International Legal Issues Involved with the Republic of Korea 1945—1985†

By L.C. Green* and Sang-Myon Rhee**

Introduction

Rhee: I am very pleased to have a discourse with you with respect to certain international legal issues involved with Korea. In many cases an international legal scholar may tend to justify the national interest of his or her country, even if he or she claims to be objective. In this discourse I expect that you will state your personal opinions which, I hope, would be as objective as possible. Now, I would like to give you some important legal questions that the Republic of Korea (ROK) has faced since the end of the World War II.

I. Recognition as a Lawful Government

Rhee: First of all, let me ask you some questions relating to Korea from the establishment of the Korean government after the World War II. Upon the establishment of the ROK government in 1948, she has been recognized as the sole and legitimate government in the Korean peninsula by the United States and other friendly countries. In December she was also declared a lawful government in the Korean peninsula by the U.N. Then, what are the legal effects of the recognition by the states and the dedication by the U.N.? And what was the legal status of North Korea?

Green: The first thing that one has to appreciate is that, according to accepted

† The authors acknowledge their gratitude to Tae-Hyun Choi, Chaihark Hahm and Young-Sun Song for their assistance in transcribing the tapes. The Korean translation of the discourse was published at 5 Hyundai Sanoe 26-40 (1965).
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international law, the U.N. cannot recognize anybody. Recognition, according to international law, is extended by a state to another entity. The U.N., as you know, and as the International Court of Justice pointed out in the "Bernadotte Case", (1) is not a state. It has certain functions that resemble those of a state, but there is, as yet, no such thing in international law as an acceptable view of collective recognition. It is true that during the nineteenth century, when new states like Bulgaria were established by specific treaties, (2) the parties to those treaties recognized Bulgaria because they were creating it by the treaty in question. But, for the U.N., to say that this or that entity is a state has no legal effect at all. The U.N. is, to put it almost in the language of the World Court in the Bernadotte case, a "standing diplomatic conference which reaches political decisions for political reasons." Once one accepts that, one is back in the traditional position that the ROK exists only for those countries that recognize it, it does not exist for those countries that refuse to recognize it. Similarly, the government or the state of North Korea exists for the Soviet Union and those countries which recognize it. And if they refuse to recognize the ROK, the Republic does not exist from their point of view.

There are, of course, what look like an increasing number of states in the Third World, at least, that are now recognizing both countries as being states within the sight of international law. You must appreciate that the situation in Korea is not unique. We have had a similar situation for twenty or more years with respect to China. The United States appeared not to know where China was when the rest of the world said that the state of China was governed from Beijing, while the United States and an increasingly decreasing number of states said it was governed from Taiwan. Today, there are only three or four countries, including the ROK, which say that Taiwan is the government of China, and not the government in Beijing. But as you see, this is a problem of the recognition of governments, and not of states. (3) The nearest

(2) 69 B.F.S.P. 960 (1877~78) (Eng. to 112 ibid. 226 (1919).
(3) See, e.g., Green, 'China and the United Nations,' 2 Malaya Law Journal xxi-xxix (1971);
we get to the non-recognition or recognition of the state was the situation concerns the two Germanies, which was somewhat similar to that of the two Koreas. While the Soviet Union and the Eastern Bloc recognized the German Democratic Republic, the Western Group of states recognized the Federal Republic of Germany. And then, in 1972, both agreed to recognize both Germanies when they were admitted to the United Nations.\(^{(4)}\)

Then, there was the situation with Mr. Ian Smith’s unilateral declaration of independence for Southern Rhodesia, which nobody recognized. Although Smith said there was Rhodesia, nobody else agreed.\(^{(5)}\) Then, there is the problem raised by the creation of the Transkei, Cook, Venda and Bophuthatswana in South Africa, where the Republic of South Africa says that these Black entities constitute independent states and the rest of the world tends to say, “Don’t make us laugh!” So that it is all very much a question of political decision made by existing states as to what they will recognize and what they will not recognize. All that one can say is, at the present moment, for some countries there is a state governed by the government of the Republic of Korea, while for other countries there is a state governed by the administration of Kim Il-sung. To some countries, there are even two states. And, if, as in the case of Germany, both are admitted to the U.N., we would be faced with the situation where, since under Article 4 of the Charter of the United Nations only a state can be a member, automatically all the members of the U.N., including those that might have voted against admission, would be stopped from denying the existence of both states, at least in so far as U.N. matters are concerned. And since the U.N. has competence on virtually every field of international life, and any decision of the General Assembly might ultimately depends on the vote of one or other of the two Koreas, it would be different for any member


of the U.N. to deny that each of the two Koreas had become a state.

II. Korean Armed Conflict

Rhee: Only after 5 years of the independence, the ROK was unfortunately invaded by North Korea on June 25, 1950. It was during this armed conflict that the ROK, as well as North Korea, acquired plenty of experience relating to the law of war or armed conflict. You are “the expert” on the law of war, who have written many articles on the law of war, including some articles relating to the Korean Conflict. What were the unique or peculiar attitudes of the ROK and North Korea in their respective practices during the Korean Conflict?

Green: Well, the difficulty of saying what was the attitude of the North or of the South is compounded by the attitude of the rest of the world. This was one of those early instances where we were faced as lawyers with the question “Was there a war?” And it contributed greatly to the current trend when we no longer talk about war but about armed conflict. This is because war is a technical term of legal art, and because neither side, according to some, constituted a state. Moreover, even the countries that came to the assistance of the ROK under the banner of the U.N. refused to introduce their trading with the enemy legislation, and refused to introduce their treason legislation. Thus, they rapidly got into the situation where it was possible to ask: “Was there a war anyway?” I think the important thing from the point of view of that conflict and the general development of international law is that it created a situation in which whether there was a war in the legal sense or not, the law of war, which is not quite the same thing, applied in what can only be described as clearly a ‘de facto’ armed conflict.

