

## EDITORIAL COMMENT

### LEGAL ASPECTS OF THE SITUATION IN KOREA<sup>1</sup>

The legal aspects of the situation in Korea may not constitute the most important aspects of that situation, or be decisive of the action which the United States or other countries, or the United Nations, should take in that unhappy land, in their own interests or in the interests of international welfare. Nevertheless they should not be passed over in silence, as has so far been the case, or nearly so. Students of international law will insist upon some attention being given to these issues and it would obviously be well to be prepared to meet allegedly juridical criticism of United States and United Nations action in Korea, both now and later.

Korea was under Japanese sovereignty in August, 1945, prior to the surrender of Japan. At the time of her surrender on September 2, 1945, Japan renounced that sovereignty by accepting the Potsdam Declaration of July 26, 1945, in which an earlier Declaration (Cairo, December 1, 1943)<sup>2</sup> of the United States, the United Kingdom and China, was accepted by Russia and confirmed; according to these Declarations, Korea was to become a free and independent state. It is true that this surrender was intended, in the normal course of events, to be finalized in a treaty of peace between Japan and the states at war with her; but nothing was said at the time to make the Japanese surrender of sovereignty over Korea depend upon such validation and it will hardly be contended now that, even in the formal legal sense, Japan retains sovereignty over Korea.

During the months of August-September, 1945, Korea came to be occupied by Soviet Russian and United States troops north and south of the 38th parallel of north latitude, respectively, although the two occupants agreed in Moscow in December that a Korean government should eventually be set up for the whole country. Implementation of this agreement (which called for a joint commission and other steps) was, however, subsequently blocked by Soviet opposition. Up to that time, and, indeed, down to the end of 1947, there had been no establishment of a Korean state but also no legal partition of the country, in terms of territorial sovereignty.

In November of 1947 the United States sought United Nations backing for the execution of the Moscow Agreement with respect to government of Korea; that Organization voted for the establishment of a national

<sup>1</sup> Completed August 10, 1950. Most of the pertinent materials on this whole case may be found in United States Department of State, Publications No. 3305: Korea 1945 to 1948 (October, 1948), and No. 3922: United States Policy in the Korean Crisis, (July, 1950).

<sup>2</sup> This JOURNAL, Supp., Vol. 38 (1944), p. 8.

government for all Korea and created a temporary commission to assist the Koreans in the implementation of that action. The Russians denied that the United Nations had any jurisdiction over the Korean problem, which related to the war and the conclusion of peace, in view of Article 107 of the United Nations Charter.<sup>3</sup> They refused to permit the United Nations Commission to enter Northern Korea and denied the validity of any action taken in the southern part of the country. Nevertheless, elections were held there on May 10, 1948, under supervision of the Commission, and a government was established on August 15 in accordance therewith; in December the United Nations accepted the Seoul Government as valid for Southern Korea; although Russian vetoes prevented its election to membership in the Organization, it was sooner or later recognized by some forty states, including, of course, the United States, as the "Republic of Korea."

What is to be said of the Russian denial of United Nations jurisdiction over the Korean question *in toto*? This argument had been raised in 1947, in fact, when the Korean question was first placed before the United Nations. Actually Article 107 does not preclude the United Nations from acting upon a matter related to, or forming part of, the peace settlement, but simply protects any action taken in such matters by a belligerent state. In this light the United Nations could act freely in reference to Korea so long as it did not attempt to contravene any action of Soviet Russia, and, as the United Nations confined its efforts merely to encouraging implementation of something to which the Russians had agreed, and, later, to repelling the aggression of the Northern Koreans, no case has arisen under Article 107.

What is more, the Russian action of 1946-1947—obstructing reasonable settlement of the problem which had arisen between themselves and the United States and the Korean people, in accordance with their own agreement—alters the situation profoundly. The United States made a fair attempt to apply Article 107 and the Russians arbitrarily defeated that effort. Furthermore, by this time the situation had become sufficiently acute to justify thoroughly the invocation of the powers of the United Nations to deal with situations endangering good international relations and ultimately world peace; and if Article 107 would constitute an exception to that authority in normal circumstances, this could hardly be pleaded by a government which had deliberately rendered that article inoperative. By November, 1947, no valid juridical bar to United Nations intervention existed or certainly no moral bar. If anything, the experience had shown the unsoundness of the theory back of Article 107 in the first place, and the need for correcting the defective legal situation created by it.

