The ius in bello and Military Operations in Korea 1950-1953

Julian G. Verplaetse, Gent, z. Z. Heidelberg

On Sunday, June 25, 1950, between 4 and 5 A.M. Korean time, North Korean forces crossed all along the 38th Parallel, being the boundary between North and South Korea, and invaded South Korea in strength. Rehearsal of the moves had been held many times in the past months. But always the North Koreans had receded, exculpating intrusion by mistake. Now it was not an alleged exercise or an insidious pecking. Now it was outright military action.

On Sunday June 25, at 5.45 P.M. New York time, upon initiative of the US, the Security Council of the UN adopted Resolution S 1501 (9 : 0, Yugoslavia abstaining, USSR absent) [1]). After calling for an immediate

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Abbreviations: AJIL = American Journal of International Law; BY = British Yearbook of International Law; CMR = Court Martial Reports; CLR = Columbia Law Review; GC = Geneva Convention; GeoLJ = Georgetown Law Journal; HC = Hague Convention; Hearings = Military situation in the Far East. Hearings before the Committee on Armed Forces and the Committee on Foreign Relations, US Senate 82d Session, GPO, Washington (1951); ICLQ = International and Comparative Law Quarterly; IndLJ = Indiana Law Journal; JCS = Joint Chiefs of Staff; LRTWC = Law Reports Trials of War Criminals; LWF = Landwarfare; NYHT = New York Herald Tribune; NYT = New York Times; POW = Prisoner(s) of War; RGDIP = Revue Générale de Droit International Public; ROK = Republic of Korea (South Korea); UNC = United Nations Command; UNSC = United Nations Security Council; US Dep. State Bull. = United States Department of State Bulletin; YBUN = Yearbook of the United Nations; YLJ = Yale Law Journal.

[1]) YBUN 1950, p. 222. Some doubt was cast on the validity of this decision. Negative opinion: J. Stone, Legal Controls of International Conflict. A Treatise on the Dynamics of Disputes and War (2d ed.), p. 207–12; L. Gross, Voting in the Security Council, YLJ vol. 60 (1951), p. 209. Hesitatingly negative: D. Bindschedler-Robert, "Korea" in Strupp-Schlochauer: Wörterbuch des Völkerrechts. Affirmative opinion: McDougal and R. N. Gardner, The Veto and the Charter, YLJ vol. 60 (1951), p. 258. Both interpretations possible: H. Kelsen, The Law of the UN (1951), p. 250, 290-4, Supplement: Recent Trends in the Law of the UN, p. 921 seq.; The Action in Korea, p. 940 seq. The most correct interpretation on validity is the statement of L. M. Goodrich, Korea. A Study of U.S. Policy in the U.N., p. 114;

cease fire and withdrawal of North Korean troops, it called upon the members to "render every assistance to the UN in the execution of this Resolution and to refrain from giving assistance to the North Korean forces".

That same day, June 25, President Truman authorized issuance of three orders, the second of which was to the effect that MacArthur should be instructed to deliver ammunition and supplies to the Korean Army by airdrop or otherwise. This was the first step of intervention by the US and it anticipated any measure taken by the UN. Thus, almost from the very moment of the outbreak of hostilities, the US gave military support to the Republic of South Korea.

On June 27, President Truman declared that, pursuant to the Resolution of the UN, he had ordered the US air and sea forces to give the South Korean troops cover and support. On June 30, President Truman, though holding that the US was not at war, authorized the sending of ground units and the establishment of a naval blockade of the entire Korean coast. On July 7, the Security Council adopted by seven votes (India, Egypt and Yugoslavia abstaining, Russia absent) a Resolution providing for the creation of a UN force under US command. On July 8, President Truman named General MacArthur as UN commander of that force.

On November 6, 1950, General MacArthur announced that the UN forces in Korea "faced an entirely new war" as over 200,000 Chinese communist troops had joined battle with the UN forces.

On April 11, 1951, President Truman relieved MacArthur of all his duties as US and UN commander and appointed as his successor General Matthew B. Ridgway.

On June 23, 1951, an appeal was made by the Russian delegate to the UN, Malik, for a cease fire and armistice. The long-protracted negotiations ended with the signing of the Agreement on Armistice on July 27, 1953 [2]). Those are the headlines of the story in the UN version [3]).

"It should be stated that whereas the Soviet Union had recognized the principle that abstention was not equivalent to a veto, it had never agreed that an absence was equivalent to abstaining".

On the subject of illegality of the decision because the provisions of the charter on the matter of aggression had been wrongly applied, see: Representative of the USSR at the meeting of the First Committee, YBUN 1950, p. 262. Also at the 482nd meeting of the Security Council (UN Doc. S/P. V. 482, p. 10; add. S/P. V. 489, p. 4).

[2]) YBUN 1953, p. 136. Concise history in: R. C. W. Thomas, The War in Korea, 1950–1953. A military study of the war in Korea up to the signing of the Cease-Fire (Aldershot 1954).

[3]) The author acknowledges his debt to Professor W. V. O'Brien, of Georgetown University, Washington D. C., who read substantial parts of the draft of this article and made invaluable suggestions. Positions and opinions are, of course, the author's own responsibility.

The main source of material available is, quite naturally, American. This may confer a certain bias upon the narrative of facts. On the other hand, the legal exegesis is fragmentary, inasmuch as only those problems are treated which gave rise to a sufficient amount of publicity or discussion. Finally, as a matter of record, it should be stressed that the *ius ad bellum* is outside our scope, except for some points of contact with UN action [4]).

It should also be pointed out that, in order to avoid excessive scattering, matters have been brought together in the most suitable way. Thus espionage is dealt with in landwarfare, though the focal novelty, as indicated, lies upward. Thus also, questions relating to POW are considered in connexion with the armistice negotiations, because both came largely under the jurisdiction of the Geneva precepts.

I. General

1. Concept of War

Nearly all problems of the *ius in bello* in the Korea operations are subservient to the concept of war. Often their solution depends on how the struggle in Korea is characterized.

Never before was there so much discussion on that concept. Never before have such a wide variety of legal figures, old and new, been considered in order to find the legal definition and the proper hallmark of the operations. The outcome of those considerations looks like a *procès-verbal de carence.* The clear result would seem to confirm that characterization of war is based on functional *criteria.*

a) The basic moot point was whether the operations were war or not. In the US Defense Department research was focused on what constitutes war [5]). No result is shown. In particular it was not clear whether a war or a state of war is a necessary prerequisite of the act of war. However, it would seem that the state of war doctrine, *i. e.* the doctrine which considers that war

Without pronouncement on the present status of the laws of war, the author has tried to avoid any fetishism of texts, the value of which is sometimes dubious and labors under stress of analogical argument. He is more intent on eliciting future legal positions on new facts than on stating old rules upon anomalous situations.

[4]) As to independence of the *ius in bello* from the *ius ad bellum* see H. Mosler, Die Kriegshandlung im rechtswidrigen Kriege, Jahrbuch für internationales und ausländisches öffentliches Recht, 1948, p. 335 seq.

[5]) Secretary Johnson, Hearings IV, p. 2604. To be noted that all witnesses at the Hearings appeared with their legal advisers, which gives proper vestment to their statements and answers.

On the concept generally: J. L. Kunz, »Kriegsbegriff« in: Strupp-Schlochauer: Wörterbuch des Völkerrechts (1961).

exists only if the contending parties regard the operations as a state of war, is implicitly rejected.

Then came the long list of concepts predicated upon the nature of the operations. The most frequently cited concept was that of limited war. Next came the concept of police action. There was also some talk about a minor war, a technical war, military action to repulse an attack, war in the accepted-ordinary, popular or usual sense, use of armed forces for various situations, military operations controlled by overriding political considerations, resistance to aggression, accordion war, bizarre war [6]).

Those different concepts are distinguished from and opposed to: overall-global war, all-out war, general war, large-scale war, World War III. It stands to reason that all of the suggested definitions do not have a legal character.

b) A second problem, entwined sometimes with the first, is whether a declaration of war is necessary in order to constitute war and, subsequently, whether operations effected without a declaration of war could be labelled as illegal warfare. In this field the bulk of discussion and weight of argument was the American constitutional prerogative of Congress to declare war. The impact of war on municipal law was likewise related to this constitutional provision.

Conjunctions like the Korea operations, led to a confusing amalgam in the American cases on the point [7]).

c) Finally a good amount of thought was devoted to the new character of armed conflict, deriving from the embroilment with UN procedure:

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[6]) Precedent for those constructions is Bas *v.* Tingy, US Supreme Court (1800) 4 Dallas 37, Hudson, Cases (1st ed.) 1362. *Per* J. Washington: "But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons and things; and this is more properly termed imperfect war, because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go no further than to the extent of their commission. Still, however, it is public war, because it is an external contention by force, between some of the members of the two nations, authorized by the legitimate powers..." (emphasis added).

[7]) A. K. Pye, The Legal Status of the Korean Hostilities, Geo LJ vol. 45 (1956–57), p. 45 discusses various cases, involving the interpretation of provisions of life insurance policies, of various provisions of the Uniform Code of Military Justice, of maximum punishment for certain offenses, of the statute of limitations and of the pleas of guilty in capital instances.

Pye tries to subsume a general rule that the Korean operations did in fact constitute a state of war. It is hard to read that rule in the cases, which are clearly decided on the merits of the facts and based on functional analysis. Sometimes different decisions are arrived at in spite of closely related facts. Moreover, Pye runs into trouble again when he contends that such a state of war ended in August 1954, whereas the negotiations never intended to go beyond and never went beyond the armistice agreement.

international police action, resistance to aggression, joint action, collective enforcement of international law or collective security were the terms used in that respect.

All these controversies belong exclusively to the UN side of action. On the communist side, the concept was always clearly stated as a civil war, started by South Korea, which served as a pretext to aggression on the part of the US [8]).

The controversy is neither meaningless nor redundant. Fateful consequences follow different classifications.

1. The classical concept of war, as it evolved from Grotius up to the summits of the 19th Century had legal implications as well in the field of international law as in that of municipal law.

In matters of international law, the application of the rules of war was generally made dependent on the existence of a state of war, although it has been shown by F. Grob that the relativity of the concept was never out of the picture [9]).

The proliferation of new facts and situations will require new concepts and a growing flexibility. At any rate the classical meaning has lost ground in recent international instruments, for instance in the Geneva Conventions, 1949. Yet, even those recent instruments may become obsolescent inasmuch as they do not take into account UN actions and are partly not applicable to them [10]).

On account of the very particular nature of the Korea operations, it would be fruitless to challenge the application, as a matter of principle, of the *ius in bello* to the UN military action in Korea. Applicability of the laws of warfare to UN actions has been denied sometimes in the case, not under consideration, of measures taken against a member-State of the UN [11]). Anyhow it is submitted that, even in that case, non-applicability can never extend to the *ius in bello* as a conglomerate.

[8]) YBUN 1950, p. 233, and 1951, p. 242–3. The representative of Russia in the UN called it a "notorious, cannibalistic and barbarian doctrine of total war" (YBUN 1950, p. 237). Also the representative of the Central People's Government of the People's Republic of China, calling it an aggression simultaneously against Korea and Taiwan (YBUN 1950, p. 242–3). R. E. Appleman, US Army in the Korean War, South to the Naktong, North to the Yalu, p. 21, citing Radio Pyongyang at the outbreak of hostilities: "The North Korean People's Army had struck back in self-defense and had begun a 'righteous invasion'".

On the Russian viewpoint about aggression see generally: I. Kracsov, Agressia Amerikanskogo Imperialisma v Koree 1945–1951 (Moscow 1951).

[9]) F. Grob, The Relativity of War and Peace (1949), chiefly p. 189 seq.

[10]) See *infra* p. 722 seq.

[11]) See Gamal El Din Attia, Les Forces Armées des Nations Unies en Corée et au Moyen-Orient (1963), p. 255. In view of the abovementioned concepts and situations

On the other hand, one must do away with legalistic formalism. Obviously Korea was not a party to the HC of 1899 and 1907, nor to any of the subsequent agreements on the law of war. China had adhered to Conventions II–IV on LWF (June 12, 1907), to Convention V on neutrality (January 15, 1910), to Convention IX on bombardment by naval forces (January 15, 1910). Observance of the laws of war should not be construed as a "formal obligation" binding by virtue of an international instrument. It might be argued that Korea and China were bound by those rules as customary law. But again it might be challenged that, on account of the oriental character of some combat actions, the full armory of Western custom was not applicable. The truth is that a *tacit de facto* agreement prevailed on the question of applicability [12]).

2. The confusion of concepts had the most pernicious effect on warfare. General Collins, though he concurred in the advice of the JCS that led to the recall of MacArthur, conceded:

> "it became apparent as the thing progressed that General MacArthur was having more and more difficulty adjusting himself to fighting a war under one concept when he believed that he ought to be fighting it under another concept" [13]).

This was due not only to the mixture of old-fashioned military types coming into play – and sometimes into conflict – with tentative new forms of the UN. It was caused also by the fact that the operations were started under the Security Council and had to be prosecuted under the General Assembly [14]). Indeed, from June 25, 1950 to August 1, 1950, Russia was absent in the Security Council, which had started and put into effect the Korea action. Russia returned to the Council on August 1, wielding the veto which paralyzed that body. Although officially the question of Korea was deleted from the agenda of the Security Council only in January 1951, in fact ever since the return of the Russians, all political issues were brought before the General Assembly. These included violations of the laws of war and neutrality, matters of our concern. Military problems belonged

the drafting has been suggested of "a code comparable to Lieber's Code but controlling 20th century techniques and weapons . . . for the guidance of armed forces engaged in hostilities to support the rule of law in international affairs. This new Code should take into account the many aspects and problems of collective enforcement action" (W. J. Bivens, Restatement of the Laws of War as Applied to the Armed Forces of Collective Security Arrangements, AJIL vol. 48 [1954], p. 140 seq.).

[12]) On the applicability of the GC, see p. 722 seq.

[13]) Hearings II, p. 1256.

[14]) Admiral Sherman, Hearings II, p. 1064; F. Seyersted, United Nations Forces, Some Legal Problems, BY vol. 37 (1961), p. 351 at p. 363. Russia was always clear and adamant on her position that the General Assembly usurped the powers of the Security Council and had no jurisdiction in those matters: See YBUN 1951, p. 226.

to the jurisdiction of the Unified Command, in fact of the US, to which Russian and Chinese complaints were directed.

3. Although stressing that, under US system, military operations must be controlled by overriding political considerations, Senator Hickenlooper made the point that, in the Korea case, there were constant political inhibitions placed on military operations. He went as far as saying that, from the standpoint of the military, the danger of World war III, mainspring of the political command, was immaterial [15]).

Indeed it cannot be denied that the whole Korea operation looks like a baffling military tangle caught in a huge political maze.

Summing up: From the l e g a l point of view South Korea was at war (civil or international) with North Korea. Warlike activity was carried out by the UN (although the contribution of the US was nearly exclusive). The enemy were the North Koreans. Communist China was not legally at war with either South Korea or the UN or the US. China was merely assisting the North Koreans against an alleged invasion by South Korean and UN troops. China did not accept responsibility for the operations, except, perhaps, in the later stages and under mitigated forms. She never accepted qualification as a belligerent and her participation in the armistice talks cannot be interpreted either as a retrospective recognition of belligerency or as a temporary reversal of attitude, which she disavows. The presence of a Chinese delegate with the North Korean Armistice Commission merely affirms her concern for her POW's.

But *de facto* this was mainly a war between South Korea and the US against North Korea and Communist China. That fact, however, could not prevail politically against the legal fiction that China was at peace with South Korea and with the US and *vice versa*. Therefore, if the US had attacked China e. g. by bombing her territory, the act was liable to be stigmatized as an act of aggression under UN principles. The intervention of China, indeed, added upheaval to confusion. From then on it was no more the "necessary" action in Korea upon which everybody had agreed. It was, though for many more reasons than General MacArthur suggested, a "new" situation. In dealing with that new phase, MacArthur carefully avoided the legal terminology of war. He spoke of predatory expeditions and of the predatory character of the Chinese intervention, of incursions as opposed to military expeditions under real control [16]). It was obvious that, under the cloak of retaliation or self-defense, he wanted to bring real warfare upon Communist China. But he was unable to overrule the fiction.

[15]) Senator Hickenlooper, Hearings IV, p. 3012 seq. Senator Green and General Barr, Hearings IV, p. 3035 seq. [16]) MacArthur, Hearings I, p. 254.

2. Command

The board of command, closely interwoven with the new concepts of military operations, reflects a loose picture and bears an experimental character.

The crux of the matter is the nature of UN authority, the relationships of the thirteen participating nations in the Korea operation, the role of the US and that of the commander in chief of the Unified Command.

Art. 46 of the UN charter provides that:

> "Plans for the application of armed forces shall be made by the Security Council with the assistance of the Military Staff Committee.
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> There shall be established a military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements on all questions of the type.
>
> The military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council."

At one time there was such a military Staff Committee. It worked to set up a permanent UN Organization of armed forces. But that force was never organized and, hence, no Staff really existed[17]). Therefore, the Security Council, by a directive of July 7, 1950, requested the US to designate the commander of the UN Korea Force. The US commander MacArthur became concurrently UN commander. That command function of the US was subject only to "reports as appropriate on the course of action taken under the Unified Command". The Unified Command was authorized at his discretion to use the UN flag in the course of the operations against North Korean Forces concurrently with the flag of the various nations participating.

MacArthur was satisfied that the entire control and complete authority of the campaign rested with the US Government[18]). The negative proof of MacArthur's claim is solid inasmuch as the Security Council did not establish any subsidiary organ to assume command in conformity with art. 29 of the Charter.

To what extent the aegis of the UN and the full agreement of the na-

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[17]) U. Scheuner, »Internationale Streitmacht« in Strupp-Schlochauer: Wörterbuch des Völkerrechts.

[18]) MacArthur, Hearings I, p. 14 and 159: "All my military orders and directives emanated from the Joint Chiefs of Staff" "under the controls that existed of the American Government over them". At p. 246, on the subject of his general mission to clear all of Korea: "The actual crossing of the 38th Parallel was specifically authorized by the Secretary of Defense". According to US military tradition great independence was left to MacArthur as a theater commander (Hearings II, p. 1147 and *passim*).

tions participating was a postulate of US policy is obscure in context although clear in result. General Collins stands in favour of collective action [19]). Senator Morse also could see that a go-it-alone policy by the US might push some nations to neutralism if war with Russia was contemplated [20]). But the report of the majority of the Republican Senators found that the theory of command function had not worked in practice. With 95 % of manpower and resources being furnished by the US: "It appears that the US has been unduly apprehensive of the opinions of our allies in carrying out its command authority".

