the conclusion of the agreement, they can specify in the agreement that the conclusion of the Korean Peace Agreement does not lead to the recognition of state or they can devise a separate declaration clarifying this.

Some argue that both South-North Korea and North Korea-the U.S. should recognize each other as states in the process of concluding the peace agreement and transitioning into a peace regime.[11] Such an argument is based on the idea that recognition of state will guarantee the opponent entity's effective execution of international responsibilities. In fact, these arguments refer to existing cases where clauses on recognition of state were included in the peace agreements for this specific reason. Recognition of a state is a political and policy decision, so parties to the peace agreement can do so upon its conclusion if desired. However, the "ability to recognize as state" and the "necessity to recognize as state" are two completely different things. Parties to treaty, regardless of them being states or other international entities, generally have

11) Bumchul Shin, "Post Cold War State Practice regarding the Peace Agreement and Its Implication for the Korean Peace Agreement," *Seoul International Law Academy*, vol. 14, no. 2 (2007), p. 218. (in Korean)

the responsibility to faithfully execute the treaty. Hence, the logic that recognition of state is a must to guarantee the effective execution of the treaty is weak. Also, recognition of state clauses included in existing peace agreements should be seen as agreements among the involved parties grounded upon political and policy judgments. North Korea and the U.S. can consider recognizing each other as states in the process of concluding the peace agreement, but doing so should be approached much more carefully given the special circumstances of the two Koreas. After all, reciprocally recognizing each other as states may legally consolidate the divided status.[12)]

C. Revising and Abolishing Legislations that Define the Other Party as Enemy

As divided states striving for unification, the two Koreas can maintain their special relationship even after concluding a peace agreement. However, the two Koreas both maintain that either one of them is the sole legitimate government in the peninsula. Based on such hostile relations, establishing a peace regime begs the question of how they would redefine the existing hostility under a peace regime.

First, the two Koreas have codified their hostilities through constitutions or extra-constitutional norms.[13)] Therefore, they face

12) In-gyun Na, "Changes in North Korea Policy and North Korea's Legal Status," *The Korean Journal of Unification Affairs*, vol. 16 (2000), p. 31. (in Korean)

13) Article 3 of the Constitution of the Republic of Korea stipulates that "the territory of the Republic of Korea shall consist of the Korean Peninsula and its adjacent islands." It indicates that North Korea is regarded as the territory of the Republic of Korea. Also, the preamble of the Charter of the Workers' Party

the problem of whether it is possible to conclude the peace agreement against the backdrop of the hostile codes. Of course, it would be most desirable for both parties, in the discussion of peace agreement, to review this issue and take reciprocal measures in a way that could eradicate the hostility. Realistically, however, revising the Constitution or extra-constitutional norms is difficult for both Koreas. Hence, this section focuses on legal problems that may arise when a peace agreement is concluded under the existing constitutional and extra-constitutional norms. In the case of North Korea, the status of treaties in the domestic legal system is uncertain, and the existence of norm control on treaties also remain unclear.[14] In the case of South Korea, norm control on treaties exist in the form of Adjudication on Constitutionality of Law, to which binds treaties as potential subjects. Hence, under the South Korean legal system, the constitutionality of the Korean Peace Agreement warrants an important debate.

Specifically, the South Korean Constitution Article 6 paragraph (1) states that "treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea." The South Korean Constitutional Court takes the stance that "the domestic laws of the Republic of Korea" do not include the Constitution. The scholarly community also generally agrees to the Constitutional Court's interpretation. That a treaty is a

---

of Korea states that "the pressing objective of the Workers' Party of Korea is to build a strong and prosperous socialist nation in northern half of the peninsula, and achieve the tasks of national liberation and a democratic revolution on a nationwide scale."

14) Chan Kyu Kim and Kyu Chang Lee, *North Korean International Law Studies* (Paju: Korean Studies Information, 2009), pp. 93~98. (in Korean)

substandard norm under the Constitution means that the Korean Peace Agreement should not contradict the South Korean Constitution. From the perspective of the territorial clause in the Constitution, the North Korean government is nothing more than an anti-state group or illegal group; concluding a peace agreement with North Korea can possibly be unconstitutional in this sense. Nevertheless, North Korea enjoys a dualistic status in the South Korean legal system ever since the South Korean Constitution newly created the "peaceful unification" clause. Maintaining the special relationship between the two Koreas after concluding the peace agreement still seems possible under the current Constitution through a harmonic interpretation Article 3 (territory) and Article 4 (peaceful unification). Still, in order to eliminate any unnecessary controversies, the two parties should clearly state that establishing a peace regime through a peace agreement is not an end goal, but a means to achieve unification.

