

## **THE KOREAN WAR**

Nigel D. White\*

### **I. Facts and context**

Japan annexed Korea in 1910 and occupied it until the end of the Second World War, when Korea became a battleground within another global confrontation. In the Korean peninsula this involved the United States (US) and United Nations (UN) on the one hand, and the Soviet Union (USSR) and the People's Republic of China (PRC) on the other, with direct military action taking place between US and PRC troops. It remains accurate to say that 'Korea remains the only conflict since 1945 in which the armies of two great powers ... have met on the battlefield'.<sup>1</sup> At the outset of the Cold War there was a decidedly hot, brutal and long conflict in the Korean peninsula (1950-3), in which the fortunes of the two sides swung quite alarmingly until a stalemate was achieved at the 38<sup>th</sup> parallel, leaving the north a hardline Communist country and the south a Western-supported and increasingly Western-democratic country. The danger to world peace posed by the Korean War was not simply evidenced by the fact that the US, the UK, and the PRC were directly, and the USSR indirectly, involved, but by the danger of escalation. For example, in the face of a blistering Chinese offensive in the winter of 1950, US President Truman openly contemplated the use of nuclear weapons.<sup>2</sup> The Korean War ended in July 1953 but there was no permanent peace agreement. The border remains heavily militarised and one of the most dangerous in the world.

Although its legal basis is disputed, the evidence is that the Korean War helped to shape a decentralised UN collective security system,<sup>3</sup> a model in which the UN Security Council uses the rubric of 'acting under Chapter VII' to authorise willing States to tackle aggressors or other threats to the peace. This is seen as a power implied, or developed from, Article 42 of the Charter, which empowers the Council 'to take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security' and, as such, is one of the exceptions (along with the right of self-defence under Article 51) to the prohibition on the use of force under Article 2(4).<sup>4</sup> However, the decentralised model does not accord with other provisions in Chapter VII of the UN Charter that envisage greater control over armed forces by the Security Council through the Military Staff Committee and by means of special agreements with member States to make armed forces available to the UN.<sup>5</sup> Also, because of the peculiarity of the political manoeuvrings in the UN at the time, which allowed only a small window for action by the Security Council, the turmoil of Korea raised another vision of collective security in which the UN General Assembly would play a more central role (in the shape of the Uniting for Peace Resolution 1950).<sup>6</sup> The Korean conflict is often seen as the

---

\* Professor of Public International Law, University of Nottingham, UK. My thanks to Jennifer Giblin for her research assistance.

<sup>1</sup> M. Hastings, *The Korean War* (Michael Joseph 1997) xiii.

<sup>2</sup> *ibid* 214.

<sup>3</sup> N.D White and O. Ulgen, 'The Security Council and the Decentralised Military Option: Constitutionality and Function' (1997) XLIV *Netherlands International Law Review* 378, 385.

<sup>4</sup> N. Krisch, 'Article 42' in B. Simma (ed), *The Charter of the United Nations: A Commentary* (3<sup>rd</sup> edn Oxford University Press 2012) 1337.

<sup>5</sup> Articles 43-7 UN Charter 1945.

<sup>6</sup> UNGA Res 377 (V) (3 November 1950) UN Doc A/RES/377 (V).

forgotten war by historians,<sup>7</sup> being eclipsed by the later, longer and, for the duration of the Cold War at least, more disastrous Vietnam War, which started almost as soon as the Korean War ended,<sup>8</sup> and also involved a country divided by Cold War ideology.<sup>9</sup> Arguably, in the longer run, the Korean War has had a more profound impact of the development of the post-1945, legal, political and institutional order.

Korea was discussed by the US, the USSR, Nationalist China and the United Kingdom (UK) at the Cairo Conference in 1943, and by the time of the Yalta Conference in 1945, the idea of a four-power trusteeship of Korea by these four States was emerging. Events moved quickly once the US used atomic weapons against Japan on 6 and 9 August 1945. The Soviet Union entered the war against Japan on 9 August, and Japan surrendered on 14 August. Soviet troops entered northern Korea on 10 August, but it was agreed that the 38<sup>th</sup> parallel should separate the zones of occupation even though US troops did not begin arriving in the south until 8 September 1945.<sup>10</sup>

The 38<sup>th</sup> parallel provided an ‘arbitrary separation’ of the country, cutting across a number of rivers, roads and railway lines.<sup>11</sup> The Korean people themselves showed a desire to live within a unified country, although political divisions started to show with a strong communist party presence in both northern and southern zones.<sup>12</sup> A Joint Commission of representatives from the US and USSR, agreed at the Moscow Conference of December 1945, was deadlocked and so the US decided to put the matter before the UN General Assembly. The Assembly adopted a resolution on 14 November 1947,<sup>13</sup> which was strongly supportive of the achievement of Korean independence, ‘believing that the national independence of Korea should be re-established and occupying forces then withdrawn at the earliest practicable date’, the future of the country being ‘primarily a matter for the Korean people itself’. The Assembly then recommended that elections be held no later than 31 March 1948 ‘to choose representatives with whom the [Temporary] Commission [of nine States] may consult regarding the prompt attainment of the freedom and independence of the Korean people and which representatives, constituting a National Assembly, may establish a National Government of Korea’.

The division of the country into two zones of occupation prevented truly national elections, with the USSR not allowing the Commission into the northern zone. Elections were held in those parts of Korea that were accessible on 10<sup>th</sup> May 1948, and were declared to be a ‘valid expression of the free will of the electorate in those parts of Korea .... in which the inhabitants constituted approximately two-thirds of the people of all Korea’.<sup>14</sup> Although seats were reserved in the National Assembly headed by Syngman Rhee for representatives from the

---

<sup>7</sup> Hastings (n 1) xix. See further J. I. Matray, ‘Korea’s War at 60: A Survey of the Literature’ (2011) 11 *Cold War History* 99; A.R. Millett, ‘The Korean War: A 50-Year Critical Historiography’ (2001) 24 *Journal of Strategic Studies* 188; D.J. Cash, ‘“History has Begun an New Chapter”: US Political-Opinion Journals and the Outbreak of the Korean War’ (2014) 36 *The International History Review* 395.

<sup>8</sup> ‘Soon after the cease-fire in Korea, in July, 1953, Communist equipment and advisers began to flow more plentifully to Ho Chi Minh’s Viet-Minh forces fighting the French in Indochina’ – B.B. Fall, *Viet-Nam Witness 1953-66* (Praeger 1966) 69.

<sup>9</sup> Both Korea and Vietnam were the subject of the Geneva Conference of 1954 – see R.F. Randle, *Geneva 1954: The Settlement of the Indochinese War* (Princeton University Press 1969).

<sup>10</sup> A. Farrar-Hockley, *Official History: The British Part in the Korean War: Volume 1 A Distant Obligation* (HMSO 1990) 5.

<sup>11</sup> J.F. Schnabel, *The United States Army in the Korean War: The First Year from the Invasion to the Beginning of Negotiations* (Red and Black Publishers 1972) 16.

<sup>12</sup> Farrar-Hockley (n 10) 5-7.

<sup>13</sup> UNGA Res 112 (II) (14 November 1947) UN Doc A/RES/112 (II); adopted by 43 votes to with 6 abstentions.

<sup>14</sup> UN Doc A/AC/19/66/Add 3 (25 June 1948).