The cooperation with the UN and with the States participating was haphazard, mostly lukewarm, never convincing. Upon questioning Secretary Acheson was unable to state whether, namely in the matter of hot pursuit and blockade, consultation with participating States was a matter of courtesy or an obligation. He spoke of closest consultation, of closest touch [21]). Upon questioning whether the unified command would have authority to take action to terminate the Korean war without submitting it to the UN, he thought that certainly an armistice could be arranged without leave of the UN. However, he doubted whether a solution involving political problems came under the Command function in the military field. But, here again, his answer was merely to the effect of consultation in the closest possible way [22]). On the other hand, in the matter of hot pursuit, the State Department consulted not with the UN nor with all nations participating in the fighting but only with some of them. After negative advice, the matter was dropped by the JCS, allegedly for other reasons [23]). Hard pressed by questions, Acheson answered that if the JCS had wanted to push further, consultation with the other nations might have been necessary [24]). Once more he does not consider the effects of neg-

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[19]) General Collins, Hearings II, p. 1188.

[20]) Senator Morse, Hearings III, p. 2538.

[21]) Hearings III, p. 1940. Statement of Churchill in the Commons on the failure of the US to notify Great Britain on bombing of power plants, The Times, June 2, 1952.

[22]) Hearings III, p. 1940 seq.

[23]) Secretary Marshall, Hearings I, p. 362 says that enemy air action did not develop to the extent that it was deemed necessary to enforce hot pursuit. According to Acheson the fighting was transferred to the South and hot pursuit became of remote interest.

[24]) Hearings III, p. 2076 seq. See *infra* p. 707 the section on hot pursuit. The matter was sharply debated during the hearings. Admiral Badger would have referred the question of hot pursuit to the UN because it involved policies (Hearings IV, p. 2801). Senator Cain would have it referred to the UN military Committee but Acheson answered that there was no such committee with jurisdiction and function in connection with the conduct of the High Command in Korea (Hearings III, p. 2076). Apart from UN action, Senator Cain could not understand why the matter of hot pursuit was taken up with some Allies and not with others. He thought, if to be done, it was the duty to

ative advice. It appears generally from the hearings that the Unified Command had a perfect right to resort to those measures and that there was no legal need for approval either of the UN or of participating States.

Summing up, the overwhelming weight of US authority in the Unified Command of the Korean campaign cannot be denied. Any restriction on that authority was due to mere consideration of political expediency. They always had a perfunctory, never a peremptory character. Further, it is clear that the Korea operation, like all UN interventions, was strictly *ad hoc,* was improvised rather than organized, relying on old instrumentalities more than on new mechanics. The North Koreans or the Chinese, while lodging a complaint of violation of the laws of war, always leveled it against the US. So did the Soviet Union, which considered the UN command a mere fiction, troops being subject without any control to the American Military Command.

II. Landwarfare

1. Ruses of War

Art. 1 (2°) of the Hague Convention on LWF 1907 requires

> «d'avoir un signe distinctif fixe et reconnaissable à distance».

This is a fundamental requirement, stemming from the prohibition of treachery and perfidy.

The use by belligerents of neutral uniforms is a violation of their obligations towards the neutrals in wartime and subject to the sanctions provided for in matters of neutrality.

The use by a belligerent of enemy uniforms is not settled in the law of warfare. The Hague Regulations on LWF of 1907 art. 23 (f) forbid

> «d'user indûment du pavillon parlementaire, du pavillon national ou des insignes militaires et de l'uniforme de l'ennemi, ainsi que des signes distinctifs de la Convention de Genève».

What is forbidden is not the use but the improper *(indûment)* use. Indeed ruses of war are considered permissible (art. 24 HC on LWF 1907).

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inform all the Allies in Korea (Hearings III, p. 2079). He found the situation awkward altogether: it was said that it could and must not be submitted to the UN and, on the other hand, the Allies said that the Unified Command had no authority and they wanted to ask the UN for approval (Hearings III, p. 2131 seq.). On the whole, it would seem that the question was well within the Command function as delegated to the US (Report of the Majority of the Republican Senators, Hearings V, p. 2584 and *passim*, Hearings III, p. 1723 seq.).

Drawing the line between permissible and not-permissible is the crux of the matter. It would seem that the prohibition must be read in the light and within the landmarks of the prohibition of treachery and perfidy (*cf.* art. 23 b and c HC on LWF 1907). It is often said that only the use in combat is prohibited. This would mean that the correct use of the stratagem, donning enemy uniforms in landwarfare, is comparable to that of the use of the false flag in seawarfare, to wit, that it might be used under condition that it be discarded at the moment of action. But this opinion is by no means generally accepted and it would seem that it suffers at the roots of transfer of concepts by analogy. The Rules of LWF of the US, 1956, in paragraph 54, authorize to make use of national flags and uniforms as a ruse, stressing that the Hague Rules do not prohibit such employment but only their improper use, such as would be the use in combat [25]). Forbiddance of fraudulent mischief remains the fundamental rule.

The use of South Korean and American uniforms by Communist troops has been frequently alleged [26]). No legal complaint was lodged.

It was asserted that Communist soldiers changed in peasant whites, walked innocently behind the lines, reformed, flung over a piece of uniform and operated beyond the lines [27]). On the other hand, in the stream

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[25]) *Cf.* US Basic Field Manual 27–10, July 1956. See Lauterpacht, International Law vol. 2 (7th ed.), p. 429; Ch. Ch. Hyde, International Law chiefly as interpreted and applied by the US (2d ed.) vol. 3, p. 1811 seq.; F. A. von der Heydte, Völkerrecht vol. 2, p. 257; J. Stone, *op. cit. supra* note 1, p. 563, deems that the limits of the permissible use are uncertain. To the same effect: P. Reuter, Droit International Public (1958), p. 342. E. Castrén, The present Law of War and Neutrality, p. 191, adopts a restrictive interpretation and deems that art. 23 (f) is unsatisfactorily drafted. G. Balladore Pallieri, Diritto Bellico (1954), p. 178, argues that the term "improper" or "indûment" applies only to the flag of truce and to the distinctive badges of the Geneva Red Cross, not to the uniform. M. Greenspan, The Modern Law of Land Warfare, p. 321 draws on analogy with the rules of seawarfare. The Skorzeny case (1947) US Mil. Gov. Court Germany, LRTWC IX, 90 Case nr. 56 contains the following statement: "During this attack, several witnesses saw members of Skorzeny's brigade, including two of the accused, wearing American uniforms and a German parachutist combination in operational areas, but this evidence included only two cases of fighting in American uniform". All the accused were acquitted of all charges. It is submitted that no legal rule should be deduced from that case, since the statement of facts and evidence was clearly – and it would seem purposely – reduced to muddle.

[26]) M. D. Schaafsma, Het Nederlands Detachement Verenigde Naties in Korea 1950–54, p. 65, 97–98 (don't shoot, Roks *i. e.* Republican of Korea troops), p. 99; R. Poats, Decision in Korea (1954), p. 34 (wearing captured US field uniforms and shouting: Don't shoot we are friends). It should be observed that shouting false pretense is not illicit.

[27]) R. Poats, *op. cit. supra* note 26, p. 34; D. Politella, Operation Grasshopper (1958), p. 25. See picture in W. Karig *et. al.*, Battle Report, vol. 6: The War in Korea (N. Y. 1952), at p. 176.

of refugees, the jet pilots rightly or wrongly thought to discover flocks of disguised troops [28]). No legal discussion on the matter is available.

The use of leaflets to induce troops to surrender, offering safe conducts and promising human treatment are viewed no more, as they were in World War I, as suspicious methods but as perfectly legitimate. They were in massive use and quite successful [29]).

2. *Guerrillas*

The term guerrilla, sometimes mixed up with partisan, is used in widely different meanings. On occasions it is even applied to parts of the army operating behind the general front lines. At the other end it is sometimes intended as saboteur [30]).

It is generally admitted that guerrilla warfare must be distinguished from guerrilla tactics. The latter are executed in the rear by regular troops and must be considered, for all purposes, as regular operations.

The proper meaning of guerrilla is still similar to that given by Dr. Francis Lieber: "self-constituted set of armed men, in times of war, who form no integrant part of the organized army, do not stand on the regular payroll of the army, are not paid at all, take up arms and lay them down at intervals, and carry on petty war (guerrilla) chiefly by raids, extortion, destruction and massacre, and who cannot encumber themselves with many prisoners, and will, therefore, generally give no quarter" [31]).

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[28]) R. Poats, *op. cit. supra* note 26, p. 141. In the retreat from Seoul: "Mingling with the civilians, enemy personnel in native dress moved inconspicuously, waiting for opportunities to stampede the crowds, block bridges and throw hand grenades into passing groups of US soldiers": Korea 1950. Office of the Chief of Military History, Department of the Army: Washington 1952, at pp. 15–16. A screening among refugees was later carried out: R. Leckie, Conflict. The History of the Korean War 1950–1953 (N. Y., London 1962), p. 116. See also: W. Karig and others, vol. 6, p. 106 seq.; L. Montross and N. A. Canzona, US Marine Operations (Historical Branch, G – 3 Headquarters, US Marine Corps, Washington 1954), vol. 3, p. 319. See *infra* p. 703 and note 87.

[29]) Hearings V, p. 3462. The use of those leaflets or waving white cloths was accepted as a proof of surrender: A. C. Geer, The New Breed. The Story of the US Marines in Korea (N. Y. 1952), p. 207; K. K. Hansen, Heroes behind barbed wire, Pictorial Supplement, p. 24 seq. There are no conventional or customary rules of international law on the topic of propaganda warfare. It would seem that such warfare is licit unless it incites to murder or actions contrary to international law. See E. Castrén, *op. cit. supra* note 25, p. 208 seq.

[30]) L. Nurick and R. W. Barrett, Legality of Guerrilla Forces under the Laws of War, AJIL vol. 40 (1946), p. 561.

[31]) F. Lieber, Misc. Writings II, p. 277. See art. 1 and 2 of the HC on LWF 1899–1907, art. 4–2 of the POW Geneva Convention, 1949, incorporating arts. 1 and 2 HC on LWF. The Lieber definition still applies, *mutatis mutandis*. The condition of non-payment is not required any more. During World War II partisans were largely supplied with parachuted money. See, generally, on guerrilla warfare: Modern Guerrilla

In earlier days guerrillas were not recognized as lawful combatants (except perhaps once they had joined the regular army). Now their situation is partly regulated by the Geneva Conventions, 1949. However, it would seem that the condition of privileged belligerency, to wit, the requirement of a distinctive emblem and that arms be borne openly cannot always be observed in modern underground and concealed action. Therefore many a guerrilla case will not be efficiently protected by international law, except for human treatment and trial by a regular court [32]).

Guerrilla tactics *i. e.* infiltration of large groups, sometimes whole divisions, through the lines and operating in the rear, as well as guerrilla warfare, were, according to General Bradley, the new and great experience of the Korea fighting [33]). General Barr found this first experience impressive [34]).

In the main there were surprisingly few allegations of lawlessness. The question came up on a limited scale at the moment of the armistice negotiations. South-Korean guerrillas had attacked a Chinese police patrol in the neutral zone, sometime in August 1951. General Ridgway refused to say whether those South Koreans were armed by the Allied forces to operate behind the lines and declined any responsibility, since they could be "South-Korean irregulars in the zone policed by the enemy". It soon appeared that this position was untenable since truce negotiations would be,

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Warfare. Fighting Communist Guerrilla Movements 1941–1961, Ed. Osanka F. M. (1962); P. Paret and J. W. Shy, Guerrillas in the 1960's (New York 1962) and bibliography cited; Mao Tse-tung, On Guerrilla Warfare, translated by Brigadier General S. B. Griffith (1961); E. Che Guevara, On Guerrilla Warfare (New York 1961) [original title: La Guerra de Guerrillas]; V. Ney, Notes on Guerrilla War (1961), chapter VII: The Korean War. On the legal side: Jürg H. Schmid, »Partisanen« in Strupp-Schlochauer: Wörterbuch des Völkerrechts.

[32]) J. Stone, *op. cit. supra* note 1, p. 564 seq.

[33]) Hearings II, p. 1009; R. F. Futrell, The US Air Forces in Korea 1950–53 (officially reviewed by the Department of State, the Department of Defense, the JCS, the United States Air Force and the USAF Tactical Air Command, N. Y. 1961), p. 243; R. E. Appleman, United States Army in the Korean War. South to the Naktong, North to the Yalu (June–November 1950) (Office of the Chief of Military History. Department of the Army, Washington 1961), p. 721 seq. On April 10, 1951, it was stated that guerrilla strength was 12,000 (YBUN 1951, p. 239). It later decreased and increased in number as well as it changed in tactics. Irregularity was its feature. The Koreans interned in Ponjam Island, numbering 9000, were said to be guerrillas, captured in South Korea and other Communists rounded up for revolutionary activity behind the lines (YBUN 1952, p. 206). Guerrilla in airwarfare developed when the UN armies closed in on the Yalu river. It was called "hit and run tactics" (Message MacArthur to Truman, Nov. 7, 1950, quoted in H. S. Truman, Memoirs vol. 2, p. 399). See further: J. T. Stewart, Air Power, the Decisive Factor in Korea, p. 44; R. E. Appleman, *op. cit.* p. 721 seq.

[34]) Hearings IV, p. 2949 seq.

at any time and to any extent, at the mercy of the South Koreans. Finally, on October 25, 1951, it was agreed on responsibility for "armed units or individuals who are controlled by or prompted overtly or covertly by one side or the other" [35]).

3. Spying and Aerial Reconnaissance

Spying in wartime is not prohibited by international law [36]). Nor is spying in peace time although, on this point, there exists some scattered dissenting opinion. The same would seem to apply to aerial reconnaissance, except that unauthorized flight through the airspace constitutes *per se* a breach of the law. There is no doubt that airwarfare has disturbed considerably the concept of spying and that a new regulation is needed [37]). Any sort of spying may of course be, and generally is, punishable under municipal law.

A) Soldiers not wearing a disguise are not considered as spies (HC on LWF 1907 art. 29). Communist China, however, adopted another view. Eleven American crewmen shot down over her territory (or over Korea, according to the American version) were treated and convicted as spies [38]).

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[35]) I. F. Stone, The Hidden History of the Korean War, p. 319.

[36]) Implicitly arts. 30 and 31 HC 1907 on LWF; Ch. Ch. Hyde, *op. cit. supra* note 25, vol. 3, p. 1862–65, par. 677; E. Castrén, *op. cit. supra* note 25, p. 154.

[37]) R. R. Baxter, So-Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs, BY vol. 28 (1951), p. 323–345, at p. 341. For instance such problems as whether a pilot landing a spy behind the front lines is to be treated himself as a spy are not elucidated. Also anyone reading W. L. Brown, The Endless Hours, My Two and a Half Years as a Prisoner of the Chinese Communists (N. Y. 1961), will realize that the treatment of spies or so-called spies ought to be put under legal control.

On the matter of espionage by air see art. 29 par. 2 of the HC on LWF; E. Castrén, *op. cit. supra* note 25, p. 391. L. M. Bentivoglio, Spionaggio aereo e Diritto Internazionale in Diritto Internazionale vol. 16 (1962), p. 228, considers peripheral reconnaissance as legitimate. In the case of penetrative reconnaissance he would distinguish: Aerial reconnaissance would be prohibited, outer space reconnaissance would be allowed. The borderline case of the X 15 must, according to the author, be solved according to the circumstances. Continuous and lasting presence over one State would entitle that State to take measures, including interception. The Russians have now their own high-altitude reconnaissance aircraft, codenamed Mandrake by NATO or nicknamed Uski-Twoski. It is also suspected that some of the Russian Cosmos satellites are a special type of reconnaissance spacecraft to help determine the effectiveness of the US Samos satellites (Aviation Week and Space Technology, June 10, 1963, p. 25).

Adde: Torsten Gihl, Who is a Spy in: Legal Essays, Festskrift til Frede Castberg (1963), p. 230; Wright, Stone, Falk, Stanger, Essays on Espionage and International Law (Ohio State University Press, 1962).

[38]) YBUN 1954, p. 41; M. D. Schaafsma, *op. cit. supra* note 26, p. 373–74. The fact that they were shot down allegedly over Chinese Communist, *i. e.* technically neutral territory, was a further complication. This might put the case in the class of peace-time espionnage. See further under armistice negotiations, p. 734.

The Americans thereupon charged violation of art. III, par. 51, and par. 54 of the Korean Armistice agreement, which provided for repatriation of all prisoners of war and recalled that the representative of Communist China had stated that release would include also those who had committed crimes before and after their capture.

B) As early as July 16, 1950 Air Force planners proposed some high level reconnaissance flights over Dairen, Port Arthur, Vladivostock, Karafuto, and the Kurile Islands. Somebody thought of asking the advice of the State Department. Dean Acheson brought the matter to President Truman, who disapproved, but not on legal grounds. His reason was that he did not want to give the Soviet Union even a pretext of entering the conflict. Some of the reconnaissance planes, he said, might be shot down by the Russians and this would create a new situation [39]).

But on July 27, 1950, President Truman approved a plan to carry out reconnaissance flights along the China coast [40]).

General McArthur in his speech to the Congress listed four recommendations among which was the unlimited reconnaissance beyond the Yalu. He seems to imply that the JCS had already approved this point in their recommendations of January 12, 1951. There is some doubt about this so-called approval. Hesitancy prevailed, not to speak of contradiction. It was later explained that the relevant note of the JCS was merely a study.

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[39]) H. S. Truman, *op. cit. supra* note 33, p. 365; A. J. Cottrell and J. A. Dougherty, The Lessons of Korea: War and the Power of Man in: Orbis vol. 2 (1958–59), p. 39–65, at p. 47. On the lawfulness of shooting down planes violating the sovereign airspace of foreign States, see: J. G. Verplaetse, International Law in Vertical Space, p. 111 seq. and literature cited. Adde: R. C. Hingorani, Aerial Intrusions and International Law, Nederlands Tijdschrift voor Internationaal Recht vol. 8 (1961), p. 165; Ch. Rousseau, Chronique des faits internationaux: Liste récapitulative des principaux incidents aériens survenus depuis 1945 dans les rapports des Etats occidentaux avec l'U.R.S.S. et les autres démocraties populaires, RGDIP vol. 65 (1961), p. 97–151. See also: RGDIP vol. 66 (1962), p. 588 and 621.

[40]) H. S. Truman, *op. cit. supra* note 33, p. 368. The difference with the former case was that they would not be penetrating Chinese territory (peripheral as opposed to penetrative reconnaissance). Peripheral reconnaissance also permitted oblique photos of Antung and Ta-tungkou airfields in Manchuria (R. F. Futrell, *op. cit. supra* note 33, p. 509). The U 2 incident and trial of Powers developed a further proof of Russian opposition to a penetrative reconnaissance. In the particular case of the Cuba situation, however, the Russians seem to have accepted penetrative as well as peripheral reconnaissance, with the one notable exception of the U 2 shot down by a Russian S A–2 air defense missile on October 27, 1962 (there are at least 24 S A–2 sites in Cuba). See Interim Report of Preparedness Investigating Subcommittee of the US Senate headed by Senator John Stennis. Nonetheless the fundamental opposition of US and USSR views on that subject remain unchanged: H. J. Taubenfeld, Surveillance from Space. The American case for Peace keeping and Self-Defense in: Air Force and Space Digest (Oct. 1963), p. 54.