Meanwhile, in accordance with the South Korean Constitution, or the Worker's Party Charter that the "only legitimate government in the Peninsula," special relations grounded on 'hostile relations' are also reflected in the legislations of the two countries. In both legal systems, treaties exist as substandards to the Constitution or the Charter, so the Korean Peace Agreement would not affect the Constitution or the Charter. However, at the legislative level, the Korean Peace Agreement and existing legislations can be in conflict. Assuming that the conflict exists between the Korean Peace Agreement and existing legislations both in South and North Korea, two paths can be taken. First is to preferentially apply either the peace agreement or domestic legislations.[15] Second is to

15) The Constitutional Court, the Supreme Court, and the government of the

preemptively revise existing laws to conform to the contents of the peace agreement. Peace agreements, which are strongly political in nature, are difficult to proceed with the first path because the formats and contents between the peace agreement and general legislation differ significantly. Also, the latter path is preferred over the former, since it would be contradictory to leave intact rules that do not fit the post-agreement circumstances even after the conclusion of peace agreement puts an official end to the war.

On a separate note, related parties may be asked to revise or abolish legislations in the process of implementing the peace agreement. In case that the peace agreement orders the parties to revise or abolish legislations hostile to other parties, the parties are bound to take adequate legislative measures to implement the agreement. The proposed drafts of the Korean Peace Agreement thus far include clauses on revising and abolishing domestic legislations. The details do vary; some use the terms "revise or abolish" while others use "put efforts into revising or abolishing." To what extent the Agreement is going to bind parties into revising and abolishing domestic legislations should be dealt with through the consensus among the involved parties.

Republic of Korea regard that contentious conflicts between treaties and laws should be resolved by the general principles of legal interpretation, such as the principle of special law priority and the principle of priority of new law (*lex posterior derogat legi priori*).

4. The United Nations Command (UNC)

With the joint statements coming out of the inter-Korean summit on April 27, 2018 at the Panmunjum and then the First North Korea-Unites States summit on June 12, 2018 in Singapore, attention is now on whether to maintain or dissolve the UNC as part of the end-of-war declaration or the conclusion of peace agreement. If the peace agreement is concluded, should the UNC be dissolved? Some hold the view that, if the peace agreement replaces the Korean Armistice Agreement, the UNC automatically dissolves.[16] They argue that replacing the Korean Armistice Agreement with a peace agreement entails the idea that "the armed attack … in the area [in the Korean territory]" have been terminated and "international peace and security" restored, as stated in the UN Security Council (UNSC) Resolution.[17] Hence, the UN's mandate will be considered complete, and the Command will have no justification for remaining in Korea. However, even if the conclusion of peace agreement can be a justification for dissolving the Command or revising its roles, it is unlikely to directly bring about the legal dissolution of the Command. Considering that the Command was created under a UNSC Resolution, a more rational expectation would be for the UN to establish extra procedures. Academics also generally hold the view that the peace agreement does not automatically dissolve the Command. Then, the issue of maintaining the UNC is more of a 'political' issue that requires careful strategic considerations of domestic and international political circumstances of South Korea and the U.S. rather than a 'legal' issue. Therefore, the next section

16) Myung-ki Kim, *The Conclusion of Korean Peace Treaty: Turning the Armistice into a Peace Treaty*, p. 133. (in Korean)

17) UN Doc. S/RES/83 (1950); UN Doc.S/RES/84 (1950).

examines the legal controversies and problems that may arise in the cases of either maintaining or dissolving the Command after concluding the peace agreement.

A. Legal Issues on Maintaining the UNC after the Conclusion of Peace Agreement

1) Wartime Operational Control (OPCON) Possession

The "Guiding Principles Following the Transition of Wartime Operational Control," agreed upon at the 50th Republic of Korea–US SCM, stated that the UNC will be maintained and supported even after the transition of the OPCON. This triggered concerns over the post-transition authority of the UNC. The controversy is grounded on the assumption that the ROK-US Combined Forces Command (ROK-US CFC) will be dissolved. Though OPCON was transferred from the UN Forces Commander to the Commander of the ROK-US CFC in 1978, there was little controversy for the authority of four-star general Commander of the CFC as he also held the position of the UN Forces Commander. However, once the ROK-US CFC dissolves, the OPCON that was originally given to the UN Forces Commander still remains valid, leading to the concern that the UN Forces Commander will maintain and exercise OPCON on the South Korean military.

Some hold that, since the transition of OPCON to the UN Forces Commander stated in the Agreed Minutes of the ROK-U.S. of 1954[18] is still valid, the OPCON that temporarily transitioned

18) The full title is "Agreed Minutes and Amendment Thereto between the Government of the Republic of Korea and the Government of the United

to the Commander of the ROK-US CFC by the 1978 Exchange of Notes for the Establishment of the ROK/U.S. Combined Forces Command would return to the UN Forces Commander with the dissolution of the CFC.[19] However, because the 1954 Agreed Minutes and 1978 Exchange of Notes have both been concluded with the U.S., the agreement to transition the OPCON to the ROK military should hold priority under the principle of *lex posterior derogat legi priori* when it comes to the ultimate possession of OPCON. Also, according to the Conditions-based Operational Control Transition Plan (COTP) agreed upon in 2017, the ROK-US CFC is not dissolving and is maintaining the structure altogether. As long as the structure of the Command stays intact, discussions on the transition of OPCON under the assumption that the CFC will dissolve hold no practical value.

