

THE OPERATION OF THE KOREAN ARMISTICE AGREEMENT

A Thesis

Presented To

The Judge Advocate General's School, U.S. Army

The opinions and conclusions expressed herein are those of the individual student, author and do not necessarily represent the views of either The Judge Advocate General's School, U.S. Army, or any other governmental agency. References to this study should include the foregoing statement.

by

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SCOPE

An analysis of the current legal status of the Korean Armistice Agreement in international law, based upon the military and political conditions under which the armistice was concluded, the nature and scope of the Agreement, the options available for settling disputes, and state practice in dealing with specific incidents.

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CHAPTER I

INTRODUCTION

A. PURPOSE AND SCOPE OF THE INVESTIGATION

The alarming increase in violations of the Korean Armistice Agreement by North Korea during 1967, as compared with previous years, posed a sufficient threat to international peace for the United States to bring the matter before the Security Council of the United Nations.¹ The incidence of infiltration by land and sea into South Korea and the casualties caused by such infiltration raised anew questions concerning the current legal status of the Armistice Agreement in international law.² To a nation fully absorbed by its involvement in Vietnam, however, it was the seizure of the *U.S.S. Pueblo*

¹22 U.N. SCOR, Supp. Oct.-Dec. 1967 at 1967, U.N. Doc. S/8217 (1967).

²The following questions and comments on the Korean Armistice were made by H. Phleger, Legal Adviser, U.S. Dep't of State, in 1955: "(a) Is it political or military in character? (b) Is the People's Republic of China bound by it? (c) By whom may it be altered or terminated? In this connection it is interesting to note that the Armistice by its terms continues indefinitely.... In this respect it is more like a treaty of peace than an armistice." 1955 AM. SOC'Y OF INT'L L. PROCEEDINGS 98.

in the waters off the coast of North Korea in January of 1968 that dramatically brought these questions into sharp focus.

The seizure of the *Pueblo* furnishes an excellent example for delineation of the primary purpose of this study. The United States branded the seizure as a violation of international law.³ The resolution of the incident by reliance upon recognized precepts of international law depends in the first instance upon several critical factual determinations: (1) the location of the *Pueblo* at the time of its seizure, i.e., whether it was located in international waters or in the territorial waters of North Korea; (2) the classification of the *Pueblo*, i.e., whether or not it was a warship; and (3) the activities in which it was engaged, i.e., whether or not it was engaged in hostile acts.⁴

Independently of the above factors, however, resolution of the incident by reliance upon international law depends upon what set of rules are to be applied. As belligerents in the Korean Conflict both parties are bound by the Armistice Agreement of 1953. If the customary rules

³N.Y. Times, Jan. 27, 1968, at 6, col 1.

⁴Morrison, *International Law and the Seizure of the U.S.S. Pueblo*, 4 TEXAS INT'L L.F. 187 (1968).

governing armistice are resorted to, the parties are technically still in a state of war, *de facto* and *de jure*,⁵ and the international law of war applies insofar as it is not displaced by the Armistice Agreement or the customary rules of armistice. The position that the armistice has ripened into a *de facto* ending of the war, tantamount to a treaty of peace is also a tentative alternative, and compels the conclusion that the international law of peace should apply.⁶ It has also been suggested in recent literature in the field that the traditional rules of international law, which are based upon the dichotomy between war and peace, are no longer applicable to modern armistices, and that new rules must be given recognition in order to best serve the needs of present-day realities.⁷ The question as to which set of rules should apply is pertinent not only to the *Pueblo* situation but to all other disputes arising under the Armistice Agreement.

⁵Levie, *The Nature and Scope of the Armistice Agreement*, 50 AM. J. INT'L L. 880 at 884 (1956) [hereinafter cited as Levie].

⁶See J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 644 n.42a (2d rev. ed. 1959).

⁷See M. TAMKOC, POLITICAL AND LEGAL ASPECTS OF ARMISTICE STATUS 47 (1963).

B. SIGNIFICANCE OF THE INVESTIGATION

Much scholarly writing has been published about the legal status of the United Nations Troops in Korea,⁸ the armistice negotiations,⁹ and the treatment of prisoners of war,¹⁰ but no material is available on the current legal status of the Armistice Agreement in terms of an analysis of the legal problems that have arisen in the light of current state practice.

In 1954, Philip C. Jessup first recommended the recognition of a "third legal status intermediate between war and peace."¹¹ In 1955, Professor Myers S. McDougal

⁸D. BOWETT, UNITED NATIONS FORCES; A LEGAL STUDY (1964); J. CITRIN, U.N. PEACEKEEPING ACTIVITIES; A CASE STUDY IN ORGANIZATIONAL TASK EXPANSION (1965); Y. TAE-HO, THE KOREAN WAR AND THE UNITED NATIONS; A LEGAL AND DIPLOMATIC HISTORICAL STUDY (1964); Goldie, *Korea and the U.N.*, 1 U. BRITISH COLUMBIA LEGAL NOTES 125 (1950); Pye, *Legal Status of the Korean Hostilities*, 45 GEO. L.J. 45 (1956).

⁹C. JOY, HOW COMMUNISTS NEGOTIATE (1955) [hereinafter cited as Joy]; W. VATCHER, PANMUNJOM; THE STORY OF THE KOREAN MILITARY ARMISTICE NEGOTIATIONS (1958).

¹⁰S. DAYAL, INDIA'S ROLE IN THE KOREAN QUESTION; A STUDY IN THE SETTLEMENT OF INTERNATIONAL DISPUTES UNDER THE UNITED NATIONS (1959); Charmatz & Wit, *Repatriation of Prisoners of War and the 1949 Geneva Conventions*, 62 YALE L.J. 391 (1953); Mayda, *Korean Repatriation Problem and International Law*, 47 AM. J. INT'L L. 414 (1953).

¹¹Jessup, *Should International Law Recognize an Intermediate Status Between Peace and War?* 48 AM. J. INT'L L. 98 (1954)[hereinafter cited as Jessup].

wrote a short editorial comment in which he expressed dissatisfaction with the dichotomy between war and peace, but suggested the possible utility of analyzing the armistice period in terms of a whole series of factual situations ranged on a scale according to intensity of conflict, with corresponding legal consequences.¹² In 1963, Metic Tamkoc wrote the most detailed study on the political and legal aspects of modern armistice status.¹³ His examination elaborated upon the suggestions of Jessup and McDougal.

In each of the above writings the author's attention was focused on the new developments in armistice status as a result of changed world conditions since the end of World War II. Tamkoc mentions the Korean Armistice, but only collaterally in support of his thesis. His approach is basically horizontal. No published information was found in which an attempt was made to analyze the implementation of Korean Armistice Agreement in a comprehensive manner.

¹²McDougal, *Peace and War: Factual Continuum with Multiple Legal Consequences*, 49 AM. J. INT'L L. 63 (1955).

¹³M. TAMKOC, POLITICAL AND LEGAL ASPECTS OF ARMISTICE STATUS (1963).

C. LIMITATIONS AND PROCEDURES

The determination of the current legal status of the Korean Armistice Agreement was primarily a matter of screening the Minutes of the Military Armistice Commission Meetings in order to identify the problems which have arisen and to consider the reaction to these problems. The treatment of problem situations was then evaluated in terms of customary rules governing armistice status, the Armistice Agreement, and where appropriate the Charter of the United Nations.

D. ORGANIZATIONAL PLAN

The study begins with an examination of the military and political setting under which the armistice was negotiated. Next the scope of the Armistice Agreement is considered. Chapter IV is devoted to the settlement of disputes arising during the armistice. This is followed by an analysis of the treatment of specific incidents.

CHAPTER II

BACKGROUND - THE ARMISTICE NEGOTIATIONS

A convenient starting point for an inquiry into the current status of the Korean Armistice as a legal institution is the armistice negotiations, which began in July of 1951 and culminated in the agreement signed on July 27, 1953. This exercise in historical perspective is useful insofar as it reflects changed conditions in the international community which have resulted in totally different legal consequences flowing from armistice status, as compared with those flowing from the traditional rules of previous centuries.

A. CUSTOMARY INTERNATIONAL LAW OF ARMISTICE

The traditional rules governing armistice status are based upon the well-established dichotomy between war and peace.¹⁴ According to the dichotomous approach nations are either at war or at peace and there is no intermediate stage between the two. It has even been declared to be a positive rule of international law that

¹⁴See Jessup, *supra* note 11 at 98.

an "...armistice does not terminate the state of war *de jure* or *de facto*."¹⁵ As a corollary "...the state of war continues to exist and to control the actions of neutrals as well as belligerents."¹⁶ The conventional rules of armistice as codified by the Hague Regulations are based upon a conception of armistice as a purely military convention between belligerents which prepared the groundwork for peace by providing an environment in which preliminary peace negotiations could be conducted. The end in view was always the treaty of peace by means of which the relations between belligerent nations passed from a state of war to a state of peace.¹⁷

Accordingly, the traditional approach views the relationship between the international law of war and the international law of peace as a relation between two totally different legal orders. The change in the concepts of war and peace brought about by the cold war makes such an "either-or" classification completely

¹⁵Levie, *supra* note 5 at 884.