On August 5, 1950 the JCS authorized aerial reconnaissance up to the Yalu but short of the Korean-Soviet boundary. All such flights were to respect the Northern Korean frontier. Upon interrogation by Senator Smith whether at least reconnaissance, if not bombing, across the Yalu, was permitted, General Vandenbergh does not answer the question of legality. He merely evades it by saying that intelligence alone is not decisive, that detection of concentrations does not mean anything if you do not know the purpose [41]).

In general it may be said that the Communist position was unswervingly against legality of aerial observation, whereas the Americans insisted that it was lawful. The opposition came in sharp contrast during the armistice negotiations. The American negotiator, Admiral Joy, insisted upon aerial reconnaissance in order to determine whether there was any violation of the truce agreement. The Chinese negotiator, General Hsieh, found this unnecessary and added: "also this aerial observation is not permissible" [42]).

4. ABC Warfare

Biological and chemical warfare are generally thought of as being both unlawful and unchivalrous [43]). After World War II Japanese officers were convicted by the Russians on that count, although Japan had not ratified the Geneva Gas Protocol of 1925 (Trial of Otozoe, 1949) [44]).

On several occasions during the Korea fighting the US was accused of germ warfare [45]). It has not ratified the Geneva Gas Protocol [46]). Never-

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[41]) General Vandenbergh, Hearings II, p. 1463.

[42]) C. T. Joy, How the Communists Negotiate, p. 77 seq. It is an undisputable fact that Communists developed a kind of spy-phobia. See W. L. Brown, *op. cit. supra* note 37, p. 152.

[43]) W. V. O'Brien, Biological/Chemical Warfare and the International Law of War in GeoLJ vol. 51 (1962–63), p. 1 seq., states that while customary international law prohibits the first use of chemical weapons, there is no such rule prohibiting the first use of biological warfare. But admittedly the first use of BC, even in reaction to aggressive acts of utmost gravity, would not be accepted by international law and world opinion (at. p. 60).

[44]) M. Greenspan, The Modern Law of Land Warfare, p. 358 note 184; J. Hinz, »Bakteriologische Kriegsführung« in Strupp-Schlochauer: Wörterbuch des Völkerrechts.

[45]) See several communications to the Security Council, YBUN 1951, p. 229–30, 247. Telegram Minister of Foreign Affairs of the People's Government of the People's Republic of China in YBUN 1952, p. 203, at p. 204. Le Monde 18/19 May 1952 and 28 May 1952. In its last form the charge was of using cholera, yellow fever and typhus bacteria: The Times, May 23, 1953. The UNC stated that the enemy had suffered heavy losses through disease and charged germ warfare for home propaganda. See the case of Colonel Schwable in Misconduct in the prison camp, CLR vol. 56 (1956), p. 709, at p. 742. Story also in R. Leckie, *op. cit. supra* note 28, p. 352 seq.

theless it always answered the allegation as if this would have been a kind of illicit or at least unfair warfare [47]). One of its counterarguments in this respect was that confessions signed by captured American airmen were extorted and fake [48]).

The US proposed an investigation into the charges by the Red Cross or any other international organization. Communist China, as usual diffident of Red Cross activity, did not reply [49]). She ordered an investigation by a certain number of scientists of different countries, who came to the conclusion that germ warfare was actually perpetrated. The UN rejected the proof, alleging that most of the scientists were communists or fellow-travellers [50]).

As regards A weapons, mainly the A bomb, since their use is in the sole discretion and power of the President of the US, the declaration of MacArthur that he did not advise the use of the bomb is legally irrelevant. Moreover MacArthur himself stresses the exclusive authority of the president [51]).

On that point President Truman, in the heat of questioning at the Press Conference held at the Withe House on November 30, 1950, said that the use of the atomic bomb had been under active consideration. Immediately after that conference, his Press Secretary, Ross, issued a statement that the answer of the President did not mean any change since there had

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[46]) See W. V. O'Brien, art. cit. *supra* note 43, and W. W. Bishop, International Law, Cases and Materials, 2d ed., p. 801 and authorities cited.

[47]) Dean Acheson at the UN General Assembly, Oct. 16, 1952, US Dep. State Bull. XXVII (Oct. 27, 1952), p. 641. Dr. Mayo, member of the US delegation to the UN, speaking before Committee I (Political and Security) on Oct. 26, 1953, *ibid.* XXIX (Nov. 9, 1953), p. 647. General Collins at a press Conference in Tokyo on July 15, 1952, said that the UN would use everything necessary against the communists but added: "Everything necessary, however, excludes germ warfare". The Times, July 16, 1952. Denial of germ warfare from General Ridgway Febr. 27, 1952, The Times, Febr. 28, 1952. See: R. Leckie, *op. cit. supra* note 28, p. 348 seq., Letter of US Consul in Geneva in: Le Comité International de la Croix-Rouge et le Conflit de Corée. Recueil de Documents. 2 vols. (Geneva 1952) vol. 2, p. 89.

[48]) See the investigation of charges by the UN forces of the bacteriological warfare before the General Assembly, YBUN 1953, p. 156. In one of the cases, brought later before the American Courts, the accused maintained that he honestly believed the US to be guilty of germ warfare: US *v.* Batchelor CMR vol. 19, p. 452, at p. 525 (1955).

[49]) Le Comité International, cited *supra* note 47, vol. 2, p. 91 seq.

[50]) J. Hinz, »Bakteriologische Kriegsführung« in Strupp-Schlochauer: Wörterbuch des Völkerrechts.

[51]) The United States Law of Land Warfare, Army Field Manual nr. 27–10 (1956) states sub par. 35: "Atomic Weapons. The use of explosive 'atomic weapons', whether by air, sea or land forces, cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention restricting their employment".

always been consideration of the subject. This statement leaves out the crucial "active" [52]).

Later when Attlee, then British Prime Minister, came to Washington and asked whether the US was giving more thought to using the A bomb, President Truman replied that nothing of the sort was intended [53]).

5. Military Occupation

Like any military question related with the Korean operations, the law of belligerent occupation was bedevilled by UN interference. The elements of that particular situation could have set a most interesting precedent. As it developed that prospect was abruptly brought to an end. No new aspect came into being. Therefore our survey will be limited to a summary note [54]).

On October 7, 1950, the General Assembly set up an Interim Committee for Korea. That Committee adopted, on October 12, 1950, a Resolution, entrusting the UNC, on a provisional basis, with government and administrative functions in those parts of North Korea occupied by the UN Forces.

The Unified Command found that qualified North Korean personnel was lacking and called in South Koreans for administration purposes. The Interim Committee soon interpreted this practice under drastic qualification. It was stated as meaning that primarily North Koreans should be employed and that, if South Koreans were called in, they should work under the supervision of the UNC.

The evacuation of North Korea, after the Chinese intervention, gave no time for experiment or settlement of custom.

By virtue of the Armistice agreement, the demarcation line, cutting the 38th Parallel, allotted part of the South Korean territory to North Korea and a larger part of North Korea to South Korea. The administration of the latter part is now entrusted to South Korea without prejudice of later final arrangements.

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[52]) US Dep. State Bull. vol. 23 No. 597, Dec. 11, 1950, p. 925.

[53]) There was, however, some toying with the A bomb e. g. the American Secretary of Defense, asked whether it would be used, did not answer: Neue Zürcher Zeitung May 18, 1952. See also the "Jocko" Clark format (drop just one A-bomb anywhere in North Korea): M. W. Cagle and F. A. Manson, The Sea War in Korea (Annapolis/Md. 1957, United States Naval Institute), p. 491. *Cf.* further note 200.

[54]) For more details see: Rapport de la Commission des Nations Unies pour l'Unification et le relèvement de la Corée. Assemblée Générale. Documents Officiels: Sixième Session. Supplément nº 12 (A/1881). See also: E. G. Meade, American Military Government in Korea (Columbia University, N. Y. 1951) for the period prior to the military operations in Korea.

On the reverse side: J. W. Riley and W. Schramm, The Reds take a City. The Communist Occupation of Seoul (Rutgers College, N.J. 1951).

III. Seawarfare

1. Embargo

Embargo or economic sanctions, sometimes called economic blockade, are not peculiar to seawarfare. But they are, and were in this case, mainly applied on shipping, since the maritime access was practically the only one which the Allies could control. Embargo applied to all finished goods that are directly military and any raw material that might have an effect on fighting. Economic sanctions are not military in nature. They are reached by agreement, governmental action and consent of other nations. They are rather a measure short of war.

They were applied strictly by the United States to all goods going directly or indirectly to the theater of war. This included the China coast. But it would not seem that the Allies were eager to enforce those measures [55]). Intensification was constantly pressed by the US upon her Allies. It was generally thought that adequate compliance therewith would have blunted the necessity for a naval blockade.

Evasion of economic sanctions was a frequent occurrence. Shipments on foreign vessels (*i. e.* vessels of not-participating States) could not be stopped. Even US goods could be transshipped in neutral ports. Indian harbors and, though technically British territory, Hong Kong, were regularly used as ports of call and transport [56]).

Some neutral shipping specialized in the trade: Panama, Greece, Norway. Even Great Britain, though she was not a neutral, came often under fire [57]). Chairman Russell puts the question whether ships flying the flags of Panama and Greece were not really owned by American capital. But Admiral Sherman, out of 37, could find only one dubious case [58]).

The Resolution 500 (V) adopted by the General Assembly at its 330th

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[55]) Secretary Marshall, Hearings I, p. 328. Admiral Sherman, Hearings II, p. 1514. Also the Report of the majority of the Republican Senators, Hearings V, p. 3587. Admiral Sherman, *loc. cit.* p. 1650 even states that one or two countries announced that they would not be bound and would trade with whom they wished. But on p. 1655 he concedes that there was a greater willingness to cooperate among the Allies than sometimes seemed, on the surface, to be the case. Admiral Badger, however, would see a distinction between all-out sanctions and some moderate form. He could see that some of the weaker and less stable Allies did not want to endanger their essential needs.

[56]) Report of the Additional Measures Committee, YBUN 1951, p. 224.

[57]) Admiral Sherman, Hearings II, p. 1516 seq.

[58]) Admiral Sherman, Hearings II, p. 1519. See also the complaint concerning seizing and looting of cargo by the Chinese nationalists in conformity with Resolution 500 (V), relating among others to the Soviet tanker Tuapse and the Polish ships President Gottwald and Pracca. The case was discussed after the armistice by the Ad hoc Political Committee from 13 to 15 Dec. 1954, YBUN 1954, p. 45 seq.

plenary meeting on May 18, 1951, noted that additional measures should be considered to meet the Chinese intervention and recommended that every State:

"a) Apply an embargo on the shipment to areas under the control of the Central People's Government of the People's Republic of China and of the North Korean authorities of arms, ammunition and implements of war, atomic energy materials, petroleum, transportation materials of strategic value, and items useful in the production of arms, ammunition and implements of war;

b) Determine which commodities exported from its territory fall within the embargo, and apply controls to give effect to the embargo;

c) Prevent by all means within its jurisdiction the circumvention of controls on shipments applied by other States pursuant to the present resolution;

d) Co-operate with other States in carrying out the purposes of this embargo;

e) Report to the Additional Measures Committee, within thirty days and thereafter at the request of the Committee, on the measures taken in accordance with the present resolution;" [59]).

There was some doubt as to item b, whether it was meant to leave to the discretion of the member-States what commodities should be included. But Dean Acheson interpreted the point as intending

"to ask each country to determine which of the commodities mentioned in the resolution are exported from the jurisdiction of that particular country" [60]).

2. *Naval Blockade*

The concept of pacific blockade need not be contemplated here. In the classical international law it would seem that a blockade can be considered as pacific only if the blockaded States choose to consider it as such [61]). At any rate, in any blockade of that type, vessels of third States could not be interfered with [62]).

Naval blockade of the coast of North Korea was decreed practically from the outset [63]). That blockade was said to have effectively stopped the

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[59]) YBUN 1951, p. 228. See also the reports from the Governments on additional measures, p. 228–9. See some of the replies received from non-member States who split also into communist and non-communist with regard to compliance (p. 229).

[60]) Dean Acheson, Hearings III, p. 1932. The Report of the majority of the Republican Senators deemed that the technical definition of "goods which contribute to the war potential of the enemy" was not the real issue. The laxity of the Allied support was a moral question undermining all efforts of collective security.

[61]) A. E. Hogan, Pacific Blockade (1908), p. 70.

[62]) See, however, L. Kotzsch, »Blockade, friedliche« in Strupp-Schlochauer: Wörterbuch des Völkerrechts, who admits interference when the blockade is a sanction applied by a community of nations.

[63]) On June 30, 1950. See R. E. Appleman, *op. cit. supra* note 33, p. 47; M. W. Cagle and F. A. Manson, *op. cit. supra* note 53, p. 281 seq.

import of supplies by water, causing them to go by rail and road [64]). It was respected by all members of the UN, including Russia. The Russians were meticulous in their observance. Their ships avoided for instance the straits between Korea and Japan. Communist China also observed the blockade [65]).

Naval blockade of China was a question discussed in the MacArthur hearings by several Senators and witnesses [66]). Would it mean an act of war? It was generally assumed that it would, even though the definition of the act of war was left in penumbra.

The importance of the measure was clearly brought to the fore by General MacArthur when he said: " . . . a rifle kills a simple man . . . with a blockade. . . . in modern civilisation . . . you threaten the life of the entire group" [67]).

The crux of the matter in the effected blockade of Korea and its proposed extension to China was the proteiform concept of the Korean operations. This blockade was the first of its kind. It was clearly an act of war confined to North Korea and a most interesting example of warfare in the framework of the UN. Technically all warships not under UN command, including Russian but excluding, of course, North Korean, would be allowed to sail into North Korean ports. All other types of ships would be staved off [68]). A typical feature of the blockade was the prohibition or restriction of fishing by the North Koreans. This measure was also a particular aspect of the economic embargo [69]).

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[64]) General Bradley, Hearings II, p. 744.

[65]) M. W. Cagle and F. A. Manson, *op. cit. supra* note 53, p. 281. In order to avoid possible retaliation of the Chinese against the US, the task of enforcing the blockade along the West Korean coast (the China side of Korea) was entrusted to the Commonwealth naval forces. Indeed Great Britain had recognized Communist China, while the US had not and Great Britain would have been in a better position to negotiate any possible incident with China. See W. Karig and others, *op. cit. supra* note 27, p. 341.

[66]) General Bradley, Hearings II, p. 924; Senator Green, *ibid.* p. 924; General Collins, *ibid.* p. 1342; Admiral Sherman, *ibid.* p. 1512; Chairman Russell, *ibid.* p. 1521. But see Admiral Sherman, Hearings II, p. 1512, 1534 and 1636, pointing out that the charter of the UN in its art. 41 specifically includes blockade as one of the means short of war for imposing the will of UN decisions. Cain, *ibid.* p. 1615; Senator Sparkman, *ibid.* p. 1636; Senator Green, Hearings III, p. 2321; Senator Morse, *ibid.* p. 2406, 2535; Senator Johnson, Hearings IV, p. 2604.

[67]) MacArthur, Hearings I, p. 179. The terms are the definition of genocide.

[68]) M. W. Cagle and F. A. Manson, *op. cit. supra* note 53, p. 281, citing Admiral Sherman.

[69]) M. W. Cagle and F. A. Manson, *op. cit. supra* note 53, p. 296 seq. See details p. 297 and the effect on fishermen forced to surrender to the Americans or seek refuge in South Korea, p. 354 seq. This blockade was also earmarked by the very special features of the Korea operations. There was an almost total absence of enemy air opposition

A naval blockade against China, either before or after her intervention, was envisaged but never put into effect. The reason for abstaining was the particular nature of warfare and its impact on one of the conditions of blockade: its effectiveness (the other conditions: formal declaration and notification thereof to neutral and local authorities did not come under dispute).

Primary hindrance was that the US did not want to go it alone and the UN Allies did not agree to the blockade of China. Technical explanation was that the blockade is an act of war, that technically the UN were not at war with Communist China and that no extension of the operations was desirable [70]). In the background hovers the unwillingness of the Allies to limit their trade in the Far East. A considerable portion of traffic was going through Hong Kong. Some Americans charged Great Britain with furnishing, through her bridge-head in China, the Chinese Communists with material to be used against UN troops in Korea.

The issue was never brought as a formal proposition before the Allies [71]). It was only informally discussed with them. Their consent was imperative. Indeed the effectiveness of the blockade supposes that it might require actual sinkings of ships *i. e.* a clear act of war. Admiral Sherman did not think that the sinking of a Russian ship would necessarily bring Russia into war, but he was certain that, if the situation were reversed, the US Navy would go out and fight [72]). General opinion was that in order to be effective and tight, it must be a UN blockade concurred in by a l l members of the UN, not a US blockade [73]). Imposing a blockade unilaterally against the will of the Allies, would lead to enforcing that blockade against Allied shipping as well as against Russian and Chinese traffic bound for blockaded ports. At least, the cooperation of all the non-communist States should be

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and naval counteraction. "The sea blockade was so complete that it was taken for granted" (General Van Fleet quoted in C a g l e and M a n s o n, *op. cit. supra* note 53, p. 492). With either or both elements present, the blockade might not have been continuous; *ibid. supra* note 53, p. 370.

[70]) General Marshall, Hearings I, p. 332. Admiral Sherman, Hearings II, p. 1512: "A blockade must be limited to the ports and coasts belonging to or occupied by the enemy; must not bar access to neutral ports or coasts. Furthermore, it must be applied equally to ships of all nations".

[71]) General Marshall, Hearings I, p. 328.

[72]) General Bradley, Hearings II, p. 924. General Collins, Hearings II, p. 1342; Senator Morse, Hearings II, p. 1342. Admiral Sherman, Hearings II, p. 1512, 1538, 1514. Morse and Wedemeyer, Hearings III, p. 2406.

[73]) General Bradley, Hearings II, p. 924. General Collins, Hearings II, p. 1188. Admiral Sherman, Hearings II, p. 1514. Morse and Sherman, Hearings II, p. 1538. Sparkman and Sherman, Hearings II, p. 1636–37. General Wedemeyer, Hearings III, p. 2381, 2537. Admiral Badger, Hearings IV, p. 2604.

the objective [74]). There was also the rub of the unclear situation of the ports of Port Arthur and Dairen over which Russia, at that time, exercised military rights and other privileges and where she would demand unconditional access [75]). At any rate, a naval blockade could not include neutral ports. Finally and again, there was the queer situation, within the UN action, of Hong Kong. A blockade of a British port by Great Britain and/or her Allies in the Korean operation was obviously out of the question [76]).

The result was that the naval blockade continued to be limited to Korea. Wonsan, Hungnam and Sonjin were besieged for many months [77]).

3. Contraband of War

Naval blockade deals with rights and duties of the belligerents to prohibit ingress into and egress from an enemy coast or parts thereof to the bottoms of all States, whether belligerent or neutral. Contraband of war regulates the rights and duties of the belligerents to search for and to seize on the High Seas certain goods useful to the conduct of war and intended to reach the forces of the enemy, either directly or indirectly, through the interposition of a third port (doctrine of continuous voyage or transport).