From the point of view of the two groups involved, by and large, perhaps unlike the Vietnamese situation, there was more respect for the operation of the law of war during the Korean conflict than there was in the Vietnamese

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conflict. Maybe that was partly because of the entry of the U.N. or—perhaps more realistically—forces commanded by General McArthur and President Truman in the name of the U.N. This raised complications. The dismissal of McArthur by Truman without consulting the U.N. justifies one in questioning whether he was a U.N. Commander or merely an American General. But the fact that the U.N. did provide a banner for a number of countries to move in, and the fact that China, through the medium of so-called volunteers, became involved may well have meant a greater respect for the law of armed conflict than one has in the very bitter situation that always arises in an internecine struggle. You see, in the case of Vietnam, you did not have the same type of internationalization that you had in Korea. So, despite the bitterness of the North against the South with the increasing ideological attitude of the U.S. and the U.N. forces towards the Northern troops, and despite the condemnation of communism that you get from the U.S. towards North Koreans, the Korean conflict was not quite so ideologically bitter as it was in the case of Vietnam.

The Korean experience probably gave a great impetus to the movement in the International Committee of the Red Cross for recognition of all major armed conflicts as international conflicts requiring legal regulation. Even though some people occasionally say that the Korean War was in the nature of a civil war, I don’t think that this can hold any reality in international law—perhaps even less than it can in the case of the Vietnamese situation. What we had here was a conflict between the two entities which were recognized by some states as states, or at least as groups having international status, and which were being supported by allies or defenders, which were undoubtedly states in the fullest sense of the word. What we had, therefore, was a normal war that was not called a war. And I think that is the real issue. What we have seen since is that the history of the Red Cross shows that the two governments, the two governing authorities—if you wish to avoid the word ‘government’—seem to have accepted that there was a war situation between them with the legal
consequences of a war situation, for although the Geneva Convention on Prisoners of War (1949) did not apply de jure, “both the U.N. Command and the North Koreans declared that they intended to apply the Convention de facto in their treatment of prisoners”. Again a very important problem was the one of the repatriation of the prisoners. According to the Geneva Convention, merely immediately active hostilities cease, the prisoners are not merely to be released, they are to be returned. Since repatriation is a ‘right’ under the Convention, prisoners cannot ask to stay with the captor and not be repatriated. What happened after the armistice between the North and the U.N.? We had the beginnings of some measures of humanitarian interests in saying that the personal desires of the prisoners should be taken into consideration although that is in direct conflict with the written law. In fact, the treaty rule has been reconfirmed in the 1977 Protocol.

III. Divided Families in the Divided Country

Rhee: As a result of this three year armed conflict in Korea, as many as ten million Koreans lost a member or members of their families. In 1984 the family reunification campaign was conducted by the KBS, which was one of the major top news items of the world. A few days ago, there was a North-South Red Cross Conference held in Seoul. In view of the principles of humanitarian law and international practices, how would you comment on this event, and how would you advise both sides to overcome the constraining factors?

Green: Well, one of the most important consideration, here, is the difference between what one would call the ‘customary’ law of armed conflict and the

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(8) 75 U.N.T.S. 135.
(10) Art. 118.
(11) Art. 7.
'treaty' law of armed conflict. Under customary law, there is no recognition of a legal obligation or a legal right of reunification. There is no recognition, despite Sarah Wambaugh's great book\(^{(14)}\), of any legal right to a plebiscite. If you are caught on the wrong side of the peace line, that is where you stay unless the government of that side is prepared to let you go.\(^{(15)}\) This may lead to political complications between the two sides, but there are no legal consequences. Since the Protocol of 1977—neither the ROK nor the "Democratic People's Republic of Korea" is a party to the 1977 Protocol—for the first time, there is a clear obligation imposed by international law in an international conflict for the reunification of families with the International Committee of the Red Cross playing a major role in trying to organize and promote reunification.\(^{(16)}\) However, countries which are not parties to that Protocol would be fully entitled to say that they are unaffected because this is not law in so far as they are concerned. What we do see, however, is that despite the political differences between the governments of the North and the South, there is still what you might almost call a traditional familial relationships, and a recognition by both sides that the problem of divided families is a very real one. And, of course, under the impact of the Helsinki Agreement,\(^{(17)}\) in Europe there is great pressure that international states—I am avoiding the word 'law' intentionally—should push for reunification of divided families. What we are seeing in Korea is apparently a willingness on both sides to promote this humanitarian effort. The discussions that took place a few days ago—which are supposed to continue in the next three or four weeks, if carried out in good faith—should contribute to this. As you know, there is a presumption in international law that when governments negotiate, they do so in good faith.\(^{(18)}\) So, on the

\(^{(14)}\) Wambaugh, *Plebiscites since the World War* (1933).

\(^{(15)}\) See, e.g., P.C.I.J. advisory opinion on *Greco-Bulgarian Communities* (1930) Ser. B, No. 17, 2 *World Court Reports* 640.

\(^{(16)}\) Pr. I, Art. 74.


basis of that presumption, one can assume that there is an intention on both sides that everything possible should be done towards family reunification. As regards the mechanism, perhaps one might have reservations. I am not convinced that the promotion of the exchange of folklore has anything whatsoever to do with the reunification of families. I can see serious disadvantages in saying that reunification will depend on the place where you were when the division took place, rather than the place where the divided families may happen to be at the present. The machinery needs a great deal of careful planning. But it does look, from the way in which last week’s meeting took place, that there is definite determination to make it work.

If the North and South Red Cross Associations are determined and listen to the International Committee of the Red Cross, rather than to the propaganda that both sides may wish to indulge in—for there is the real danger that the issue may get buried in a sea of propaganda and vituperation—then it may well be that out of these talks, perhaps not next month, perhaps not in the next three months, but perhaps in the next series or second series, we may begin to see reunification taking place. But what do we mean by reunification? Do we mean that those in the North who want to move south will be allowed to, and those in the South who want to move north will be allowed to, or does it merely mean there will be a right of visitation? These are problems of the mechanics rather than of the law with regard to reunification.

IV. Korean Minority in Japan

Rhee: During the 35 years of Japanese occupation many Koreans moved to Manchuria, the Japanese islands, and Sakhalin. These days, we have only a limited amount of news about the Korean minority in Manchuria. It has been reported that the Korean minority of one million in Japan is suffering from mistreatment, despite the rapprochement between the ROK and Japan in 1966. How can the ROK government urge Japan to comply with the principles of international law, and how can the Korean government urge the Japanese
government to treat Korean minority on the basis of equality with the Japanese, and how can we urge them to follow international standards?