¹⁶Levie, *supra* note 5 at 884.

¹⁷Monaco, *Les Conventions Entre Belligerents*, 75 HAGUE RECUEIL 277 at 323 (1949) [hereinafter cited as Monaco].

unsatisfactory.¹⁸ On the other hand the relationship between the international law of war and the international law of peace may be treated as a relation between the legal consequences that follow from facts which exist during war and those which exist during peace. When the relationship is considered in this regard, it is the reaction to different facts and the corresponding effect on the legal rules which are significant.¹⁹

B. THE MILITARY AND POLITICAL SITUATION

The negotiators at Kaesong and Panmunjom were responding to three basic factors which were to influence the future course of the armistice and the relations between the opposing sides: (1) the absence of a military solution to the Korean question; (2) the absence of a political solution; and (3) the desire on the part of the Communist side to restore the *status quo* as it had existed prior to the war. These factors

¹⁸See M. TAMKOC, POLITICAL AND LEGAL ASPECTS OF ARMISTICE STATUS 47 (1963); Jessup, *supra* note 11; McDougal, *Peace and War: Factual Continuum with Multiple Legal Consequences*, 49 AM. J. INT'L L. 63 (1955); Yohuda, *The Inge-Toft Controversy*, 54 AM. J. INT'L L. 398 at 402 (1960).

¹⁹See Monaco, *supra* note 17 at 279.

will be considered in turn.²⁰

1. *Military Situation*

By the summer of 1951, the military situation had progressed to the point where neither side viewed a continuation of the fighting as a satisfactory means of achieving their respective political objectives. It should be recalled at this point that at the end of World War II Korea had been divided at the 38th parallel for surrender purposes only--the Russians to receive the surrender of Japanese forces north of that line and the United States to receive the surrender of forces south of that line. The objectives of the United States, and later of the United Nations, were the reunification of Korea as an independent state and the establishment of a national government based upon free elections.²¹

²⁰The characteristics of *intermediacy* proposed by Jessup are: "First, there would be between the opposing parties a basic condition of hostility and strain.

...
A second characteristic of intermediacy might be that the issues between the parties would be so fundamental and deep-rooted that no solution of a single tangible issue could terminate them.

...
The third characteristic would be an absence of intention...to resort to war as the means of solving the issues." Jessup, *supra* note 11 at 100.

²¹See U.S. Policy in the Korean Crisis, Dep't of State Publication No. 3922 (1950).

On June 25, 1950 the Communists attacked across the 38th parallel in an attempt to enforce their regime on all of Korea. The invasion was based on the erroneous premise that the United States would not retaliate.²² The sudden and unexpected response of United Nations forces made it obvious that the subjugation of South Korea could not be achieved by military force without unacceptable risks. When the successes of United Nations forces in 1951 made it apparent that the objectives of those forces were no longer limited to maintaining the integrity of the Republic of Korea, but extended to the liberation of North Korea as well, the Soviet Ambassador to the United Nations suggested the possibility of a truce based upon the 38th parallel.²³

2. *Political Situation*

The second factor to which the negotiators were responding was the absence of any immediate political

²²See address by Secretary Dulles before American Legion at St. Louis, Mo., Sep. 2, 1953, in 29 DEP'T STATE BULL. 339 (1953).

²³Joy, *supra* note 9 at 1.

solution to the Korean question. As early as 1947 the United Nations General Assembly had adopted a resolution calling for free elections and the establishment of an independent government. The Soviet Union categorically rejected this resolution.²⁴ In the light of Soviet intransigence to any solution other than one which would insure communist control for all Korea, there was little likelihood that any peace conference proposed by the Armistice Agreement would result in a peace treaty in the traditional sense.

3. *Desire to Restore the Status Quo*

Once the Communists became convinced of the desirability of a cease-fire, they attempted to restore the *status quo* as it had existed prior to the outbreak of hostilities. The agenda proposed by the Communists called for (1) the establishment of the 38th parallel as the Military Demarcation Line; and (2) the withdrawal of all armed forces of foreign countries from South Korea.²⁵ The military significance of these proposals

²⁴1947-48 YEARBOOK OF THE UNITED NATIONS 81-88.

²⁵11 U.N. BULL. 408, 512 (1951).

is reflected in the situation as it then existed. The line of ground contact was anchored just south of the 38th parallel on the West and well north of the 38th parallel on the East. This line afforded United Nations forces strong defensive positions while the 38th parallel did not.²⁶

Although the agenda as adopted did not contain the Communist proposals, it is obvious that they were intended to achieve a so-called armistice that would have merely reestablished the *status quo* as it existed prior to June 25, 1950.

The negotiations also provided a preview of Communist intentions as to the manner in which the Armistice Agreement would be implemented. Once an armistice is concluded one of the major considerations is to minimize the probability of the resumption of hostilities. It is therefore necessary to establish consultative machinery with adequate supervisory and enforcement powers to carry out the prescriptions of the agreement.²⁷ With this end in mind the United Nations

²⁶Joy, *supra* note 9 at 24.

²⁷See Monaco, *supra* note 17 at 343.

Command proposed elaborate supervisory organs and recommended aerial reconnaissance as one of the single most effective means of armistice supervision. The Communists categorically rejected the use of aerial reconnaissance. The United Nations Command yielded on this point on instructions from Washington.²⁸

In response to the use of aerial reconnaissance, the Communists offered a counterproposal that would have required unanimous agreement among the members of the various supervisory organs as a prerequisite to any action. They also insisted that Neutral Nations Observer Teams in the ports of entry be allowed to inspect every detail of military equipment introduced into Korea. Such a method of inspection would have exposed vital military secrets to the Czechoslovak and Polish members of the inspection teams. Both of the above points were conceded to the United Nations Command, but at the expense of severe limitations on the freedom and effectiveness of the inspection teams.²⁹

²⁸Joy, *supra* note 9 at 88.

²⁹Joy, *supra* note 9 at 100.

C. SUMMARY

The military and political conditions under which the armistice was negotiated support the conclusion that the Communists genuinely desired a cease-fire. In retrospect, however, it is apparent from an analysis of the factors discussed in this section that any armistice contemplated by the Communists did not have for its purpose the establishment of conditions conducive to the preliminaries of peace in the traditional sense.

CHAPTER III
SCOPE OF THE ARMISTICE AGREEMENT

The purposes of this section are (1) to examine the nature and scope of the Korean Armistice Agreement; (2) to identify those characteristics which distinguish the Korean Armistice Agreement from armistices of the past; and (3) to draw generalizations based upon these distinctions.

A. MATTERS STIPULATED IN THE KOREAN ARMISTICE AGREEMENT

The *Law of Land Warfare* provides that the following matters should be stipulated in an armistice:

- "a. Precise Date, Day, and Hour of Commencement of the Armistice.
- b. Duration of the Armistice.
- c. Principal Lines and all Other Marks or Signs Necessary to Determine the Locations of the Belligerent Troops.
- d. Relation of the Armies With the Local Inhabitants.
- e. Acts to be Prohibited During the Armistice.

f. Disposition of Prisoners of War.

g. Consultative Machinery."³⁰

In addition, it is further provided that various political stipulations may also be incorporated in general armistices. The above stipulations will be used as a framework for examining the scope of the Korean Armistice Agreement.

1. Precise Date, Day, and Hour of Commencement of the Armistice

According to the customary rules of international law an armistice becomes binding on the belligerents at the time of its signing, in the absence of a stipulation to the contrary.³¹ Subordinate officers, however, are not responsible for respecting the armistice until they have received notification.³² The Korean Armistice Agreement obviated potential problems in this respect

³⁰U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, LAW OF LAND WARFARE para. 487 (1956) [hereinafter cited as FM 27-10].

³¹2 L. OPPENHEIM, INTERNATIONAL LAW § 238 (6th rev. ed. H. Lauterpacht 1944) [hereinafter cited as Oppenheim].

³²Oppenheim, *supra* note 31 at § 238; FM 27-10, para. 491.

by the stipulation of an effective date and time for the cessation of all hostilities by all armed forces under the control of the commanders of the opposing sides, "...including all units and personnel on the ground, naval and air forces...."³³ Paragraph 12 specifies that the cessation of hostilities shall be effective twelve hours after the Agreement is signed. All other provisions of the Agreement became effective as of 2000 hours on July 27, 1953.³⁴ In effect, all provisions became effective as of the latter time, since the Agreement was executed at 1000 hours on July 27, 1953.

2. Duration of the Armistice

Where the Agreement specifies no particular period, it remains in effect until notice of a resumption of hostilities has been communicated to the opposing side.³⁵ The Korean Armistice Agreement specifies no particular

³³Agreement Between the Commander-in-Chief, U. N. Command and the Supreme Commander, Korean People's Army and the Commander of the Chinese People's Volunteers, Concerning a Military Armistice in Korea, 27 July 1953, art. II, para. 12, 4 U.S.T. 234, T.I.A.S. No. 2782 [hereinafter cited as T.I.A.S. No. 2782].