Others argue that the UNC can continue to exercise OPCON despite the COTP with the U.S. if South Korea does not agree on a separate agreement with the UN. They point out that the Exchange of Public Letters Concerning Transfer of Operation Command in 1950, which provides legal justification for the transition of OPCON, was concluded with the UN while the 1954 Agreed Minutes and 1978 Exchange of Notes were separate agreements with the U.S.[20] However, the word 'operational command' stated

---

States of America relating to Continued Cooperation in Economic and Military Matters and Amendment to the Agreed Minute of November 17, 1954."

19) Kwang-chan Ahn, "Constitutional Study on Military System-Focusing on the Korean Military's Operational Powers" (Ph.D dissertation, Dongguk University, 2002), p. 122, n. 236. (in Korean)

20) Myung-ki Kim, "A Study on the Legal Issues Raised by the Return of Operational Power to the Armed Forces under International Law," *Indian Law Journal*, No. 34 (2014), p. 29. (in Korean)

in the 1950 Letter has been replaced as 'operation control' in accordance to the Agreed Minutes. Also, the legal foundation for the UN Forces Commander's authority over OPCON also lies in the combination of the Letter and the Agreed Minutes. Hence, the controversy over the UNC maintaining OPCON over the South Korean Army even after the agreement between South Korea and the U.S. over transition of OPCON does not hold validity.

2) Setting Command Relations between the UN Forces Command and the Future Alliance Command

Once the South Korean Army retrieves OPCON, the UNC cannot exercise OPCON over the South Korean Army in cases of emergency. However, the possibility of the UNC combining the sending states and performing as an independent command post cannot be ruled out. On this matter, the South Korean Ministry of National Defense claims that the role of the UNC will be limited to integrating the sending states and supporting the Future Alliance Command. Also, the Ministry is seeking to establish with the UNC a unitary command system under the Future Alliance Command. When the UN Forces Commander Robert Abrams said recently that, "in the case of an emergency, the UNC's role is to be a coordination center for the sending states," he seemed to have taken into account the worsening South Korean public opinion on the UNC becoming a command post. However, when the 50th Republic of Korea–US SCM was concluded to sit a South Korean general as the commander of the CFC, the two countries did not clarify whether the UNC will be limited to acting as a support command, leaving a bone of contention. Considering that the

Guiding Principles only state that the two countries' ministries of defense "continue to maintain and support the United Nations Command […] and develop the mutual relationships among the ROK Joint Chiefs of Staff, the post-OPCON transition Combined Forces Command, USFK, and the United Nations Command," the U.S. still has numerous options when it comes to the scope of alternative role of UNC after the OPCON transition.

Currently, the biggest concern is with setting the command relationship between the UNC and the Future Alliance Command. Especially, concerns remain with the U.S. being able to control the Future Alliance Command through the UNC based on the Korean Armistice Agreement. As the negotiation on the Terms of Reference and the Strategic Directive No.3 (TOR/SD #3)—both on the command relationship between the UNC and the ROK-US CFC—is going on, the relationship between the two entities should leave no room for interpretative and applicative divergences between South Korea and the U.S.

B. Legal Issues on Dissolving the UNC after the Conclusion of Peace Agreement

1) Specific Methods and Procedures for Dissolving the UNC

a. Assuming the UNC as the UN Security Council's subsidiary organ

Those who understand the UNC as a subsidiary organ of the UN Security Council argue that the dissolution requires the Security Council's resolution and, based on such understanding, argue that the U.S.'s decision alone cannot dissolve the UNC.

Dissolving a 'subsidiary' organ created by a 'principal' organ of the UN (i.e. Security Council) requires following the rules stated in the UN Charter. However, the Charter does not include a specific rule on dissolving subsidiary organs. Still, subsidiary organs are subordinated under principal organs, so a subsidiary organ can be dissolved through adequate measures decided by the principal organ if the Charter does not contain any related rules. The UN Peacekeeping Forces is a representative subsidiary organ established through Article 29 of the Charter. For instance, the United Nations Mission in the Central African Republic and Chad (MINURCAT) was established under the Security Council Resolution No. 1778 and terminated through Resolution No. 1923.[21] Then, considering the UNC as a subsidiary organ of the Security Council, dissolving it through a Security Council Resolution seems to be the likely procedure.