The enforcement of the right of contraband was not seriously considered in the course of the Korean operations. It probably would have required a decision of the UN. It would also presuppose the announcement of a list of goods to be considered as contraband [78]). Since the Allies were unwilling to enforce drastically the economic sanctions provided for by the UN, since they were opposed to the extension of the naval blockade, it is self-evident that they would have been even more reluctant to implement the right of contraband.

4. Naval Bombardment

The HC IX of 1907 prohibits the bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings (art. 1 par. 1).

But article 2 contains important exceptions. Military works, military or naval establishments, depots of arms or war materials, workshops or

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[74]) Admiral Sherman, Hearings II, p. 1513.

[75]) *Id. ibid.* and Hearings II, p. 1524 seq. The clear effect of a naval blockade of the Chinese coast would be to cause deviation of traffic to Port Arthur and Dairen.

[76]) Dean Acheson, Hearings III, p. 1754. Also III, p. 1773.

[77]) YBUN 1951, p. 240 and 1952, p. 162. M. W. Cagle and F. A. Manson, *op. cit. supra* note 53, *passim* and details of the siege of Wonsan, p. 398 seq.

[78]) Admiral Sherman, Hearings II, p. 1514, 1518, 1524, 1636. Senator George and General Wedemeyer, Hearings III, p. 2542. Admiral Badger, Hearings IV, p. 2740.

plants which could be utilized for the needs of the hostile fleet or army, and warships lying in harbor may be fired at, even in undefended localities provided all other means of destruction (e. g., the landing of troops) are impossible and the local authorities have not themselves destroyed these objects within the time fixed after a summons issued by the commander of an enemy naval force to do so.

It must be admitted that, despite prohibition in principle, a wide range of freedom is left to the naval commander (see also art. 3). In the practice of the Korean naval operations, no limits were opposed to bombardment[79]).

5. Capture

The only enemy ship captured at sea during the operations was a North Korean minelayer[80]). No legal problems were involved since this was a man-of-war.

IV. Airwarfare

The clear lesson of airwarfare in Korea seems to be that the sole use of air power, in any of its aspects, did not guarantee decision. As General Bradley put it: an air attack by the UN on China might possibly trade the small deadlock in Korea for a larger stalemate in China[81]). Thorough devastation brought only desultory military effects, well below expectations. But it is likewise clear that without FEAF (Far Eastern Air Forces), the UNC would have been swept from the Korean peninsula[82]).

In the first phases of the Korean fighting there was practically no enemy action, either bombing or fighting. The US bombing was carried out with loss only slightly greater than training at home[83]). Not until the later stages was there enemy air fighting of high quality and in sufficient numbers[84]).

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[79]) E. g. Final-battering of Wolmi with hardly a shot fired in reply: R. Leckie, *op. cit. supra* note 28, p. 137; M. W. Cagle and F. A. Manson, *op. cit. supra* note 53, p. 370 seq. *Contra:* W. Karig and others, *op. cit. supra* note 27, p. 151.

[80]) M. W. Cagle and A. F. Manson, *op. cit. supra* note 53, p. 204 seq.

[81]) General Bradley before the Junior Chamber of Commerce in Pasadena. The Times, 21 March, 1952. MacArthur, Hearings I, p. 309; Testimony of American ex-prisoners of war, cited by Senator Stennis, Hearings I, p. 308. Brassey's Annual 1951, p. 397.

[82]) R. F. Futrell, *op. cit. supra* note 33, and the frequent assertion of the North Korean Communist leader Lt. General Nam Il, *ibid.* p. 345 and C. T. Joy, *op. cit.* note 42, p. 43.

[83]) General O'Donnell, Hearings IV, p. 3064.

[84]) General O'Donnell, Hearings IV, p. 3067.

1. Bombing

Unlike bombing in land and seawarfare, air bombing has never been regulated. The non-ratified Hague Rules of 1922–23 in arts. 22 to 25 have tried to cover the topic. But this is one of the parts in which they have been notoriously inadequate. Practice of World War II was different from that of World War I. It has been submitted by the author elsewhere that it did not create new settled customs of airwarfare [85]). It might be worthwhile to reconsider that assertion in the light of the Korean experience. Without leaping to general conclusions, the drawing of the line between the creation of new customs and behavior that remains unlawful is the most difficult problem confronting the student of airwarfare today.

President Truman's original order of June 30, 1950, authorizes missions across the 38th Parallel on "specific military targets in Northern Korea, whenever militarily necessary" [86]). Action went far beyond that original order. MacArthur says that the war in Korea has almost destroyed that nation, that he had never seen such devastation, that looking at the wreckage and those thousands of women and children he had vomited, that there had been a slaughter he had never heard of in the history of mankind [87]).

North Korea, Communist China and the USSR often protested vehemently. On August 8, 1950, the representative of the USSR submitted a draft Resolution to the Security Council:

> "*Having considered* the protest of the Government of the People's Democratic Republic of Korea against the inhuman, barbarous bombing of the peaceful population and of peaceful towns and populated areas which is being carried out by the United States Air Force in Korea;
>
> *Recognizing* that the bombing by the American armed forces of Korean towns and villages, involving the destruction and mass annihilation of the peaceful civilian population, is a gross violation of the universally accepted rules of international law;
>
> *Decides:*
>
> *To call upon* the Government of the United States of America to cease and not permit in future the bombing by the air force or by other means of towns and populated areas and also the shooting up from the air of the peaceful population of Korea;

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[85]) J. G. Verplaetse, International Law in Vertical Space, p. 442.

[86]) US Dep. State Bull. July 10, 1950, p. 46.

[87]) General MacArthur, Hearings I, p. 82; General O'Donnell, Hearings IV, p. 3075: The almost entire Korean peninsula is just a terrible mess. Everything is destroyed. There is nothing standing worthy of the name. See also at p. 3310. I. F. Stone, *op. cit. supra* note 35, p. 258, citing the New York Times: "A napalm raid hit the village ... Nowhere in the village have they burned the dead because there is nobody left to do so ...". Citing at p. 313 Brassey's Annual, The Armed Forces Yearbook (1951): "The war was

To instruct the Secretary-General of the United Nations to bring this decision of the Security Council to the very urgent notice of the Government of the United States of America" [88]).

The Draft Resolution was rejected by nine votes to one (USSR) and one abstention (Yugoslavia).

Saturation bombing, described as about 300 tons per square mile, seems to have been common. General O'Donnell, at the MacArthur Hearings, said that up to that moment, in the Korean war, the US had dropped 123,000 tons of bombs, compared with the 160,000 tons expended in the Mariannas campaign against Japan, which lasted almost an entire year and in which 57 major cities were flattened [89]).

However, some restrictions were imposed. General MacArthur and General O'Donnell deny having advocated the use of the A bomb. To be sure the final decision is a prerogative of the President. The use of incendiary bombs was prohibited, according to the testimony of General O'Donnell, who also said that, though towns could be bombed by high explosives, such bombing must be limited to military objectives [90]).

General O'Donnell had proposed to serve notice to the Republic of North Korea to withdraw above the 38th Parallel or "they better have their wives and children and bedrolls to go down with them because there is not going to be anything left up in North Korea to return to". Concretely he proposed to blast out of existence five major cities and eighteen major

fought without regard for the South Koreans and their unfortunate country was regarded as an arena rather than a country to be liberated ... quite ruthless". See the whole text, which has been written by The Times correspondent Louis Heren, at p. 110 of the Annual. See also: Lt. General Nam Il at Kaesong: C. T. Joy, *op. cit. supra* note 42, p. 43; General O'Donnell, Hearings IV, p. 3064; Testimonies in Panikkar, In Two Chinas, p. 140.

Indiscriminate action is explained by illicit ruses of the enemy, notably the use of civilians; W. Karig and others, *op. cit. supra* note 27, p. 111.

[88]) YBUN 1950, p. 235. See also p. 236, 237 (Sept. 26, 1950), p. 238 seq. F. I. Kozhevnikov, Velikaia Otečestvennaja vojna Sovetskogo Sojuza i nekotorii voprosy meždunarodnogo prava (Moscow 1954), p. 87 seq.

[89]) General O'Donnell, Hearings IV, p. 3075; the carpet-bombing opposite Waegwan on Aug. 16, 1950, over a 27 square mile rectangular, supposedly a concentration place of enemy troops. Observation and later information could not show evidence that this bombing of 960 tons had killed a single North Korean soldier: R. E. Appleman, *op. cit. supra* note 33, p. 350 seq.; Facts and charges in text of Red Cross Society of China, translation in: Le Comité International, cit. *supra* note 47, vol. 2, p. 80.

[90]) General O'Donnell, Hearings IV, p. 3076. J. T. Stewart, *op. cit. supra* note 33, p. 27, states that selectivity of targets and refusal to attack on marginal objectives was due to the fact that the Air Force employed in Korea was not balanced to the concept of an air campaign.

On June 29, 1950, at the National Security Council, President Truman stated that the bombardment of North Korea should not be indiscriminate (R. F. Futrell, *op. cit. supra* note 33, p. 41). With regard to prohibition of incendiaries, *ibid.* p. 42.

strategic targets [91]). This proposal was not accepted by the Unified Command, on the basis of overriding political and diplomatic considerations. General O'Donnell deemed that he had the military capacity to carry out such a program which, he says, would have ended the war forthwith.

One particular case, the bombing of Rashin, developed into a major issue. The Air Force had been allowed to bomb that port once. But the State Department, in a sharply-worded letter of James Webb, acting Secretary of State, strongly objected to that bombing and it was not until much later that a new raid was allowed. The place is only 17 miles from the Russian border and it was felt that the risk of a miss was too great. Besides, some military men thought Rashin was really not a worth-while target, since it was linked by rail only with the Russian mainland, not downward with the Korean Peninsula. Moreover, General Collins indicated that it would be difficult to bomb the waterfront without hitting a good portion of the town [92]).

Another moot case arose when the US was charged with and partly admitted bombing of a POW camp in North Korea. Its defense was that the site was not properly marked [93]).

Concerning the necessity of a warning before bombing, practice in Korea goes rather to the negative and confirms prior opinion and custom. Sometimes forewarning was given. That advance warning or notice was also part of the proposed O'Donnell scheme to knock out North Korea by air from the outset. But forewarning does not seem to affect the bombing itself. It is merely an announcement of general intentions without reference of place and time of bombing [94]). Nowhere is there any indication that warn-

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[91]) General O'Donnell, Hearings IV, p. 3063 and 3067. Other proposals in: R. F. Futrell, *op. cit. supra* note 33, p. 439. The particular and important military supply, troop and factory complex of Pongha-dong was attacked for the first time at the end of the war, in March 1953 (YBUN 1953, p. 1141).

[92]) General Collins, Hearings II, p. 1331, but admitting that it was decided on political and over-all considerations, not on purely military ones. Also Cain, Hearings III, p. 2260. The same line of thought underlies the abstention from bombing the power reservoirs in North Korea and the Yalu bridges (one was permitted to be bombed up to midstream). See Dean Acheson, Hearings III, p. 2260; Admirals Badger and Sherman, Hearings IV, p. 2802; ex Secretary Johnson, Hearings IV, p. 2591 (who agreed on the bombing of Rashin). Fluctuation was the rule and military necessity was truly out of the picture: e. g. Rashin was bombed on Aug. 28, 1951, almost a year after MacArthur was denied that right.

[93]) C. T. Joy, *op. cit. supra* note 42, p. 136. Art. 23 par. 3 and 4 GC III, 1949.

[94]) E. g. W. L. Brown, *op. cit. supra* note 37, p. 9. See, however, in R. F. Futrell, *op. cit. supra* note 33, p. 186, an indirect and unreliable testimony of North Korean workers at Wonsan, telling of a warning by leaflets three days prior to the attack.

ing is a legal requirement. To our mind, art. 26 HC on LWF 1907 is obviously not applicable to air bombardment.

Through the use of radar, night and inclement weather bombing were said to be nearly as accurate as visual bombing [95]).

Arguments on the Russian side in the UN were art. 25 of the HC on LWF of 1907 and art. 1 of the HC IX of 1907 on bombardment by naval forces. None of these arguments is to the point, since air bombing is technically different from land and naval bombardment [96]). In general they charged a gross violation of universally recognized standards of international law. The representatives of Norway and India to the UN stated that the USSR had not presented proof of the facts [97]).

Legal arguments on the US side at the UN were, first, that it had bombed only the military targets of the invader but that the latter's command compelled civilians to work at targets and used peaceful villages to cover its tanks and used civilian dress to disguise its soldiers. Secondly the UNC, through use of leaflets and broadcasts, minimized to the fullest extent possible the damage and injury to peaceful civilians and property. Thirdly, the President of the International Committee of the Red Cross had not been allowed to enter territory held by the North Korean forces, in order to investigate alleged violations of the law.

2. Air Combat

UN air superiority was complete. In two years the losses on both sides stood eight to one in favor of the UN [98]). When the MIG 15 came into action they started the first clash of jet air forces in history. In view of the peculiar conditions of the Korean warfare no new technical or legal rules evolved from its use.

There was no shooting after baling out in distress. Both sides adhered meticulously to that rule [99]). Further, as stated above, propaganda leaflets

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[95]) YBUN 1951, p. 241.

[96]) Even in landwarfare it has been contended that art. 25, although still formally in force, has been *de facto* repealed by contrary practice: E. Castrén, *op. cit. supra* note 25, p. 199.

[97]) YBUN 1950, p. 236.

[98]) YBUN 1952, p. 162. In Nov. 1952, the UNC destroyed its 500th Russian built MIG 15. R. F. Futrell, *op. cit. supra* note 33, p. 96; W. M. Cagle and A. F. Manson, *op. cit. supra* note 53, p. 474.

[99]) NYHT, Aug. 13, 1952: Declaration of the Sabre-jet ace, James L. Low, at the Pentagon. Even in cases of clear jeopardy, the rule seems to have been observed: L. Montross and N. A. Canzona, *op. cit. supra* note 28, vol. 2, p. 257. See, however, an uncertain case, in the field of army aviation, in D. Politella, *op. cit. supra* note 27, p. 169.

The case would be quite different if soldiers tried to escape from a disabled tank:

dropped from the air were no longer considered as a means of dubious legality. They were in massive use.

3. Hot Pursuit

It has been argued that hot pursuit is a peacetime concept [100]). But similarity with the factual situation in warlike activity is so evident that the term can be used without misgiving or misapprehension. The view that hot pursuit derived from the practice of naval blockade is probably the best exegesis. A blockade runner escaping from port could be chased as long as the patrol was in hot pursuit [101]).

At sea, the concept is familiar. Art. 23 of the Convention on the High Seas, Geneva 1958 [102]), grants the right to warships or military aircraft or other ships or aircraft on government service specially authorized to that effect to pursue a foreign ship into the High Seas when they have good reason to believe that the ship has violated the laws and regulations of the State. Such pursuit must be commenced when the foreign ship or one of its boats is within territorial waters or contiguous zones of the pursuing State. The right of pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State [103]).

Over land, the matter of hot pursuit is controversial, and opinions are divided. Admittedly American authors and practice recognize the right of hot pursuit or of hot trail overland across the boundaries of another State [104]). Outside the US the trend of legal opinion is that such a right

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A. C. Geer, *op. cit. supra* note 29, p. 71: "a hail of small-arms fire killed them as they spilled out".

[100]) J. R. Brock, Hot Pursuit and the Right of Pursuit (1960), JAG Journal March-April, p. 18, at p. 19. The author would call the warlike situation a right of pursuit, which is part of self-defense and subject to its conditions.

[101]) Admiral Sherman, Hearings II, p. 1596. The majority of the Republican members of the Committee found that the origin lies in criminal law where the peace officer has the right to pursue a fleeing criminal outside the area of his jurisdiction when he is closely behind the culprit (Hearings V, p. 3583).

[102]) Text in: UN Doc. A/CONF. 13 L. 58; AJIL vol. 52 (1958), p. 830; Special Supplement to the ICLQ: ICLQ vol. 7 (1958).

[103]) To this part of the rule there would seem to be an exception in the case of pirate vessels: Hackworth, Digest vol. 2, p. 683.

[104]) J. B. Moore, Digest vol. 2, p. 418 seq.; International Arbitrations vol. 2, p. 1212–14, vol. 3, p. 2430 seq.; Ch. Ch. Hyde, *op. cit. supra* note 25, vol. 1, p. 240 seq.; G. H. Hackworth, Digest vol. 2, p. 282 seq.; A. S. Hershey, Incursion into Mexico and the Doctrine of Hot Pursuit, AJIL vol. 13 (1919), p. 557; US Foreign Relations 1916, p. 463, 581 seq.

The crossing of the 38th Parallel by the UN Forces might be considered as a case of hot pursuit, if the North Korean forces were to be classified as armed bands and not

cannot be recognized as a customary rule, as it is in the law of the sea. It could only be admitted subject to the same limitations and conditions which govern any right of self-defense[105]). Even those authors adverse to hot pursuit on land would concede that right as a measure for protection against further attacks and incursions, if limited to destruction of intruding bands. Against the transfer of the rule from maritime law into land operations one could argue that the right of hot pursuit on the sea ceases precisely when it reaches another sovereign State, whereas on land it postulates crossing of another sovereign limit. To that argument one may answer that the rule is not absolute in the law of the sea (case of piracy).

In the air the right of hot pursuit of airplanes by airplanes over the High Seas is generally admitted by analogy, though there is no text in point. As to hot pursuit of airplanes by airplanes overland in peacetime, the matter is still unsettled. In wartime the case arose in the Korea fighting. It concerned the right of US planes to pursue communist planes across the Yalu, up to certain limits and under certain conditions. Hot pursuit might have been limited to a certain distance. But, since this was hardly practicable on technical grounds, the limit was proposed in terms of time. Two or three minutes flying time into Chinese airspace was the usually proposed measure.

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as regular armies. In authorizing operations above the 38th Parallel and in limiting such operations, the President expressed the limits inherent to hot pursuit: rule of proportionality. See the message of MacArthur of Oct. 1, 1950, resting the decision to cross the 38th Parallel squarely on "military exigencies". Text quoted in R. E. Appleman, *op. cit. supra* note 33, p. 608.

See H. S. Truman, *op. cit. supra* note 33, vol. 2, p. 360, who agrees with Pace (meeting of June 28, 1950) to limit operations to destroying military supplies in accordance with purpose to restore peace. This would fit into the plan which rejected the concept of war and considered the Korea operation as a case of self-defense. Acheson, however, expressed the view that the Air Force should not be restricted to South Korea, though it should keep within the boundaries of the Koreas.

Also the case of North Korean and Chinese troops crossing the boundary into Manchuria could have been met by hot pursuit. But the Americans, in this case, received strict directives to the contrary. They were even prohibited from firing across the frontier into Manchuria. This was quite reciprocal, for the North Koreans and the Chinese also ceased to fire once they had crossed the border (Russell and General Barr, Hearings V, p. 2954).

American bombing north of the 38th Parallel started almost from the outset of the operations. See M. Higgins, War in Korea, the Report of a Woman Combat Correspondent (1951), p. 57.