³⁴T.I.A.S. No. 2782, art. V, para. 63.

³⁵Oppenheim, *supra* note 31 at § 240; Levie, *supra* note 5 at 892.

duration, but paragraph 62 stipulates that the "...Agreement shall remain in effect until expressly superseded either by mutually acceptable amendments and additions or by provision in an appropriate agreement for a peaceful settlement at a political level between both sides."³⁶ This provision can be construed to preclude the right of either party to resume hostilities. Such a construction gives a modern armistice a permanency that distinguishes it from the temporary armistices of the past. It can be argued that paragraph 62 means that the Korean Armistice is to "...remain in effect as long as the parties do not agree to exchange it for one of real peaceful relations."³⁷ It is primarily for the above reasons that the modern armistice agreement has been compared "...to the preliminaries of peace and even to a definitive treaty of peace."³⁸

³⁶T.I.A.S. No. 2782, art. V.

³⁷*Cf.* Yohuda, *The Inge-Toft Controversy*, 54 AM. J. INT'L L. 398 at 401 (1960).

³⁸Levie, *supra* note 5 at 881.

3. *Principal Lines and all other Marks or Signs
Necessary to Determine the Location of
Belligerent Troops*

Article I of the Korean Armistice Agreement establishes both a Military Demarcation Line and a Demilitarized Zone. The Military Demarcation Line was fixed generally along the line of ground contact when the Agreement was signed.³⁹ The Demilitarized Zone, or buffer zone, was established by northern and southern boundaries drawn two kilometers respectively from the Military Demarcation Line.

4. *Relation of the Armies with the Local Inhabitants*

The Korean Armistice Agreement did not provide for a resumption of commercial intercourse between the populations of the opposing sides, and therefore, commercial relations remain suspended. Three paragraphs, however, do deal with civil administration and the displacement of civilians. These paragraphs comprise the principal political stipulations of the Agreement.

a. *Control of Civil Shipping in the Han River Estuary*

Paragraph 5 provides for the control of civil shipping in the Han River Estuary. Specifically, the Estuary is

³⁹Joy, *supra* note 9 at 59.

open to the "...civil shipping of both sides wherever one bank is controlled by one side and the other bank is controlled by the other side."⁴⁰ The Military Armistice Commission is given authority to prescribe rules and has prescribed rules to govern civil shipping in designated areas of the Estuary.⁴¹

b. Civil and Administrative Relief within the Demilitarized Zone

Paragraph 10 places the responsibility for civil administration and relief in the Demilitarized Zone with the respective Commanders of both sides. That part of the zone south of the Demilitarized Zone is the responsibility of the Commander-in-Chief, United Nations Command, and that part of the Zone north of the Military Demarcation Line is the joint responsibility of the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers.

c. Displacement of Civilians

Paragraph 59 contains provisions for the resettlement of civilians who were displaced by the war. All

⁴⁰T.I.A.S. No. 2782, art. I.

⁴¹Minutes, Military Armistice Commission Meetings, 22d meeting, Oct. 3, 1953 [hereinafter cited as M.A.C., (number) meeting, (date)].

civilians who resided south of the Military Demarcation Line at the start of the fighting and who were located in territory controlled by the Korean People's Army and the Chinese People's Volunteers at the time of the armistice were allowed to return to their homes south of the line if they so desired. Likewise, displaced persons south of the Military Demarcation Line were allowed to return to their homes north of the line. A special committee was established to assist the return of displaced persons.

5. *Acts to be Prohibited During the Armistice*

a. *Customary rules.*

One of the more frequent problems which arose under armistices of the past was the determination of what acts are prohibited and what acts are allowed.⁴² In the absence of stipulations the weight of authority is "...that belligerents during an armistice may, *outside* the line where the forces face each other, do everything and anything they like regarding defense and preparation of offense...."⁴³ In practice states have refrained

⁴²Levie, *supra* note 5 at 886.

⁴³Oppenheim, *supra* note 31 at § 237.

only from acts expressly prohibited.⁴⁴

The *Law of Land Warfare* provides:

"In the absence of stipulations to the contrary, each belligerent is authorized to make movements of troops within his own lines, to receive reinforcements, to construct new fortifications, installations and bases, to build and repair transportation and communication facilities, to seek information about the enemy, to bring up supplies and equipment, and, in general to take advantage of the time and means at his disposal to prepare for resuming hostilities."⁴⁵

b. Stipulations in the Korean Armistice Agreement.

(1) Cessation of all hostilities.

The most sweeping prohibition in the Korean Armistice Agreement is the stipulation calling for a complete cessation of all hostilities in Korea by all ground, naval, and air forces under the control of the commanders of the opposing sides.⁴⁶ However, since the true armistice must establish a reciprocal situation for the armed forces of both sides, with a view toward reducing the likelihood of a resumption of hostilities, additional stipulations were added to maintain the relative balance of power.

⁴⁴Levie, *supra* note 5 at 886.

⁴⁵FM 27-10, para. 487e.

⁴⁶T.I.A.S. No. 2782, art. II, para. 12.

(2) *Rotation of military personnel and equipment.*

The principal arrangements for insuring the stability of the cease-fire are contained in paragraphs 13c and d. Paragraph 13c requires the commanders of both sides to stop the introduction into Korea of reinforcing military personnel. Paragraph 13d requires the commanders of both sides to cease the introduction into Korea of reinforcing combat aircraft, armored vehicles, weapons, and ammunition.

In spite of the worthy objectives of paragraphs 13c and d, it will subsequently be shown that violations by the Communist side caused the United Nations command to consider the provisions as no longer binding. These prohibitions were obviously intended to apply only for a limited period of time. They were drafted with the expectation that the armistice would soon be replaced by a political settlement on a higher level. When the Geneva Conference of 1954 failed to achieve the desired political settlement, it became completely unrealistic to assume that military equipment which was destroyed, damaged, or worn out would be replaced on a piece-for-piece basis with equipment of the same type and effectiveness over a long period of time.

6. *Disposition of Prisoners of War*

The exchange of prisoners of war was the single greatest stumbling block to the speedy execution of the Armistice Agreement. For over a year the Communist side refused to accede to the principle of "no forced repatriation" nor to the process of screening prisoners to determine whether or not they desired to return to their side of origin.⁴⁷

Eventually the United Nations Command prevailed. Paragraphs 51-58 and the Annex to the Korean Armistice Agreement contain detailed provisions for the disposition of prisoners of war. These provisions applied only to prisoners captured prior to the armistice. No provision was made for the treatment of personnel captured during the armistice period itself.

7. *Consultative Machinery*

The following organs were established to implement the Korean Armistice Agreement: (1) a Military Armistice Commission; (2) a neutral Nations Supervisory Commission; (3) a Commission for the Repatriation of Prisoners of War; (4) Joint Red Cross Teams; (5) a Committee for Assisting the Return of Displaced Persons; and (6) a Neutral Nations Repatriation Commission.

⁴⁷Joy, *supra* note 9 at 59.

With the exception of the Military Armistice Commission and the Neutral Nations Repatriation Commission, all of the other organs were dissolved upon completion of their respective missions. Because of the opposition of the Czechoslovak and Polish Members and the violations of paragraphs 13*c* and *d* by the Communist side, the Neutral Nations Inspection Teams were ultimately withdrawn to Panmunjom.⁴⁸ The Neutral Nations Supervisory Commission has remained moribund since that time. Consequently, the only commission set up by the Armistice Agreement that is still viable is the Military Armistice Commission.

8. Political Conference

The only stipulation of a political nature not previously discussed is paragraph 60 of the Armistice Agreement, which is a recommendation to the governments of both sides that "...within three (3) months after the Armistice Agreement is signed and becomes effective, a political conference on a higher level of both sides be held by representatives appointed respectively to settle through negotiations the questions of the

⁴⁸U.N. Doc. A/3167 (1956).

withdrawal of all foreign forces from Korea, the peaceful settlement of the Korean question, etc."⁴⁹

B. SUMMARY

Examination of the nature and scope of the Korean Armistice Agreement reveals that its "...conditions and terms are intended to be purely military in character...."⁵⁰ However, a fair construction of the Agreement supports the conclusion that the customary rule of international law which reserves the right of either belligerent to resume hostilities is inapplicable to the Korean Armistice.

⁴⁹T.I.A.S. No. 2782, art. IV, para. 60.

⁵⁰T.I.A.S. No. 2782, preamble.

CHAPTER IV

SETTLEMENT OF DISPUTES ARISING DURING THE ARMISTICE

The purposes of this section are (1) to consider the organization and functions of the supervisory organs established by the Korean Armistice Agreement; (2) to evaluate the effectiveness of these supervisory organs; and (3) to consider the permissible range of options available under the customary rules of international law for the handling of disputes during the armistice period.

A. THE MILITARY ARMISTICE COMMISSION

The most important organ created by the Armistice Agreement is the Military Armistice Commission, whose mission is to supervise the implementation of the Armistice Agreement in all of its particulars and to settle all alleged violations by negotiation.