Green: The problem of the treatment of the minorities is perhaps one of the most complex in international law. Nobody was interested in any minority other than perhaps a religious minority until the latter part of the nineteenth century, when provisions were placed in various treaties for the special treatment of this or that minority in this or that country. Sometimes it was a linguistic minority, sometimes a racial minority, sometimes a religious minority and sometimes, of course, all three coincided. Under the League of Nations, even with the establishment of a Permanent Minorities Commission, very little had changed. The power of the Permanent Minorities Commission only related to those minorities that were affected by the Peace Treaties of 1919–1923. There was no general recognition of minority rights. It was only when a country like Albania became a member of the League—without a minorities treaty, but with an undertaking that it would treat its Greek minority in accordance with the League minorities régime—that you got any extension of minority protection to a minority group not actually protected by treaty. After the World War II, with the exception of the situation between India and Pakistan, Austria and Yugoslavia, and Italy and Yugoslavia, there is no specific protection of minorities as such. If one looks at the various human rights agreements—and here you come up immediately—to which agreements are the ROK and Japan parties, because for those who are not parties to such agreements, their provisions have no relevance whatsoever; though Japan is a party to the International Covenant on Civil and Political Rights (1966), the ROK is not. But even there, all we have is a general provision that there shall be no discri-

(19) See, e.g., Macartney, National States and National Minorities (1933); Azcurra, League of Nations and National Minorities (1945).

(20) See Robinson, Were the Minorities Treaties a Failure? (1943).

(21) See P.C.I.J. advisory opinion on Minority Schools in Albania (1935), Ser. A/B. No. 64. 3 World Court Reports 485.


(23) 999 U.N.T.S. 171.
mination on account of such things as race, language, ethnic background, or religion, with little recognition of a right for minorities or groups to exercise their cultural and religious rights individually or by way of group activities. So, we do not have any clear recognition of minority rights under general international law at the present moment.

Insofar as the Koreans in Sakhalin or Japan are concerned, it must be remembered that, whether the ROK likes it or not, for the period of the Japanese occupation of Korea, the world recognized Japan as the sovereign of Korea. Insofar as Japan was the sovereign of Korea, all the nationals of Korea were Japanese. Subject to any agreement on human rights to which Japan is a party, it still has the right under international law recognized in Article 2, paragraph 7 of the U.N. Charter to treat its nationals as it likes, even though this results in discrimination. For a number of reasons that we can’t go into at the moment, the world is not so concerned about the Japanese ill-treatment of this or that group as it concerned with South Africa’s ill-treatment of its Blacks or its Coloreds. Countries find a variety of political reasons for not criticizing what our friends do, while criticizing what the uncommitted or potential non-friends may do. So, we are faced with the position that under strict international law the Koreans who went to Japan while Japan was the sovereign of Korea are Japanese citizens. If Japan wishes to discriminate among those citizens as distinct from other citizens, that is Japan’s privilege unless it is obligated by any limiting treaty. There is no limiting customary international law. The Universal Declaration of Human Rights of 1948(24) was only a Resolution of the General Assembly and it has no binding legal force whatsoever. It has not constituted customary law. If it did constitute customary law, I suppose one would have to say 75% of the members of the United Nations are in breach of their obligations under that Declaration. In so far as the Covenant(25) is concerned, since the ROK is not a party, it has no legal right to complain of any Japanese breach thereof. So, once again, we are thrown back to the position

(24) Res. 217 (1) A.
(25) See n. 23 above.
that the 'agitation'—if I may express it in somewhat emotional language—of the ROK for its brethren in Japan is political and moral, it is not legal. It reminds me of a situation that I was faced with in connection with Cree Indian tribe which crosses the border between Montana (U.S.) and Alberta (Canada). Some of them live in Canada and are Canadians while some of them live in the United States and are Americans. It is very difficult to explain to the tribal council, say in Canada, that their brothers in the United States are not their brothers, and that they are Americans and not Canadians with rights under American law and not under Canadian law, and vice-versa. The Korean situation is very similar. The only way the ROK can do anything on behalf of the Koreans of ethnic background in Japan, or those in Sakhalin, or those who may still be in the Soviet Union, or in China through Manchuria, would be by political pressure, by friendly gesture, and by bilateral negotiation. But the idea of relying upon international law for this is not going to be very real, and I fear that any of these attempts to apply pressure upon Japan through the medium of the United Nations is likely to be blocked by Japan's allies, while any attempt to apply pressure on the Soviet Union would be blocked by the Soviet veto, or fail to secure the necessary two-thirds majority in the General Assembly.

V. Korean Minority in Sakhalin

Rhee: Professor, let me add one question about the Sakhalin Korean minority problem that you have raised. There are a number of problems relating to Korean minorities in the world, but I think the problem in Sakhalin is the worst. Most of the Korean minority in Sakhalin were originally coal-miners there during the World War II. At that time, they had Japanese nationality. But, upon the termination of the war, they lost Japanese nationality, and Japan would not take any responsibility for their status. And the Soviet Union was not willing to give them her nationality easily, while the Korean minority would not accept it easily either. It has been difficult for them to return to the ROK.
It has been reported that only a small number of them applied for Russian nationality or North Korean nationality, and that many of them would still like to return to the ROK eventually. How could the ROK government make Japan or Russia comply with the principles international law and take the responsibilities to give them full-fledged human rights?

Green: Well, once again, we are very close to the last discussion that we had. Insofar as the Soviet Union, when it took over Sakhalin, refused to make them Soviet citizens, and insofar as they could no longer be Japanese because, at least according to some countries, Sakhalin was no longer Japanese territory, they would become stateless. So far as I recall, the Soviet Union is not a party to any of the treaties directed against statelessness. (26) And as we know from recent activities by the Soviet Union with regard, for example, to the great musician Rostropovich, the Soviet Union does not hesitate to render stateless those who leave its country.

