

War on the Korean Peninsula? Application of *Jus in Bello* in the *Cheonan* and Yeonpyeong Island Attacks

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The media often reports that the Korean Peninsula remains technically in a state of war, but there remains uncertainty about whether its countries are still legally at war. On December 6, 2010, the International Criminal Court (ICC) released a statement that it was initiating a preliminary examination to determine whether it had jurisdiction over the sinking of the South Korean warship Cheonan by a North Korean submarine, as well as over North Korean artillery attacks near Yeonpyeong Island. For the two attacks to fall under the jurisdiction of the ICC, they must be found to be “war crimes,” which would require that the laws of war (jus in bello) be in effect at the times they were committed. Because the signing of the Korean

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Armistice Agreement in 1953 marked the conclusion of large-scale hostilities, questions have been raised as to whether the two attacks occurred in the context of a “war” or of an “armed conflict” under international law. This Article analyzes the concepts of war and of armed conflict, the general legal effects of armistice agreements, and the legal effects that a declaration of war might have in the context of the Korean Peninsula. If these two military confrontations in fact occurred during a war or an armed conflict, the ICC would have authority to punish the individuals responsible for committing any associated war crimes. However, if such a nexus is not proven, the ICC will lack clear authority to hold accountable the individuals responsible for these attacks.

I. INTRODUCTION.....	44
II. A BACKGROUND HISTORY OF THE KOREAN WAR.....	48
III. A KOREAN APPLICATION OF JUS IN BELLO	52
A. <i>Defining “War”</i>	52
B. <i>Defining “Armed Conflict”</i>	56
C. <i>Application</i>	60
IV. THE LEGAL EFFECT OF ARMISTICES.....	62
A. <i>General Principles</i>	62
B. <i>Application</i>	66
V. THE LEGAL EFFECTS OF DENOUNCING AN ARMISTICE OR OF RESUMING HOSTILITIES.....	70
A. <i>General Principles</i>	71
B. <i>North Korea’s Declaration not to Be Bound to the Armistice</i>	73
C. <i>The Sinking of the Cheonan and the Shelling of Yeonpyeong Island</i>	76
VI. CONCLUSION.....	79
VII. APPENDIX: DETAILED COASTAL MAP.....	81

I. INTRODUCTION

The incidents that occurred on the Korean Peninsula in 2010 are reminders that the situation between the Democratic People’s Republic of Korea (North Korea or DPRK) and the Republic of Korea (South Korea or ROK) remains tense. There have been sporadic naval clashes and military provocations in the past, but the status quo has remained the same.

On March 26, 2010, the South Korean naval ship *Cheonan* sank in the waters around Yeonpyeong Island near the maritime border, killing forty-six South Korean marines.¹ That May, an international team comprised of experts from South Korea, the United States, Australia, the United Kingdom, and Sweden investigated the incident and concluded that the *Cheonan* was sunk by a torpedo fired by a North Korean submarine.² However, North Korea has denied involvement.³ The case was brought to the United Nations Security Council, which issued a Presidential Statement condemning the attack.⁴ Tensions escalated further on November 23, 2010, when the DPRK launched an artillery attack on the ROK's Yeonpyeong Island, approximately two miles from the Northern Limit Line (NLL).⁵ During this incident, North Korea fired dozens of artillery shells and rockets at Yeonpyeong Island, resulting in the deaths of two South Korean marines and two civilians.⁶ South Korea fired rockets back, but the exact number of North Korean casualties has not been reported.⁷ The DPRK blames the ROK for this incident, arguing that South Korea initiated live fire exercises in North Korean waters.⁸ This attack on Yeonpyeong Island marks the first time that the DPRK has openly targeted civilians since North and South Korea signed the Armistice Agreement in 1953.

As tensions escalated on the peninsula, these incidents were brought to the attention of the International Criminal Court (ICC), which has authority to prosecute individuals for war crimes.⁹ On December 6, 2010, the Prosecutor of the

¹ Choe Sang-Hun, *South Korea Searches for Survivors of Sunken Navy Ship*, N.Y. TIMES, Mar. 27, 2010,
<http://www.nytimes.com/2010/03/28/world/asia/28korea.html?scp=3&sq=cheonan&st=nyt>.

² The Joint Civilian-Military Investigation Group, *Investigation Result on the Sinking of ROKS "Cheonan"*, MINISTRY OF NATIONAL DEFENSE, REPUBLIC OF KOREA (May 20, 2010),
<http://www.mnd.go.kr/webmodule/htsboard/template/read/engbdread.jsp?typeID=16&boardid=88&seqno=871&c=TITLE&t=&pagenum=3&tableName=ENGBASIC&pc=undefine&dc=&wc=&lu=&vu=&iu=&du=&st=>.

³ Choe Sang-Hun, *North Korea Denies Role in Sinking of Warship*, N.Y. TIMES, Apr. 18, 2010,
http://www.nytimes.com/2010/04/18/world/asia/18korea.html?_r=1&gwh=5D8EC4F9167DD50D882DA0A377847BA9.

⁴ S.C. Pres. Statement 2010/13, U.N. Doc. S/PRST/2010/13 (July 9, 2010).