1. Composition and Functions

The Commission is composed of ten senior members, five of whom are appointed by the United Nations Command, and five of whom are appointed jointly by the Supreme

Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers.⁵¹

The Commission supervises the armistice by observation, inspection, and investigation. The Commission performs these functions through Joint Observer Teams and through the Neutral Nations Supervisory Commission.⁵² The functions of the latter two organs compliment each other and provide a comprehensive scheme for the investigation of violations reported to have occurred any place in Korea. The responsibility of the Joint Observer Teams is limited to the Demilitarized Zone and the Han River Estuary.⁵³ Investigation at any place outside the Demilitarized Zone where violations are reported to have occurred is the responsibility of the Neutral Nations Supervisory Commission.⁵⁴

The stated purpose of the Military Armistice Commission--to supervise the implementation of the

⁵¹T.I.A.S. No. 2782, art. II, para. 20.

⁵²T.I.A.S. No. 2782, art. II, paras. 23, 28.

⁵³T.I.A.S. No. 2782, art. II, para. 26.

⁵⁴T.I.A.S. No. 2782, art. II, para. 28.

Armistice Agreement--was soon "...overshadowed by [Communist] propaganda...."⁵⁵ To date only two alleged violations reported by the United Nations Command have been admitted by the Communist side. This occurred at the ninth meeting of the Commission on August 8, 1953, when the Senior Member of the Korean People's Army and the Chinese People's Volunteers admitted that two men in a detail removing communication wire from the Demilitarized Zone had crossed the Military Demarcation Line by mistake.⁵⁶ With the exception of this admission the Communist side has uniformly denied all allegations, or as is more often the case, have simply ignored the charges of the United Nations Command.

In the main the Military Armistice Commission has proved to be an ineffective forum for settling disputes through negotiation. However, much has been accomplished by the staffs of the respective sides, where the opportunity for propaganda is minimal.⁵⁷

⁵⁵Time, July 2, 1965 at 19.

⁵⁶M.A.C., 9th meeting, Aug. 8, 1953.

⁵⁷M.A.C., 2d meeting, July 29, 1953 -- rules for civil shipping in the Han River Estuary and related matters; M.A.C., 6th meeting, Aug. 3, 1953 -- movement of civilian residents of Demilitarized Zone; M.A.C., 65th meeting, Aug. 21, 1955 -- return of pilots shot down over North Korea; M.A.C., 82d meeting, Mar. 10, 1958, return of aircraft wreckage.

2. Joint Observer Teams

The Armistice Agreement provided for the initial establishment of ten Joint Observer Teams, to be composed of not less than four nor more than six field grade officers, half of whom were to be appointed by each side.⁵⁸ In its first meeting, the Military Armistice Commission agreed upon three field grade officers from each side to constitute each Joint Observer Team. The Demilitarized Zone and the Han River Estuary were divided into ten zones, with one Joint Observer Team for each sector.⁵⁹ The number of teams was subsequently reduced from ten to seven on the recommendation of the United Nations Command.⁶⁰

The Armistice Agreement provides that Joint Observer Teams may be dispatched by the Military Armistice Commission, or by the senior member of either side thereof.⁶¹ In actual practice only certain types of alleged violations have resulted in satisfactory investigations. For example, in the eleventh meeting of the

⁵⁸T.I.A.S. No. 2782, art. II, para. 23.

⁵⁹M.A.C., 1st meeting, July 28, 1953.

⁶⁰M.A.C., 35th meeting, Jan. 10, 1954.

⁶¹T.I.A.S. No. 2782, art. II, para. 28.

Military Armistice Commission, the United Nations Command charged that the Communist side was constructing a fortification within their half of the Demilitarized Zone.⁶² A Joint Observer Team was dispatched, completed an investigation, and reported that no fortification nor evidence of construction was found. The United Nations Command conceded that the point had been satisfactorily dealt with.⁶³ Such examples are rare.

By far the majority of reported incidents do not lend themselves to investigation, either because evidence is unavailable, or is fabricated for the purpose of propaganda,⁶⁴ or is peculiarly within the knowledge of one side or the other. Consequently, the practice has been for one side or the other to make an allegation of violations to the Military Armistice Commission. Ex parte investigations are then conducted, and depending upon the results, the allegations are admitted, denied, or ignored.

⁶²M.A.C., 11th meeting, Aug. 13, 1953.

⁶³M.A.C., 12th meeting, Aug. 19, 1953.

⁶⁴In one instance there was strong evidence that the Communist side murdered six of their own personnel and attempted to create an incident by placing their bodies within the Demilitarized Zone. M.A.C., 58th meeting, May 25, 1955.

B. THE NEUTRAL NATIONS SUPERVISORY COMMISSION

While the Military Armistice Commission is ranked first among the supervisory organs in relative importance because of its overall responsibility, the Neutral Nations Supervisory Commission is the most important from the practical standpoint. Theoretically, at least, the Commission was to be composed of representatives of nations which were genuinely neutral; and whom, it was hoped, would bring a complete impartiality to their responsibilities in policing the armistice.⁶⁵

What appeared to be an effective means of supervision in theory was not borne out in actual practice. The gap between conception and execution was never effectively bridged, primarily because the Czechoslovak and Polish Members of the Commission were influenced by and supported the position of the Communist Members of the Military Armistice Commission.⁶⁶ Czechoslovakia and Poland were neutral only in the sense that they were not active participants in the Korean hostilities. While it could be argued that the subsequent failure of the Neutral Nations

⁶⁵Joy, *supra* note 9 at 90.

⁶⁶Letter from Maj. Gen. Lacey, Senior U.S. Representative, Military Armistice Commission in Korea, to the Neutral Nations Supervisory Commission, April 15, 1954, in 30 DEP'T STATE BULL 689 (1954).

Supervisory Commission was due to inadequate terms of reference, in that each side exercised a virtual veto over the other, the fact remains that successful functioning of the Commission was predicted upon the strict neutrality of all members, and good faith on the part of the Communist side in facilitating free and open investigation. Without these latter two ingredients, no system could have been effective.

1. Composition and Functions.

The Commission is composed of two senior officers appointed by Sweden and Switzerland, who were nominated as neutral nations by the Commander-in-Chief, United Nations Command; and by two senior officers appointed by Czechoslovakia and Poland, who were nominated by the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers.⁶⁷

The function of the Commission is two-fold. First, it is charged with supervising the rotation of personnel and units, and the replacement of combat material as stipulated in paragraph 13c and d of the Armistice Agreement. Second, it is charged with conducting inspections of violations of the Armistice Agreement that are alleged to have occurred outside the Demilitarized Zone.⁶⁸

⁶⁷T.I.A.S. No. 2782, art. II, para. 37.

⁶⁸T.I.A.S. No. 2782, art. II, paras. 41-42.

2. Neutral Nations Inspection Teams

a. Permanent teams

The first part of the Commission's dual role was to be accomplished through the use of Neutral Nations Inspection Teams permanently stationed at specified ports of entry.⁶⁹ Initially, five Inspection Teams were stationed at ports under military control of the Communist side, and five Inspection Teams were stationed at ports under the military control of the United Nations Command. All outgoing and incoming combat personnel and equipment were required to be introduced into and evacuated from Korea only through the specified ports.⁷⁰

In the South the Inspection Teams controlled the inspection of all incoming and outgoing military personnel and combat materiel through well-established procedures. The teams in the South freely conducted on-the-spot inspections in addition to checking ship and load manifests furnished to them by the United Nations Command.⁷¹

⁶⁹T.I.A.S. No. 2782, art. II, paras. 42-43.

⁷⁰T.I.A.S. No. 2782, art. II, para. 13c and d.

⁷¹M.A.C., 60th meeting, July 5, 1955.

By contrast, the teams in the North had no established system. For the first six months of the armistice the Communist side submitted no reports of any incoming combat materiel. The first combat materiel report, which was submitted on October 6, 1953, reflected that four 57mm anti-tank guns and 20 rounds of ammunition had been shipped out of Korea. The first combat personnel report, submitted on September 12, 1953, purported to show that there were no personnel rotations for a seven-week period, despite the fact that the Communists had a military force in excess of a million men, most of whom had come from Communist China.⁷²

The reports of the Communists prompted the Senior Swiss Member of the Neutral Nations Supervisory Commission to comment, "I think we have the right to ask ourselves how it is possible that an Army counting several one hundred thousand soldiers can be logistically supported by the amount of materiel as shown by the figures which are being submitted to us."⁷³

In addition to not reporting personnel rotations and combat materiel replacement as required by paragraph 13c

⁷²M.A.C., 60th meeting, July 5, 1955.

⁷³M.A.C., 60th meeting, July 5, 1955.

and d of the Armistice Agreement, there was evidence that the movement of incoming personnel and materiel were not limited to designated ports of entry in the North. At one port a railroad bypass was constructed. Within the designated ports of entry inspection activities were restricted to the vanishing point by the scheduling of inspections at unreasonable hours and by the failure to give sufficient advance notice of train movements to permit inspections.⁷⁴

b. Mobile teams.