However, one should be aware that establishing or dissolving a subsidiary organ of the Security Council does not always require a Resolution. Aside from Resolutions, the Security Council can also use various means such as notes or letters by the Security Council President, presidential statements or unrecorded consensus from the Security Council members. When dissolving a subsidiary organ, the method used to establish the organ is often used to dissolve it. For instance, an Ad Hoc Committee on Mandate Review was established through a letter from the Security Council President to the UN Secretary General on May 2006 and dissolved on December 2007 by the same means.[22]

Can a subsidiary organ be dissolved through a different means

21) UN Doc. S/RES/1778 (2007); UN Doc. S/RES/1923 (2010).
22) UN Doc. S/2006/354 (2006); UN Doc. S/2007/770 (2007).

from that used to establish it? On this issue, the Security Council discussion on the process of dissolving subsidiary organs in 1947 provides important insights. At the time, the Security Council discussed what would happen to the Subsidiary Group of the UN Commission for the Investigation of Greek Frontier Incidents if the latter were to dissolve.[23] At the 188th meeting of the Security Council on August 19, 1947, the representatives of the United Kingdom and the U.S. argued that dissolving the two organs requires the Security Council's explicit decision. However, at the 202nd meeting held on September 15 of the same year, they simply removed the Greek incident from the list of matters discussed in the Security Council, deeming the mandates of those two organizations terminated.[24] This implies that the effective dissolution of a subsidiary organ lies not in the "form" of the dissolution but on whether the principal organ clearly expressed the "intention" to dissolve it. Then, even if the UNC was established by a Security Council Resolution, its dissolution does not necessarily require a Resolution. The Commission of Inquiry on the origin, background and financing of the mercenary aggression of 1981 in the Republic of Seychelles was also a subsidiary organ established by a Security Council Resolution on December 15, 1981,[25] but it was dissolved through a note by the Security Council President affirming the completion of the mandate.[26]

Although replacing the Armistice Agreement with a peace

23) UN Doc. S/RES/15 (1946); UN Doc. S/RES/23 (1947).

24) Repertoire of the Practice of the Security Council: Supplement 1946-1951 (United Nations, 1954), pp. 207-208.

25) UN Doc. S/RES/496 (1981).

26) UN Doc. S/15860 (1983).

agreement does not automatically dissolve the UNC legally, some argue that a peace agreement ends the UN Forces' Resolution-based mandate and, therefore, should dissolve the UNC as it loses its rationale. Then, can an implicit dissolution of a subsidiary organ of the Security Council be allowed on the basis of the organ having completed its mandate? On this issue, the question of whether the "UN Council for Namibia" was automatically dissolved or not provides useful insight. It was a UN Assembly subsidiary organ that could be seen as having completed its mandate with the independence of Namibia in 1990. The UN Legal Counsel confirmed that, though the independence of Namibia could be seen as having completed the mandate bestowed by the UN Security Council in 1969, the legal status of the Council for Namibia, a subsidiary organ, remains valid until the Assembly itself decides otherwise.[27] In other words, a subsidiary organ's completion of its mandate does not warrant the automatic dissolution of that organ.

To recapitulate, the dissolution of a Security Council subsidiary organ requires the explicitly expressed intention of the Security Council to dissolve its subsidiary organ. Some simply view that the dissolution of the UNC is up to the decision of the U.S. regardless of whether or not the Command is considered a subsidiary organ of the UN Security Council.[28] However, assuming that the UNC is a subsidiary organ of the Security Council, that fact that the U.S. was given the authority by the Security Council to establish the Command through the Resolution does not legally include the

27) United Nations Juridical Yearbook (1990), p. 271.

28) Kibeom Lee, "Change of the Future Role of the United Nations Command and Preparation for Korea," *Issue Brief,* The Asan Institute for Policy Studies, 2019, p. 8. (in Korean)

U.S.'s right to unilaterally dissolve the Command. In general, the Security Council delegates the authority to establish the UN Peacekeeping Forces to the Secretary General under Chapter VII of the Charter, but this delegation is not interpreted as providing the Secretary General with the authority to unilaterally dissolve the Peacekeeping Forces. In 1961, the then-Secretary General wrote in his message to the President of the Republic of Congo that the dissolution of the Peacekeeping Forces is only possible on the grounds of the Security Council itself or its explicit delegation of authority. In the same vein, the Secretary General's unitary decision to withdraw the UNEF-I (The First UN Emergency Force) from Egyptian territories is also appraised as an *ultra vires*.[29] Accordingly, assuming that the UNC is a subsidiary organ of the Security Council, it cannot be dissolved by the unitary decision of the U.S., and the principal organ must explicitly express its intention to dissolve its subsidiary organ in one form or another.

b. Assuming the UNC is not the Security Council's subsidiary organ

Assuming the UNC is not the Security Council's subsidiary organ, the Security Council's explicit expression of intention is not necessary for its dissolution. Hence, according to this assumption, the U.S., rather than the Security Council, has the final say. If the sets of Security Council Resolutions established with the outbreak of the Korean War are to be seen as simply authorizing and supporting the military activities of the allies, these Resolutions are

29) Danesh Sarooshi, "The Role of the United Nations Secretary-General in United Nations Peace-Keeping Operations," *Australian Yearbook of International Law*, vol. 20 (1999), p. 288, n. 48.

no different from the Resolutions authorizing the use of military forces by a multinational force.