Similarly, it is within their competence to say that those who remain within their country shall not enjoy the right of all their citizens, although I am not sure that is compatible with the latest version of the Soviet Constitution. But that is a matter of Soviet national law, not of Korean rights or of international law. And again if a country does not want certain individuals, international law has not forbidden the country from saying that it will only send the individual to a country of its choice.

So, the fact that you do not wish to be a Soviet citizen when your territory is taken over is not your right at all in international law. International law says very simply if there is an annexation of territory or a transfer of territory, the nationality of the citizens or of inhabitants changes automatically. If the new sovereign says that it is not going to accept you and therefore you are going to be stateless, or if it says you are its citizen but you are going to be under certain discriminatory regulations; then again, as you know, in accordance with international law the problem being one of internal affairs is one of

(26) E.g., Convention Relating to the Stateless Persons, 1954, 360 U.N.T.S. 117. It is interesting to note that the ROK is a party to this Convention, while the U.S.A., like the U.S.S.R., is not.
domestic jurisdiction. And even the U.N. says that issues of domestic jurisdiction only become of international concern if peace is threatened.\(^{(27)}\) So far as I am aware, the peace is not threatened as between Japan and the ROK, or between the Soviet Union and the ROK. So, we are once again in a situation wherein, unfortunately, these people are very much in the hands of the de facto government under which they are living. If the government of the ROK were able to enter negotiations with the Soviet Union, and that opens a much wider consideration of mutual recognition and the like, maybe then it would be possible to discuss the position of these people. But in some ways it may be compared to the situation of the Tamils in Sri Lanka, who are also citizens of Sri Lanka and complain of being discriminated against. India, which is the country of ethnic origin, says, “No, we don’t want them back.” I know in the case of the ROK, she would say, “Yes, we want to have them back.” But you see, from the point of view of the Soviet Union at the moment, the only government of Korea is the one in the North, and people involved say, “We don’t want them to go to the North.” From this point of view, one might almost feel inclined to suggest that the Soviet Union is being a little more humane than some other countries by saying “if you don’t want to go to the North, we won’t send you to the North.” But, for political reasons the Soviet Union says, “we don’t know where the ROK is and therefore when you say you want to go there, we don’t know where that country is. Anyway, from the political point of view, we will not send you or allow you to go to a country which is unfriendly to us.”

So, you are in not a legal world but a political world where this is concerned. And you have all sorts of problems like that of the Indians in South Africa.\(^{(28)}\) In the eyes of the world, the Indians born in South Africa were South African citizens. The South African government said, “Yes, they are citizens, but they have no rights.” The Government of India raised the issue in the United Nations. South Africa said, “We will send them back to India,”

\(^{(27)}\) Charter, Art. 2(7).

and India said, "God forbid!" So, you are going around and around in circles. In the relations between states, unfortunately, whatever the law may provide, they still turn around and say this or that is or is not a current political interest. If the political alliances change, we may see a great many differences in this type of situation.

VI. Korea and the Surrounding Powers

Rhee: Many Koreans still think that Korea is small, but I think Korea is not a small nation in view of its size, population, and its role in world affairs. I think many Koreans believe Korea is small because Korea is surrounded by the stronger powers such as China, Soviet Russia, and even Japan, the economic power. How can the Korean people and the Korean government cope with the disputes arising between these relatively bigger powers?

In direct negotiations, as we know, which is the first step to settle international disputes, usually the bigger power may gain more because it usually has better leverage. How can the ROK, as a relatively smaller state, get out of these difficulties dealing with these relatively stronger powers as neighbors?

Green: Professor Rhee, when you first started your question, I was reminded of a story told by a former teacher of yours, Professor Richard R. Baxter at Harvard. Professor Baxter, as you know, for one or two sessions, was a member of the United States' delegation to the Law of the Sea Conference. And he tells a wonderful story about what are called and what are known as the geographically disadvantaged nations. You may have heard his story. How, for example, Senegal which is a small country—not a very important maritime country—complained that the name of the "United Kingdom," which was always regarded as a great naval power, had been captured by England? And how, for example, the islands in the west Indian group, whose new names I can never remember, complained that the word "China," which already pictured going back to the days of the great Khan—a big and mighty country—had been stolen by China? Professor Baxter used to redraw the map of the world placing
names like Soviet Russia somewhere in a small country in Latin America, and China was shifted into Africa. And you know, the way in which you started off sounded almost like this from the point of view of the ROK. But joking apart, I do see your point. However, so long as the ROK is dependant, because of a variety of political reasons, on protection from outside, the difficulty of speaking on equal terms with anybody is going to be real. But it remains in any case the problem of a small geographic country and even of a relatively small population country, for though it may have 40 million it is relatively small if compared with the Soviet Union, India, the United States or China.

Rhee: But if you add up North Korea, it will be over 60 million.

Green: Well, that only makes it about the size of France, which is a middle power or a second rate power. So we would still be faced with the same sort of problem. But you have to recall that many of the small countries have learned how to use power as members of the United Nations. The so-called Group of 77 which now numbers 123 or 130 do in fact hold a majority power. If you were a member of the U.N., you would automatically find that despite the strength of your big neighbor, whether China or the Soviet Union, or I suppose one could say whether you are limited because of the power of your great ally, the United States, which may inhibit you in certain realities; you would at least be able to say, as some of the Latin American countries say, “We are going to flex our shoulders a little because we know we are going to be supported in a vote by a clear two-thirds majority in the U.N.”. And surprisingly, some of the big powers, sometimes even the Soviet Union or China are a little concerned. No country, however powerful, wants to appear on the record as the constant “naughty boy.” And I suppose the only way in which you will be able to exercise influence, other than economy, and the only way will be able to exercise political influence is when you are able to exercise it

through a majority in the debating chambers of the world. And that probably depends on admission to the U.N. Until you get that, you may find that however much you want to influence, you are not really going to be able to, not even with the United States, supporting you.

**VII. The Incident of KAL 007 by the USSR**

*Rhee:* Korea is surrounded by relatively bigger powers. So we have sometimes difficult international relations with our neighbors politically and even legally. One of the most tragic incidents was the 1983 case concerning the shooting down of the Korean Air Lines 007. Despite the claims of the ROK government and the families of the victims, and the condemnations of many countries, the U.S.S.R. has simply denied any guilt and would not give any compensation. How can we deal with this kind of violator of international law?