The second part of the Commission's dual role, that of inspecting reported violations of the Armistice Agreement outside of the Demilitarized Zone, was to be accomplished by twenty mobile inspection teams. According to the terms of reference under which the teams were to operate, investigations could be requested either by the Military Armistice Commission or by the senior member of either side on the Military Armistice Commission.⁷⁵ This latter provision meant that either side could request that teams be dispatched to investigate

⁷⁴M.A.C., 70th meeting, May 31, 1956.

⁷⁵T.I.A.S. No. 2782, art. II, para. 28.

reported violations in territory controlled by the other side without advance agreement by the opposing side.

In practice, the Czechoslovak and Polish Members of the Neutral Nations Supervisory Commission exercised their veto on five separate occasions to unilateral requests for investigations by the United Nations Command.

On June 29, 1953, the United Nations Command requested an investigation into the case of three soldiers who had entered the joint security area around Panmunjom and sought refuge in a sentry box belonging to the United Nations Command.⁷⁶ Preliminary investigation supported their allegations that they were Republic of Korea soldiers who had been captured and forcibly impressed into the service of the Korean People's Army. If true, the results of the preliminary investigation was evidence of a violation of the Armistice Agreement, since it had been previously reported that all prisoners of war who had insisted upon repatriation had been returned to their side of origin. For obvious reasons, the Czechoslovak and Polish Members refused to order a joint investigation.⁷⁷

⁷⁶M.A.C., 29th meeting, Nov. 21, 1953.

⁷⁷Letter from Maj. Gen. Lacey, Senior U.S. Representative, Military Armistice Commission in Korea, to the Neutral Nations Supervisory Commission, April 15, 1954, in 30 DEP'T STATE BULL 689 (1954).

Similar investigations with respect to other individuals were unilaterally requested by the United Nations Command on three subsequent occasions, with similar results.⁷⁸

In the 96th meeting of the Neutral Nations Supervisory Commission it became obvious that there would be no further investigations relating to the forcible detention of captured personnel. The Polish Delegation stated that "...it will not agree--either now or in the future--to a request of one of the sides to conduct any investigation in connection with the issue of retention of captured personnel on either side--until settlement or understanding is reached on the matter by the two opposing sides or by the forthcoming political conference."⁷⁹

The subject of the fifth refusal to conduct an investigation at the request of the United Nations Command concerned the alleged illegal introduction of combat air craft into the North in violation of paragraph 13d of the Armistice Agreement.⁸⁰

⁷⁸Letter from Maj. Gen. Lacey, Senior U.S. Representative, Military Armistice Commission in Korea, to the Neutral Nations Supervisory Commission, April 15, 1954, in 30 DEP'T STATE BULL 689 (1954).

⁷⁹*Id.*

⁸⁰*Id.*

Not all requests for investigations were refused, but in those cases where investigations were conducted, they were rendered ineffective by obstructionist tactics and restrictions imposed by the Czechoslovak and Polish Members on the inspection teams. One of the clearest examples of this was in connection with the introduction of combat aircraft into the North.⁸¹ As of July 27, 1953, intelligence had established that there were no aircraft and no useable airfields in territory under Communist control. Soon after the armistice became effective, radar detected the presence of combat aircraft in the North. This evidence was later corroborated by defectors who surrendered Soviet-built combat aircraft at airfields in the South.⁸²

In each case where a mobile inspection team was dispatched to investigate the alleged illegal introduction of aircraft, its mission was frustrated by a variety of means. Defectors furnished information on how evidence was concealed or removed. This information formed the basis for the following charges by the senior

⁸¹M.A.C., 60th meeting, July 5, 1955.

⁸²*Id.*

delegate of the United Nations Command in the 60th meeting of the Military Armistice Commission:

"Your side flew many combat aircraft away from the inspected air fields.

"Your side hid combat aircraft in ravines in the hills in the vicinity of the airfields and camouflaged them.

"Your side dismantled some of the aircraft and concealed them.

"Your side stationed heavy guards about the hiding places and prevented inspections of these areas by the Mobile Inspection Teams.

"Your side arbitrarily reduced the boundaries of the airfields, thereby restricting the scope of the Mobile Inspection Teams Inspection.

"Your side prepared false testimony by long, detailed coaching of probable witnesses and by substituting politically indoctrinated, higher ranking officers for lower ranking officers by switching insignia.

"Your side delayed the assembly of newly arrived combat aircraft at Taecheon by leaving them in their crates until the Mobile Inspection Team investigations were completed."⁸³

Requests for documents by the Swiss and Swedish members of the inspection teams were routinely vetoed

⁸³M.A.C., 60th meeting, July 5, 1955.

by the Czechoslovak and Polish Members on the pretext that they were secret.⁸⁴

3. *Suspension of Functions.*

The continual frustration of the mission of the Neutral Nations Supervisory Commission caused the Swiss and Swedish Governments in January of 1955 to recommend the abolition of the Commission, or in the alternative to significantly reduce its size.⁸⁵ The United States agreed in principle with the recommendation that the Commission be terminated.⁸⁶

The Communist side rejected the abolition of the Commission, but agreed instead to the alternative proposal calling for a reduction in size.⁸⁷ Consequently, the number of inspection teams in the ports of entry was reduced from ten to six.⁸⁸

On May 31, 1956, the United Nations Command notified the Communists that it would provisionally suspend the operations of the Neutral Nations Commission and the

⁸⁴M.A.C., 60th meeting, July 5, 1955.

⁸⁵Dep't of State Statement, February 23, 1955, in 32 DEP'T STATE BULL 427 (1955).

⁸⁶*Id.*

⁸⁷*Id.*

⁸⁸11 CHRONOLOGY OF INTERNATIONAL EVENTS 465 (1955).

inspection teams in the South during the time that the Communist side continued in default of paragraphs 13c and d of the Armistice Agreement.⁸⁹

The activities of the inspection teams in the North and South were suspended on June 9, 1956. All teams returned to Panmunjom by April 11, 1956.⁹⁰

C. OPTIONS AVAILABLE UNDER CUSTOMARY INTERNATIONAL LAW

The withdrawal of the Neutral Nations Inspection Teams to Panmunjom marked the end of any effective supervision under the terms of the Armistice Agreement. The ineffectiveness of the supervisory organs established by the Agreement, coupled with the increased violations from the North beginning in the latter part of 1966 has necessitated a fresh look at the alternatives available under customary international law. Two courses of action (1) denunciation of the Agreement and (2) the use of force will be considered.

1. *Denunciation of the Agreement*

Under the Hague Regulations and the *Law of Land Warfare* "[a]ny serious violation of the armistice by one

⁸⁹U.N. DOC. A/3167 (1956).

⁹⁰*Id.*

of the parties gives the other party the right of denouncing it, and even, in case of urgency, of recommencing hostilities immediately."⁹¹ It is necessary at the outset to distinguish the right of denunciation from the right of recommencing hostilities, a distinction that has not always been recognized.⁹²

a. Unilateral denunciation.

It seems to follow from the customary rules governing armistice status that a serious violation by one party gives the other party at least the right of denouncing it, irrespective of whether or not that party has a right to recommence hostilities. Article 40 of the Hague Regulations leaves open the question as to who determines the seriousness of a violation. Theoretically this is left for each belligerent to decide.⁹³

The right of unilateral termination does not necessarily follow if the rules that apply to international agreements generally are applied to armistices.

⁹¹Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, arts. 36-41, 36 Stat. 2277, T.S. No. 539 [hereinafter cited as H.R.].

⁹²See Oppenheim, *supra* note 31 at § 239.

⁹³Monaco, *supra* note 17 at 337.

The statements of writers and diplomats, and the weight of opinion in the United States as expressed in court decisions, support the position that such a right exists.⁹⁴ Nevertheless, it is safe to say that the right has not received recognition in the practice of states in the international community.⁹⁵

Conceding the right of either side to denounce the Korean Armistice Agreement, it is submitted that there is ample justification for the United Nations Command to do so because of the gravity of the violations on the part of the Communist side.

b. Who may denounce the Agreement.

A second legal question which arises in connection with the Korean Armistice Agreement is--who may denounce the Agreement? The question arises because the Agreement is a collective convention, signed by multiple parties on both sides. Monaco argues that an armistice is always considered to be a bilateral rather than a multilateral agreement; and therefore, there must be an agreement among allies as to who is authorized to act for the group.⁹⁶

⁹⁴G. HACKWORTH, 5 DIGEST OF INTERNATIONAL LAW 342-346 (1943).

⁹⁵*Id.*

⁹⁶Monaco, *supra* note 17 at 327.

In passing the resolution calling for collective action in Korea, the Security Council of the United Nations recommended that all members providing military forces make them available to a unified command under the United States.⁹⁷ It would therefore appear that the United States is authorized to act for its allies in effecting any alteration or termination of the Agreement. In practice, the United States has consulted with its allies prior to making any decision which had the effect of altering the Armistice Agreement.⁹⁸

c. Resumption of hostilities.

The right to recommend hostilities must be considered in light of the legal limits imposed by the United Nations Charter. The most significant limitation is contained in Article 2, paragraph 4, which provides that members shall refrain from the threat or use of force in the settlement of international disputes.⁹⁹ There are two exceptions to this principle: (1) Article 51 preserves the inherent right of individual or collective self-defense in the case

⁹⁷5 U.N. SCOR, 544th meeting 4 (1950).