The multinational force that took part in the War in Iraq officially terminated its mission through the bilateral agreement between the U.S. and Iraq that affirmed the termination of mandate and the authorization for the use of force under Chapter VII of the UN Charter.[30] Likewise, peace agreements or other agreements that affirm the termination of the sets of Resolutions established during the Korean War may be enough to dissolve the UNC.

c. Dissolution in consideration for the distinct characteristics of the UNC

Whether the UNC is a subsidiary organ of the Security Council has long been a controversy for academics. Those who view it as a subsidiary organ mostly assume that the UN Forces' use of force was enforcement actions under Chapter VII of the UN Charter as a response to the invasion of North Korea. However, to view the UN Forces' use of force as actions of individual states or establishment of a collective right of self-defense, the Resolutions established during the Korean War become mere authorization and support for the legality of military activities, leading to the logical conclusion that the UNC is not a subsidiary organ of the Security Council. Though the former view has been dominant in the past, the latter view is gaining traction with the UNC not operating under UN funds, not being categorized as a subsidiary organ in various documents, and not being under the control of the UN.

---

30) "Agreement between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Irag," Article 25, November 15, 2008.

Nonetheless, the UNC was established under special circumstances and in close connection to the Security Council. Therefore, interpreting the legal characteristic of it as something other than a subsidiary organ of the Security Council is difficult. In fact, the Security Council President claimed the establishment of a unified command under the Security Council Resolution No. 84 as an 'United Nations action.'[31] Likewise, the use of the UN flag in missions have also been grounded on such understandings.[32] Participating countries perceived themselves as providing troops to the UN. And the UN, as well as the Communist opponents, used the term "UN Forces" or "United Nations Command" on official documents.[33] Also, the UN awarded the UN Service Medals to the participants of the Korean War under the General Assembly Resolution[34] as well as concluded an agreement directly with South Korea to build the UN Memorial Cemetery in Busan.[35] Under the special circumstances of the Cold War that prohibited the Security Council's use of military enforcement actions, the UNC had to be established under the U.S.'s lead, not being able to be operated by the UN funds while allowing the use of the UN flag and directly reporting to the Security Council. Accordingly, excessively focusing on formalities and considering the UNC as a mere multinational force, and therefore distancing it from the UN, is deemed to be an inadequate interpretation that lacks consideration for the special circumstances during its establishment. Hence, the

31) UN Doc. S/PV.476 (July 7, 1950), p. 2.
32) UN Doc.S/RES/84 (1950).
33) D.W. Bowett, United Nations Forces: A Legal Study of United Nations Practice (Stevens & Sons, 1964), pp. 46-47.
34) UN Doc. A/RES/483(V) (1950).
35) UN Doc. A/RES/977(X) (1955).

special circumstances should also be taken into full account when discussing the Command's dissolution. Some suggest that, when the decision to dissolve the Command is finalized through the agreement between South Korea and the U.S., the two countries should report the decision to the participant countries and circulate the final report on the UNC as a Security Council document.[36] However, in order to emphasize the international legitimacy of the Command by improving its legality and actuality, these measures are not enough. Considering that the Command had been established under a Security Council Resolution and that securing the international legitimacy of its activities is important, it would be desirable for the UN Security Council to announce the dissolution of the Command directly, if not through a Security Council Resolution, through at least notes or letters by the Security Council President or an unrecorded consensus of the Security Council members.

2) Crisis Management in the Korean Peninsula after Dissolving the UNC

The re-participation of UN member states in case of an emergency on the Korean Peninsula and military support from the international community could be more easily induced without extra Security Council Resolutions if one was to deem the following Resolutions still valid by applying an active interpretation: 1) the array of Resolutions after the outbreak of the Korean War advising

36) Sungho Jae, "Peace Treaty on Korean Peninsula: Ways to Conclusion and Legal Issues," Shim Ji-Yeon and Kim Il-Young (Edition), *50 Years of the ROK-U.S. Alliance: Legal Issues and Future Prospects* (Baeksan Seodang, 2004), p. 264. (in Korean)

to provide any necessary support for repelling armed attacks and restoring international peace and security in the Korean Peninsul a[37] and 2) the UN General Assembly Resolution No. 376(V) providing the legal foundation for advancing to the north of the 38th Parallel.[38]