*Green:* Well, before we can talk about a violation of international law in any circumstances, we need to know the complete statement of the facts. Unfortunately, because of the non-recovery of the “black box,” we will never know what the exact factual situation was. As you will recall, when the incident occurred, President Reagan was a little emotional and perhaps overenthusiastic in some of his immediate reactions,\(^{(30)}\) because a little later the State Department had to issue certain disclaimers from some of the statements that he had made. As you perhaps also will recall, the legal adviser of the International Air Transport Association (IATA) issued a statement very early on that, looking at the strict letter of the law, not of ethics, not of morality, but of the law; it was very difficult to say that the Soviet Union, in defending a defense area, was in any way in breach of the law.\(^{(31)}\) And if I remember rightly, only two weeks ago the Japanese issued a statement, a completely new and unexpected statement, to the effect that at one point before the shooting took place, the pilot of the aircraft gave them the wrong information as to his altitude,


\(^{(31)}\) *The Times* (London), 3 Sept. 1983. In this statement he refers to a Notice to Airmen (Notam) warning them that “the Soviet Union reserves the right to use any means to preserve the integrity of this area.”
and his geographic location, which makes the whole thing a rather difficult one to analyze. Again, you will no doubt recall that the area, in which the plane was, had been announced by the Soviet Union as a closed area, — a matter that is permitted by the International Civil Aviation Organization (ICAO) regulations, international air regulations, while even the Charter of the United Nations talks about the inherent right of self defense. (33) The matter is further complicated by the fact that sometime previously another KAL aircraft was shot down by the Soviet Union off the coast of Murmansk military base. On that occasion, there were not the same calamitous results as in the case of KAL 007. Insofar as the Soviet Union and the ROK not only do not speak to each other, but do not recognize each other, one has to accept that the commander on the ground has a problem in his mind immediately when an unidentified or an aircraft that should not be in a security zone is present as happened previously, “What will happen if I don’t do something about this?” And even to those who say, “Well, it was a civil aircraft”, he would be entitled to reply, “Yes, it looked like a civil aircraft.” Until after the disaster took place, in so far as those on the ground were concerned, they would not know if the aircraft was carrying civilian passengers, cargo, living animals, troops on leave, spies, or what have you. Much of this is of course ex post reasoning. So that, we are constantly thrown back to “give us the correct factual situation.” Moreover I would remind you that it was only a couple of weeks ago that KAL paid compensation to relatives of those who were shot down, because prima facie the liability for an accident of this kind rests on the airline whose aircraft is in the wrong place due to the carelessness, negligence, incompetence of its crew. If as has been suggested the computers were wrong, it then goes back to the manufacturers of the computers. Probably the last authority that would be liable would be the Soviet Union. So that one may say emotionally, “How could they!” It should not be forgotten that Prime Minister Papandrea saying for the government of Greece, for example, said a month ago, “If any foreign aircraft encroaches into our security

(32) Ibid.
(33) Art. 51.
zones, we will shoot it down." British air regulations are to the same effect, if an intruding aircraft does not identify itself or if it does not leave. Both Canada and the United States have their air defense identification zones and if a strange aircraft or an aircraft that has no right to be there appears in that area, it will either be chased out or fired upon. So, this issue of shooting down aircraft that should not be there is not a new one.

What this incident has produced apparently is not only a Protocol from ICAO seeking to clarify the rules with regard to an intruding aircraft that appears to be civilian aircraft. These rules, however, are likely to be completely disregarded if a civilian aircraft does come in and misbehave itself from the military point of view, because it is by no means difficult for what is an apparent civil aircraft to act in a military fashion. But much more importantly, Japan, the Soviet Union, and the United States—leaving out the ROK for political reasons arising from the non-recognition of the Soviet Union and the ROK—have come to an agreement by which they hope they will be able to avoid a repetition of a similar situation.

To some extent it may be suggested that the KAL 007 incident is not too dissimilar from the killing of the American intelligence officer in the eastern zone of Germany in recent months. In that instance the United States said, "Yes, we know he was spying but he was spying in an area where he is allowed to be a spy." Well, it is very difficult to persuade the victim of espionage that anybody is ever entitled to be a spy. So you come back to the fundamental issue in this case, whoever is responsible. The Soviet Union may have behaved wrongly, but we cannot criticize unduly, we cannot talk about legal liability until we have an absolutely clear statement on the factual situation. But here we go into the realm of conjecture. Perhaps the Soviet Union has recovered the "black box." Perhaps the "black box" indicates that the Soviet Union knew it was a civil aircraft. If such be the case, the Soviet Union is unlikely to present the "black box." Equally, we may assume that either Japan or the United States found the

"black box", and the "black box" indicates that the aircraft was, as the Soviets maintain, on a spy mission, although that is unimportant, for justifying the incident is *ex post*. The shooting down occurred when nobody on the ground knew what the aircraft was doing. However, let us assume that the "black box" might be embarrassing to the United States. Then, one can see that the United States or Japan might not be prepared to disclose what the "black box" said. So that, from this point of view, it may well be to everybody's advantage that the "black box" is not recovered or that the statement is made, "We don’t know where it is." Perhaps, as diving techniques improve in 20 years, if the "black box" has not by then been found, then we won’t have to wait, as long as we do, to recover ships from the Spanish Armada 300 years later.

**VIII. Problems with China**

**A. Continental shelf**

*Rhee*: Professor, the ROK has another big power as a neighbour, that is to say, China. One of the pending problems that the ROK has with the People's Republic of China (PRC) is that we have to develop the hydrocarbon resources deposited in the continental shelves in the Yellow Sea and the East China Sea. Although as yet there have been no agreements to that effect between the two governments which do not recognize each other, currently the ROK, which does not produce a single drop of hydrocarbon in her land territory, is badly in need to develop any possible oil-and-gas deposits in the continental shelves in the Yellow Sea and East China Sea. Is there any way, or any means for both governments to develop such resources in the Yellow Sea and the East China Sea, although they appear not to recognize each other?