North, Kim Il-sung, a Korean exile who had entered Korea with Soviet forces and had become leader in the North, responded by holding elections in that zone to a supreme people's assembly.<sup>15</sup> A UN General Assembly resolution of 12 December 1948 reflected acceptance of the situation, by recognising the government of South Korea as the only government in Korea but one only having effective control over half of the country, and establishing a new Commission on Korea to lend its good offices for the unification of the country and observe the withdrawal of the occupying forces, be achieved as early as possible.<sup>16</sup> In the second half of 1949 there were a number of incidents of insurrection by communist guerrillas in the south and 'twelve clashes of note along the border between uniformed forces of north and south. The latter were deemed by the United Nations observers to be responsible for two of the twelve'.<sup>17</sup> While the South Koreans had, with US assistance, built up an army of around 100,000 by 1950, the Soviets had trained and continued to advise a better-equipped force of about 150,000 in the North.<sup>18</sup> With US and Soviet troops withdrawn leaving behind indigenous armies, and with the idea of a unified Korea still in the air, the conditions for conflict were present. Evidence suggests that Kim Il-sung had first proposed military invasion of the South to the Soviet leader Stalin early in 1949, while Korean President Syngman Rhee had made a number of threats to invade the North.<sup>19</sup>

With communist insurgents in the South being defeated, the North took direct action by attacking over the 38<sup>th</sup> parallel on the morning of 25 June 1950. That this was an unprovoked attack by the North against the South was supported by the UN Commission on Korea reporting that 'all the evidence continues to point to a calculated co-ordinated attack [by North Korea] prepared and launched by secrecy'.<sup>20</sup> Discussions had taken place in the US about this eventuality, including the proposition that the response should come from the UN and not just the US.<sup>21</sup> The dangers of a unilateral US response being seen as an 'imperialistic action',<sup>22</sup> led the United States to exploit the absence, since January 1950, of the USSR from the Security Council in protest at the continued occupation of the UN permanent seat by the Nationalist Chinese government.<sup>23</sup> Initially, the Security Council adopted Resolution 82 on 25 June 1950, the day of the invasion, 'noting with grave concern the armed attack on the Republic of Korea by forces from North Korea', determining that this action constituted a 'breach of the peace', and calling for the immediate cessation of hostilities and withdrawal of the North Korean forces to the 38<sup>th</sup> parallel. The resolution also called on Member States to 'render every assistance to the United Nations in the execution of this resolution and to refrain from giving assistance to the North Korean authorities'.<sup>24</sup> The dangers of a 'third world war' were spoken about in the

---

<sup>15</sup> Farrar-Hockley (n 10) 20.

<sup>16</sup> UNGA Res 195 (III) (12 December 1948) UN Doc A/RES/195 (III); adopted by 48 votes to 6 with 1 abstention.

<sup>17</sup> Farrar-Hockley (n 10) 29-30.

<sup>18</sup> Schnabel (n 11) 34, 38.

<sup>19</sup> Farrar-Hockley (n 10) 37-8.

<sup>20</sup> Report of UN Commission on Korea, UN Doc S/1505 (26 June 1950) [14]. But for the argument that South Korea had crossed the border first see K. Gupta, 'How Did the Korean War Begin?' (1972) *China Quarterly* 699, 704.

<sup>21</sup> Schnabel (n 11) 47.

<sup>22</sup> *ibid* 63.

<sup>23</sup> The Secretary General opened the Security Council meeting of the Security Council on 25 June 1950, and saw this as an invocation of his powers under Article 99 of the Charter 'to bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security' – T. Lie, *In the Cause of Peace* (Macmillan 1954) 328. See also T.J Hamilton, 'The U.N. and Trygve Lie' (1950-51) 29 *Foreign Affairs* 67.

<sup>24</sup> UNSC Res 82 (25 June 1950) UN Doc S/RES/82; adopted by 9 votes to 0 with 1 abstention (Yugoslavia). The USSR was absent.

UN.<sup>25</sup> Two days after Resolution 82, and in the face of continuing military incursion by North Korea, the Council, again in the absence of the Soviet Union, adopted Resolution 83 on 27 June 1950, in which the Security Council: repeated its determination that the ‘armed attack upon the Republic of Korea from North Korea’ constituted a ‘breach of the peace’; noted the appeal ‘from the Republic of Korea to the United Nations for immediate and effective steps to secure international peace and security to the area’; and recommended that ‘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 to the area’.<sup>26</sup>

With North Korean forces capturing Seoul the South Korean capital on 28 June, the defence was entirely in the hands of the South Korean forces, the US only sending a survey group on 27 June. Although the US had plans in place to take action in the event of a failure to secure a Security Council resolution, being unprepared militarily, it was not able to send troops in significant numbers until after Resolution 83 had been secured.<sup>27</sup> President Truman first authorised General MacArthur to undertake airstrikes on targets in the North and then to deploy ground troops as it became clear that the North Korean forces were pushing down the peninsula and resistance was failing. The first major engagement between US forces and North Koreans was on 5 July, with US forces overwhelmed by superior firepower and strength.<sup>28</sup>

Although the US rejected UN control over the operation it welcomed forces and other military assistance eventually from 16 other countries.<sup>29</sup> A new Security Council resolution was adopted on 7 July 1950, which welcomed the contributions made by States ‘to assist the Republic of Korea in defending itself against an armed attack and thus to restore international peace and security in the area’; it recommended that ‘all Members providing military forces and other assistance pursuant to the aforesaid Security Council resolutions make such forces and other assistance available to a unified command under the United States of America’. It requested the US to ‘designate the commander of such forces’; and authorised the ‘unified commander at its discretion to use the United Nations flag in the course of operations against North Korean forces concurrently with the flags of the various participating nations’. This delegation of authority to the US had one element of on-going UN involvement in that the resolution requested the US to provide the Security Council ‘with reports as appropriate on the course of action taken under the unified command’.<sup>30</sup> This resolution marked the end of meaningful direction of the operation by the Security Council,<sup>31</sup> with the USSR returning to the Council chamber in August 1950.

---

<sup>25</sup> For example, UNSC Verbatim Record (27 June 1950) UN Doc S/PV/474 [2] (India).

<sup>26</sup> UNSC Res 83 (27 June 1950) UN Doc S/RES/83; adopted by 7 votes to 1. India and Egypt did not participate in the voting and the USSR was absent.

<sup>27</sup> Schnabel (n 11) 68.

<sup>28</sup> *ibid* 75.

<sup>29</sup> Hastings (n 1) 411. These were Australia, Belgium, Canada, Colombia, Ethiopia, France, Greece, Luxembourg, the Netherlands, New Zealand, the Philippines, Thailand, Turkey, South Africa, UK and US. As of December 1951 the US contribution to United Nations forces was 50.32% (ground forces), 85.89% (naval forces) and 93.38% (air forces), while South Korea’s was 40.1%, 7.45% and 5.65% respectively - L.M. Goodrich, ‘Korea: Collective Measures Against Aggression’ (1953-1955) 30 *International Conciliation* 129, 145-6.

<sup>30</sup> UNSC Res 84 (7 July 1950) UN Doc S/RES/84; adopted by 7 votes to 0, with 3 abstentions (Egypt, India and Yugoslavia). The USSR was absent. The US supplied 59 reports to the Security Council over the course of the War.

<sup>31</sup> UNSC Res 85 (31 July 1950) UN Doc S/RES/85 addressed the plight of the civilian population; while UNSC Res 88 (8 November 1950) UN Doc S/RES/88 invited the representative of the PRC to be present at a Security Council meeting.

In the first report by the US to the Security Council on 25 July on the course of action taken by the Unified Command in accordance with Resolution 84, the scramble to deploy forces to meet the North Korean forces was apparent. The report stated that US and UK forces had drawn upon forces occupying Japan, which had been initially deployed to Korea ‘upon the request by the Security Council ... for assistance to defend the Republic of Korea against North Korean aggressors’.<sup>32</sup> In the second report, the US ambassador wrote about the ‘savage character of the fighting’, speaking of the ‘splendid cooperation and the perfect coordination not only within but between the defense contingents of the various nationalities that comprise the United Nations forces’. It also commented upon the ‘international character of the operations in Korea’, although the report identified the main combat forces were US and South Korean.<sup>33</sup> US-led (South Korean, US and UK) forces successfully defended a perimeter around the southern port of Pusan in August and September 1950 against successive North Korean attacks, enabling UN forces to build up sufficiently to turn the tide of the war.<sup>34</sup> On 15 September 1950, US-led forces launched a counter-attack behind North Korean lines by landing forces at Inchon on the western side of the Korean peninsula leading to the capture of Seoul, which, when combined with US-led forces breaking out of the Pusan perimeter, led to the retreat of North Korean forces from the South.<sup>35</sup>