Nevertheless, criticisms on using these Resolutions as legal basis for military support exist as some view that these Resolutions have become invalid after the Korean War. However, the U.S. 'reused' existing Resolutions to justify its use of force during the War in Iraq in 2003 after failing to secure additional UNSC Resolutions for the War. The U.S., along with the United Kingdom, justified the use of force by cohesively interpreting existing Resolutions (No. 678, 687, 1441) when they found it difficult to secure additional UNSC Resolution. Supporters of the U.S.'s interpretation argue that the Security Council Resolution No. 687 can be interpreted as holding the traits of an armistice agreement and that, when associated with the Article 40 of the 1907 Hague Regulations respecting the Laws and Customs of War on Land, Iraq can be seen as having violated the UNSC Resolution, which can be viewed as a violation of an armistice agreement, providing the U.S. with the right to immediately recommence hostilities.[39] Understandably, such a view has received an ample amount of criticisms. Critiques argue that the objective behind the initial authorization over the use of force through the Security Council Resolution No. 678 has been fulfilled at the end of the Gulf War, and that therefore, any extra use of armed forces requires a new Security Council

37) UN Doc. S/RES/83 (1950); UN Doc. S/RES/84 (1950).

38) UN Doc. A/RES/376(V) (1950).

39) John Yoo, "International Law and the War in Iraq," *American Journal of International Law*, vol. 97, no. 3 (2003), p. 569.

Resolution to justify the additional use of force under international law.[40] Unlike such a controversy over the War in Iraq, however, the 1953 Armistice Agreement has been officially concluded in the Korean Peninsula, allowing immediate resumption of hostilities in cases of emergency. Also, the objectives behind the General Assembly Resolution No. 376(V), which provided justifications for advancing to the north, have not been fulfilled as the establishment of a unified, independent and democratic government in Korea still remains a task. Hence, unlike in the case of the 2003 War in Iraq, the U.S. will easily reuse the Resolutions from the Korean War to justify its use of armed forces in case of emergency on the Korean Peninsula. This also means that, if the institution of UNC dissolves, inducing the re-participation of UNC member states and forming a multinational force becomes more difficult.

In addition, if the UNC dissolves, the UNC-Rear, which provides a strategic advantage by allowing immediate intervention without the UNSC Resolution through large-scale troops on the Korean Peninsula in cases of emergency, is also bound to dissolve. Japan's agreement to provide facilities and labor services to the UN Forces in accordance with the Acheson-Yoshida note of 1951 was officially applied to the 1954 Status of Forces Agreement that was signed on February 19, 1954. Accordingly, the seven UNC-Rear bases support the UNC in Japan in cases of emergency in the Korean Peninsula and support member states on using the bases and deploying troops to the Korean Peninsula. However, Article 24 of the 1954 Status of Forces Agreement states that the UN Forces in Japan must withdraw within 90 days of the withdrawal of the

40) Thomas M. Franck, "What Happens Now? The United Nations after Iraq," *American Journal of International Law*, vol. 97, no. 3 (2003), pp. 611-612.

UN Forces from the Korean Peninsula. Hence, in case the UNC dissolves, the right of use for the UNC-Rear also terminates.

More recently, the Guidelines for U.S.-Japan Defense Cooperation has been revised to provide legal basis for the U.S. to use Japanese logistics bases, leading some to argue that the dissolution of the UNC will not hinder the use of Japanese logistics bases.[41] However, whereas the Status of Forces Agreement allows the use of the UNC-Rear bases without any Japanese authorization, the Guidelines for U.S.-Japan Defense Cooperation limits strategic military actions in that it requires "prior consultation" with the Japanese government before using the logistics bases.[42] If the Japanese anti-war sentiments proliferate, deployment of supporting forces, including strategic assets mounted with nuclear weapons, will likely become impossible.

41) Sung-ryul Cho, "Adjusting the Status of U.S. Forces Korea after the Peace System on the Korean Peninsula," Il-young Kim and Sung-ryul Cho, *U.S. Forces Korea: History, Issues, Prospects* (Hanul, 2003), p. 254. (in Korean)

42) As the exchange notes regarding Article 6 of the U.S.-Japan Security Treaty was revised on January 19, 1960, the so-called "prior consultation" system was introduced. According to this, "Major changes in the deployment into Japan of United States armed forces, major changes in their equipment, and the use of facilities and areas in Japan as bases for military combat operations to be undertaken from Japan" are subjects of prior consultation with the Government of Japan.

5. The Presence of the US Forces Korea (USFK) and Revising and Abolishing the Mutual Assistance Treaty

A. The Presence of the USFK

Regardless of the presence of the UNC, does the conclusion of the peace agreement legally bound the USFK to withdraw? The withdrawal of foreign forces following the conclusion of a peace agreement can be decided by the agreement among the warring parties, so the mere conclusion of a peace agreement does not determine whether the foreign forces should stay or not. For instance, Article 5 of the Agreement on Ending the War and Restoring Peace in Vietnam, concluded by North Vietnam, South Vietnam, and the U.S. in Paris on January 27, 1973, explicitly stated, and legally established, "a total withdrawal" of foreign forces. On the other hand, Article 1 of the Security Treaty Between Japan and the United States of America, signed on September 8, 1951, generated a complete opposite legal effect—providing justifications for the presence of American troops in Japan. More recent cases suggest that peace agreements mandate the overall withdrawal of foreign forces while at the same time stationing international forces by establishing Transitional Authority.[43)]