*Green*: Well, we come up here against a multitude of problems. Firstly, international law has established the principle that the continental shelf belongs to the littoral state.\(^{(25)}\) What is somewhat difficult is that the International Court has left doubt whether the methods of division of the continental

shelf had been established by customary international law or not.\(^{(36)}\) On the other hand, in a recent arbitration between Iceland and Norway,\(^{(37)}\) the Arbitral Commission took the line that the provisions laid down in the 1982 Montego Bay Convention on the Law of the Sea, having been adopted by ‘consensus’ by so many countries, are declaratory of customary international law. It appears that the Commission did not appreciate the true meaning of the word ‘consensus’, which does not mean unanimous agreement. It doesn’t even mean agreement, but it implies rather than to give expression to opposition the parties involved not to vote, but to give the impression that the parties are agreed.\(^{(38)}\) It also ignores the fact that draft conventions do not make law. It is the convention that makes law. On the other hand, if the 1982 Convention becomes law, and if the PRC and the ROK become parties to that Convention, even though they do not recognize each other, then as we have seen in the 1983 Chinese hijacking case, there seems to be a tendency by both countries to recognize their obligations under a multilateral treaty to which they are both parties. And then, we would have all sorts of interesting problems arising with regard to the possible mutual delimitation and exploitation of the continental shelf. So we are once again from the legal point of view, if I dare call it, in a state of flux. And no lawyer likes talking about law being in a state of flux. But otherwise, we get thrown back to what seems to be increasingly happening between the PRC and the ROK: ‘no-official’ but yet official discussions between the authorities responsible in both countries in a specific field with the blessing of both governments, with the governments pretending that they are not involved even though they may name the people who are taking part in the discussions with a view to working out a satisfactory *modus vivendi*. The two countries seem to be coming closer and closer together, and sliding towards a state of *de facto* recognition, which would then facilitate reasonably


\(^{(38)}\) See Kaufmann, *op. cit.*, 127 et seqq., 210-12; Moskowitz, *op. cit.*, 196-98.
easy conclusion to what appears to be at first sight an almost insoluble problem.

B. Chinese Hijacking Case

Rhee: Despite the non-existence of any diplomatic relationship and the constraining factor of North Korea, recently the ROK and the PRC have had a few official contacts with each other. As you know, all of these cases related to ‘unfortunate’ incidents. But both the ROK and the PRC have made efforts to turn these ‘unfortunate’ incidents into ‘fortunate’ events. Now let’s review a few cases one by one. First of all, the ‘unfortunate’ hijacking of an aircraft of the Chinese Civil Airlines by Chinese nationals in 1983 was turned into ‘fortunate’ speedy resolution through direct negotiation between the two parties. How would you comment on the trial of the Chinese hijackers in Seoul, and the surrender of the convicted to Taiwan?

Green: Well, perhaps I can make a general comment first, with regard to all these incidents, that the two countries appear to have decided politically that they are not prepared to allow any of these incidents to develop in an unfortunate way, and that they have decided politically to find—what you might call—a respectable way out of an embarrassing situation. Insofar as the hijack is concerned, perhaps I may tell a simple story first. I was due to lecture in Shanghai on the subject of terrorism in 1983. I had been asked to do this three months before I arrived in Shanghai. The day before my lecture, the hijack took place. And I was able to begin by saying, “I did not organize the hijack to give me an opportunity to talk about terrorism.” But the importance of the hijack incident does not lie in its facts at all. It lies in the issue that both countries are parties to the anti-hijack treaties of the ICAO. And although they do not talk to each other officially, do not recognize each other, and do not have diplomatic relations with each other, both countries were prepared to say that their obligations under multilateral treaties were all supreme.

Chinese Civil Airlines is officially a trading company, and even though it is a

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state agency. As you know, under the present rules increasingly being adopted with regard to state immunity since the Tate Letter of the United States, more and more countries including those in the Eastern Bloc are recognizing the principles of 'qualified' and not 'absolute' immunity. So that one could argue that Chinese Civil Airlines was no longer entitled to enjoy state immunity. What we had therefore was an agreement by the ROK to negotiate with the Managing Director of Chinese Civil Airlines for the return of the aircraft. The ROK then looked at the principles laid down by the three ICAO hijack agreements; which lay down the rule that the state holding a hijacker is under an obligation either to try him according to its own criminal law, or else, to hand him over to a party having a claim to jurisdiction. The ROK did not return the hijacker, but said "We will try him ourselves," and strictly applied her own obligations under international law. The ROK did what Bulgaria had done with communist hijackers from Turkey: "You go to jail for a nominal period to uphold the rule of law, and then we will give you your freedom." Likewise, the ROK said, "We won't send you back to the PRC, for this would be contrary to the new principle of non-refoulement in accordance with which you do not send people back to a country where you are not sure that they will not suffer political persecution." Subsequently they allowed the hijacker to go where he did namely to Taiwan. But the importance of the case is that the PRC and the ROK showed determination to apply the rules of international law with regard to hijacking that the rest of the world has not always been willing to show. They showed a greater respect for international law than we have seen in any other hijacking case. And I think that is terribly important.

C. Chinese Torpedo-Boat Case

Rhee: As a result of the direct negotiation, the Chinese Civil Airlines and the Korean government agreed that both sides would cooperate with each other in similar cases in the future. Recently, there was a 'Chinese torpedo-boat case.' It was not exactly the same but another 'unfortunate' accident, which

(40) 6 Whiteman, *Digest of Int'l Law* 569-71 (1952).
turned into a 'fortunate' event. How would you comment on the ROK government's handling of the case?