[105]) D. W. Bowett, Self-Defence in International Law, p. 41; I. Brownlie, International Law and the Activities of Armed Bands, ICLQ vol. 7 (1958), p. 712, at p. 732; I. Brownlie, The Use of Force in Self-Defence, BY vol. 37 (1961), p. 183, at p. 260; I. Brownlie, International Law and the Use of Force by States (1963), p. 372 note 3; C. H. M. Waldock, The Regulation of Force by Individual States in International Law, Académie de Droit International, Recueil des Cours vol. 81 (1952 II), p. 455.

This corresponded roughly, under the conditions of jet flight at the time, to 6 or 8 miles. Such limits were established probably in view of the limitations inherent both to self-defense and to hot pursuit. Within those limits the right would have covered shooting down as well as pursuing.

Manchuria provided a sanctuary for the Communist forces. Chinese fighter planes could, starting from their Manchurian bases, attack Americans in North Korea and then seek shelter across the Yalu, in technically neutral China. The American fighter pilots were aroused. In particular, being engaged in a dog fight, at high altitude and speed, over the Yalu, it was impossible for them to keep an eye on the river while they had to watch their enemies. So they had to break off pursuit well before reaching the boundary. Bombers, in that respect, were better off. They had their targets assigned and made the procedural turn after bombing. Military necessity, more particularly the need to bolster the morale of the pilots, was invoked to support the claim of hot pursuit *i. e.* the right to repel an actual attack by pursuit across the borders [106]).

The General Staff, the Department of State and the President approved it. But then came the most controversial step in this controversy. The State Department sent to the ambassadors accredited to the countries who had soldiers in Korea, the following telegram dated November 13, 1950:

> "Please discuss with Foreign Minister at earliest possible moment grave problem confronting UN forces in Korea in use by enemy of Manchuria as privileged sanctuary for forces which are in fact attacking UN forces in Korea itself. See excerpt from Austin's statement to UNSC on November 10. This problem arises in two respects. First ground forces can move into Korea and supply themselves from bases and lines of communications which are largely sheltered by immunity of Manchuria. Secondly enemy aircraft (nationality not always known) operate from Manchurian fields, dash into Korea airspace to strike UN air and ground forces and then fly to safety behind the Manchurian border very few minutes away.
>
> UN Commander has strictest orders about violations Manchurian territory in addition to orders to use extreme care in operations near the frontier itself to insure that hostilities are restricted to Korea. This determination to play according to the rules imposes most serious handicap in face of an enemy which is willing not only to break the rules themselves but to exploit proper conduct UN forces.
>
> United States Government is determined to do everything possible to localize

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[106]) R. F. Futrell, *op. cit. supra* note 33, p. 211 seq.; W. Karig and others, *op. cit. supra* note 27, p. 378. The area between the Chongchon and Yalu rivers, where the communist pilots operated in unchallenged solo-flight was called by US pilots "Mig Alley": Futrell, *op. cit. supra* note 33, p. 269.

conflict in Korea. This is illustrated by rigorous instructions to commanders as well as by efforts made to adjust accidental intrusions into Chinese territory by offering compensations for damages, etc. It is obvious, however, that the abuse of Manchuria by the enemy could easily impose an intolerable burden upon UN forces operating lawfully and properly on UN missions in Korea.

Therefore, US Government wishes to inform Government to which you are accredited that it may become necessary at an early date to permit UN aircraft to defend themselves in the airspace over the Yalu River to the extent of permitting hot pursuit of attacking enemy aircraft up to 2 or 3 minutes flying time into Manchuria air space.

It is contemplated that UN aircraft would limit themselves to repelling enemy aircraft engaged in offensive missions into Korea.

We believe this would be a minimum reaction to extreme provocation, would not itself affect adversely the attitude of the enemy toward Korean operations, would serve as a warning, and would add greatly to the morale of UN pilots who are now prevented from taking minimum defense measures and for whom in case of bomber pilots it is impossible under existing conditions to provide adequate air cover.

For your information we are not asking the concurrence of Government, because we believe the highly limited application of hot-pursuit doctrine in this situation would turn upon military necessity and elementary principles of self defense, but we think it important that Government be notified of the problem. Please telegraph any reactions NIACT" [107]).

It was not quite clear whether this telegram was dispatched to all 13 nations or only to six. Secretary Acheson, who should know, said that it was sent to six and that he probably chose them because they were representative. Upon questioning, he said that after the strongly negative response of the six, "very disturbing replies" Acheson called them, the matter was dropped after consultation between the Department of State and the Department of Defense. Officially, the JCS had no more interest in the project because the front-line was now farther to the South. If the JCS had persisted in their original view, Acheson thought that it might have been necessary to consult with all the participating States. Of all the problems concerning the *ius in bello* in Korea, this one caused the deepest resentment in the Armed Forces and the strongest objections from the Senators.

The explanation of Secretary Acheson at the hearings on the subject of consultation with the Allies, was far from crystal-clear and satisfactory [108]). He said that, both the State Department and the Department of Defense, thought it highly desirable to have the reaction (not the approval or con-

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[107]) Hearings III, p. 1928.

[108]) Hearings III, p. 1663. See also *supra* under Command.

currence) of the Korea partners. It was not taken up in the UNSC because, being highly security-rating at that time, it was not proper to inform Russia.

Some Senators would have liked to know whether the State Department urged the Allies. Acheson declined responsibility and said that it was done by the Embassies abroad and he did not know how it was done.

Acheson suggests, however, that freedom of the Unified Command was in no way hampered and that they could have acted if military necessity required it [109]). This seems to be an incorrect statement of facts. Senator Cain insisted that enemy aircraft continued to cross the Yalu river and that US airmen were not allowed to cross the boundary, not even in hot pursuit, that this failure had cost planes and lives and that, by military necessity, circumstances had not changed [110]). The reason for prohibiting hot pursuit was of a political nature [111]).

It is submitted, indeed, that for psychological and technical reasons, the legal precepts embodied in hot pursuit apply fully to the situation. From the legal and military point of view the chase in hot pursuit was a clear right and near-duty. The refusal to bomb the Manchurian bases was also deeply resented. But the situation was different. Hot pursuit of an escaping enemy and air-to-ground action against property and human targets, giving the impression that the whole people is being attacked, must be fundamentally distinguished. Defense against sly attack and deliberate planning of mass bombings in Manchuria are legally heterogeneous types.

4. Airborne Operations

Dropping of heavy material was further developed in the Korean war. Countless lives were saved by medical aircraft [112]). One of the largest airborne operations took place on March 23, 1951, fifteen miles southwest of Seoul [113]). This counterpart in the air of guerrilla tactics will be one of the outstanding features of warfare today.

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[109]) Acheson, Hearings III, p. 2075, 2132.

[110]) Senator Cain, Hearings III, p. 2078–9, 2132. Historical survey in T. Higgins, Korea and the Fall of MacArthur, a precis in limited war, p. 155 seq.

[111]) Senator Cain, Hearings III, p. 2278. Admiral Badger, Hearings IV, p. 2801, though in full agreement, would like to have a decision of the UN, because the matter involves a policy. General Barr, Hearings IV, p. 3010. See the Report of the majority of the Republican members, Hearings V, p. 2583 seq.

[112]) J. T. Stewart, *op. cit. supra* note 33. Also: A. C. Geer, *supra* note 29, p. 191. There was even, for the first time in history, the airdrop of a bridge during the retreat from the Yalu (R. F. Futrell, *op. cit. supra* note 33, p. 241).

[113]) Operation Tomahawk at the village of Munsannu. See R. F. Futrell, *op. cit. supra* note 33, p. 325. Another large airborne operation was at Sukchon-Sunchon, *ibid.* p. 196–8, and R. E. Appleman, *op. cit. supra* note 33, p. 654 seq.

5. Aerial Blockade

For the first time in history aerial blockade came close to reality on the Korean theater of war [114]). But no legal technique was devised upon the facts and the stand would seem to be that neither the rules of sea nor those of landwarfare would be very helpful in framing the new concept.

V. Neutrality

Some countries, in any event, could not claim the status of neutrals in the Korea conflict. Irrespective of the concept adopted, South and North Korea as well as the countries participating militarily in the UN action were not neutrals.

As regards members of the UN not engaged in the Korea fighting, it would seem that they could not be considered as neutrals, since the action was undertaken under the aegis of an international organization to which they were bound by membership [115]). It would be irrelevant, for our purpose, to follow up the distinction between traditional neutrality of common international law and qualified neutrality, in conformity with the charter. Moreover, since the action was essentially conducted outside the scope of the Security Council, the virtue of qualified neutrality looks somewhat dimmed. The fact that, at the moment of negotiation, some non-participating member-States, were included in the "neutral" Commission, does not impair that position. Indeed, at that moment, the conflict was discolored and the quality of members and Commission was purely functional.

The case of Russia is somewhat particular. If Russia had used her right of veto in the Security Council, she would not have been bound by the decision to intervene in Korea and, indeed, the whole action would have been paralyzed. But, instead, she chose to be absent and otherwise regular

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[114]) R. F. Futrell, *op. cit. supra* note 33, p. 311. The legality of such a blockade is beyond challenge: E. Castrén, *op. cit. supra* note 25, p. 410.

[115]) *Contra:* R. W. Tucker, The Law of War and Neutrality at Sea. Naval War College GPO Washington (1951), p. 177 note 25, though he admits that member States were bound to refrain from giving any assistance to the North Korean forces or to States acting in support of these forces.

See also authorities cited in note 1 p. 679 of this paper. At one point the representative of India drew a distinction between belligerent UN and the UN as a whole, including all 60 members. YBUN 1952, p. 197. See generally on UN and neutrality: J.-F. Lalive, International Organization and Neutrality, BY vol. 80 (1947), p. 72; H. J. Taubenfeld, International Actions and Neutrality, AJIL vol. 47 (1953), p. 377 (at p. 390: Korean conflict) Gamal El Din Attia, *op. cit. supra* note 11, p. 271.

decisions of that body are generally considered to be binding upon Russia [116]).

Those countries that were not members of the UN were neutrals, in the classical sense. It would not be worth while to delve into learned writings about aggression in order to commit non-members on either side of the belligerents [117]).

The matter must be further elucidated with regard to Russia, who is a member of the UN, and with reference to Communist China, who is not.

The case of Russia is rather plain. On the whole, it would seem that Russia was painstakingly anxious to avoid anything which might endanger her position as a self-imposed neutral. Several violations of Russian territory by the UN forces, mainly by the Air Forces, were charged by Russia and sometimes recognized by the US, who said they were mistakes, and apologized. In no case did Russia push a claim to retaliation or even to compensation [118]).

On October 8, 1950, two American fighter planes attacked a Soviet airport sixty miles North of the Korean frontier. The Soviet Government lodged a protest with the American Minister Counselor in Moscow, asking strict punishment and "the necessary measures to prevent such provocative action in the future". The Counselor refused to accept the note on the grounds that it was a UN matter. The incident seems to have died down [119]).

There was explicit prohibition against bombing any place beyond the area of Korea. Up to November 6, 1950, General MacArthur was directed not to use bombing power within 15 miles of the border. Later that restriction was removed and the only limit was the frontier [120]).

[116]) Russia stated that she was not bound. Following that point of view she would have been subject to traditional law of war and neutrality, if she had not returned the argument and accused the US of aggression on the basis of the UN principles. See also note 113 above.

[117]) Italy, non-member country, approved of the UN action: H. J. Taubenfeld, *art. cit. supra* note 115, p. 392 note 89 and six non-members agreed to observe the terms of the recommendation on embargo: *ibid.* p. 394 note 102 (Federal Germany, Italy, Japan, Laos, Spain, Viet-Nam). Taubenfeld writes that those States were willing to abandon neutrality in order to assure effective international action in the interest of world peace. This view is hardly plausible. The true reason is that those countries were not in a position to take advantage of running the economic blockade. Great Britain, even though a participating member State, was in a position to use her facilities at Hong Kong and did not hesitate to do so.

[118]) I. F. Stone, *op. cit. supra* note 35, p. 135. General MacArthur, Hearings I, p. 251 said: "The Soviet Union, even when we accidentally bombed one of her fields and admitted it and apologized and disciplined the officers involved and offered the Soviets compensation, they didn't even take the trouble as far as I know to collect any compensation. They dropped the issue".

[119]) I. F. Stone, *op. cit. supra* note 35, p. 135–136.

[120]) General Bradley, Hearings II, p. 757 (says: five miles, case of a naval aircraft);

Some borderline cases were much discussed. The JCS gave permission to bomb the Korean end of the Yalu bridges [121]). Another case, already mentioned, was the bombing of Rashin or Nasjin, 17 miles from the Soviet border. That place was a forbidden area, although leave for bombing was given twice. It was a moot case. The JCS felt that the risk of bombing Russian territory by mistake was too heavy in comparison with the possible profits of the operation. But the backbone of argument was political in nature and it was the State Department that objected to the bombing [122]). Again it was pointed out that Russia had some rights of undefined character in the port of Rashin, which was held to be a part of the Vladivostock complex [123]). For the same reason it was repeatedly stated that no non-Korean ground forces were to be sent into the area along the Soviet border [124]). The fact that the main railway system over Manchuria and down into Korea was under joint Russian-Chinese control constituted another inhibition, since any bombing involved risk to damage Russian property [125]).

It should be added, though, that General Marshall hinted that General MacArthur was entitled to disobey instructions and to retaliate by bombing if the US forces were attacked outside Korea [126]).

It was no secret that the Soviet Union sent supplies of war material to Korea and that, in the guise of observers, Russian officers were participating in the operations [127]). The observers went home in October 1950 [128]). But

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Secretary Marshall, Hearings I, p. 333, 359 (says: fifteen miles). See: R. F. Futrell, *op. cit. supra* note 33, p. 208 seq.; R. E. Appleman, *op. cit. supra* note 33, p. 715 (says: five miles).

[121]) General Bradley, Hearings II, p. 741. R. E. Appleman, *op. cit. supra* note 33, p. 715–16.

[122]) General Bradley, Hearings II, p. 1063; R. F. Futrell, *op. cit. supra* note 33, p. 183.

[123]) Admiral Sherman, Hearings II, p. 1651–52.

[124]) Secretary Marshall, Hearings I, p. 360. See contrary orders of MacArthur in R. F. Futrell, *op. cit. supra* note 33, p. 202.

[125]) Senator Kefauver and General Bradley, Hearings II, p. 1333. Senator Kefauver and General Wedemeyer, Hearings III, p. 2503.

[126]) General Marshall, Hearings I, p. 360. But see General Bradley, Hearings II, p. 881.

[127]) General MacArthur, Hearings I, p. 118. US representative at the First Committee, YBUN 1953, p. 117, admitted by the representative of the USSR for China but denied for Korea, *ibid.* Until Oct. 4, 1950, thirty Russians were in Wonsan, assembling mines and supervising laying of mine fields (R. E. Appleman, *op. cit. supra* note 33, p. 635).

[128]) General Bradley, Hearings II, p. 995. One may cautiously suggest that this was the turning point of the war. It was, by then, clear that the war had been mistakenly started and was left to die away. As one GI put it: "the war we can't win, we can't lose, we can't quit".

MacArthur thought that there was no violation of a neutral duty. There was no evidence that the Russians were aiding in any other way [129]). No staff officers, no single Russian among the dead or captured, no Russian airmen were ever found [130]). There was not the slightest increase in troops along the Siberian-North Korean border [131]). Russian planes were used; the MIG 15, Russian tanks and artillery were also used [132]). There were many kinds of rifles, many of them captured from the Japanese or from American supplies going to Chiang Kai-shek.

The Sino-Soviet mutual Aid Treaty of 1950 was alleged frequently as one reason for a policy of caution with respect to Russia. It was feared, indeed, that Russia had promised help to China in any case of violation of her territory or even of interference with the Manchurian railway system [133]).

China was a more pugnacious opponent. MacArthur asserted strongly that China had no more intention than Russia to intervene. He repeated his belief up to the day that Chinese troops, called volunteers, joined battle with the UN forces [134]). On her side, Communist China had alleged violation of her land- and airspace as well as of her shipping by the UN forces as early as August 27, 1950 [135]).

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[129]) General MacArthur, *loc. cit.*

[130]) General MacArthur, *loc. cit.;* General Bradley, Hearings II, p. 995.

[131]) General MacArthur, Hearings I, p. 251: "At Lake Success and in the Chancelleries of the world they have been the spokesmen, but on the battlefront it has been quite the contrary".

[132]) General Bradley, Hearings II, p. 995; General Collins, Hearings II, p. 1185.

[133]) E. g. Senator Morse and Secretary Acheson, Hearings III, p. 1877. See text of the Treaty in Hearings V, p. 3171. It was supposed to contain secret clauses. See the background and terms: Allen S. Whiting, China crosses the Yalu. The Decision to enter the Korean War, at p. 27 seq.

[134]) R. E. Appleman, *op. cit. supra* note 33, p. 759 seq. According to MacArthur, at the Wake meeting with Truman, there had been engaged in the earlier fighting a considerable number of racial Koreans who had fought with the Russian forces in World War II or with the Communist Chinese forces in the Chinese civil war. They had not come over as units but were released and reorganized into North Korean forces in Manchuria (H. S. Truman, *op. cit. supra* note 33, vol. 2, p. 370). On the Wake Island conversations between Truman and MacArthur see: J. W. Spanier, The Truman – MacArthur Controversy and the Korean War, p. 91 seq.

[135]) YBUN 1950, p. 238, 283 seq. with, at p. 284, a proposal by the US to send an investigating Committee to the area and offer to pay, eventually, compensation. See also the statement of the representative of the Ministry of Foreign Affairs of the People's Republic of China, read before the SC on Nov. 11, 1950, YBUN 1950, p. 241, charging bombing raids on North Eastern China. The US retorted that it had proposed a commission of investigation, that had been vetoed by the USSR, p. 242. Statement of the representative of the People's Republic of China on Nov. 28, 1950, YBUN 1950, p. 242, charges ninety violations of Chinese airspace from Aug. 27 to Nov. 10, 1950. Also YBUN 1951, p. 261, a complaint by the USSR of US violations of Chinese airspace and bombing

On October 3, 1950, the State Department received a number of disquieting messages. One was that Chou En-lai had called the Indian Ambassador at Peiping, K. M. Panikkar, and had told him that, if the UN forces crossed the 38th Parallel, China would send troops into Korea. He added that no such measure was contemplated if only the South Koreans crossed the 38th Parallel [136]).

In his Special Report to the Security Council on November 5, 1950, General MacArthur mentioned several attacks, chiefly by anti-aircraft fire from Manchuria upon UN planes beginning August 22 [137]). He dates the first crossing of Chinese troops on October 16, 1950. They were identified as the 124th Division of the Chinese Communist 42d Army. They crossed the Yalu at Wan Po Jiu and came into contact with UN forces approximately 40 miles north of Hamhung. On October 20, a Chinese Communist task force known as the 56th Unit crossed the Yalu at Antung. Of this force a soldier was captured and the Chinese intervention was proved [138]). On December 6, the General Assembly decided to include the subject in its agenda [139]).