Meanwhile, the controversy over the presence of the UNC following the conclusion of peace agreement is also associated with the problem of withdrawing the USFK. North Korea sees the dissolution of the UNC as inseparable from the withdrawal of USFK, and it has been arguing for the withdrawal of USFK as a precondition for the conclusion of Korean Peace Agreement. However, the two entities have clearly distinct legal grounds; the UNC has been established under the Security Council Resolution

43) Prime examples are "Paris Agreement" on the political settlement of the Cambodian disputes signed by four political parties and 19 related countries on 23 October, 1991 and the "Dayton Peace Agreement" in 1995.

No. 84 passed on July 7, 1950, while the USFK has been established under the Mutual Defense Treaty Between the U.S. and the Republic of Korea that went into effect on November 18, 1954. Hence, even if the conclusion of peace agreement dissolves the UNC, the withdrawal of the USFK is a separate issue for South Korea and the U.S. to negotiate on.

B. Revising and Abolishing the Mutual Defense Treaty between the U.S. and the ROK and the Sino-North Korean Mutual Aid and Cooperation Friendship Treaty

In the process of the potential transition from the Korean Armistice Agreement to the Peace Agreement, South or North Korea's own mutual assistance treaties concluded with a third country may require revision. Article 2 of the Mutual Defense Treaty between the ROK and the U.S. of 1953 articulates "consultation and agreement" as preconditions for mutual assistance, but Article 2 of the Friendship Treaty concluded between North Korea and China of 1961 includes the so-called the "automatic intervention clause." The two are contrasted in that the former, contrary to its names, does not articulate the automatic intervention of the U.S. in cases of emergency. However, the key factor here is that, despite the two Koreas having concluded the two agreements, their allies – the U.S. and China – have the final say in providing military support.

In international law, mutual assistance treaties are statutory forms of right of collective self-defense. However, the right of collective self-defense is a right stated in Article 51 of the UN Charter, so its execution does not require the conclusion of mutual

assistance treaties as a precondition. Right of collective self-defense faces various controversies over its legal traits, warranting conditions, utility, and the distinction against intervention upon request. Especially, three issues on the warranting conditions regarding collective self-defense demands attention. First, based on Article 103 of the UN Charter, obligations based on the UN Charter precedes the obligations based on mutual assistance treaties or other agreements. This implies that a mutual assistance treaty cannot be used as means for invading other countries by violating Article 2(4) of the UN Charter's prohibition of the use of force. Second, in order to execute the right of collective self-defense, standard warranting conditions for right of individual self-defense such as necessity and proportionality must be satisfied as well. Especially, the existence of an armed attack must precede the execution of the right of self-defense. Therefore, neither China nor the U.S. can execute the right of collective self-defense regardless of the existence of a mutual assistance treaty unless there is a preceding unilateral armed attack by either South or North Korea. Finally, in order for the right of collective self-defense to be executed legitimately, the receiving country must claim that it has been attacked and that it explicitly requests assistance, along with meeting the standard warranting conditions for the right of individual self-defense. However, under the two separate treaties between South Korea and the U.S. and North Korea and China, whether the damaged country could make a request for assistance would not become a factor in the U.S. or China's decision for execution of the right of collective self-defense.

In the end, the only cases where the U.S. or China would execute the right of collective self-defense in the Korean Peninsula

would be when either one of the Koreas receives armed attacks and claims themselves the victim. In other words, the mutual assistance treaties that the two countries concluded with a third country only fulfill the requirement of whether there has been "a request by the victim state"; it does not influence another requirements. However, the automatic intervention clause in Article 2 of the Friendship Treaty should be taken with caution as it can act as a legal basis for China's military intervention in the Korean Peninsula during emergencies. This clause is in direct contrast with the Mutual Defense Treaty's provision to "take suitable measures in consultation and agreement." Though the automatic intervention clause's validity is questionable in today's settings, China, which maintains strategic ambiguity on the Sino-North Korea alliance, can use the clause as legal basis for intervening in the Korean Peninsula. Considering that a just execution of the right of collective self-defense requires a preceding armed attack, revising the Friendly Treaty may be theoretically unnecessary. However, powerful countries have left a handful of precedents on abuses of the right of collective self-defense. Hence, while leaving intact the initial treaties concluded with a third country and applying gradual, non-radical revisions, the ROK should actively make a demand that a prior consultation clause in the Friendly Treaty be adopted to limit any indiscriminate foreign intervention.