Green: Once again, we have seen a clear instance of recognition by both sides of the customary rules of the law of the sea in respect of a ship that is in distress\(^{(41)}\) even in the case of a capital ship, that is to say, a state ship. Strictly, the patrol vessel was not in distress on the high seas. It appears that it was brought into the ROK territorial waters as a rescue operation by a privately owned vessel. This raises the question whether the rescue vessel is entitled to salvage money from the PR China which would be a much more interesting problem than some of the other issues. Since the ship had been lost and had disappeared from radar and radio screens, there is no basis for the Chinese warships to say they were coming to the aid of a distressed ship—they were on a 'fishing' expedition, looking for a missing naval vessel. And if they are looking for a missing naval vessel, they have no right to enter into another state's territorial sea, which is where the vessel had been brought by the fishing boat, that had gone to its assistance. As regards the request of the Koreans for the warships to leave and the obeying of that order by the Chinese, this is fully in accordance with traditional customary rules of international law. And the Chinese in a very diplomatic fashion issued an apology. Countries do not say, "We were wrong, we apologize." Private people may do that, courts may order this, but countries are very conscious of face and prestige. Professor Schwarzenberger of England introduced the term "diplomatic double-talk," and this is exactly what both countries played. They were prepared to accept the language that a mistake had been made, and that they would try not to allow similar mistakes to occur in the future, and agreed that this would be treated as a formal apology.\(^{(42)}\) Here was a situation in which both countries, while not recognizing each other, accepted the territorial seas of each other, for the exchange between the ROK and the PR China naval authorities took place on the high seas roughly between


the outer-limits of the two territorial waters.\textsuperscript{(43)}

The Korean government said, "This is a public vessel, and we have no power to deal administratively or disciplinarily with what happens on a state vessel." This meant that the two murderers who were involved could not claim political asylum in the same way as, perhaps, mutineers on a civil or merchant ship could not have claimed political asylum. Anyway, it is perhaps doubtful that when they shot the six people they were thinking of political asylum. Moreover, as you are aware in the last twenty years, more and more countries have said, "If the crime is so outrageous (and when six people are dead, it is fairly outrageous) and if it outweighs the needs, we will not recognize the claim of political asylum."\textsuperscript{(44)} But again, we have here a situation in which both the ROK and the PRC were quite determined that this was not going to be a political aggravation. Fortunately, it was without very much difficulty that they could say, "There are rules of international law, we are law-abiding, we will obey the law." Thus, it was possible to effect a solution through the medium of a non-governmental representative, a press agency in Hong Kong, and everybody knows that the Chinese Shin Wha News Agency is a government agency, just as the Tass Agency is an organ of the Soviet government.\textsuperscript{(45)} We all know this, but we are able to maintain the pretext that we are talking to a press officer, to a newspaper correspondent who has received permission from his government to participate in negotiations on behalf of his government, but we pretend, not on behalf of his government. So that we still preserve the situation that we are not government-to-government. We find ourselves in exchange between naval command and naval command. Thus we are once more moving rapidly towards a measure of de facto recognition.\textsuperscript{(46)} If you look at the problem of the patrol boat in each of its aspects, the recognition of the territorial sea, the recognition that the patrol boat is a military vessel, the recognition that

\begin{itemize}
\item \textsuperscript{(43)} See Choi Nam-hyun, interview with Green, Korea Herald, 6 Apr. 1985, for general discussion of legal implications.
\item \textsuperscript{(45)} See, Krajina v. Tass Agency [1949] 2 All E.R. 274.
\item \textsuperscript{(46)} See Green interview, n. 43 above.
\end{itemize}
the rescued and searching vessels are military boats that cannot be seized, the
way in which the discussions took place, as well as the exchange, it becomes
clear that both countries are saying it is a government-to-government situation.
We are very much, in the relations between the ROK and the PRC, in what the
late Professor T.C. Chen, perhaps the greatest of modern Chinese international
lawyers, described as "relations officieuses."(47) They are not diplomatic, they are
not non-diplomatic, they are not state to state, but just official. But they are
official in a somewhat non-official way. And I think that is probably the best
way of describing them. But of course, Professor Chen envisaged these as the
next step to de facto recognition.(48) And it looks very much as if that is the
way the relations between the two countries are going. Quietly, smoothly,
 unofficially, just a sliding into this relationship which would avoid a political
uproar internally in either country or among its allies.

D. Chine/Korean Vessel Collision Case

Richard: One of the fortunate things that resulted from that ‘Chinese torpedo-
boat case’ was the establishment of the official channel through the unofficial link
in Hong Kong. That means the channel between the Korean Consulate General
in Hong Kong and Shin Wha News Agency there. Not long after the torpedo-
boat incident, there took place the Chinese/Korean vessel collision incident.
After the collision both parties decided to reach an agreement through direct
negotiations between the interested parties. How would you comment on this
‘unfortunate’ incident which also eventually turned into a ‘fortunate’ event?

Green: Well, I think that is just one more step towards a proper relationship.
What is interesting is nobody has objected. The ROK representatives are going
to Hong Kong; the Chinese are coming to Hong Kong. The British/Chinese
Agreement on the Future of Hong Kong(49) was ratified last week. I am not
quite sure if this is any longer an unofficial relationship. In fact, the Chinese
are almost a part of the government of Hong Kong as a result of this ratifica-

(48) Ibid., at 220.
tion and the News Agency is a government agency. But, again, it appears that it is being done very nicely by way of negotiations between the representatives of the freighter company, which is a PRC government company, and the ROK representatives on behalf of the owners of the fishing boat. It will be settled in a direct fashion. If the two countries were on friendly terms, it might well have been a case to go to the International Court of Justice. But since they are not officially talking to each other, they are doing it in this way of direct negotiation. The ROK will ask for compensation in respect of the boat that has been lost, the men that have been drowned, their families, the catch that was destroyed, for it is possible to estimate what that catch was likely to be by taking into consideration how long the boat was at sea, how long it would normally have been at sea, what its traditional catch was, what was the catch of other vessels.... This is not a difficult thing to estimate. The result will be a claim larger than the Chinese are prepared to agree to, while the Chinese will make an offer that is lower than the Koreans are prepared to accept. But this is traditional in international negotiation: one side asks more than it will accept, the other will offer less than it will pay. There will be a compromise. It already appears, although it has not been said, that the PRC is recognizing that the basic liability rests on the freighter, which is the bigger vessel, which has the more advanced technological aids. A fishing vessel has traditionally in international law the right of way—it doesn’t have to pull up its anchor when it is engaged in its fishing operations. This we know from the incident of the Russian war fleet and the Dogger Bank fishing fleet incident at the time of the Russo-Japanese War.\(^{50}\) And there is also the general principle in international maritime law of ‘last opportunity’,\(^{51}\) and it is the bigger vessel, the more maneuverable vessel that has the last opportunity of avoiding an accident. This is particularly so in fog, for a fishing vessel has not the same anti-fog equipment that a freighter would have. From the reports I

\(^{50}\) Permanent Court of Arbitration, The North Sea Dogger Bank Case (1905). Scott, Hague Court Reports 405.

have seen, the freighter was quite clearly the technologically advanced vessel as compared with the fishing boat. But it would look as if the willingness of the Chinese to negotiate suggest that they are going to accept liability—perhaps not the liability that you and I might think. It is just liability, but it will be one that will be negotiated. And once more, it will be ‘one more step’ towards a more normal relationship between the ROK and the PRC.