With the USSR returning to its seat in the Council a Resolution was adopted by the General Assembly on 7 October 1950, and along with Security Council Resolution 83, provided the links between the UN collective security system and the actions of the US-led operation. The Assembly, ‘having in mind that United Nations armed forces are at present operating in Korea in accordance with the recommendations of the Security Council’ recommended that: ‘all appropriate steps be taken to ensure conditions of stability throughout Korea’; ‘all constituent acts be taken, including the holding of elections, under the auspices of the United Nations, for the establishment of a unified, independent and democratic government in the sovereign State of Korea’. and that ‘United Nations forces should not remain in any part of Korea otherwise than so far as necessary for achieving’ these objectives. The resolution established a UN Commission for the Unification and Rehabilitation of Korea (consisting of representatives from Australia, Chile, Netherlands, Pakistan, Philippines, Thailand and Turkey), to ‘represent the United Nations in bringing about the establishment of a unified, independent and democratic government of all Korea’.<sup>36</sup>

On 19 October 1950 the US-led force captured Pyongyang, the North Korean capital, and moved up to the Sino-Korean border. However, it proved premature for President Truman to claim victory in his speech to the UN General Assembly on 24 October 1950:

In uniting to crush the aggressors in Korea, these Member nations have done no more than the Charter calls for. But the important thing is that they have done it, and have done it successfully. They have given dramatic evidence that the Charter works. They have proved that the Charter is a living instrument backed by the material and moral strength of Members, large and small.<sup>37</sup>

---

<sup>32</sup> First US Report (25 July 1950) UN Doc S/1626

<sup>33</sup> Second US Report (17 August 1950) UN Doc S/1694

<sup>34</sup> Fourth US Report (18 September 1950) UN Doc S/170

<sup>35</sup> Sixth US Report (21 October 1950) UN Doc S/1860

<sup>36</sup> UNGA Res 376 (V) (7 October 1950) UN Doc A/RES/376(V); adopted by 47 votes to 5 with 7 abstentions.

<sup>37</sup> UNGA Verbatim Record (24 October 1950) UN Doc A/PV/295 [245] (US).

On 25 October 1950 the PRC intervened in the conflict, which by late November amounted to a force of 200,000 troops from the People's Liberation Army, known as the People's Volunteer Army when fighting in Korea.

A draft resolution calling on the PRC to withdraw from Korea was vetoed by the Soviet Union in the Security Council on 30 November 1950.<sup>38</sup> After this point the matter was removed from the agenda of the Security Council,<sup>39</sup> and was dealt with by the General Assembly. On 1 February 1951, the Assembly, after noting that the Security Council had failed to exercise its primary responsibility for peace and security, found that the PRC had 'engaged in aggression in Korea' by engaging directly in hostilities against UN forces, and ordered the PRC 'to cease hostilities against United Nations forces and to withdraw from Korea'. It also affirmed the 'determination of the United Nations to continue its action against Korea to meet the aggression'.<sup>40</sup> In May 1951 the Assembly recommended that 'every State' apply an arms embargo on the PRC and North Korean authorities.<sup>41</sup>

After a massive Chinese spring offensive was repulsed in 1951, the war ground into a stalemate around the 38<sup>th</sup> parallel but one that involved a number of bloody battles.<sup>42</sup> Protracted armistice negotiations actually commenced in July 1951 but were not concluded until 27 July 1953, with the repatriation of POWs to North Korea being a major stumbling block.<sup>43</sup> The Preamble to the Agreement Concerning a Military Armistice in Korea stated:

The undersigned, the Commander-in-Chief, United Nations Command, on the one hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, on the other hand, in the interest of stopping the Korean conflict, with its great toll of suffering and bloodshed on both sides, and with the objective of establishing an armistice which will insure a complete cessation of hostilities and of all acts of armed force in Korea until a final peaceful settlement is achieved, do individually, collectively, and mutually agree to accept and to be bound and governed by the conditions and terms of armistice set forth in the following Articles and Paragraphs, which said conditions and terms are intended to be purely military in character and to pertain solely to the belligerents in Korea.

The above-mentioned 'final peaceful settlement' has not been achieved leaving Korea divided, with tensions between North and South an ever-present danger to world peace.<sup>44</sup>

## **II. The positions of the main protagonists and the reactions of third States and international organizations**

---

<sup>38</sup> UNSC Verbatim Record (30 November 1950) UN Doc S/PV/530.

<sup>39</sup> UNSC Res 90 (31 January 1951) UN Doc S/RES/90; surprisingly adopted unanimously at UNSC Verbatim Record UN Doc S/PV/531 [46] (USSR). This was the first use of the 'Uniting for Peace machinery' - D.H.N. Johnson, 'The Korean Question and the United Nations' (1956) 26 *Nordisk Tidsskrift* 25, 28.

<sup>40</sup> UNGA Res 498 (V) (1 February 1951) UN Doc A/RES/498 (V); adopted by 44 to 7 with 9 abstentions.

<sup>41</sup> UNGA Res 500 (V) (18 May 1951) UN Doc A/RES/500 (V); adopted by 47 votes to 0 with 8 abstentions.

<sup>42</sup> For example, the battle of the Imjin River, April 1951; the battle of 'the Hook' (1952-3), Hastings (n 1) 250, 371-3.

<sup>43</sup> See proposals in UNGA Res 610 (VII) (3 December 1952) UN Doc A/RES/610 (VII).

<sup>44</sup> See E.Y.J. Lee, 'Can the SC Resolution 2270 Stop North Korea's Nuclear Dilemma? From the Geneva Agreed Framework to the Washington Communique' (2016) 9 *Journal of East Asia and International Law* 262.

## 1. The initial conflict

The collective position of the UN on the Korean War, albeit one arrived at by majorities in its main political organs with the USSR and its allies consistently in the minority, is found in key resolutions described above. The Security Council adopted Resolution 82 on the day of the outbreak of hostilities, in which it noted the ‘armed attack’ on the Republic of Korea by forces from North Korea, and determined that this constituted a ‘breach of the peace’.<sup>45</sup> In Resolution 83 on 27 June 1950 the Security Council repeated these determinations and recommended that assistance be provided to the Republic of Korea ‘as may be necessary to repel the armed attack and to restore international peace and security to the area’.<sup>46</sup> In Resolution 84 of 7 July 1950, the Security Council welcomed the contributions made by States ‘to assist the Republic of Korea in defending itself against an armed attack and thus to restore international peace and security in the area’, recommending that they be placed under US command and authorising the use of the UN flag.<sup>47</sup>

Initially, therefore, it seemed that the Security Council’s position was that the movement of significant numbers of North Korean troops over the 38<sup>th</sup> parallel was an ‘armed attack’ by the North against the South, thereby equating this to an attack by one country against another in violation of Article 2(4) of the UN Charter and therefore triggering the right of individual and collective self-defence under Article 51. However, the legal analysis in section III below shows that this is qualified by the determination that there was a ‘breach of the peace’, rather than an ‘act of aggression’. Nonetheless, the rhetoric of some of the Members of the Council is suggestive that they saw this as an aggression by one State against another, especially those States supporting the resolutions. On 25 June 1950, the US stated that ‘this wholly illegal and unprovoked attack by North Korean forces ... constitutes a breach of the peace and act of aggression’, but also ‘this is clearly a threat to international peace and security’; and later ‘it is an invasion upon a State which the United Nations itself ... has brought into being’.<sup>48</sup> The invited South Korean representative declared that ‘this unprovoked armed attack by the forces of North Korea is a crime against humanity ... the invasion of my country is an act of aggression and a threat to international peace and security’.<sup>49</sup> Nationalist China spoke of ‘aggression’, Cuba ‘armed attack’, and Ecuador ‘aggression’.<sup>50</sup> In the Security Council, on 27 June 1950, the US spoke about an ‘armed attack’, ‘breach of the peace’, and an ‘attack on the United Nations itself’; France used the term ‘attack’; UK ‘aggression’; China ‘attack’ and ‘aggression’; Norway ‘attack’.<sup>51</sup> By determining the attack to be a breach of the peace in its resolutions rather than a threat to the peace the Security Council appeared to have viewed this as an issue of inter-state peace, rather than intra-state peace, in which the term ‘threat to the peace’ would have been more appropriate. However, the analysis in Part III below suggests that the term breach was understood in a different way in 1950, and that the situation was one of an internationalised civil conflict rather than an inter-state one.

Given this finding, it would be feasible to view the US-led operation as an action undertaken at the invitation of the only recognised government in Korea, a view reinforced by the fact that

---

<sup>45</sup> UNSC Res 82 (25 June 1950) UN Doc S/RES/82.