⁹⁸U.N. DOC A/3167 (1956).

⁹⁹U.N. CHARTER.

armed attack;¹⁰⁰ (2) Chapter VII provides for collective action of the United Nations to deal with serious threats or breaches of international peace and security.¹⁰¹

In any event where disputes cannot be settled by peaceful means, members are obligated to submit disputes likely to endanger international peace to the Security Council.¹⁰²

It is submitted that notwithstanding the Hague Regulations, any use of force by the United Nations Command must be brought within the legal limits established by the United Nations Charter. In keeping with the charter provisions for collective self-defense and as further deterrents to aggression on the part of the Communist side, the United States has concluded a security treaty with the Republic of Korea.¹⁰³ Serious threats to the stability of the armistice have been brought to the attention of the Security Council.¹⁰⁴

¹⁰⁰U.N. CHARTER.

¹⁰¹*Id.*

¹⁰²*Id.*, art. 37, para. 1.

¹⁰³8 U.N. SCOR, Supp. July-Sep. 1953, at 8, U.N. Doc. S/3079 (1953).

¹⁰⁴22 U.N. SCOR, Supp. Oct.-Dec. 1967 at 1967, U.N. Doc. S/8217 (1967); N.Y. Times, Jan. 27, 1968, at 6, col. 1.

2. *Force Short of a Resumption of Hostilities.*

To what extent may local commanders in Korea react to illegal acts by the opposite side? Such reaction could range from self-defense to reprisals. The Korean Armistice Agreement furnishes little guidance, since it contemplates a complete cessation of hostilities and is limited to the treatment of violations by individuals.¹⁰⁵

No citation of authority is necessary to support the proposition that local commanders can exercise the inherent right of self-defense. What is not clear is the extent to which immediate action may be taken to restore the equilibrium as it existed prior to the violation.

The resort to reprisals is subject to the same limitations of the United Nations Charter discussed above with respect to denunciation. It is difficult to envision justification for a reprisal except in the case of collective action by the United Nations under Chapter VII of the Charter.

One incident did occur in the operation of the armistice, which could be construed as a form of

¹⁰⁵ See T.I.A.S. No. 2782, art. II, para. 13e.

reprisal from a legal point of view. On February 5, 1955, MIG aircraft based in North Korea attacked United Nations Command aircraft over international waters. The United Nations Sabre Jets pursued the attacking MIG's and apparently downed two of them over coastal waters of North Korea.¹⁰⁶

From a practical point of view the use of reprisals presents serious dangers to the maintenance of the armistice, and therefore cannot be sanctioned under the United Nations Charter. There is a great danger that a reprisal may be regarded as a denunciation of the Armistice Agreement and as a resumption of hostilities.¹⁰⁷

D. SUMMARY

The elaborate supervisory machinery set up by the Armistice Agreement has failed to achieve the objectives set up in the Agreement for the settlement of disputes. The functionings of these organs have been frustrated to the point where the United States would be justified

¹⁰⁶M.A.C., 57th meeting, Apr. 26, 1955.

¹⁰⁷See W. BISHOP, INTERNATIONAL LAW, CASES AND MATERIALS 746 (2d ed. 1962).

in terminating the Agreement, or in the alternative of completely suspending its provisions. The permissible range of options available under customary international law for exerting pressure on the Communist side to induce them to refrain from violating the Armistice Agreement is severely limited by the United Nations Charter.

CHAPTER V

TREATMENT OF SPECIFIC INCIDENTS UNDER
THE ARMISTICE AGREEMENT

The purposes of this section are (1) to analyze the legal problems that have arisen in the treatment of specific incidents during the armistice period, and (2) to identify and appraise any dissimilarities in the treatment of violations by ground, naval, and air forces.

A. GROUND INCIDENTS

The majority of violations of the Demilitarized Zone by ground forces has been perpetrated by individuals, patrols, and relatively small bands of infiltrators. Under the terms of paragraph 13e of the Armistice Agreement the Senior Commanders of both sides are obliged to "...insure that all personnel of their respective commands who violate any of the provisions of the Armistice Agreement are adequately punished."¹⁰⁸ No distinction is made between the acts of private persons who act on their own responsibility and those who act

¹⁰⁸T.I.A.S. No. 2782, art. II.

under the instigation of opposing armed forces; no distinction is made between violators who remain under the control of their respective sides after violations and those who are captured by opposing forces; and no distinction is made between intentional and unintentional violations.

1. *Acts of Private Persons Versus Acts of Armed Forces.*

Article 41 of the Hague Regulations provides that "[a] violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand punishment of the offenders or, if necessary, compensation for the losses sustained."¹⁰⁹ The *Law of Land Warfare* defines a private individual as "...any person, including a member of the armed forces, who acts on his own responsibility."¹¹⁰

The only significance that attaches to the characterization of an individual violator as a private person as defined by the *Law of Land Warfare*, is that in such a case there is no right to denounce the armistice, regardless of the seriousness of the hostile acts

¹⁰⁹H.R., art. 41.

¹¹⁰FM 27-10, para. 494

committed. However, violations by individual military personnel may constitute a basis for denunciation if such violations are "...committed with the knowledge and actual or tacit consent of their own government or commander. Consent may be inferred in the event of a persistent failure to punish such offenders."¹¹¹

Violations by private persons do not give the opposing side the right of denunciation, because there must be a violation by one of the *parties*, that is to say by a *subject* of international law, as a condition precedent to denunciation and/or a resumption of hostilities.¹¹² In those cases where violations are committed by individuals with the consent of their government, the responsibility for the violations is imputed to the belligerent with whose approval they are committed.

Most, if not all, of the serious violations by the Communist side have been committed by military personnel acting pursuant to military orders. While it is true that the more serious hostile acts have been committed by what were nominally guerrilla forces, the critical

¹¹¹FM 27-10, para. 494

¹¹²See Monaco, *supra* note 17 at 339. Monaco does not treat hostile acts by individuals acting on their own initiative as constituting violations of the armistice.

factor is that these forces were organized, equipped, and trained by the Korean People's Army.¹¹³ Paragraph 12 of the Armistice Agreement provides that "[t]he Commanders of the opposing sides shall order and enforce a complete cessation of all hostilities in Korea by *all* armed forces under their control...."¹¹⁴ [Emphasis added.] This language is broad enough to include all guerrilla forces under the control of either side.¹¹⁵

The strongest evidence that North Korean infiltrators were acting under military control was the attempted assassination of South Korea President Park Chung Hee on January 17, 1968. A 31-man commando team, which had been organized and trained in North Korea, crossed the Demilitarized Zone wearing fatigues of the Republic of Korea Army. Their mission was to behead the South Korean President. Only one member of the team, a lieutenant in the Korean People's Army, is known to have survived. He was captured and remains in the custody of the Republic of Korea. His testimony

¹¹³Hubbell & Reed, *Mission: To Murder a President*, Reader's Digest, July 1968, 142-147.

¹¹⁴T.I.A.S. No. 2782, art. II.

¹¹⁵*See* Levie, *supra* note 5 at 903.

conclusively establishes the responsibility of the Korean People's Army for the mission.¹¹⁶

It is probably valid to conclude that paragraph 13e of the Armistice Agreement contemplates violations by private individuals only, and does not extend to violations by armed forces. In actual practice, the Senior Member of the aggrieved side has protested violations to the Military Armistice Commission. Where investigation has revealed responsibility on the part of individual violators under control of the United Nations Command, assurances have been given that immediate and positive steps will be taken to prevent a repetition, and that persons found to be responsible will be adequately punished. The Communist side has admitted and expressed regret for only two relatively minor violations in the early days of the armistice.¹¹⁷

2. *The Legal Status of Captured Members of Opposing Forces.*

Neither the Armistice Agreement nor the Hague Regulations contain any directions for the handling of individuals who are captured by opposing forces. The

¹¹⁶Hubbell & Reed, *Mission: To Murder a President*, Reader's Digest, July 1968, 142-147.

¹¹⁷M.A.C., 9th meeting, Aug. 8, 1953.

Law of Land Warfare provides that individual violations are punishable as war crimes.¹¹⁸ It follows, therefore, that individual violators may be tried and sentenced to execution for war crimes, and this is so whether or not such individuals act on their own responsibility as private persons or as part of the opposing armed forces.

It can be concluded that personnel captured in the act of breaking the armistice are no longer entitled to treatment as prisoners of war.¹¹⁹ Therefore, the transfer of captured personnel to the Republic of Korea by the United Nations Command in no way controvenes any rule of international law, even if the Geneva Conventions are deemed to apply to the armistice period. The sole responsibility of the United Nations Command in transferring custody of captured personnel to the Republic of Korea is to insure that the latter will not execute, imprison, or penalize such prisoners "...without further judicial proceedings to determine what acts they

¹¹⁸FM 27-10, para. 494

¹¹⁹*cf.* J. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 644-645 (2d rev. ed. 1959).

have committed and what penalty should be imposed therefore [sic]."¹²⁰

In actual practice both sides have returned captured personnel who have not committed hostile acts in territory under their respective control, except in cases where asylum has been requested and granted.¹²¹

3. *Intentional Versus Unintentional Violations.*

While paragraph 13e of the Armistice Agreement makes no distinction between intentional and unintentional violations, military personnel of the United Nations Command have been subjected to disciplinary action even where investigation has revealed accidental violations, such as navigational errors by pilots of aircraft.¹²² It does not appear from the minutes of

¹²⁰FM 27-10, para. 71c.