Taking matters in their own hands in Northern Korea, the Russians en-

<sup>3</sup> Text: "Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action."

couraged the establishment of a "Democratic People's Republic of Korea," claiming jurisdiction over the entire country, on September 9, 1948. The new entity did not become a part of the Soviet Union, although a satellite thereof. The government has not, of course, been admitted to the United Nations or been recognized by any states Members thereof outside of the Soviet bloc. The Russians later announced that they had withdrawn their occupying forces in December, 1948; the United States withdrew its forces from Southern Korea in June, 1949, as was verified and reported by the United Nations Commission in July.

North Korean forces invaded Southern Korea in full strength on June 25, 1950. The United Nations at once noted this breach of the peace, called upon the North Koreans to withdraw from the Republic of Korea, and called on all Members to assist the United Nations in carrying out the resolution and to refrain from giving aid to the North Koreans. Two days later the Security Council recommended to all members to furnish aid to the Republic of Korea in repelling the attack and recovering its peace and security. On July 7 it recommended that the aid furnished by Members—the Members had responded favorably and almost unanimously to the recommendations of June 27—be placed in a unified force under United States command and authorized use of the United Nations flag in the operations.

Soviet Russia has denied again the jurisdiction of the United Nations in Korea or over the North Korean government, and has denied the validity of the resolutions of the Security Council in view of the continued presence of the Nationalist China delegate and her own non-participation in the votes. Finally she has argued that this is an ordinary civil war in Korea and that neither the United Nations nor any of its Members, notably the United States, have any right to intervene therein.

Again it appears necessary to admit that the United Nations has no jurisdiction over North Korea and that that government has no obligations under the Charter, or under any other legal instrument or principle, to refrain from aggression against the Republic of Korea. No mention was made in the Security Council resolutions of Article 2, paragraph 6, of the Charter, which purports to authorize action against non-member states,<sup>4</sup> but such mention could hardly have added any juridical basis for United Nations authority over Northern Korea. On the other hand, there is certainly no legal bar to action by the United Nations or its Member States designed to protect even a non-member state against another non-member if it seems wise and desirable to them to do so, apart from some special consideration. There is no need to cite any article of the Charter or any other document

<sup>4</sup> Text: "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."

in this connection and no purpose would be served by doing so; this is a case of simple common international law.

The denial of validity to the Security Council resolutions could be argued at great length, but prior to June 25, 1950, abstention had not been treated as a veto and we must probably for the moment be content with the finding on this point of the Members of the United Nations themselves. It will also be noted that the Security Council contented itself with recommendations and authorizations and this reduces greatly the strength of the argument that unanimity of permanent member votes was required. It is true that the resolution of June 25 employed the term "determines" (a breach of the peace) but no effort was made to follow this by any formally authoritative action.

Finally the Russian argument against intervention in civil war breaks down over the fact that the other Members of the United Nations had long been treating the Republic of Korea as an established state and had every right to do so; they could not impose this view on Soviet Russia, just as they could not elect the Republic of Korea to membership over Russian objection; but neither can Russia demand that other states accept the view that the Republic does not exist and that consequently the attack of North Korea on the south is merely a civil war. For that matter it has never really been established that outside states are barred from going to the aid of a recognized state or government confronted with civil rebellion and appealing for aid, although all students of international relations would readily agree that such action is very debatable and must be taken only where the political and ethical claims of the government appealing for aid are very sound. The result of all circumstances and considerations in this respect is certainly not clearly on the Soviet Russian side, and still less so if the actual facts of the situation are taken into account and not merely the external legal formalities, not to say fictions.

In sum, while the legal case of the United Nations and the United States against Soviet Russia in the matter of Korea is not completely clear and simple, and requires appeal not merely to formal legal instruments and to juridical principles but also to considerations of ethics and political wisdom, it is, on the whole, sound. It would be a mistake to be too formalistic and too puritanical in stating the case against Soviet or North Korean aggression; one weakens one's position by exaggerating one's claims. It would be a mistake not to recognize the defects of common international law, and especially those of the Charter, concerning the conclusion of peace, recognition, aggression, the unanimity rule, and intervention, not to go further. At times—as perhaps in war crimes trials—international welfare demands extra- or ultra-legal action. But it is always useful to face all the facts, legal as well as physical, including the need for such action in some cases.

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