The Chinese intervention started the most complicated problem of the war. Was Communist China to be considered as a neutral after she started overt fighting? The Chinese claimed that it was not an intervention of Chinese separate armies but merely an assistance by volunteers [140]). They

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of Chinese territory and of illegal inspection of a Chinese merchantman. *Adde* R. F. Futrell, *op. cit. supra* note 33, p. 142.

136) H. S. Truman, *op. cit. supra* note 33, vol. 2, p. 383; K. M. Panikkar, In Two Chinas, Memoirs of a Diplomat (London, 1955), p. 110. At midnight Oct. 2, 1950, Mr. Panikkar was asleep, when called to the residence of Prime Minister Chou En-lai to be informed; R. E. Appleman, *op. cit. supra* note 33, p. 758 seq.; A. S. Whiting, *op. cit. supra* note 133, p. 107 seq.

137) NYT, Nov. 7, 1950, cites twelve such cases of violation of neutrality by the Chinese. Oct. 15, 1950, was the starting day of an organized offensive from the sanctuary: R. F. Futrell, *op. cit. supra* note 33, p. 205.

138) R. E. Appleman, *op. cit. supra* note 33, p. 676.

139) Definitely identified forces totalled 231,000 men drawn from eight armies and comprising 26 divisions. See chronology in A. S. Whiting, *op. cit. supra* note 133, p. 116 seq.

140) The legal position of the Chinese was that they intervened to protect their homeland by sending volunteers to Korea. India seems to have adopted a similar view. The Chinese Communists spoke of legitimate measures of defense. Chinese volunteers, they said, acted under Korean leadership in full conformity with international law. Volunteers could and should be organized, equipped and trained for modern war. They did not constitute undisciplined hordes.

It is fair to say that the Chinese attitude was very flexible. From the initial position that they were to be considered as a kind of freebooters, they came to accept responsibility, which was clearly manifest in the armistice negotiations. Nonetheless, China still considered herself as neutral and treated US airmen landed on her soil as having violated

said they acted in perfect conformity with art. 4 and 6 HC V, 1907. But they relied on the Russian version of the Convention which had translated the relevant passage of art. 6: «des individus passant isolément» by «des individus passant séparément». The UN found intervention as defined "centrally directed army, organized and equipped for war by a great national effort" [141]). Was China to be considered as a belligerent and treated as such? If so, which whom was she at war: the US, the UN or South Korea or the participating States of the UN Force?

On November 8, 1950, the Security Council adopted by eight to two (Nationalist China and Cuba) and one abstention (Egypt) a resolution submitted by Great Britain deciding

> "... to invite, in accordance with rule 39 of the Rules of Procedure, a representative of the Central People's Government of the People's Republic of China to be present during discussion by the Council of the Special Report of the UNC in Korea (S/1890)".

A representative of Communist China attended the sessions as of November 27, 1950.

The General Assembly on February 1, 1951, adopted Resolution 498 V, which read:

> "Finds that the Central People's Government of the People's Republic of China, by giving direct aid and assistance to those who were already committing aggression in Korea and by engaging in hostilities against UN forces there, has itself engaged in aggression in Korea" [142]).

The heart of the new situation was the so-called "Manchurian sanctuary", a refuge in neutral territory, or, at least in somebody else's territory. From that sanctuary men and implements of war were pouring southwards, antiaircraft raked the UN fighter squadrons, unidentified MIGs 15 look off to engage UN aircraft and escaped in safety as soon as they were in danger themselves. All MIGs seem to have been based in Manchuria [143]).

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neutrality (YBUN 1954, p. 41). On the subject see I. Brownlie, Volunteers and the Law of War and Neutrality, ICLQ vol. 5 (1956), p. 570–580.

[141]) YBUN 1950, p. 244, at p. 245. The weight of authority gives support to that opinion. See Gamal el Din Attia, *op. cit. supra* note 11, p. 280 and footnotes. The position of the UN supporters was that China had intervened illegally in Korea, that she had violated her obligations as a neutral State and the charter of the UN. The latter point was obviously wrong, since Communist China had no membership status and was even jealously excluded from that body.

[142]) YBUN 1951, p. 225. Action against China was fraught with booby traps. See letter of Lord Perth to The Times, Jan. 23, 1951. Lord Perth claims that the condemnation of the Chinese Communist Government as an aggressor would imply its recognition as the Government of China.

[143]) J. T. Stewart, *op. cit. supra* note 33, p. 33 and 41.

Ground forces, however, seem to have ceased firing as soon as they reached the sanctuary, altogether a situation rather similar to that which existed along the Bulgarian-Yugoslav and Greek frontier during the Greek Communist uprising in 1946.

Senator Hickenlooper pointedly observed that this situation was essentially different from the rules of law which sometimes give refuge in places controllable by nature and for a very short stay e. g. ships in a harbor. In this case the sanctuary was really a built-up of military strength for an unlimited period of time, without any possibility of control, not even reconnaissance [144]). Admiral Badger, however, made a clear distinction as to action taken with respect to the sanctuary: hot pursuit, on the one hand, and bombing of the Manchurian bases, on the other:

> "... we have certain things in international law, which we have recognized, continuation of the chase and all that sort of business and it has been recognized in sound international law for a good many years, but that does not mean necessarily that – because suppose that a bomb was acquired in France, for instance, and found its way to Korea. I don't think you would be justified in going over there and destroying that point of source of the bombs.
>
> ... The sanctuary relates to the man who has committed the act, and not to the man who is supporting the act, in my definition of it.
>
> ...
>
> It is the airplane that is going to produce an attack, and if you can by the system of 'hot pursuit' refuse to recognize the security of that fellow because he happens to cross a certain border, and authorize going and getting him, why I think you have performed something along the lines that I want to perform.
>
> I don't think that the base can come over, the base can't fly over and form the attack, I want to get the fellow that comes over there and not give him sanctuary" [145]).

MacArthur wanted to go further. He claimed also the right to bomb all military objectives starting with the supply lines and bases, reserving eventually action to the deeper rear. But the JCS on January 9, 1951, intimated that such action must "await attack outside of Korea of the UN forces by Chinese Communists, since only in that eventuality could authorization be obtained" [146]).

The main argument against the MacArthur strategy was that it might

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[144]) Senator Hickenlooper, Hearings III, p. 1597.

[145]) Admiral Badger, Hearings IV, p. 2799 seq. See *supra* p. 711.

[146]) General Marshall, Hearings I, p. 333. See speech of General MacArthur to Joint meeting of Congress April 19, 1951, Hearings V, p. 3553, invoking military necessity in the conduct of war. It should be made clear that Japan provided an identical sanctuary for UN action.

precipitate an all-out war with China, either declared or undeclared, and provoke the intervention of Russia, starting World War III [147]). General opinion was that this would be the wrong strategy, since it would engage the US in a land war (which, it was said unanimously, it must avoid in Asia as well as in Europe) and involve a great risk in view of her global committment of air defense all over the world. As General Bradley stated in an oft-repeated formula: "it would involve the US in the wrong war, at the wrong place, at the wrong time, and with the wrong enemy" [148]). He stressed that the real targets were not in China but in Russia and that bombing China would have been of no avail [149]).

General Wedemeyer, while opposed to any action against Russia, agrees with General MacArthur that the Manchurian bases should be bombed. He brushes aside that it might be an act of war. It is, he said, a calculated risk. Russians were committing acts of war shooting down US planes over the High Seas. As to China, he claims that the US was at war with China and he thought it was problematical to evaluate the effect of such bombing towards expanding the war [150]).

At the moment of negotiation two other aspects of neutrality were dealt with. The first was a proposal by the Republic of South Korea for the permanent establishment of a buffer zone in Manchuria manned by an international security brigade [151]). The proposal was carried out, in a strongly different form, along the armistice demarcation line. The second was the creation of neutral nations inspection teams which were dispatched to the ports of entry of both sides and the neutral nations Commission which carried out the provisions of repatriation. That Commission was composed of India, Poland, Sweden, Switzerland, and Czechoslovakia. One might interpolate that membership of the UN was not exclusive of neutrality. More accurately it can be stated that, f o r n e g o t i a t i o n p u r p o s e s,

147) Senator Saltonstall and Secretary Acheson, Hearings III, p. 1764. Saltonstall would see the main reason of opposition to bombing in the opinion of the Allies. Acheson states as the basic reason the risk of a general war and affirms that the views of the Allies were also the US views. See also, but with some reservations, Admiral Badger, Hearings IV, p. 2739. General Barr, Hearings IV, p. 2978 seq., deeming that many reasons, political and military were against it. H. S. T r u m a n , *op. cit. supra* note 33, vol. 2, p. 418 says: "Anxiety about bombing Manchurian bases was more pronounced after the highly secret report received from Peiping on Nov. 15, stating that top Russian diplomats there had said that, if Manchurian airfields were bombed by UN planes, the Soviet Air Force would strike back in force".

148) General Bradley, Hearings II, p. 732 and *passim* e. g., p. 900.

149) General Bradley, Hearings II, p. 887. Also Vandenbergh, *ibid.* p. 1378. The time factor (non-readiness to meet Russia) was also adduced by Senator Morse, *ibid.* p. 897.

150) General Wedemeyer, Hearings III, p. 2503 seq.

151) YBUN 1951, p. 198.

neutral States were those States that had not actively participated in the Korean military operations.

Finally, a different facet of neutrality or neutralization was that of Formosa. The actual status of Formosa was that of a territory taken from the enemy and awaiting a peace settlement to decide on the problem of sovereignty [152]). The implication seems to be that Chian Kai-shek was not free to decide on intervention and on the use of his troops. MacArthur, in a certain sense, wanted to resume the World War II thrust in the Far East and engage nationalist China troops on the Chinese mainland. Washington firmly opposed that intent. That clash of policy and strategy contributed to the dismissal of MacArthur.

VI. Prisoners of War and Armistice Negotiations

1. With whom to negotiate

When negotiations were suggested, and the idea was in the bud from the very outset of the operations, there arose a preliminary question: with whom to negotiate? The UN had set up a Good Offices Committee. The US as trustee for the Unified Command had large powers. Both could be partners on the UN side. But what of the Communist side? Should negotiations be initiated with the North Koreans, the Chinese Communists or the Russians or all three [153])?

Acheson was confident that the Chinese Communists were the chief partner to deal with. He thought that the North Koreans might claim some voice in the matter. He also saw a case for Soviet intervention, but he discounted that possibility because the Russians always acted as if the satellites were independent nations and referred to them for any discussion.

Senator Hickenlooper was not satisfied with the explanation. He put some questions which Secretary Acheson did not consider as such and discarded offhandedly. Senator Hickenlooper asked whether the negotiations would be carried out with Mao Tse-tung and political officials or with the field army officials of the "unauthorized" Chinese government. The UN First Committee had agreed that, in case an armistice could be agreed upon, the General Assembly would set up a body on Far Eastern problems which would have included a representative of Communist China. Senator Hickenlooper wanted to know whether that proposal, if joined in by the US, would not imply, in fact, the recognition of the People's Republic of

[152]) H. S. Truman, *op. cit. supra* note 33, vol. 2, p. 377.
[153]) Senator Johnson, Hearings III, p. 1775.

China as a political body, with far reaching consequences, even if the Department of State did not formally document any recognition. He evoked the precedent of the American civil war and showed that the Union had avoided any recognition by dealing scrupulously with the military commanders only [154]).

Acheson saw a clear distinction between recognition of Government and dealings with an authority of China for the purpose of bringing the war in Korea to an end. In the latter case the talks would not amount to more than a statement of facts that such authorities exist.

As it developed the Armistice was discussed between representatives of the US, acting in the name of the UN, on the one side (Admiral Joy, later L. C. Harrison, being the Chief delegates) and, on the other hand, the representatives of Communist China and North Korea (Generals Hsieh Fang and Teng Hwa for the Chinese and Lt. General Nam Il, Major Lee Sang Cho and Major General Sang Chang, for the North Koreans). At the signature of documents at Panmunjom, all States having participated in the military action were present, except South Korea, which, however, appeared later, when General Clark, then Commander in Chief UNC, signed the document. The adhesion of the ROK to the armistice was a legal requirement, since all the other nations had acted only in support of ROK. Hence, it would seem that, from the legal point of view, the reservations lodged by President Syngman Ree at the moment of adherence, are valid clauses of the instrument.

2. Incorporation of ROK Prisoners into North Korean Army

Before entering into the question of negotiation and POW problems, it seems convenient to deal with a connected problem that was barely mentioned: that of the incorporation of South Korean POW into the North Korean Army.

When it came to drafting the lists of POW on both sides it appeared that, on the Communist side, some allied captured soldiers and approximately 50,000 ROK prisoners were not accounted for. The Communists explained that they had been "reeducated and released at the front where many of them joined North Korean forces and ... the process was so rapid that [the Communist Command] had no opportunity to obtain their names" [155]). In other words the Communists alleged that many POW had freely joined their ranks.

[154]) Hickenlooper, Hearings III, p. 2036 seq.

[155]) Special UNC Report, p. 16 cited by J. Mayda, The Korean Repatriation Problem and International Law, AJIL vol. 47 (1953), p. 414–438.

This practice is contrary at least to the spirit of arts. 6 and 23 (h) par. 2 of the HC 1907 on LWF and to art. 50 of the GC III of 1949, which forbid the use of prisoners of war in tasks connected with the operations of war. Moreover art. 130 of the latter Convention considers as a grave breach "compelling a prisoner of war to serve in the forces of the hostile Power". The nub of the matter is, of course, the word "compelling". The wholesale incorporation of POW into the army was further stigmatized as contrary to the rules of warfare and as a violation of human rights [156]). The condemnatory terms, however, were mild: "there is reasonable doubt that the prisoners were free from duress in making this decision" [157]).

The same charge was made with respect to the conscription of many civilian nationals of the ROK and the enlistment of deserters in the army. All those, it was said, should be returned to their normal status, being nationals of the ROK and, eventually, prisoners of war.

An outright case of violence and violation of the POW Convention was the alleged use by the North Koreans of American prisoners of war under armed guard to drive supply vehicles [158]).

3. Applicability of Geneva Conventions

One may agree with Pitman B. Potter that nothing would be gained by long discussions on the applicability of the laws of war, including the Geneva Conventions, to the Korea conflict [159]). By and large, there was

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[156]) Admiral Libby quoted in W. H. Vatcher, Panmunjom. The Story of the Korean Military Armistice Negotiations (1958), p. 132.

[157]) *Id. ibid.* That practice is said to be consistent with Communist doctrines but incompatible with classical rules. The crime of enlisting in the enemy army is as old as human history and of first degree gravity, although since the first English case (John de Culewen, Close Roll 7 Edw. 3, memb. 15, 1333), cited in Hale: Historia Placitorum Coronae vol. 1 (1736), p. 167–8, the plea of coercion limited the primitive harshness of the automatic death penalty. On the general impact of coercion see the note in CLR vol. 56 (1956), p. 768, and: Coercion a Defense to Misconduct while a Prisoner of War, IndLJ vol. 29 (1954), p. 603.

It seems impossible to establish a fair balance of the duty to resist and the right to submit in the face of overpowering violence.

[158]) R. F. Futrell, *op. cit. supra* note 33, p. 164.

[159]) P. B. Potter, Repatriation of POW, AJIL vol. 46 (1952), p. 508–9, with particular reference to art. 118 of the Geneva Convention III. See, however, to the contrary, some casual evidence such as the statement by the Chinese People's Military Court to American POW alleged to have parachuted to safety over Chinese territory (W. L. Brown, *op. cit. supra* note 37, p. 68: "They explained . . . that I was a prisoner of the People's Republic of China and as such the Geneva Convention rules did not apply to me"). It is submitted that the value of that statement is dubious since the so-called Court appears to have been a mere police rehearsal with the purpose of intimidating the POW.

de facto agreement that the relevant provisions were *de facto* applicable to the operations.

From a legal point of view, there would be a good argument for formal non-applicability of the GC III of 1949 relating to POW. This Convention was signed by sixty-one States. It came into force on October 21, 1950, together with the three other Geneva Conventions. It clearly discards the general participation clause of earlier international agreements on matters of warfare.

North Korea and South Korea were not among the signatories of those Conventions. But, from the outbreak of hostilities, they promised to observe its provisions [160]).

Communist China was not bound either. But the Foreign Minister Chou En-lai, declared in July, 1952, that the Peiping Government recognized with certain reservations the Geneva Conventions. Those reservations were:

1) that the substitute for a Protecting Power shall be subject to the consent of the Power to which the protected persons belong;

2) the Detaining Power shall not be allowed to be absolved of its liability even after the prisoners of war, or wounded and sick, have been transferred to another Power;

3) the Conventions shall be applicable to civilian persons outside the occupied territory;

4) prisoners of war who have been convicted as war criminals according to the principles established by the International Military Tribunals of Nuremberg and Tokyo shall not be entitled to the benefits of the Convention [161]).

The Soviet Union, which had signed but not ratified, seems to have based her arguments on the text. The contention of Great Britain, that by signing the Convention Russia had approved the principles, was accepted by the UN in 1950, and the Soviet Union in 1951 reciprocated the argument with respect to Great Britain [162]).

The US which had also signed but not ratified, was very cautious and slow in accepting *de facto* the application of the principles implemented by the Convention. It was not until October 1952, that it acted as if the

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See, generally, on the technical ambit of the Conventions: H. Strebel, Die Genfer Abkommen vom 12. August 1949. Fragen des Anwendungsbereichs, ZaöRV vol. 13 (1950/51), p. 118 seq.

[160]) T. Lie, In the Cause of Peace. Seven Years with the United Nations (1954), p. 340. Telegrams of South and North Korea in: Le Comité International, *cit. supra* note 47, vol. 1, p. 15–16.

[161]) The Times, July 17, 1952.

[162]) J. Mayda, art. cit. *supra* note 155, p. 425. Technically the argument is unsound.

GC III was binding on all parties. But, in fact, the US, as well as Great Britain, always stressed its willingness to apply that instrument on a voluntary basis [163]).

To a certain extent that construction also governs the applicability to the UNC [164]). But that case is legally different. Surely the UN was not a party to the Geneva Conventions by signature and, hence, cannot become bound by ratification. But her inability goes farther. She cannot even become a party by adherence. She does not fit into the Geneva scheme, nor indeed in any apparatus of the law of warfare. She is not a Power within the meaning of the common art. 2 [3] of the Geneva Conventions. She is not a transferee Power under art. 12 of Geneva Convention III. She ist not a Detaining Power. She has no jurisdiction to hold prisoners. Detaining Powers are only States. This led *i. a.* to shortcomings in the military penal provisions. Some prisoners had committed crimes during their captivity. Technically they should have been tried by the UN Command. But no machinary compatible with the Geneva provisions could be set up [165]).

During the truce talks the UNC avoided all reference to international law and the GC 1949, except with regard to the treatment of the prisoners of war in captivity. It was not until the matter came before the General Assembly of the UN on the point of repatriation that the debate was put squarely on a Geneva basis.

4. Treatment of Prisoners of War

The treatment of prisoners of war is diversily related. Both sides made charges against each other. The Communist side was particularly violent

[163]) Letters of Acheson and Kenneth M. Younger in: Le Comité International, *cit. supra* note 47, vol. 1, p. 13 seq., 25.