<sup>46</sup> UNSC Res 83 (27 June 1950) UN Doc S/RES/83.

<sup>47</sup> UNSC Res 84 (7 July 1950) UN Doc S/RES/84.

<sup>48</sup> UNSC Verbatim Record (25 June 1950) UN Doc S/PV/473 [4] (US).

<sup>49</sup> *ibid* 8.

<sup>50</sup> *ibid* 9-11.

<sup>51</sup> UNSC Verbatim Record (27 June 1950) UN Doc S/PV/474.

Korea was not a member of the United Nations at the time.<sup>52</sup> However, those States contributing to the military operation to repel the armed attack and to restore peace saw themselves as fighting on behalf of the United Nations to enforce international peace and security, not simply acting on behalf of South Korea to secure its territorial integrity. 'There is ample evidence that the Security Council and the General Assembly, the United States and other contributing States, and even the People's Republic of China were all of the view that this was a United Nations action and that the forces involved were United Nations forces' and, despite the fact that it was dominated by the US, the 'character of the Force as a matter of law' was unaffected.<sup>53</sup> Examples of leading contributors having this belief can be found in statement by Australia that the 'Australian Government regards all the Korean operations as having been conducted under the Security Council and in pursuance of the United Nations Charter';<sup>54</sup> and by the US that this was the 'first and only genuine, powerful, collective security enforcement Army established under the aegis of the United Nations Security Council'.<sup>55</sup> In the case of the UK, it was the case that at the outset of the operation Prime Minister Attlee was of the opinion that the initial US assistance to South Korea had been justifiable action in collective self-defence under Article 51 of the UN Charter but, 'after the passing of the resolution of the 27<sup>th</sup> justification for the continued action of America and the United Kingdom and other members is to be found in this resolution'.<sup>56</sup> In his speech, opening Parliament in October 1950, King George VI spoke of UK forces playing a part in a 'historic action ... giving proof of the ability of the United Nations to meet a threat to world peace'.<sup>57</sup>

The UN Secretary-General, Tryvge Lie, also saw the war in terms of a UN collective security action: 'The aggression in Korea might ... have doomed the United Nations; but here in continental Asia the United Nations passed the test and set a first precedent for armed international police action in the field'.<sup>58</sup> The Secretary-General noted that the US had committed troops before the Security Council, in Resolution 83 on 27 June 1950, had recommended that Member States furnish assistance to South Korea. However, he did not attribute this to the US acting in collective self-defence of South Korea but acting 'within the spirit' of the Security Council Resolution 82 of 25 June that called for a cessation of hostilities and a withdrawal of North Korean forces to the 38<sup>th</sup> parallel.<sup>59</sup> The Secretary-General also strove to try and make the military action more of a UN action and less of a US one, though the dominance by the US could only be curbed a little. Although the US wanted to avoid unilateral action and had secured Resolution 83, it rejected Lie's proposal for a Committee on Coordination of Assistance for Korea, not wanting any level of control placed between the US government and field commander.<sup>60</sup> This Committee would have coordinated assistance, kept the UN 'in the picture' and promoted 'continuing United Nations participation in and supervision of the military security action in Korea'.<sup>61</sup> Tryvge Lie viewed the US rejection of

---

<sup>52</sup> See O. Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart 2010) 331.

<sup>53</sup> D.W. Bowett, *United Nations Forces* (Stevens 1964) 45.

<sup>54</sup> Minister's response in L.C. Green, 'The Nature of the "War" in Korea' (1951) 4 *International Law Quarterly* 462, 465.

<sup>55</sup> S. Pollack, Special Assistant, OSJA, Eighth US Army/Korea, 'The Korean Armistice: Collective Security in Suspense' (1984) *Army Law* 43.

<sup>56</sup> HC Deb 5 July 1950, vol 477, col 485.

<sup>57</sup> HC Deb 31 October 1950, vol 480, col 6.

<sup>58</sup> Lie (n 23) 323.

<sup>59</sup> *ibid* 332.

<sup>60</sup> Schnabel (n 11) 92.

<sup>61</sup> Lie (n 23) 334.



this proposal as a missed opportunity for shaping ‘the pattern of the police action’ that would have prevented dominance by one state.<sup>62</sup>

The USSR objected to Resolutions 82, 83 and 84 as justifications by the US for its ‘armed intervention in Korea’, and that they were ‘adopted illegally by the Security Council and constitute a flagrant violation of the United Nations Charter’. It elaborated by saying that ‘only three of the five permanent members of the Council, namely, the United States, the United Kingdom and France, were present at the meetings ... at which those resolutions were adopted’, meaning that ‘those resolutions were adopted at private meetings of certain members of the Security Council’ and were ‘not legally binding’. The Soviet Union stated that it was ‘absolutely clear’ that the ‘military operations in Korea are conducted not by the armed forces of the United Nations ... but by armed forces of individual States which, in contravention of the Charter, are usurping the name and flag of the United Nations’.<sup>63</sup>

The objections of the USSR to the US-led military operation were: that Security Council resolutions were not properly adopted as neither PRC nor the USSR had supported them; because the resolutions interfered in the domestic affairs of Korea; that the Secretary-General and UN Security Council should have attempted to reconcile the two sides in the conflict; and that US was the real aggressor and violator of the Charter.<sup>64</sup> The Secretary-General asked the UN Legal Department for advice, which concluded that: the occupation of the Chinese seat was a decision for the UNSC; the absence of the USSR was not a veto but the equivalent of an abstention; that the conflict was not a purely civil one but had been the subject of international and UN concern for years, and besides which the prohibition on intervention in domestic matters in Article 2(7) did not apply to enforcement action.<sup>65</sup> The Secretary-General did not agree with the Soviet argument that the internal unification of a Korea was a matter for the Koreans:

In the world today, legally bound by the new factor of the United Nations Charter, such an argument seemed to me to be transparent nonsense; for the United Nations clearly was empowered to deal with any threat to international peace, whether its origins were in an international dispute or in a civil one.<sup>66</sup>

## 2. Crossing the 38<sup>th</sup> parallel

With the Soviet Union’s return to the Council, and with North Korean forces in retreat in September 1950, the issue for US-led forces was whether to enter North Korea and unify the country. With the Security Council now deadlocked, the UK took a draft resolution to the General Assembly. The UK Foreign Secretary, Ernest Bevin, explained the purpose of the draft in the following terms:

You will see that the resolution contemplates the contingency that United Nations forces may enter North Korea but that it very carefully defines their functions there. I feel strongly that if the authority of the United Nations is to be established we cannot be content with

---

<sup>62</sup> *ibid.*

<sup>63</sup> UNGA Verbatim Record (7 October 1950) UN Doc A/PV/294 [241] (USSR); for similar views see [227] (Ukraine).

<sup>64</sup> Lie (n 23) 335.

<sup>65</sup> *ibid.*

<sup>66</sup> *ibid* 336.

restoring the *status quo*. The 38<sup>th</sup> Parallel is an imaginary line on the map which has neither political nor military significance on the ground. The General Assembly of the United Nations has already declared as its object the unification of Korea and it is highly improbable that this object can be achieved if North Korea is permitted to remain as a separate entity.<sup>67</sup>

With US General MacArthur in charge of the military campaign there is little doubt that the US-led forces would have ventured into North Korea without Resolution 376,<sup>68</sup> but it is interesting that the US supported the General Assembly's endorsement rather than rely on the wording of Resolution 83 which, like Resolution 678 (1990) adopted in response to Iraq's invasion of Kuwait, not only authorised repelling the attack but more broadly restoring 'international peace and security to the area'.<sup>69</sup> In the General Assembly, the Ukrainian SSR spoke to a defeated alternative draft resolution that would have provided 'for putting an end to foreign interference in the settlement of the internal conflict between North and South Korea', reflecting the Eastern bloc view that there was a civil war in Korea.<sup>70</sup>

Essentially a General Assembly recommendation of military enforcement action to unify Korea, Resolution 376 of 7 October 1950 was a harbinger of the Uniting for Peace Resolution (377), adopted on 3 November 1950, in which the General Assembly resolved:

that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security ...<sup>71</sup>

This can be seen as a retrospective justification of the type of power exercised by the General Assembly in its previous resolution (376) on Korea as well as embodying an alternative vision of collective security based on the will of the majority (two-thirds) of Member States. A direct product of the Korean War, the Uniting for Peace Resolution has been invoked at crucial points in the UN's history,<sup>72</sup> but it has not been utilised in its fullest sense as unlocking enforcement action outside the Security Council.