**XI. Koreans’ Desire for a Unification**

*Rhee:* Professor, lastly, but not the least, let me say that. Korean people’s wish is to unify the divided homeland. There have recently been some good signs for an appeasement: the North-South Red Cross talks, North-South talks on economy, and also a proposal for a talk between the North and South Assemblies. How can we use these events to remove the constraining factors against unification? The trend of improvement of the relationship between the ROK and the PRC may pave the way toward building up a better relationship between North and South. Would the proposed ‘cross-recognition’, that is to say, that the United States and Japan recognize North Korea, while the U.S.S.R. and the PRC does the same to the ROK, be realized? Would you please give good pieces of advice to these two divided Koreans? And how can we achieve the unification which is the Korean people’s dream?

*Green:* Well, in the first place, I think we have to stop saying “if the Soviet Union and China recognize the ROK, and if the United States and Japan recognize the North.” They are not the only countries in the world. The fact that they recognize the two countries would only mean that they had recognized the two countries. It would not make any difference for others on the world scene. It will, of course, as regards the relations between the two Koreas and the United States and the Soviet Union. I notice you have not said, “If the South recognizes the North, and the North recognizes the South.” So that, from the point of view of the two sides most directly concerned, one is tempted to say, “Who cares?” The fact that countries which are not directly concerned in
the relations between the North and the South would have hardened the division by recognition of two countries will not help one iota. It will merely consolidate the fact that there are in fact two different countries. There is a great dream in the Federal Republic of Germany for reunification. It may well be a nightmare from the point of view of reality. The fact that there are now Federal Republic of Germany, a member of the U.N., and Democratic Republic of Germany, another member of the U.N., means that the prospect of reunification is further away than it has ever been. If there is ‘mutual’ recognition, which is different from what you have described as ‘cross recognition’, the only thing that is important from the Korean people would be the relations between the South and the North, not the relations of foreign countries vis-à-vis the South or the North. If there is mutual recognition, then, of course, you will most certainly have hardened the division. Once you mutually recognize, there is a state of North Korea and a state of South Korea. The possibility of removing that statehood becomes much difficult emotionally, practically, nationally, chauvinistically, and in every other way.

I do not think one should assume that this is not a serious problem simply because there are discussions between the parliamentarians, because there are negotiations on reunification between the Red Cross Societies which are intended to deal with a specific problem only. The problem of the reunification of families has nothing to do with the reunification of the two countries. It is a separate issue of a humanitarian character. You can reunify German families living in Poland and Polish families that may be living in the Soviet Union, but that does not mean to say that Poland is going to give back to Germany those parts of Germany that are now parts of Poland. The questions are completely distinct. The questions of economic discussions are like those that go on between the Federal Republic of Germany and the Democratic Republic of Germany. They deal with immediate problems of an economic or trading character. And again, that does not mean that reunification is not only in the immediate future, but that it is almost in the ‘never-never-land.’ It will not
change the situation one jot. As to the parliamentarians’ talks, they talk to each other anyway in the Inter-Parliamentary Union. I have seen pictures in the Korea Herald of various international conferences, where I find that the North Korean and the South Korean delegates talk to each other perhaps more happily than Arab delegates talk to Israeli delegates in the coffee rooms of the United Nations. They have certain common problems which have to be discussed. And in the case of North Korea and South Korea, of course, there are much closer common problems. There are linguistic affiliations, family ties, historical affiliations and so on. It does not mean that they are coming any nearer together. Since I do not consider reunification to be a practical issue in the near future at all, perhaps the most realistic answer to your problem as to what may be possible is some sort of a federal system. Something like the U.N. has been discussing with regard to Cyprus, not what the Turkish element in Cyprus is talking about, but what the U.N. has said, namely, that there should be sort of an independent Turkish state and an independent Greek state which are independent internally with a common federal administration.\(^{(52)}\) That may be much more realistic with regard to the future of Korea than any problem with regard to potential reunification. If there is a federal system, perhaps over the years, the federal system will work itself out into a reunification situation. Perhaps they two governments will find that the political system which has endured over the last forty years has not in fact become so hardened in the North and so fixed in the South that there is no way that those political systems can unite.

It may be possible, as in the divided Germany before the Berlin Blockade when there were the four zones with the Allied Kommandantur and the Allied Control Council administering these four zones in a united fashion when they were considering problems affecting the entire country. So maybe the situation might develop in Korea—a federal system recognizing the internal independent status of the South and the internal independent status of the North, each with

its own political system. If you look at the United States—I would not like to draw similarities too strictly—some of the right-wing Republican-governed states are very far removed from the political ideology of some of the center-to-left-wing Democratic-governed states. Some of the southern states, regardless of the party in power, are extremely remote from some of the northern states, even under the same party in control. Nevertheless they live together within the same federal system. Maybe that will be the solution for Korea. Who can tell at the present moment? Fortunately—or should I say unfortunately—we don’t have a crystal ball.

**Conclusion**

*Rhee:* Thank you very much indeed for your clear and distinct remarks. So far I have raised thirteen important international legal questions that the ROK has had to deal with for the past forty years. Your lucid remarks are particularly valuable because you have made efforts to try to be objective as a distinguished legal scholar from the third state. In spite of the significance of the questions that I have presented and the objective analysis by you, it would not be easy to generalize the Korean attitudes toward international law at this time, when no Korean digest of international law has yet been published. It would be desirable to compile all the international legal documents and materials on the important legal problems that the ROK has faced and to study them carefully in order to find out the Korean attitudes toward international law and the Korean contribution for the development of international law.