6. Conclusion

As the issue of denuclearization progresses in close proximity with the issue of the peace regime, a deadlock in one issue results in a deadlock in the other. This also implies that the resurfacing of the former can result in the resurfacing of the latter. At a time when the U.S. is maintaining its hawkish stance on easing or abolishing the sanctions against North Korea, a possibility cannot be ruled out that corresponding measures on North Korea's denuclearization might shift from economic incentives to security incentives. Hence, the issue of establishing a peace regime in the Korean Peninsula demands continuous attention and discussions. In this sense, this study introduced the Korean Peace Agreement as an alternative to the Korean Armistice Agreement and examined the surrounding legal issues, bracing for a full-blown discussions of the Korean Peace Agreement in the future.

First, Section II examined the legal issues on concluding the Korean Peace Agreement. It first examined the end-of-war declaration and the peace agreement as part of a two-step procedure. Generally, separating out an end-of-war declaration as a political statement prior to concluding a peace agreement is unconventional. However, it should be considered that such a process is connected to the special circumstances on the Korean Peninsula arousing from the six decades-old armistice regime and the denuclearization issue. Hence, whether the end-of-war declaration is necessary should be discussed in tandem with the question of how effective the declaration would be for proactive trust-building and inducing denuclearization. Second, this section examined the parties and the way in which the peace agreement is concluded. Specifically, this study focused on two ways for concluding the agreement: 1) the two Koreas concluding the peace

agreement while the U.S. and China supporting and guaranteeing the agreement and 2) the two Koreas, the U.S., and China concluding the peace agreement all as equal parties. The first option is limited by the ambiguity in the role of the U.S. and China and the meaning of their signing, leading to a conclusion that the second may be the more adequate option. However, it should be considered that certain provisions of the peace agreement may not be appropriate under the four-party structure given the bilateral nature of certain pledges if the four parties were to conclude the peace agreement as equal parties.

Section III examined the legal issues stemming from the special circumstances of the Korean Peace Agreement where the two governments of a divided nation are included as the parties to the peace agreement. The current legal system in South Korea is dualized between the treaty under the Constitution and the South-North Korean agreements under Development of Inter-Korean Relations Act. This system brings forth the problem of where the peace agreement fits under. The conclusion of a multilateral agreement such as the four-party agreement would generally be taken as a treaty under the Constitution, which means that the four-party peace agreement would recognize North Korea as a legitimate party of a treaty under the Constitution. Not all treaties are concluded by states alone, so legally recognizing North Korea's status as a legitimate party of the treaty under the Constitution would not necessarily change the special South-North relationship. However, a question remains that due to the very nature of peace agreement, the agreement might entail the effect of recognizing North Korea as a state even though North Korea's status as a party to treaty under the Constitution can be recognized. Still, under the

circumstances of the Korean Peninsula, a peace agreement comprehensive enough to reciprocally imply a recognition of state among parties is not likely to be concluded. Nevertheless, if involved parties would like to make this matter clear, they could either state in the agreement that the conclusion of agreement does not generate the effect of mutual recognition of the state, or devise a separate declaration containing such a statement. The two Koreas can still maintain their special relationship under a divided nation after the peace agreement, but they ought to reciprocally resolve the fundamentally hostile relationship by removing the hostilities engraved in each of their laws.

Section IV analyzed the issue of maintaining or dissolving the UNC in the case of the conclusion of the Korean Peace Agreement. Legally, the conclusion of the peace agreement does not automatically lead to the dissolution of the UNC. Therefore, in the case of maintaining the UNC, revitalizing and restructuring the role of the UNC, along with setting the command relations between the UNC and the Future Alliance Command, should be considered comprehensively. Oppositely, if the UNC dissolves after the peace agreement, some form of expression from the UN Security Council should explicitly state the intention to dissolve the Command with sufficient considerations for the special circumstances regarding its genesis in mind. Furthermore, preparations should take place against the backdrops of the dissolution of the UNC; it will become much more difficult to induce the re-participation of the original UNC member states and to utilize the U.S. Army Base in Japan.

Section V examined the issues that may arise from the Korean Peace Agreement regarding the presence of the US Forces Korea (USFK) and revising and abolishing the Mutual Defense Treaty and

the Friendship Treaty. The withdrawal of foreign forces even after the conclusion of the peace agreement should be negotiated separately amongst the parties, so the peace agreement does not uniformly determine the presence of foreign forces. Also, the mutual assistance treaty that South and North Korea separately concluded with a third country will highly likely require revisions in the process of transitioning from the Korean Armistice Agreement to the Korean Peace Agreement. Importantly, despite the mutual assistance treaties, the decision to provide military support is ultimately at the hands of the individual allies. Since the legality of military support is decided by the requirements on the right of collective self-defense, the Peace Agreement does not strongly demand revisions to existing mutual assistance treaties. Nonetheless, the right of collective self-defense has often been abused by powerful states as a means for intervention, so South Korea ought to request the revision of Article 2 of the Friendship Treaty (automatic intervention).

Not for sale
93340
9 791165 890025
ISBN 979-11-6589-002-5

Korea Institute for
National Unification