### 3. Uniting for Peace

---

<sup>67</sup> Farrar-Hockley (n 10) 210.

<sup>68</sup> Hastings (n 1) 135-8.

<sup>69</sup> At the meeting during which Resolution 83 was adopted only the invited representative of South Korea alluded to this provision in the Resolution when saying: 'It is my fervent hope that the Council will consider this appeal favourably in order to expel the invader from our territory and act directly in the establishment of international peace and security' – UN S/PV/474 meeting (27 June 1950) 8.

<sup>70</sup> UNGA Verbatim Record (7 October 1950) UN Doc A/PV/294 [227] (Ukraine).

<sup>71</sup> UNGA Res 377 (V) (3 November 1950) UN Doc A/RES/377 (V); adopted by 52 votes to 5 with 2 abstentions. Czechoslovakia, Poland, Ukrainian SSR, USSR and Byelorussian SSR voted against.

<sup>72</sup> For example, enabling the creation of the first peacekeeping force (UNEF I) by the General Assembly in the Suez Crisis 1956.

The majority of States argued that there was a legal base for Uniting for Peace, for example: the Philippines on the basis that the Security Council's responsibility was not exclusive;<sup>73</sup> Greece on the basis that it did not encroach on the Security Council's power to make legally binding decisions;<sup>74</sup> and that such transference was necessary as the Council would not have been able to act as 'swiftly and effectively' as it had done in the case of Korea if the USSR Union had been present.<sup>75</sup> The latter point reflects the majority view that Uniting for Peace was a necessary outcome of the Korean War, to enable action to be taken on the basis of a majority view in the UN. Canada stated that it was 'nonsense' to attack the Resolution on the basis that it undermined Great Power unanimity: 'what is the use of a unanimity which can be achieved only by doing nothing, which is used as a cloak for obstruction and reaction?'.<sup>76</sup>

The USSR's objection to Uniting for Peace and, therefore, to the power of enforcement passing to the General Assembly was primarily that it violated the Charter, specifically disregarding the fact that the Security Council was functioning within the meaning of Article 12 and fulfilling its responsibility in the sense of Article 24 when it did not take action as well as when it did.<sup>77</sup> In the Korean situation, the Soviet veto was cast, when it returned to the Security Council, on the basis that the conflict should be seen as a civil one, which did not require action in the form of any outside involvement.<sup>78</sup> The attempted transference to the Assembly was illegal according to the USSR because the US-led majority in the UN wanted 'to move the centre of gravity in the veto controversy to a point where you are bound by nothing save your majority, which you have under your thumb, and by using that majority to do what you want regardless of anything'.<sup>79</sup> Finally, the USSR made it clear that the General Assembly did not have the power of enforcement action which 'under the Charter, is reserved to the Security Council'.<sup>80</sup>

#### 4. Chinese intervention

When the US-led forces reached the Yalu River that marked the boundary with China, 'victory was within sight' according to the UN Secretary-General, but massive Chinese intervention on 29 November 1950 against over-extended UN forces led to the possibility of defeat for the UN.<sup>81</sup> In a Christmas broadcast, the Secretary-General stated:

The collective military defense against aggression and invasion which the United Nations undertook in Korea was the first action of its kind in history. It was not without risk ... The first victory for the United Nations' principles, the purely military one, was ... within sight until four or five weeks ago. It was then that half a million Chinese soldiers were suddenly thrown into the battle ... the danger of a new world war ... brought closer.<sup>82</sup>

---

<sup>73</sup> UNGA Verbatim Record (1 November 1950) UN Doc A/PV/299 [295] (Philippines).

<sup>74</sup> *ibid* [297] (Greece).

<sup>75</sup> *Ibid* [301] (Greece).

<sup>76</sup> UNGA Verbatim Record (3 November 1950) UN Doc A/PV/302 [243] (Canada).

<sup>77</sup> UNGA Verbatim Record (2 November 1950) UN Doc A/PV/301 [332] (USSR). For similar views see [337] (Ukrainian SSR)

<sup>78</sup> Other examples of Eastern bloc states making this argument were Czechoslovakia and Poland - J.L. Kunz, 'The Legality of the Security Council Resolution of June 25 and 27, 1950' (1951) 45 *AJIL* 137, 138.

<sup>79</sup> UNGA Verbatim Record (2 November 1950) UN Doc A/PV/301 [333] (USSR).

<sup>80</sup> *ibid* [333] (USSR).

<sup>81</sup> *ibid* [350] (UNSG).

<sup>82</sup> *ibid* [358] (UNSG).

The position of the majority of Members at the UN on Chinese intervention can be found in the draft resolution in the Security Council calling on the PRC to withdraw from Korea, which was vetoed by the USSR on 30 November 1950.<sup>83</sup> The draft would have called upon States and authorities responsible for military action ('Chinese communist military units', which were deployed against 'the forces of the United Nations') to 'refrain from assisting or encouraging the North Korean authorities' and to withdraw those units. The draft would have affirmed the 'policy of the United Nations to hold the Chinese frontier with Korea inviolate', but then would have called attention 'to the grave danger which continued intervention by Chinese forces in Korea would entail for the maintenance of such a policy'.<sup>84</sup>

After this point the matter was removed from the agenda of the Security Council,<sup>85</sup> and was dealt with by the General Assembly. The UK proposed this transfer expressing concern that otherwise 'technical doubts' may be raised about possible infringements of Article 12 of the UN Charter, which provides that while the Security Council is exercising 'the functions assigned to it under the present Charter', the Assembly shall not make any recommendations. The UK argued that a Council deadlocked by the veto was not properly functioning.<sup>86</sup> On 1 February 1951, the Assembly, after noting that the Security Council had failed to exercise its primary responsibility for peace and security, found that the government of the PRC had committed aggression in Korea by engaging directly in hostilities against United Nations forces, and ordered the PRC 'to cease hostilities against United Nations forces and to withdraw from Korea'. It also affirmed the 'determination of the United Nations to continue its action against Korea to meet the aggression'.<sup>87</sup> In May 1951, the Assembly recommended that 'every State' apply an arms embargo on the PRC and North Korean authorities.<sup>88</sup>

The lack of representation for the PRC at the UN means that it is difficult to find the official position of its government for its intervention in the Korean War in October-November 1950.<sup>89</sup> Bearing in mind that the US-led force was at the time rapidly approaching the Yalu River, which marked its frontier, and with General MacArthur dismissing any thoughts of leaving a buffer zone between Korea and China,<sup>90</sup> the evidence is that the PRC entered the war reluctantly, and there certainly was no evidence of collusion between the USSR and the PRC.<sup>91</sup> One account of China's reasons comes from General P'eng Te-huai, who led the Chinese military action in Korea, who recalled Chairman Mao Tse-tung's reasoning in the regime's Central Committee to the effect that China was coming to the aid of an ally, and that allowing the US to be on its border in force would be a constant threat to the new Communist regime in mainland China.<sup>92</sup> The intervention was forewarned by a Chinese Foreign Ministry statement on 10 October that 'the Chinese people cannot stand idly by when such a serious situation has

---

<sup>83</sup> UNSC Verbatim Record (30 November 1950) UN Doc S/PV/530.

<sup>84</sup> UNSC 'Complaint of Aggression upon the Republic of Korea' (10 November 1950) UN Doc S/1894.

<sup>85</sup> UNSC Res 90 (31 January 1951) UN Doc S/RES/90.

<sup>86</sup> UNSC Verbatim Record (31 January 1951) UN Doc S/PV/531 [8].

<sup>87</sup> UNGA Res 498 (V) (1 February 1951) UN Doc A/RES/498 (V); adopted by 44 votes to 7 with 8 abstentions.

<sup>88</sup> UNGA Res 500 (V) (18 May 1951) UN Doc A/RES/500 (V); adopted by 47 votes 0 with 8 abstentions.

<sup>89</sup> The Security Council invited a representative from the PRC to discuss Korea on 8 November 1950, UN Doc S/184 (1950). The PRC did not accept.

<sup>90</sup> Hastings (n 1) 147-9.