[164]) Declaration of MacArthur July 4, 1950. Reports of the UNC S/1756; S/1834; S/1860; S/1883. Letter dated July 6, 1951, of the representative of the US to the Secretary General of the UN in SC 2232 (US Dep. State Bull., July 30, 1951, nr. 631. p. 189). See declaration of General Mark Clark, Supreme Commander of the UN Forces in Korea, NYTH, Dec. 22, 1952; J. Pictet, Les Conventions de Genève du 12 août 1949, Commentaire vol. 3 par Jean de Preux, p. 451 and 572; «. . . la convention n'était que partiellement applicable». H. J. Taubenfeld, International Armed Forces and the Rules of War, AJIL vol. 45 (1951), p. 671. See the measures taken by the UNC in order to adapt the rules to the POW of the United Nations in R. R. Baxter, Constitutional Forms and Some Legal Problems of International Military Command, BY vol. 29 (1952), p. 325–359. As regards the applicability of the law of warfare see p. 683 seq.

[165]) Crimes committed by POW during their detention belong to the jurisdiction of the Detaining Power (Art. 82 seq. GC III 1949, and E. Castrén, *op. cit. supra* note 25, p. 87). Since the UN is not a Detaining Power they could not exercise penal jurisdiction. See: A. J. Esgain and W. A. Solf, The 1949 Geneva Convention Relative to the Treatment of POW in: North Carolina Law Review vol. 41 (1962/63), p. 537–596, at p. 568; G. I. A. D. Draper, The Red Cross Conventions (London 1958), p. 70.

in the charge of maltreatment of prisoners at the moment of screening. They alleged duress and violence and put forthright the responsibility for the bloodshed caused by the uprising to the brutality of the UNC [166]). The UNC retorted that treatment was in conformity with the Geneva Conventions and that Red Cross teams supervised the conditions of detention [167]).

The UNC charged the Communists with several atrocities on prisoners of war [168]). Shooting of American prisoners of war is recorded many times [169]). The North Korean Command was concerned about the charges and issued a rather baffling directive in the following terms: "The unnecessary killing of enemy personnel where they could be taken as POW shall be strictly prohibited as of now . . ." (emphasis added) [170]). The facts mostly occurred in case of retreat. Sometimes the dead were found with hands tied behind their backs. In any case, the shooting is a flagrant violation of art. 23 (c) and (d) and 4 par. 2 of HC IV, 1907, which forbid killing or wounding an enemy who, having laid down his arms or having no longer any means of defense, has surrendered at discretion and which prohibit the refusal to give quarter. Those principles are assumed

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[166]) During the uprising of the Communist POW in Koje, the American commander of the camp, Brigadier General Francis Dodd, was taken a prisoner. His successor, Brigadier General Colson, had to admit, under duress, that "in the future the prisoners of war can expect human treatment in this camp according to the principles of International Law". See the full text of his statement in R. Leckie, *op. cit. supra* note 28, p. 344. Brigadier General Dodd was often accused of failing to use force against the POW. However, attention should be drawn to art. 42 of GC III 1949, which authorizes the use of weapons only as an "extreme measure".

The delegation of the International Committee of the Red Cross had also some complaints against the UNC: Le Comité International, cit. *supra* note 47, vol. 2, p. 33, 39.

[167]) The UNC proposed in Oct. 1951, a Penal Code, governing the conduct of the POW and the regulation governing confinement (YBUN 1951, p. 248; 1952, p. 207). *Cf.* Note: Misconduct in the Prison Camps, CLR vol. 56 (1956), p. 709 seq.

As regards the intervention of the Red Cross generally see: Le Comité international, cit. *supra* note 47.

[168]) See Reports of MacArthur, Hearings V, p. 3384 seq., from the third Report, p. 3393 onwards; YBUN 1951, p. 248. Other violations of international law, YBUN 1952, p. 207. The case was examined by the General Assembly which expressed its grave concern on Dec. 3, 1953. See the facts alleged and the proofs adduced, YBUN 1953, p. 148 seq.

[169]) R. E. Appleman, *op. cit. supra* note 33, p. 347 (Tragedy on Hill 303) and the text of the sharp warning of General MacArthur (p. 350). Further pp. 427, 587 and 662. According to R. Leckie, *op. cit. supra* note 28, p. 388, the US Army alone was able to prove that 1036 of its soldiers had been murdered after capture. See picture in W. Karig and others, *op. cit. supra* note 27, following p. 368.

[170]) Allied Translator and Interpreter Section Enemy Docs., Issue 4, p. 2 (captured by US 8th Cavalry Reg., 6 Sept. 1950) as cited by R. E. Appleman, *op. cit. supra* note 33, p. 350.

in art. 3 common to the GC 1949, and in art. 13 GC III, 1949, and considered as customary international law [171]). In particular, evacuation and transfer of POW, seem to have occurred often in conditions contrary to the terms of art. 20 and 46 GC III, 1949.

On the subject of maltreatment proper there is conflicting evidence in the American literature. Some authors present a dark picture [172]). Others say that American prisoners, upon their release, declared that they were never struck, beaten or in any way physically maltreated. Some North Korean civilians tried to strike and kick them, while marched away, but the guards drove them off. The Chinese told them that they were "newly liberated friends" [173]). Treatment seems to have been harsher for American airmen and complaints were directed more against North Koreans than against Chinese.

Salient among the imputations, and this one clearly established, is brain-

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[171]) G. Balladore Pallieri, *op. cit. supra* note 25, p. 179 seq.

[172]) W. L. White, Captives of Korea: an unofficial white paper on the treatment of war prisoners; our treatment of theirs, their treatment of ours (1957), comparing with the treatment of Communist prisoners and UN POW charges Communists with violation of several articles of the GC III, 1949; A. D. Biderman, March to Calumny, also challenges the view that American POW were not maltreated (see p. 122 seq.); W. L. Brown, *op. cit. supra* note 37, e. g. p. 56 (shackles, handcuffs, blindfolding), p. 107 and *passim;* The Reverend Philip Crosbie, March till they die, also relates the evils of captivity, but many a prisoner will be flabbergasted when he reads that a bottle of wine and sandwiches were brought into the cell by the Communists (p. 57). See also pp. 99, 100.

It is generally agreed that the worst ordeal was the march to POW's camps: See, POW, the Fight continues after the Battle. The Report of the Secretary of Defense's Advisory Committee on POW, Aug. 1955, GPO Washington D.C., 1955, p. 8. The Department of the Army Pamphlet n 30–101 May, 1956: Communist Interrogation, Indoctrination and Exploitation of POW, with respect to the death march of Nov. 1950, where from 700 prisoners only 250 survived.

[173]) I. F. Stone, *op. cit. supra* note 35, p. 333 seq. This would seem to be in perfect accord with Mao Tse-tung concepts. See on that particular point: Mao Tse-tung, Über den langdauernden Krieg (on the long protracted war) in »Ausgewählte Schriften« (Berlin 1956) vol. 2, pp. 228 and 242. English translation, Selected Works, vol. 2 (New York 1954), p. 157. This volume was published during the Japanese invasion in 1938 and republished in 1951, implying that it is still accepted doctrine. See also: M. Higgins, War in Korea, p. 208. It is generally recognized that the Chinese are masters in that field: Nieuwe Rotterdamse Courant, Febr. 5, 1963, p. 3. R. Leckie, *op. cit. supra* note 28, p. 389, says that none of the Americans held in capture was subjected to physical torment (apart the case of germ-warfare confession). One isolated case of beating in: R. A. Gugeler, Combat Actions in Korea (Combat Forces Press, Washington 1954), p. 64. Other American sources state that the high death rate of American POW was not due primarily to Communist maltreatment and deny that there was outright cruelty (E. Kinkhead, In every war but one, p. 17 and 139 seq.). The treatment improved when the Chinese entered the war, *ibid.* p. 141.

washing [174]). It consisted of endless sessions of indoctrination. In a similar vein it was alleged that day and night questioning led some of the prisoners to sign confessions of bacteriological warfare [175]). It was said that those who refused to sign were among the real heroes of the war. Those who submitted were granted a better treatment, which apparently consisted of better living conditions. It would seem that the much vaunted psychological warfare was not the main agent. The real incentive and seducer was clearly of physiological and economic nature. Political indoctrination was also used by the UNC [176]).

It is submitted that brainwashing, as evidenced by the facts available, is not necessarily contrary to art. 17 par. 4 of the POW Convention 1949, which provides that no physical or mental torture, nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatever. To what degree it could clash with arts. 16 and 22, which provide equal treatment regardless of political opinion or like criteria, is a debatable point. It is submitted that there would be no violation as long as the treatment inflicted does not reach a point below the minimum standard of treatment.

The use of a lie detector on three selected Chinese POW by the US Eighth Army seems to be the first of the kind in that connection [177]). The facts are not clearly stated. If they related to spying, they would not come under the Geneva Conventions, which do not cover that activity. No spying incidents, however, can be read in the statement. Being a pure POW

[174]) YBUN 1953, p. 113; R. Poats, *op. cit. supra* note 26, p. 293; I. F. Stone, *op. cit. supra* note 35, p. 333; See Note: Misconduct in the Prison Camps, CLR vol. 56 (1956), p. 712. The process of indoctrination started only after the Chinese entered the war: E. Kinkhead, In every War but one, p. 86. As to the results, Kinkhead deems that one out of every three American prisoners of war was guilty of some sort of collaboration with the enemy, while A. D. Biderman, *op. cit. supra* note 172, has written his book as a challenge to the Kinkhead and official viewpoint. On the technique of brainwashing or thought-remoulding *(szu-hsiang-kai-tsao)* see Eric Chou, A Man Must Choose (London 1963). This report on personal experience makes it clear that Chinese methods are based on persuasive rather than compulsive tactics. As to the effects of brainwashing: E. Hunter, Brainwashing in Red China, the Calculated Destruction of Men's Mind (N.Y. 1951 and 1953).

Lately a distinction has been made between brainwashing (individual treatment in isolation) and indoctrination or collective treatment. It has been said that in Korea there was not a single case of brainwashing and that only indoctrination was used: Department of the Army Pamphlet cit. note 172 *supra*. But POW, the Fight continues after Battle, cit. *supra* note 172, speaks of brainwashing in some cases and for the rest of indoctrination and brainstorming.

[175]) R. Poats, *op. cit. supra* note 26, p. 293; R. Leckie, *op. cit. supra* note 28, p. 352 seq. See art. 99 par. 2 GC III, 1949.

[176]) Le Comité International, *cit. supra* note 47, vol. 2, p. 38.

[177]) R. E. Appleman, *op. cit. supra* note 33, p. 752.

case, the permissible character of the use of a lie detector depends on the methods. On that point the sources are silent. In view of the fact that the use of particular methods on criminals, without their consent, has been considered as unlawful, one must draw the conclusion *a fortiori* that methods which destroy the will of POW would be illegal (*cf.* art. 17 par. 4 GC III, 1949).

From the records it appears that art. 71 POW Convention was not regularly observed by the Communist Command. That article provides for postal freedom, granting not less than two letters and four cards monthly and prohibiting them from being delayed or retained for disciplinary reasons. The loophole of mild limitation provided for as a disciplinary measure, was apparently not justified in the case.

Furthermore it was asserted that the Communists did not transmit information about the prisoners of war (art. 122 seq.) [178]); that they refused to admit relief supplies (art. 72 seq.) [179]); that they refused access to camps by members of the International Committee of the Red Cross (art. 75) [180]); that they also ignored a request for the appointment of a Protecting Power (art. 78 and 126 GC) [181]).

In view of the novel POW situation, which emerged in World War II and was consolidated in the Korean fighting, the US immediately reacted responsibly and drafted a Code of Conduct for the Armed Forces [182]).

5. Subjects of Negotiation

On June 23, 1951, A. Malik, Russian delegate to the UN, after being approached by Great Britain and India, suggested during a radio broadcast that the conflict in Korea could be settled. He said *i. a.*:

> "The Soviet peoples believe that as a first step, discussion should be started between the belligerents for a ceasefire and an armistice providing for the

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[178]) Le Comité International, *cit. supra* note 47, vol. 1, p. 42, 73, and *passim.*

[179]) *Ibid.*, p. 73.

[180]) *Ibid*, p. 73, 85, 103, and *passim.*

[181]) Neither side appointed a Protecting Power: J. S. Pictet, *op. cit. supra* note 164, vol. 3, p. 119 note 1, cited also in A. J. Esgain and W. A. Solf, The 1949 Conventions Relative to the Treatment of Prisoners of War: its Principles, Innovations and Deficiencies, North Carolina Law Review vol. 41 (1962/63), at p. 543 note 29.

[182]) See G. S. Prugh, Jr., The Code of Conduct for the Armed Forces, CLR vol. 56 (1956), p. 678 seq. It is not possible to deal with all the new aspects of the prison camps. Just one instance: at p. 701: "A mathematical class, however, might appear to be the most politically innocuous of study groups. But given the proper orientation, it could become a subtle and well disguised political science class – so subtle that even the students would be unaware of indoctrination taking place".

Text of the Code of Conduct, from now on to be memorized by all US servicemen, also in R. Leckie, *op. cit. supra* note 28, p. 390.

mutual withdrawal of forces from the 38th Parallel. Can such a step be taken? I think it can, provided there is a sincere desire to put an end to the bloody fighting in Korea" [183]).

The UNC proposed negotiation on the Danish hospital ship "Jutlandia", anchored off the coast at Wonsan. Denmark had not participated in the Korean action. The Communists suggested Kaesong as a meeting place. Kaesong was well inside Communist-held territory. Liaison officers of the UN and the Communists met at Kaesong on July 8, 1951. Subsequent meetings were devoted to the discussion of procedural matters. Substantive discussion started on July 26, 1951.

Since violation of the truce site by both belligerents was frequently charged, meetings were suspended on August 22, 1951. The UN proposed to transfer to Soglyon-Ni. The Communists on October 7, 1951, proposed Panmunjom, duly neutralized by a zone which would include Kaesong and Munson. After negotiations it was agreed, on October 22, that the truce talks should be held in an area immune from hostile acts with a radius of 1000 yards in the vicinity of Panmunjom. The negotiations were marred by several incidents.

Although a *de facto* cease-fire was agreed upon as a condition of the negotiations in the summer of 1951, hostilities lasted all through the truce talks. Since there was clear unwillingness on the part of the UN to engage in any major military campaign, the twilight of war and peace acted in favor of the Communists. They could replenish their stocks and supplies and build up strongholds.

The neutrality of the negotiation site was violated several times. On August 4, 1951, a Chinese-Korean infantry regiment, fully armed, crossed the zone at not more than 100 yards. The Communist party admitted that this was a violation of the agreements [184]).

On August 9, 1951, Lt. General Nam Il, through his liaison officer, claimed that the UN Air Force had attacked a Chinese-Korean vehicle clearly marked with a white cloth and carrying a white flag. The UN answered that only properly marked vehicles, upon prior notification of the time and routes of their movement, were immune [185]).

A charge against the UN for firing into Panmunjom on August 7, was rejected by the UNC as pure fabrication.

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[183]) Summary in British White Paper Cmd. 8596: Korea. A Summary Development in the Armistice Negotiations and the Prisoner of War Camp (June 1951 – May 1952), analyzed in The Times, July, 1, 1952.

[184]) W. H. Vatcher, *op. cit. supra* note 156, p. 58.

[185]) Art. 32 HC on LWF of 1899 and 1907.

On August 19, a Chinese lieutenant was killed allegedly by UN Forces. An inquiry by the UNC led to the answer that the group responsible for the incident must be partisans or irregulars. Responsibility, first declined, was later assumed.

On August 22, Kaesong was allegedly attacked by a plane. The inquiry stated that this was false.

On September 10, a UN aircraft B-26, through faulty navigation, strafed the neutral zone but did no damage. Regrets were expressed and disciplinary action taken.

On October 12, two UN jet aircraft attacked the Kaesong area. The UNC accepted responsibility.

It should be observed that the original plan of the UNC was not focused on the Geneva Conventions nor on the procedures of release and repatriation of POW. It was conceived as a cartel *i. e.* an agreement between belligerents for the exchange of prisoners of war on the basis of strict reciprocity [186]). This procedure was more in line with the undefined and unfinished character of the military operations. Although the developments drifted towards the Geneva ambit, the original purpose was latent even in the later stages.

Both sides agreed, on July 26, 1951, to the following agenda:

1) Adoption of the agenda.
2) Fixing a military demarcation line with a demilitarized zone as a basic condition for a cessation of hostilities.
3) Concrete arrangements for the realization of a cease-fire and armistice, including the composition, authority and functions of a supervising organization for carrying out the terms of a cease-fire and armistice.
4) Arrangements relating to prisoners of war.
5) Recommendations to the governments of the countries concerned on both sides [187]).

Communist negotiators displayed a dialectical cunning that stunned their antagonists [188]). As it developed *item* 4 went through rough seas. The other questions were disposed of in less strained discussions.

[186]) On the other hand, a proposal that the Communists exchange displaced South Koreans on a one-to-one basis for the 100,000 or more prisoners of war that the UN holds in excess of the number of Allies held prisoner by the Communists was dropped later. NYT, Febr. 12, 1952; The Times, Febr. 8, 1952; also The Times, Dec. 12, 1951, and Febr. 12, 1952.

On the concept of cartel: Ch. Ch. Hyde, *op. cit. supra* note 25, vol. 3, p. 1782; G. H. Hackworth, Digest vol. 6, p. 297–298; F. A. von der Heydte, Völkerrecht vol. 2, p. 232.

[187]) YBUN 1951, p. 242.

[188]) See *passim:* W. H. Vatcher, *op. cit. supra* note 156; C. T. Joy, *op. cit.*

Prisoners of War *(Item 4)*

The UNC insisted on two steps prior to any substantial agreement:

a) Exchange of POW data to include numbers, nationality, names and locations of prisoners of war held by both sides.
b) Authority for entry into the enemy prisoner-of-war camps of the delegates of the International Committee of the Red Cross, who were immediately available for POW relief work [189]).

The UNC Report S/2593 covering the period 16–31 January 1952, states the fundamental opposition which, from now on, became the main, interminable issue. The Communist side wanted all POW repatriated. The UN side wanted repatriation only of those who were willing to go home. A screening process would be necessary in the latter case [190]).

During that period the UNC admitted to having attacked an area of the North Korean POW camps. It protested that the area had not been properly marked, in accordance with the GC [191]).

During the same period several riots and uprisings occurred in the POW camps of the UNC. It appeared that Communist resistance to screening and to lodging of willing and unwilling POW in different compounds had been secretly and efficiently organized [192]). The resistance was quenched in some bloody encounters which were, in turn, the object of renewed charges of ill-treatment and duress by the Communist negotiators [193]).

By the end of 1952, most questions were settled. A draft armistice agreement had been worked out [194]). The sole question now pending was that of the nature of the release of the POW.

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supra note 42; R. Poats, *op. cit. supra* note 26. The chief delegate of China, General Hsieh, made the strongest impression upon the American delegates and advisors.