¹²¹On Sep. 21, 1953, a pilot officer of the Korean People's Army and the Chinese People's Volunteers surrendered a MIG-15 aircraft at a Republic of Korea airport. On June 21, 1955, two members of the Korean People's Army surrendered a YAK-18 aircraft at Seoul Air Base. All requested and were granted asylum. M.A.C., 60th meeting, July 5, 1955.

¹²²M.A.C., 7th meeting, Aug. 4, 1953; M.A.C., 35th meeting, Jan. 10, 1954; M.A.C., 54th meeting, Feb. 10, 1955; M.A.C., 65th meeting, Aug. 21, 1955; M.A.C., 73d meeting, Nov. 10, 1956; M.A.C., 82d meeting, Mar. 10, 1958; N.Y. Times, May 19, 1965, at 10, col. 1.

the Military Armistice Commission what this action consists of. Presumably, punitive action is taken on the grounds of dereliction of duty or violation of orders.

According to the *Law of Land Warfare*, neither side is justified in resuming hostilities without "...convincing proof of intentional and serious violation of its terms by the other party."¹²³ It is clear, therefore, that with respect to resumption of hostilities under the customary rules of armistice, there must not only be action by a subject of international law, but such action must be intentional.

B. MARITIME INCIDENTS

1. Customary Rules

Most writers agree that in the absence of specific stipulations regulating the conduct of naval forces, the customary rules of armistice are that naval blockade may be continued, along with the rights of visitation and search, control over neutral vessels, seizure of contraband, and the taking of prizes.¹²⁴

¹²³FM 27-10, para. 493.

¹²⁴See Oppenheim, *supra* note 31 at § 231; Levie, *supra* note 5 at 904.

The blockade in maritime warfare has been analogized to the siege in land warfare, so that blockades in existence at the time of the armistice are not required to be lifted without a special stipulation to the contrary.¹²⁵

2. *Stipulations in the Korean Armistice Agreement.*

The Korean Armistice Agreement includes provisions which are designed to eliminate the difficulties that may arise under the customary rules of armistice applicable to maritime warfare.¹²⁶ Paragraph 12 requires a complete cessation of all hostilities, including naval forces. Paragraph 15 explicitly states that "[t]his Armistice Agreement shall apply to all opposing naval forces, which naval forces shall respect the waters contiguous to the Demilitarized Zone and to the land area under the military control of the opposing side, and shall not engage in blockade of any kind in Korea."¹²⁷

Paragraph 15 uses the term "contiguous waters," and is silent as to the extent of these waters. In the

¹²⁵A. ROLIN, 2 LE DROIT MODERNE DE LA GUERRE §§ 801-810 (1920).

¹²⁶Levie, *supra* note 5 at 906.

¹²⁷T.I.A.S. No. 2782, art. III.

armistice negotiations dealing with this point an attempt was made to obtain agreement on the breadth of the territorial waters of North and South Korea. Agreement was not reached because of the divergent proposals of the United Nations Command, the Republic of Korea, and the Communist side. The United Nations Command suggested the traditional three-mile limit; the Republic of Korea established the "Rhee Line" which varied from 60 to 200 miles; and the Communist insisted upon the 12-mile limit, which has uniformly been claimed by Communist states.¹²⁸ In consonance with the underlying objectives of the armistice, the United Nations Command imposed a 12-mile limit on personnel under its control.¹²⁹ The Republic of Korea subsequently abolished the Rhee Line in a fisheries agreement concluded with Japan, but maintained that the line "...would continue to exist for purposes of national security and the preservation of continental shelf resources."¹³⁰

¹²⁸Levie, *supra* note 5 at 906.

¹²⁹*Id.*

¹³⁰Shigeru, *The Normalization of Relations Between Japan and the Republic of Korea*, 61 AM. J. INT'L L. 35 at 54 (1967).

3. Incidents Involving Fishing Vessels.

Most of the incidents arising in the waters contiguous to North and South Korea have involved fishing vessels.¹³¹ Technically such intrusions constitute violations of the armistice by private persons. Under customary rules the injured party is entitled to demand punishment of the offenders, and compensation for any losses.

The practice by the Communist side with respect to the intrusion of unarmed fishing boats into its coastal waters has not been consistent. The Senior Communist Members of the Military Armistice Commission have accepted in principle, at least, that fishing vessels and their crews should be returned if their intrusions were harmless.¹³² On two occasions this was done. In response to a protest by the United Nations Command on November 15, 1957, the Communists replied that if investigation revealed that the 47 persons seized were *bona fide* fishermen, they would be released. Eight vessels and their crews were subsequently

¹³¹See the TIMES INDEX July-Sep. 1953 to present.

¹³²M.A.C., 83d meeting, Mar. 20, 1958.

returned to South Korea.¹³³ On July 8, 1954, South Korean fishermen drifted into the waters of North Korea during a storm. North Koreans repaired their boats, salted their catch of fish, and assisted them in returning to South Korea.¹³⁴

On other occasions defenseless fishing boats from the South have been subjected to hostile fire which cannot be justified under any rule of international law. One example will suffice. On May 10, 1955, North Korean shore batteries fired upon eight unarmed fishing boats. Five boats were sunk, and three were missing; six fishermen were killed, nine were wounded, and fifteen were missing.¹³⁵ Considered as a reprisal, the reaction was clearly disproportionate to the violation of the Demilitarized Zone. The Communists alleged self-defense, stating that warning signals had been given, but that armed vessels disguised as fishing boats, mixed among the fishing boats and continued to approach the North Korean shore. There was no allegation of other

¹³³M.A.C., 83d meeting, Mar. 20, 1958.

¹³⁴M.A.C., 83d meeting, Mar. 20, 1958

¹³⁵M.A.C., 65th meeting, Aug. 21, 1955.

hostile acts. The United Nations Command presented evidence that the fishermen did not fire a single round during the more than one hour that the vessels were subjected to the so-called defensive measures. The evidence further indicated that the fishermen were struggling to recover their nets while the shore batteries were firing over 800 rounds of heavy artillery.¹³⁶

4. Incidents Involving Naval Vessels.

The first incident involving naval craft occurred in January 1967, when a South Korean patrol escort was sunk by North Korean shore batteries. The South Korean Defense Minister conceded that the boat had crossed three miles north of the Military Demarcation Line into North Korean waters and was attempting to escort 240 South Korean fishing boats back to South Korea. The patrol boat was four miles from the North Korean shore when fired upon.¹³⁷

The second and more interesting maritime incident from the point of view of international law involved

¹³⁶M.A.C., 59th meeting, June 14, 1955.

¹³⁷N.Y. Times, Jan. 20, 1967, at 1, col. 2.

the seizure of the *U.S.S. Pueblo* in January, 1968. The position of the United States was that the *Pueblo* was seized in international waters and that at no time had the *Pueblo* intruded into the territorial waters of North Korea.¹³⁸

It has been shown that North Korea claims that her territorial sea extends 12 miles from the shoreline. The validity of this claim in international law is by no means settled, but it is not controlling in this situation, since the United States agreed to respect North Korea's claim to 12 miles for the purposes of the armistice. It was conceded that the "...[i]nstructions under which the *Pueblo* was operating required it to stay at least 13 nautical miles from the North Korean coast."¹³⁹

The legality of the seizure depends upon whether or not the *Pueblo* was within 12 miles of the North Korean coast, a factual question which has never been satisfactorily settled. If the seizure occurred outside the 12-mile limit, it was a clear violation of

¹³⁸N. Y. Times, Jan. 27, 1968, at 6, col. 1.

¹³⁹*Id.*

international law. Assuming that the *Pueblo* was within the 12-mile limit, its very presence was a violation of the Armistice Agreement and its seizure was justified.

Two writers have examined the right of innocent passage to determine if this rule of international law would have permitted the *Pueblo* to navigate within the territorial waters of North Korea.¹⁴⁰ The authors reached opposite conclusions. In both cases it was assumed without argument that the rule establishing the right of innocent passage was applicable to the *Pueblo*. This line of reasoning completely ignores the existence of the Armistice Agreement, which is binding on both parties. The right of innocent passage is a rule which properly belongs to the international law of peace and which has no application to an armistice situation. It is submitted, therefore, that there are no rules of international law which would have permitted the *Pueblo* to navigate within the territorial sea of North Korea.

¹⁴⁰Goldsmith, *The Pueblo Incident -- Possible Legal Aspects Under International Law*, 20 S. CAROLINA L. REV. 487 (1968); Morrison, *International Law and the Seizure of the U.S.S. Pueblo*, 4 TEXAS INT'L L.F. 187 (1968).