<sup>91</sup> *ibid* 155-6. See also H. Yufan and Z. Zhihai, 'China's Decision to Enter the Korean War: History Revisited' (1990) 121 *The China Quarterly* 94, 99. But see A. Whiting, *Chinas Crosses the Yalu: The Decision to Enter the Korean War* (Stanford University Press 1960) 2-13.

<sup>92</sup> Farrar-Hockley (n 10) 271-2.

been created by the invasion of Korea by the United States and its accomplices'.<sup>93</sup> In fact a representative of the PRC did speak before the Security Council on 30 November 1950, principally concerning the situation of Taiwan, but taking the opportunity to take the following statement on Korea (and implicitly justifying Chinese intervention):

The reason why I do not participate in the discussion of the so-called complaint of aggression against the Republic of Korea is very clear. The truth of the question of Korea is that the Government of the United States has used armed forces to intervene in the domestic affairs of Korea, and has seriously breached the security of the People's Republic of China. The usurpation of the name of the United Nations by the United States Government is entirely illegal. ...

Since the Government of the United States started its aggressive war in Korea, according to preliminary estimates, from 27 August to 25 November, the United States armed forces of aggression in Korea violated the territorial air space of my country two hundred times, and the number of airplanes thus employed total more than one thousand. These acts have damaged Chinese property and killed Chinese people. I wish to ask Mr. Austin [US representative]: Is this not aggression?<sup>94</sup>

Although there was no explicit invocation of the right of self-defence by PRC, the rhetoric comes close. According to Max Hastings, the PRC remembered that 'Korea had provided the springboard for the Japanese invasion of Manchuria only a generation before. As the Americans drove north after smashing Kim Il Sung's armies in September 1950, Peking was appalled by the imminent prospect of an American imperialist army on the Yalu'.<sup>95</sup>

## 5. Armistice

Initiatives for a cease-fire at the 38<sup>th</sup> parallel came from both sides and from the UN starting in June 1951, but were delayed according to Secretary-General Lie by, *inter alia*, 'Communist fabrications that charged the Americans in Korea with carrying on germ warfare', and protracted negotiations over PoWs.<sup>96</sup> An 'armistice' was signed on 27 July 1953. The UN Secretary-General welcomed this:

As much as any man, I have been gripped by the tragedy of the Korean War. But I am conscious of the nobility and surpassing significance of United Nations police action in Korea, in which sixteen Member nations actively have taken part. It has been the first determined stand against international lawlessness and aggression which peace-loving nations of the world have taken. It has been a successful stand. Collective security has been enforced for the first time in the whole of human history.<sup>97</sup>

The Secretary-General returns to his vision of collective police action against lawless behaviour, but it is tinged with a grim realisation that the likelihood of regular such police actions by the UN in the future was going to be very slim indeed.

---

<sup>93</sup> *ibid* 213.

<sup>94</sup> UNSC Verbatim Record (30 November 1950) UN Doc S/PV/530 [19]. For similar comments by PRC's leaders see Yufan and Zhihai (n 91) 101-106.

<sup>95</sup> Hastings (n.1) 158. Yufan and Zhihai (n 91) 106-7: 'Were Truman's promises that United Nations Forces would stop at the Yalu river and take no provocative action against China reliable? Everyone at the meeting [of the Central Committee] doubted that they were since America had already broken its previous promise – which had been solemnly conveyed through the diplomatic channels of India – not to cross the 38<sup>th</sup> parallel'.

<sup>96</sup> Lie (n 23) 365.

<sup>97</sup> *ibid* 366.

The General Assembly welcomed the armistice agreement and also supported its recommendation that a peace conference be held within 3 months of its conclusion.<sup>98</sup> In a tribute to the armed forces who fought in Korea ‘to resist aggression and uphold the cause of freedom and peace’, the General Assembly expressed satisfaction that:

The first efforts pursuant to the call of the United Nations to repel armed aggression by collective military measures have been successful, and expresses its firm conviction that this proof of the effectiveness of collective security under the United Nations Charter will contribute to the maintenance of international peace and security.<sup>99</sup>

Thus, for the majority of States in the UN General Assembly, the US-led action in Korea was a legitimate expression of collective security under the UN Charter.

### **III. Questions of legality**

Debates as to the legality of the US-led response revolve around the nature of the conflict, whether the response was a collective one by States or by the UN, the legal basis of that response (as either being the request of the recognised government, collective self-defence or collective security), and the legality or otherwise of the intervention by the PRC.

#### **1. Inter-State or civil war?**

General Assembly resolutions prior to the outbreak of the conflict were clearly premised on Korea being one country, with one recognised government, albeit one divided temporarily with the recognised government in Seoul not having control over the whole.<sup>100</sup> Furthermore, when US-led military operations were poised on the 38<sup>th</sup> parallel in 1950, the General Assembly spoke of bringing stability to the whole of Korea and of having one single democratic government, showing a clear rejection of any *de facto* or *de jure* division of the country into two States.<sup>101</sup> The fact that the Security Council spoke of the ‘armed attack’ on the South,<sup>102</sup> suggests that this was an attack by one State against another and there was certainly statements by some Member States to this effect, but the Council deliberately chose the more neutral term ‘breach of the peace’ as the trigger for enforcement action taken under Chapter VII rather than the term ‘act of aggression,’ which is closer to the concept of ‘armed attack’.

While modern understandings of the key terms in Article 39 might strongly suggest that ‘threat to the peace’ should have been used, as indicative of an internationalised civil war that threatened regional and world peace, the fact is that in 1950 such broad understandings of ‘threat to the peace’ were not fully realised.<sup>103</sup> Although the Secretary-General did use the term ‘threat’ to describe the conflict on several occasions, thereby presaging its broader use in the context of the Congo and Southern Rhodesia a decade later,<sup>104</sup> the term ‘breach of the peace’

---

<sup>98</sup> UNGA Res 711 (VII) (28 August 1953) UN Doc A/RES/711 (VII); adopted by 43 votes to 5 with 10 abstentions.

<sup>99</sup> UNGA Res 712 (VII) (28 August 1953) UN Doc A/RES/712 (VII); adopted by 53 votes to 5 with 0 abstentions.

<sup>100</sup> UNGA Res 195 (III) (12 December 1948) UN Doc A/RES/195 (III).

<sup>101</sup> UNGA Res 376 (V) (7 October 1950) UN Doc A/RES/376 (V).

<sup>102</sup> UNSC Res 82 (25 June 1950) UN Doc S/RES/82; UNSC Res 83 (27 June 1950) UN Doc S/RES/83.

<sup>103</sup> Krisch (n 4) 1279-84.

<sup>104</sup> UNSC Res 161 (21 February 1961) UN Doc S/RES/161 (Congo); UNSC Res 253 (29 May 1968) UN Doc S/RES/253 (Rhodesia).

was used as indicative that the conflict in Korea, with its potential to ignite a world war, represented a violation of a temporary division of the country and of a broader accord between the great powers at the end of World War Two.<sup>105</sup> There was limited discourse at the time of the US-led operation that could be construed as indicating an action in collective self-defence under Article 51 of the UN Charter, which is normally triggered by an armed attack on one State by another. But the weight of *opinio juris* points to the Korean War of 1950-53 not being treated as an inter-State conflict between two Korean States, but a civil war between two factions that quickly also became an inter-State war directly involving the US and other Western States on the one side and the PRC on the other. This is supported by some writers who saw the alternative argument (to UN enforcement action) not as one of collective self-defence of South Korea but as one of states coming to the aid of an established government confronted with a civil rebellion<sup>106</sup> However, the weight of evidence indicates that this was viewed as a form of UN enforcement action, aimed not at a classic aggressor in the form of a state, but at aggressive action by North Korea that constituted a breach of international peace and security. Although Simma notes that ‘a breach of the peace is typically characterized by hostilities between armed units of two States ... [it] is broad enough to reach well beyond such situations; it should be understood to include all situations in which a “threat to the peace” is no longer merely a threat but has already materialized’.<sup>107</sup> Korea should be understood in that latter sense.