[189]) YBUN 1951, p. 246.

[190]) YBUN 1952, p. 156–7, with description of the screening process at p. 157–8. Out of a total of 110,000 Communist prisoners, 83,000 would not oppose repatriation. On the other hand, twenty-one American prisoners chose not to return, but some of them changed their mind later.

[191]) Art. 23 GC III, 1949. See also art. 19. Letter of P. Ruegger in: Le Comité International, *cit. supra* note 47, vol. 2, p. 83.

[192]) YBUN 1952, p. 159 seq. See Report of the International Committee of the Red Cross: The Times, May 19, 1952, and the Declaration of General Mark Clark: *ibid.* and in: Le Comité International, *cit. supra* note 47, vol. 2, p. 42.

[193]) YBUN 1952, p. 159 and 204 seq., alleging violation of art. 42 of GC III and the abovementioned Report of the International Committee of the Red Cross. The North Korean delegate at the Plenary meeting of the Armistice on May 10, 1952, declared: "These criminal acts committed by your side under the name of voluntary repatriation thoroughly violate the Geneva Convention relating to POW and repudiate the minimum standard of human behavior. The resistance of our captured personnel against these unlawful and perfidious acts of your side is entirely justified" (W. H. Vatcher, *op. cit. supra* note 156, p. 148).

[194]) See text YBUN 1952, p. 166.

On December 3, 1952, the UN General Assembly had adopted Resolution 610 (VII) recommending that the repatriation of prisoners of war should be in accordance with the GC III, 1949, and that force should not be used to prevent or effect their return [195]).

In fact the implementation of the still unfinished agreements started with full accord on April 11, 1953, on repatriation of sick and wounded in accordance with art. 109 of GC III.

A neutral Nations Repatriation Commission composed of Poland, Czechoslovakia, Sweden, Switzerland, and, in the role of umpire, India, was to take in custody the prisoners [196]). Terms of reference in matters of screening were agreed upon in June, 1953 [197]).

Finally, along the lines of Resolution 610 (VII) a Prisoner of War Agreement was signed on June 8, 1953, and incorporated by reference in the Armistice Agreement. But, on June 18, a large number of prisoners, who had chosen to resist repatriation, escaped from the UN stockades [198]).

This action, imputed to the Republic of South Korea, was admittedly contrary to the agreement of June 8. The Communists wanted assurances.

The long-protracted negotiations, alongside the sporadic eruption of the long-protracted operations, came to an end on July 27, when a document was signed under the title: "Agreement concerning a military armistice" [199]).

The participating nations pledged that, in case of a breach of armistice, they would resume fighting [200]). Indeed, this was just an armistice conform-

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[195]) See text YBUN 1952, p. 201–202 and *infra* in this paper, p. 736.

[196]) Custody was meant to be in Korea, since the UNC stated that it could not let the prisoners outside its jurisdiction. However, it appears that some prisoners agreed to be and were actually transferred to India by the Neutral Repatriation Commission: YBUN 1954, p. 31. It might be questioned whether this procedure is in accordance with art. 12 of the GC III, 1949. To be sure India had ratified this Convention in 1950, but the UN is not a Detaining Power. India did not act in her capacity of a ratifying Power but as a member of the neutral Commission, and, finally, after screening, a prisoner of war may loose that quality. See also art. 46 GC III.

[197]) See in general: K. K. Hansen, Heroes Behind Barbed Wires (1957) at p. 21 and *passim.*

[198]) As reported by the UNC: "... officials of the Republic of South Korea brought about a breakout from prisoners of war camps of some 27,000 Korean prisoners of war who had previously indicated that they would resist repatriation to North Korea" (YBUN 1953, p. 112). See the full story in R. Leckie, *op. cit. supra* note 28, p. 382 seq.

[199]) See special Report to the Security Council S/3079, YBUN 1953, p. 113–114. Text of the Armistice Agreement of July 27, 1953, YBUN 1953, p. 136 seq. and in TIAS (Treaties and other International Acts Series) nr. 2782, reproduced in Department of the Army Laws Governing Land Warfare, Dep. of the Army 27–1 (Dec. 1956).

[200]) At the Bermuda Conference, Dec. 1953, President Eisenhower told a frightened Churchill that in event of renewed attack the US would feel free to use the A bomb "against military targets whenever military advantage dictated such use": D. D. Eisenhower, The White House Years. Mandate for Change (London 1963), p. 248.

ing to art. 36 seq. of HC 1907 on LWF, a settled truce, which meant a suspension of hostilities, not the establishment of peace, not even the reestablishment of the *status quo ante* [201]).

A Military Armistice Commission (known as MAC), set up to "supervise the implementation of the truce terms", has been discussing for ten years in a pattern similar to that which prevailed during the truce negotiations. Uninterrupted and futile talks with no real peace in the offing [202]).

In the wake of the armistice agreement two cases were further submitted to the General Assembly. The first was a complaint of detention and imprisonment of UN military airmen shot down over the Yalu region. The complaint listed violation of the Korean Armistice agreement [203]). The second was brought for violation of the freedom of navigation in the China Seas. It was alleged that between 1949 and 1954, 470 ships of the People's Republic of China had been seized and 111 other acts of piracy had been committed against 67 merchantmen of other nationalities [204]).

6. Repatriation of POW

The main legal problem involved in those negotiations was the release and repatriation of the prisoners, as embodied in art. 118 GC III, 1949, in conjunction with art. 6 and 7 of that Convention and art. III, par. 51 of the Draft Armistice. The relevant paragraphs of art. 118 are 1 and 2:

"Prisoners of war shall be released and repatriated *(seront libérés et rapatriés)* without delay after the cessation of active hostilities.

In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of

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[201]) On the subsequent events and the US position see: W. W. Bishop, Jr., International Law. Cases and Materials (2d ed. Boston 1962), p. 770 note 45. On the general situation in Korea: Kyong Cho Chung, New Korea: New Land of the Morning Calm, New York-London 1962.

On the continuance of war generally: Die Beendigung des Kriegszustands mit Deutschland nach dem zweiten Weltkrieg, hrsg. von H. Mosler und K. Doehring (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht. 37), p. 474 seq.: Die Fortdauer des Kriegszustands nach Beendigung des Waffenkriegs.

[202]) The 177th meeting was held at Panmunjom on Aug. 2, 1963. On the agenda there was the question of a North Korean officer captured by the UN-Forces, south of the demilitarized zone, the question of two US helicopter pilots shot down in North Korea, held prisoners there and treated as criminals, a charge by North Koreans that the UN personnel attacked North Korean fishing boats, the ambush of an American jeep in which two US soldiers were killed and a third wounded (according to the American version, published in the NYT, International ed., Aug. 21, 1963).

[203]) YBUN 1954, p. 40 seq. See *infra*, p. 734.

[204]) YBUN 1954, p. 45 seq. The charges were mainly directed against Chiang Kai-shek forces. The USSR did not insist.

hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute *(établira elle-même et exécutera)* without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph" [205]).

A literal application of that text and of art. III par. 51 of the Draft Armistice Agreement was propounded by the Communists. In conjunction with the abovementioned provisions, they supported the repatriation of all POW. This was also in conformity with classical international law which orders all prisoners to be repatriated with the exception of those investigated or condemned on criminal charges [206]). The Chinese had agreed to grant an amnesty and no trouble was expected on account of the exception [207]). As it developed in the case of American airmen charged with espionage, the Chinese soon held that the matter was not included in the settlement since the People's Republic was not a belligerent and the airmen had landed on her territory [208]). They also referred to a statement of Chou En-lai to the effect that war crimes were excepted and the reservation of war crimes was, indeed, constantly upheld by the Communist side [209]). It is further apposite to notice that the Communist bloc, at the moment of ratification of GC III, 1949, made the same formal reservation with regard to art. 85, relating to offences committed before capture [210]). It is submitted that art. 85 will provide one of the many loopholes left in the Convention. Indeed, any prisoner convicted of a war crime under the laws of his captors will be deprived of the POW

[205]) See J. Stone, *op. cit. supra* note 1, chapter XXIV, sec. II, 2 and p. 680–83, who considers that the legal interpretation is quite doubtful. G. I. A. D. Draper, *op. cit. supra* note 165, p. 69, though admitting that the Diplomatic Conference of 1949 did not consider seriously the question, deems that considerations of humanity as well as the text of art. 118 preclude forcible repatriation. J. A. C. Gutteridge, The Repatriation of Prisoners of War, ICLQ vol. 2 (1953), p. 207 would like to rest the solution on two principles: no detention by force and no repatriation by force. See further: H. Kruse, Das Prinzip der freiwilligen Repatriierung. Völkerrecht und Politik in Korea, Außenpolitik vol. 5 (1954), p. 36; Letter of Edwin D. Dickinson to the NYT, Dec. 7, 1952; Letter of W. Harvey Moore, ICLQ vol. 2 (1953), p. 386. R. C. Hingorani, Prisoners of War (Bombay 1963), p. 210, admits that compulsory repatriation may be the rule in view of the position taken by the leading delegates at Geneva, 1949, but opposes the Universal Declaration of Human Rights and finally concludes to a residual question of asylum.

[206]) Letter D. N. Pritt, The Times, May 12, 1952; Leading article The Times, May 23, 1952; Letter P. Baker, The Times, June 13, 1952, and answers to The Times, June 16, 1952.

[207]) YBUN 1952, p. 196.

[208]) YBUN 1954, p. 41. See story and trial in W. L. Brown, *op. cit. supra* note 37, chiefly at p. 228 seq. See *supra* p. 692 and 733.

[209]) The Times, Nov. 20, 1951.

[210]) J. Pictet, *op. cit. supra* note 164, vol. 3 par Jean de Preux, p. 449 seq. with an official letter of the Soviet Union explaining the meaning of her reservations.

status and the protection of the Geneva Convention. There is also the thorny, ever-expanding case of espionage. These activities are not dealt with in the Convention and, as a rule, the spy is not entitled to the POW status.

The interpretation according to the spirit of the text and to humanitarian principles was proposed by the UNC in order to restrict repatriation to those who accepted or wished. The main argument was that, if the text of art. 118 says that prisoners "shall be released and repatriated", it cannot imply the use of force [211]).

It is submitted that this argument is not genuine. The crux of the matter is the meaning of "release" or *«libérer»*. It would seem that it bears on the release from camp confinement. Moreover, it is followed immediately by repatriation. Release and repatriation, obviously, must be read together. The UNC was aware that its position was weak. Its formulation was always cautious. It did not even state that it was based on the spirit of the Convention. It said that it was "in consonance with that spirit" [212]).

Admiral Joy, who led the UN delegation in the earlier stages, admitted that the UNC was concerned with the idea of voluntary repatriation, which was imposed by Washington. The negotiators tried to rely on the release by the North Koreans of ROK prisoners who were given so-called freedom to join the North Korean armies. In this way the Communists themselves had applied the principle of free choice [213]). Later the UNC switched

[211]) See on the whole position: H. Coursier, L'évolution du Droit international humanitaire, Académie de Droit International, Recueil des Cours vol. 99 (1960 I), p. 361–461; H. Strebel, Die strafrechtliche Sicherung humanitärer Abkommen, ZaöRV vol. 15 (1953/54), p. 31–75, at p. 46 seq.

[212]) J. P. Charmatz and H. M. Wit, Repatriation of POW and the 1949 Geneva Conventions, YLJ vol. 62 (1952/53), p. 391, at p. 396, take the contrary view. According to the authors, whose opinion reflects that of Washington, the real issue is not whether the literalist view is the "law" and the UN position "an interpretation"; the issue is which interpretation is compatible with generally accepted modern principles of treaty interpretation.

This view is not acceptable. Interpretation, by its very nature, means that there is something to interpret. Hell is hell and no general principle can make it heaven. Reference to Conference purposes (p. 397–8) would be relevant only if it were shown that, at the moment of drafting art. 118, the delegates had another purpose in mind or had obviously included a provision contrary to the essence and finality of the treaty. *Cf.* on the whole question of interpretation of international treaties: Rudolf Bernhardt, Die Auslegung völkerrechtlicher Verträge insbesondere in der neueren Rechtsprechung internationaler Gerichte, 1963 (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, 40); F. C. De Gan, L'Interprétation des Accords en Droit International (The Hague 1963).

On the position of the US: See US delegate and other delegates in support of the 21 nations draft. YBUN 1952, p. 186 seq. The Mexican delegate went as far as stating that voluntary repatriation was a principle of international law. UN Press Release GA/VII N 33, p. 1. This is manifestly wrong.

[213]) J. Mayda, art. cit. *supra* note 155, p. 417.

from voluntary repatriation to the negative concept of "no-forced repatriation".

The position of the UNC was further laborious on art. III par. 51 of the Draft Armistice Agreement, which they thought to subsume the condition of non-forcible repatriation and under the Communist charge that large numbers of prisoners refused repatriation under systematic duress and compulsion [214]).

The UN General Assembly in its Resolution 610 (VII), adopted on December 3, 1952, by 54 to 5 (Byelorussia, Czechoslovakia, Poland, Ukrainia, USSR) broke the deadlock by deciding:

> "1 – Affirms that the release and repatriation of prisoners of war shall be effected in accordance with the Geneva Convention relative to the Treatment of prisoners of war, dated 12. Aug. 1949, the well established principles and practice of international law and the relevant provisions of the draft armistice agreement.
>
> 2 – Affirms that force shall not be used against prisoners of war to prevent or effect their return to their homelands, and that they shall at all time be treated humanely in accordance with the specific provisions of the Geneva Convention and with the general spirit of the Convention" [215]).

Accordingly the final text of the Armistice Agreement, art. III, 51 was redrafted as follows:

> "... each side shall, without offering any hindrance, directly repatriate and hand over in groups all those prisoners of war in its custody who insist on repatriation to the side of which they belonged at the time of the capture" [216]).

Jaro Mayda deems that this Resolution gives legal cloth to the talk on humanitarian principles. He justifies the Resolution on three arguments [217]):

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[214]) J. Mayda, art. cit. *supra* note 155, p. 420. Once the Soviet Delegation gave a pungent expression to that idea: protect "prisoners against any attempt to compel them to waive their right of repatriation" (YBUN 1952, p. 193). Legally the idea is supported by the clear text of art. 7 GC III, 1949.

The British Command paper 8596, p. 26, however, interprets the article as a benefit for the prisoners and a protection against the attempts by the Detaining Power to procure such a renunciation under pressure. It would not limit the long-established rights of States to grant asylum on political grounds. It is submitted that this opinion is vulnerable, since no definition of "pressure" is hermetic to abuse, since customary rules of asylum have been expressly discarded by the Convention and since the "political" bearing of asylum is generally dealt with in an individual manner and not on mass basis.

[215]) YBUN 1952, p. 201.

[216]) This provision is a concrete part of the Panmunjom agreement, not a general rule of law. Therefore one must disagree with Eisenhower in his Memorial Day Speech of 1954 (cited in Hansen, op. cit. supra note 29, p. 1) when he states: "The Armistice in Korea inaugurated a new principle of freedom – that the prisoners of war are entitled to choose the side to which they wish to be released".

[217]) J. Mayda, art. cit. *supra* note 155, p. 434.

a) the prisoners have a right of option in specific cases: art. 21 (liberty on parole or promise) [218]) art. 109 *in fine* (no-forcible repatriation of sick and wounded during hostilities);

b) the extension *per analogiam* of that right to the situation under 118 is not explicitly excluded and, therefore, permissible;

c) the Convention has not abolished the signatories' right of discretion concerning asylum of prisoners not covered by articles 21 and 109 (See the Mexican Draft for Resolution 610 (VII) of the General Assembly). In that context the US delegation pointed out that

> "the right of a Power to grant asylum to prisoners of war which it detained and the thesis that forced repatriation was in no way admissible had, moreover, been recognized by the Soviet Union itself in the Brest-Litovsk Treaty and in numerous other treaties signed between 1918 and 1921" [219]).

M a y d a further argues that voluntary repatriation was envisaged by Austria at the Convention meetings at Geneva, but not on a massive scale. However, the Austrian proposal was clearly rejected on several grounds [220]):

a) no State was willing to accept the duty of asylum. This seems to be the primary reason why the Austrian proposal was defeated;

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[218]) This provision stems from art. 11 HC on LWF 1899 and 1907, where it is double-edged: prisoners cannot be forced to accept liberty on parole and the hostile Government has no obligation to grant such liberty.

[219]) YBUN 1952, p. 187; J. P. C h a r m a t z and H. M. W i t, art. cit. *supra* note 212, p. 408. It should be pointed out that those cases were incorporated into peace treaties or other agreements. Therefore, their binding force derives from the particular instrument and is limited thereto. If such provisions were deemed necessary to that effect, the plain conclusion would be that, otherwise, repatriation was compulsory. The representative of the USSR in the First Committee opposed that the Treaty of Brest-Litowsk was one of the most predatory and forced treaties in history and could not serve as an example (YBUN 1952, p. 192). H. K r u s e, Islamische Völkerrechtslehre (1953), p. 147, asserts that in all armistice-agreements of Islamic Powers with the unfaithful there is a current provision relating to non-repatriation of prisoners converted to Islam.

[220]) J. M a y d a, art. cit. *supra* note 155, p. 433; J. P. C h a r m a t z and H. M. W i t, art. cit. *supra* note 212, p. 403 seq.; Statements of Vichynski to the 514th meeting of the Political and Security Committee of the UN, Oct. 29. 1952, US Delegation Doc. US/A/C 1/2538. This proposal was rejected by a large majority. The Americans as well as the Russians voted against it. The Rapport of the Second Commission of the Comité International de la Croix Rouge was also against it: Comité International de la Croix Rouge, Rapport sur les travaux de la Conférence d'experts gouvernementaux pour l'étude des Conventions protégeant les victimes de la guerre (Genève, 14–26 avril 1947), Série I No. 5, p. 257. It should be mentioned that the original art. 20 HC II (IV) on LWF 1899 and 1907 provided in the French original: *le rapatriement des prisonniers de guerre s'effectuera . . .* (imperative). Immediate liberation was formally rejected and delayed repatriation implicitly admitted: *Cf.* A. M e c h e l y n c k, La Convention de La Haye concernant les Lois et Coutumes de la Guerre sur Terre (Gand 1915), p. 229.

Adde: Actes de la Conférence Diplomatique de Genève de 1949, tome II Section A, p. 314, 451; R. C. H i n g o r a n i *op. cit.* note 205 *supra*, p. 219 seq. and references in notes.

b) any right of option may in fact delay repatriation;

c) the prisoner of war may not be able to express himself freely when in captivity.

By the light of precedent and *travaux préparatoires,* the current interpretation of GC III is not very convincing. The positive law is bent towards compulsory repatriation. It is doubtful whether this bent can be straightened altogether. One would certainly wish it could. Since no custom is established in its own right, it is submitted that the necessary procedure is one of revision or authoritative interpretation of the GC. But, again, one must oppose the *communis opinio* which suggests that the problem arose from a lacuna in the text. This is definitely not correct. The facts were foreseen and article 118, as stated, was consciously adopted, as it stands, since its opposite was clearly rejected.