C. AIRCRAFT INCIDENTS

Protests over aircraft violations were made by the Communist side as early as the second meeting of the Military Armistice Commission on July 29, 1953.¹⁴¹ Most of these overflights by United Nations aircraft occurred prior to effective marking of the Demilitarized Zone.¹⁴² Even after marking, however, it was difficult for pilots to determine the exact location of the Demilitarized Zone from the air.¹⁴³

In the 35th meeting of the Military Armistice Commission the Senior Member of the United Nations Command reported that of 116 violations alleged as of January 3, 1954, investigation had substantiated that 12 of the alleged violations had been unintentionally committed. In each case assurances were given that steps had been taken to prevent recurrences and that disciplinary action had been taken against responsible individuals.¹⁴⁴

¹⁴¹M.A.C., 2d meeting, July 28, 1953.

¹⁴²M.A.C., 60th meeting, July 5, 1955.

¹⁴³M.A.C., 65th meeting, August 21, 1955.

¹⁴⁴M.A.C., 4th meeting, July 31, 1953.

The first serious aircraft incident occurred on February 5, 1955, when a United Nations reconnaissance bomber, escorted by 12 Sabre Jets, was attacked over international waters off the west coast of Korea by four MIG's based in North Korea. The bomber returned fire in self-defense and in accordance with United States policy. The MIG's were also engaged by the escorting Sabre Jets, which shot down two of the MIG's over North Korean coastal waters.¹⁴⁵

The unprovoked attack by the MIG's constituted violations of the Armistice Agreement in two respects: (1) it violated the cease-fire provisions; and (2) it furnished uncontroverted evidence that combat aircraft had been introduced into North Korea in violation of paragraph 13d. On February 8, 1955, Pyongyang radio admitted the planes were based in North Korea.¹⁴⁶ The most convincing evidence came on February 9th, when the Communist side charged a violation of their air-space in the shooting down of two MIG's above their coastal waters. By inadvertently admitting that the

¹⁴⁵Dep't of State Statement, Feb. 23, 1955, in 32 DEP'T STATE BULL 427 (1955).

¹⁴⁶*Id.*

MIG's were owned by North Korea, they admitted that the aircraft had been illegally introduced into the North.¹⁴⁷

The above attack was never satisfactorily settled. A further incident occurred over international waters between United States and Communist Chinese aircraft on May 10, 1955, when eight Sabre Jets downed two MIG's.¹⁴⁸ Since that time, most of the serious incidents involving aircraft resulted from the straying of aircraft over the Demilitarized Zone and the Military Demarcation Line.

On at least six occasions United Nations aircraft were brought down over North Korea by hostile fire.¹⁴⁹ In all cases there was no evidence that these planes had engaged in hostile acts. The pilots were eventually released to the United Nations Command.¹⁵⁰

¹⁴⁷M.A.C., 53d meeting, Feb. 9, 1955.

¹⁴⁸N.Y. Times, May 10, 1955, at 1, col. 1.

¹⁴⁹M.A.C., 54th meeting, Feb. 10, 1955; M.A.C., 65th meeting, Aug. 21, 1955; M.A.C., 73d meeting, Nov. 10, 1956; M.A.C., 82d meeting, Mar. 10, 1958.

¹⁵⁰M.A.C., 65th meeting, Aug. 21, 1955; The Times (London), Aug. 22, 1955, at 5, col. 2; The Times (London), Nov. 22, 1956, at 6, col. 7; The Times (London), Mar. 18, 1958, at 8, col. 1; The Times (London), May 19, 1964, at 10, col. 3; N.Y. Times, May 22, 1965, at 7, col. 3.

The practice of the Communist side with respect to violations of their airspace is in marked contrast to their treatment of individuals who unintentionally crossed the Military Demarcation Line on the ground, and of harmless intrusions by fishing vessels. It may be that the ease with which aircraft can maneuver and escape detection, and the great potential they possess for committing hostile acts justifies the extreme measures practiced by the Communist side. It is submitted, however, that there is no legal justification for shooting down aircraft not engaged in hostile acts. First, considerations of humanity would seem to require a warning, or if necessary, a demand that the pilot land so that a determination could be made as to reasons for the violation. Second, the unrestrained firing on aircraft is not in keeping with the underlying spirit of the Armistice Agreement. Third, such conduct cannot be justified on the grounds of self-defense. Finally, it could be argued that such conduct cannot be justified as reprisals, since the reaction is disproportionate to the gravity of the violations,¹⁵¹ and since reprisals cannot be justified under the Armistice Agreement.

¹⁵¹ See generally Oppenheim, *supra* note 31 at § 250.

D. SUMMARY

The continued treatment of the Korean Armistice Agreement as a purely military convention has raised problems with respect to the legal status of captured members of opposing forces, primarily because the Agreement does not contemplate intentional violations by opposing forces.

While the practice by the Communist side reveals that maritime and airspace violations are more severely dealt with, there is no legal justification for such a disparity of treatment.

CHAPTER V

CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS

The customary rules of international law governing armistice status, insofar as they allow a resumption of hostilities, are no longer relevant to the present situation in Korea. This conclusion emerged from an analysis of the military and political conditions under which the armistice was concluded, the nature of the Armistice Agreement, the settlement of disputes arising during the armistice, and from the practice of both sides in dealing with specific incidents. The conclusion was drawn from an appraisal of the following:

1. The armistice negotiations reveal that while the Communists sincerely desired a cease-fire in Korea, their intent was not to establish an armistice in the traditional sense, but to restore the *status quo* as it had existed prior to the outbreak of hostilities.

2. The Armistice Agreement, although primarily military in scope, contains political stipulations, and

by its own terms continues indefinitely. Consequently, it is structured to evolve into a political settlement.

3. The obligations placed upon the United Nations Command by the United Nations Charter severely limits the permissible range of options available under customary international law for insuring compliance with the Armistice Agreement. However, the continued violations by the Communist side would justify a denunciation of the Agreement by the United Nations Command.

4. The continued treatment of the Armistice Agreement as a purely military convention has raised legal problems that could be avoided by the recognition of a new status to govern relations between the two Koreas.

B. RECOMMENDATIONS

Although the frustration of the Armistice Agreement by North Korea would justify a denunciation of the Agreement, it should be maintained for the following reasons:

1. Our first obligation in securing world order is to "...preserve the effective existence of the United

Nations."¹⁵² In coming to the assistance of South Korea, the United States was acting in response to a request of the Security Council of the United Nations.¹⁵³ The continued presence of United States forces in Korea provides a basis for mediation by the world body. Any future action by the United States will command greater world respect if it is brought under the aegis of the United Nations.¹⁵⁴

2. In the absence of cultural, technical, commercial, or diplomatic intercourse with North Korea, the Military Armistice Commission provides the United States with a vital contact for keeping the channels of communication open. Although the stated purpose of the Military Armistice Commission has been largely supplanted by

¹⁵²Cf. Hoyt, *The U.S. Reaction to the Korean Attack: A Study of the Principles of the U.N. Charter as a Factor in American Policy-Making*, 55 AM. J. INT'L L. 45-76 (1961).

¹⁵³ 5 U.N. SCOR, 544th meeting 4 (1950).

¹⁵⁴See Hoyt, *The U.S. Reaction to the Korean Attack: A Study of the Principles of the U.N. Charter as a Factor in American Policy-Making*, 55 AM. J. INT'L L. 45-76 (1961).

Communist propaganda, the Commission has succeeded in negotiating the release of captured personnel.

3. There is no reason why the Armistice Agreement cannot be amended to cover political questions. The Communists have taken the initiative in proposing that the Commission consider a resumption of commercial intercourse between the two countries.¹⁵⁵ By abandoning the concept of the Agreement as a purely military convention, the machinery is available for transforming the Agreement into a definitive treaty of peace.

¹⁵⁵M.A.C., 78th meeting, Oct. 11, 1957. The U.N. Command rejected these proposals as being political and, therefore, not proper subjects for discussion by the Military Armistice Commission. The Communists used the same argument against the U.N. Command in reply to a request for the return of Korean National Airlines plane and its cargo. The plane was on a routine flight from Pusan to Seoul when the pilot was forced to fly to North Korea. The Senior Members of the Korean People's Army and the Chinese People's Volunteers on the Military Armistice Commission insisted that the question was one to be worked out between the respective governments, and was not a proper question for the Commission.

APPENDIX

CHAPTER V

THE HAGUE REGULATIONS

Article 36.

An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

Article 37.

An armistice may be general or local. The first suspends the military operations of the belligerent states everywhere; the second only between certain fractions of the belligerent armies and within a fixed radius.

Article 38.

An armistice must be notified officially and in good time to the competent authorities and to the troops.

Hostilities are suspended immediately after the notification, or on the date fixed.

Article 39.

It rests with the contracting parties to settle, in the terms of the armistice, what communications may be held in the theatre of war with the inhabitants and between the inhabitants of one belligerent State and those of the other.

Article 40.

Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.

Article 41.

A violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the punishment of the offenders or, if necessary; compensation for the losses sustained.

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