## 2. Collective self-defence or collective security?

As has been stated there was limited evidence of the US-led response being framed as collective self-defence of South Korea in the *opinio juris* or legal doctrine especially at the time. The determination by the Security Council, however, was that the armed attack by North Korean forces was a ‘breach of the peace’, thereby triggering the enforcement provisions of Chapter VII through the gateway of Article 39, rather than the right of self-defence as found in Article 51.<sup>108</sup> The emphasis from those taking part was on the ‘United Nations character of the operation’,<sup>109</sup> which is further evidence of the collective security nature of the operation. The decision by the US to send forces to South Korea before the adoption of the recommendation in Resolution 83 was seen as a ‘strained interpretation’ of Resolution 82 rather than an action in collective self-defence.<sup>110</sup> Others, however, point to the action by the US of sending troops to Korea before the adoption of Resolution 83 as only being justifiable as action undertaken in collective self-defence of South Korea,<sup>111</sup> but, even if this was the case, it does not prevent the action from being a Chapter VII enforcement action once the resolution was secured. Goodrich also points to the term ‘restoration of international peace and security in the area’ in Resolution 83 as indicative that the response was more than simply repelling an armed attack.<sup>112</sup> Any uncertainty about whether North Korea and South Korea were separate States at the time of the North Korean incursion becomes irrelevant if the Security Council determines that there is a breach of the peace (‘for even a civil war, if it was one, may constitute a breach of the

---

<sup>105</sup> Goodrich (n 29) 142

<sup>106</sup> P.B. Potter, ‘Legal Aspects of the Situation in Korea’ (1950) 44 *AJIL* 709, 712, although he preferred to categorise it as UN action. See also Corten (n 52).

<sup>107</sup> Krisch (n 4) 1293.

<sup>108</sup> Kunz (n 78) 139.

<sup>109</sup> Goodrich (n 29) 133.

<sup>110</sup> *ibid* 144.

<sup>111</sup> Bowett (n 53) 33.

<sup>112</sup> Goodrich (n 29) 172.

peace'),<sup>113</sup> given that the limitation upon intervention by the United Nations in domestic matters is not applicable to action taken under Chapter VII.<sup>114</sup>

Some later comment, made in the context of the Gulf Conflict 1990-91, suggests the Korean action was one of collective self-defence and was a precedent for the Iraq campaign that was also one of collective self-defence rather than 'international enforcement action'.<sup>115</sup> According to Rostow: 'For all their symbolic panoply of the United Nations flag and other emblems, the forces that which finally prevailed in Korea were national forces carrying out a mission of collective self-defence under American direction, not a Security Council enforcement action'.<sup>116</sup> The discussion of enforcement action in Simma's commentary on the Charter sees Resolutions 83 and 84 as recommendations of actions in self-defence, primarily on the basis that they were only recommendations and not 'authorisations' of necessary measures.<sup>117</sup> However, the leading French commentary classifies Resolutions 83 and 84 as recommendations of military enforcement action under Article 39,<sup>118</sup> and other modern commentators agree, viewing Korea as a precedent for a model of decentralised military enforcement action under UN authority, albeit a model having weaknesses,<sup>119</sup> a view shared by most commentators at the time.<sup>120</sup> The prevailing view is to 'regard the Korean action as enforcement action authorised by recommendations under Article 39'. The action was 'fully consistent with the Purposes and Principles of the Charter and was authorised by Resolutions of a competent organ of the United Nations', and therefore must be presumed to be within the powers of the UN.<sup>121</sup>

Most commentators, like Goodrich, are critical of the collective security model that emerged from Korea as potentially allowing one Member to dominate with the consequence that the 'collective action risks taking on the character of a private or at least a coalition war of the traditional kind', which would be obviated by 'continuous guidance so that collective measures ... will be kept within the limits prescribed by the purposes' of the Charter and by the mandate,<sup>122</sup> a criticism echoed by other commentators.<sup>123</sup> This lack of control existed for the duration of the Korean War including the armistice negotiations. The Security Council, 'apart

---

<sup>113</sup> Kunz (n 78) 140. See Article 2(7) UN Charter 1945.

<sup>114</sup> *ibid.*

<sup>115</sup> E.V. Rostow, 'Until What? Enforcement Action or Collective Self-Defense?' (1991) 85 *AJIL* 506, 506. Schachter seems to share this view, at least in relation to the Gulf - O. Schachter, 'United Nations Law in the Gulf' (1991) 85 *AJIL* 452, 471.

<sup>116</sup> Rostow (n 115) 508.

<sup>117</sup> Krisch (n 4) 1296. See also Y. Dinstein, *War, Aggression and Self-Defence* (3<sup>rd</sup> edn, Cambridge University Press 2001) 275.

<sup>118</sup> G. Cohen-Jonathan, 'Article 39' and G. Fischer, 'Article 42' in J.P. Cot and A. Pellet (eds), *La Charte des Nations Unies* (2<sup>nd</sup> edn, Economica 1995) 662, 714-15. See further J.P. Cot, A. Pellet and M. Forteau (eds), *La Charte des Nations Unies* (3<sup>rd</sup> edn, Economica 2005).

<sup>119</sup> White and Ulgen (n 3); D. Sarooshi, *The United Nations and the Development of Collective Security* (Oxford University Press 1999) 169-74; E. de Wet, *The Chapter VII Powers of the UN Security Council* (Hart 2004) 275-7; T.M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2002) 24-5.

<sup>120</sup> Kunz (n 78) 140; Goodrich (n 36) 172, Bowett (n 53) 34; H. Kelsen, *Collective Security under International Law* (Naval War College, 1957) 142-3; Q. Wright, 'Collective Security in the Light of the Korean Experience' (1951) 45 *American Society of International Law Proceedings* 165, 180.

<sup>121</sup> Bowett (n 53) 34. For the argument that the US-led operation is best analysed as intervention at the request of the established government rather than UN enforcement action see Corten (n 52).

<sup>122</sup> *ibid.* 191.

<sup>123</sup> *ibid.* at 45; F. Seyfersted, *United Nations Forces in the Law of Peace and War* (Sijthoff 1966) 41; J.W. Houck, 'The Command and Control of United Nations Forces in the Era of "Peace Enforcement"' (1993) 4 *Duke Journal of International and Comparative Law* 1, 15.



from being technically the recipient of the reports of the United Nations Command, played no role whatever in the political direction of the armistice negotiations’, but that the General Assembly perhaps did more by suggesting terms for the cease-fire and proposals for the sensitive issue of PoWs.<sup>124</sup> Unfortunately, during the conflict, alternatives to the Military Staff Committee envisaged under Chapter VII were not explored, although the Secretary-General’s suggestion of a controlling Commission of States, appointed as a subsidiary organ of the Security Council or General Assembly, would seemed to have been an obvious answer. Wright agrees: ‘It seems likely that if the United Nations had had a more direct relationship with, and more effective control of, its commander in the field, collective security would have worked better’.<sup>125</sup>

### 3. Legality under the UN Charter

Despite its defects, the US-led response is analysed as coming within one of the exceptions to the prohibition on the use of force under Article 2(4) by being a lawful exercise of enforcement powers under Chapter VII by the Security Council, but this is not without controversy.<sup>126</sup> As regards the legality of Security Council Resolutions 82-84 doctrine is split between the majority who argue for a ‘living instrument’ interpretation of the Charter and those who see the lack of compliance with key provisions of Chapter VII such as Article 43 (troops to be supplied by special agreements) and Article 45 (control by the Military Staff Committee) as fatal to the operation’s legality. Goodrich argues that ‘a liberal interpretation of the Charter’ was ‘essential to an effective United Nations response’, permitting the adoption of recommendations by the Security Council under Article 39 of the Charter (as opposed to decisions based on Articles 42 and 43), in the absence of the USSR.<sup>127</sup> The absence of the USSR is viewed by most commentators as the equivalent of abstention given that the latter means that the Security Council had already accepted that it does not require *all* permanent Members to vote positively for a resolution to be adopted.<sup>128</sup>

Kelsen states that the Security Council had a choice under Article 39, after determining a threat to the peace, breach of the peace or act of aggression, as to whether to recommend or decide on enforcement measures of a forcible or non-forcible kind, but in the absence of the special agreements under Article 43, it could not decide to take military enforcement action under Article 42. He concludes that ‘in spite of the fact that Article 42 of the Charter could not be applied, the action in Korea was a police action of the United Nations, the execution of a military sanction within the system of collective security established by the Charter of the United Nations.’<sup>129</sup> Quigley, however, represents the view of the minority in arguing that the absence of real control over the military operation by the Security Council constitutes a violation of the Charter – a failure to comply with key provisions in the UN Charter that delineate its legal competence over military action:

Chapter VII contemplates that enforcement action will occur at the direction of the Security Council. By stating that the Council “may take such action”, Article 42

---

<sup>124</sup> Goodrich (n 29) 179-80.

<sup>125</sup> Wright (n 120) 174.

<sup>126</sup> See, for example, Corten (n 52).

<sup>127</sup> Wright (n 120) 141.

<sup>128</sup> Kunz (n 78) 142.

<sup>129</sup> Kelsen (n 120) 142-3. But see statement in H. Kelsen, *The Law of the United Nations* (Stevens, 1950) 932

requires that the Council direct the action, define military objectives, and decide when to terminate hostilities ... With Korea in 1950, the Council came closer to complying with this requirement than it did with Iraq. There it decided that the United Nations should take military action and set up a command under a U.N. flag. By delegating its command, as it did to the United States, the Council relinquished much of its control, but in Resolution 678 [on Iraq in 1990] the Council made not the slightest effort to exert any control.<sup>130</sup>

But his view remains a minority one, albeit one that does make a telling point given that the lack of control does enable powerful States to (potentially) subvert collective security.

Doubts about the legality of the General Assembly's endorsement of the crossing of the 38<sup>th</sup> parallel in October 1950, and its more general claim to be able to recommend military enforcement action, are more extensive, though mostly this is of more recent origin.<sup>131</sup> At the time there was some support for the USSR's position that *Uniting for Peace* was *ultra vires*: 'The Russians are technically quite correct when they insist that the General Assembly has no competence to deal with such matters as the use of armed force. Conditions may change but it would still come as a shock to the planners of 1945 to find the planners of 1950 discovering residual powers in the General Assembly sufficient to overcome the implications of Art. 12(1)'. Nonetheless, the same commentator then states:

Korea has quickened, perhaps even fathered, a genuine desire to make the world organization more democratic by strengthening the Assembly at the expense of the Security Council. How far this can go without an amendment to the present Charter (which would in itself present difficulties because of the language of Article 109(2)) is a question that will bear thoughtful consideration.<sup>132</sup>

Others saw the recognition of a recommendatory power in the General Assembly as a necessary development in the UN's collective security scheme and clearly justified under the general powers granted to the Assembly under Articles 10-14.<sup>133</sup> Later commentators seem to accept the legality of recommendatory enforcement action under General Assembly mandate embodied in *Uniting for Peace*,<sup>134</sup> as did the International Court of Justice in the *Expenses* case,<sup>135</sup> but the fact that it has not been fully utilised and its invocation could well be against the interests of its original sponsors, mean that at best it lies dormant.

#### 4. Intervention by the PRC

---

<sup>130</sup> J. Quigley, 'The United States and the United Nations in the Persian Gulf War: New Order or Disorder' (1992) 25 *Cornell Journal of International Law* 1, 25-6.

<sup>131</sup> D. Zaum, 'The Security Council, the General Assembly and War: The *Uniting for Peace* Resolution', in V. Lowe et al (eds), *The United Nations Security Council and War* (Oxford University Press 2008) 154, 156, 173-4; L. Sievers and S. Daws, *The Procedure of the UN Security Council* (4<sup>th</sup> ed., Oxford University Press 2014) 595. But see S.D. Bailey and S. Daws, *The Procedure of the UN Security Council* (3<sup>rd</sup> ed., Oxford University Press 1998) 296; A.J. Carswell, 'Unblocking the UN Security Council: The *Uniting for Peace* Resolution' (2013) 18 *JCSL* 453.

<sup>132</sup> D.M.M. Goldie, 'Korea and the United Nations', (1949-1952) *U.B.C. Legal Notes* 125, 133-4.

<sup>133</sup> Wright (n 120) 169.

<sup>134</sup> M. Bennari, 'Article 10' and H. Cassan 'Article 11(2)(3)' in Cot and Pellet (n 118) 261-2, 287.

<sup>135</sup> *Certain Expenses of the United Nations* (1962) ICJ Rep 151, 162-5.

There is much less discussion of the legality of this military intervention. While the PRC saw its actions as coming to the defence of an ally (North Korea),<sup>136</sup> the prevailing view was that the actions of the PRC were ones of ‘aggression’ against the US-led forces and against South Korea and, therefore, that the US-led forces were legally justified in their fight against forces of both North Korea and the PRC, not as some form of collective self-defence, but as encompassed in the UN operation originally mandated by the Security Council in Resolutions 82-4, and then supported by General Assembly Resolutions 376 and 498. The latter was probably the most important in this regard as it found aggression by the PRC and endorsed the UN and US-led army’s response to it.<sup>137</sup>

#### **IV. Conclusion: precedential value**

The key resolution on Korea (83) seemed to be used as a precedent for the UN’s response to Iraq’s invasion of Kuwait in 1990<sup>138</sup> and, more broadly the Korean operation, has helped to establish and shape a decentralised model of collective security based on coalitions of volunteer States. These coalitions operate under broad mandate from the Security Council. In 1950 this mandate took the form of a recommendation derived from Article 39 of the Charter, while in 1990 and thereafter it took the shape of an authorisation based on Article 42. The possibility of the General Assembly recommending enforcement action using its broad subsidiary powers on peace and security contained in Articles 10, 11 and 14, when the primary organ was deadlocked, was forged during the heat of the Korean War in Resolutions 376 (on Korea) and 377 (Uniting for Peace), but such a power has not been fully utilised thereafter. State-dominated coalitions acting under a Security Council Chapter VII mandate, but not under UN command and control as with UN peacekeeping operations, emerged out of the Cold War as the model of military enforcement, their legal basis being Article 42 rather than 51 of the Charter. In addition to the US-led operation against Iraq in 1991 in response to aggression, other operations were taken in response to threats to the peace (examples include: a US-led operation in Somalia in 1992,<sup>139</sup> an Italian-led operation in Albania in 1997,<sup>140</sup> an Australian-led operation in East Timor in 1999,<sup>141</sup> a US and French-led operation in Haiti in 2004,<sup>142</sup> and a NATO operation in Libya in 2011).<sup>143</sup> Such Security Council-authorized interventions in response to threats to the peace can only be derived from an exercise of power by the UN under Article 42 (Chapter VII) or, if regional organisations are involved, Article 53 (Chapter VIII).

Such a decentralised model has obvious constitutional weaknesses given that it does not fully meet the requirements of Chapter VII, which is predicated on there being much greater UN command and control. On the other hand, Article 42 does empower the Security Council to ‘take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security’, and the decentralised military option has emerged as a way of allowing this power to be exercised in a way that is acceptable to Member States.<sup>144</sup> The

---

<sup>136</sup> Yufan and Z. Zhihai (n 91).

<sup>137</sup> Wright (n 120) 170.

<sup>138</sup> UNSC Res 678 (29 November 1990) UN Doc S/RES/678.

<sup>139</sup> UNSC Res 794 (3 December 1992) UN Doc S/RES/794.

<sup>140</sup> UNSC Res 1101 (28 March 1997) UN Doc S/RES/1101.

<sup>141</sup> UNSC Res 1264 (15 September 1999) UN Doc S/RES/1264.

<sup>142</sup> UNSC Res 1529 (29 February 2004) UN Doc S/RES/1529.

<sup>143</sup> UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

<sup>144</sup> Such a development is supported to some extent by Article 48 UN Charter 1945 which provides in part that ‘action required to carry out the decisions of the Security Council for the maintenance of international peace and

constitutional weaknesses reflect wider legitimacy concerns, especially about the model's inherent inconsistency; there being no guarantee that every aggression will be met with counter-force, or that major threats to the peace (that may be caused by genocide or other inhumane and destabilising forms of violence) will be met by UN authorised force. It follows that the UN system is triggered not by the seriousness of the threat per se, but by a confluence of political, economic, humanitarian and military factors, which align sufficiently for a Security Council resolution to be secured and a coalition to be created. In Korea in 1950 there was a very brief window when such a confluence was present enabling the unlikely invocation of the UN collective security system, albeit in a denuded form.

---

security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine'.