⁵ Mark McDonald, *'Crisis Status' in South Korea After North Shells Island*, N.Y. TIMES, Nov. 24, 2010,
http://www.nytimes.com/2010/11/24/world/asia/24korea.html?_r=1&src=mv.

⁶ *Two Civilians Found Dead on Devastated Yeonpyeong Island*, CHOSUN ILBO, Nov. 25, 2010, http://english.chosun.com/site/data/html_dir/2010/11/25/2010112500683.html.

⁷ McDonald, *supra* note 5.

⁸ *Id.*

⁹ See Rome Statute of the International Criminal Court, art. 5, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90, 92 ("The jurisdiction of the Court shall be limited to the most

ICC, Luis Moreno-Ocampo, released a statement saying that the court had received communications alleging that North Korean forces had committed war crimes in South Korean territory.¹⁰ As a result, the ICC began to examine these allegations so as to determine whether the incidents constituted war crimes and thus would fall under its jurisdiction.¹¹

Article 8 of the Rome Statute of the International Criminal Court, to which South Korea is party, provides that war crimes include:

(a) Grave breaches of the Geneva Conventions of 12 August 1949 . . . (b) [o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law . . . [and] (c) . . . serious violations of article 3 common to the four Geneva Conventions of 12 August 1949¹²

Since war crimes are by definition violations of the laws of war, the laws of war, including the Geneva Conventions, The Hague Conventions, and other relevant treaties and case law, must be in effect at the time of a confrontation for related activities to constitute war crimes. In other words, the sinking of the *Cheonan* and the attack on Yeonpyeong Island must have occurred during a war or an armed conflict, as distinct from a border clash or an internal disturbance.¹³

The media often report that the Korean Peninsula remains “technically at war,”¹⁴ but it is unclear whether the Korean Peninsula is, as a matter of law, in a state of war or armed conflict. The ROK, DPRK, United States, and United Nations have yet to establish clear positions on this matter. The parties to the Korean Armistice agree that a peace agreement should be concluded, but have not

serious crimes of concern to the international community . . . [specifically] genocide . . . [c]rimes against humanity . . . [w]ar crimes . . . [and] [t]he crime of aggression.”)

¹⁰ Press Release, Int’l Criminal Court, ICC Prosecutor: Alleged War Crimes in the Territory of the Republic of Korea Under Preliminary Examination (Dec. 6, 2010), available at <http://www.icc-cpi.int/NR/rdonlyres/46A212DA-6CDC-48F7-8F9A-DF5FB5B8BBD5/282744/KoreaEng1.pdf>.

¹¹ *Id.*

¹² Rome Statute of the International Criminal Court, *supra* note 9, art. 8, ¶ 2(a)-(c), 2187 U.N.T.S. at 94-97.

¹³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 1, June 8, 1977, 1125 U.N.T.S. 609, 611 [hereinafter Protocol II] (distinguishing the Protocol, which covers “organized armed groups,” from “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature”).

¹⁴ See, e.g., Kenneth Chamberlain, *Nearly 60 Years After the Armistice, Korean War Hasn’t Ended*, NAT’L J. (July 27, 2012), <http://www.nationaljournal.com/pictures-video/nearly-60-years-after-armistice-korean-war-hasn-t-ended-pictures-20120727>.

announced an official position regarding whether they presently consider themselves to be in a state of war. For the past sixty years, political leaders have ignored the question, but these recent confrontations have initiated discussions on the issue. Recent attention can be attributed to the international community's ongoing efforts to hold North Korean leaders accountable for war crimes, making it necessary to analyze the Korean Peninsula conflict under objective principles of international law.

When North Korea invaded South Korea on June 25, 1950, it was clear from a legal standpoint that a war had begun. Large-scale hostilities on the peninsula lasted for three years, ending when the Korean Armistice Agreement was signed in 1953.¹⁵ The parties agreed to hold another conference at a later date to finalize a peace agreement, and to abide until that time by the terms of the Armistice.¹⁶ Since the parties have thus far failed to finalize a peace settlement, the effect of the Armistice on the legal status of the conflict, and the applicability of the laws of war, are ambiguous. If the media is correct that the Korean Peninsula remains at war, it could imply that the belligerent rights of the parties have remained in effect for the past sixty years, but this would contradict the U.N. Charter prohibition on the use of force.¹⁷ On the other hand, if the Armistice Agreement terminated the war, *jus in bello* would not apply to any subsequent events. Then the attacks against the *Cheonan* and at Yeonpyeong Island would not be war crimes, and the ICC would not have authority to prosecute the leaders of North Korea.

If these confrontations are not war crimes, they may constitute the crime of aggression,¹⁸ but the ICC does not yet have jurisdiction over the crime of

¹⁵ Agreement Between the Commander-In-Chief, United Nations Command, on the One Hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, on the Other Hand, Concerning a Military Armistice in Korea, July 27, 1953, 4 U.S.T. 234 [hereinafter Korean Armistice Agreement].

¹⁶ *Id.*

¹⁷ See U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

¹⁸ Cf. Special Working Group. on the Crime of Aggression of the Assembly of States Parties to the Rome Statute of the Int'l Criminal Court, *Report of the Special Working Group on the Crime of Aggression*, in ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, RESUMED SIXTH SESSION, NEW YORK, 2-6 JUNE 2008, OFFICIAL RECORDS 9, 20 (2008), available at http://www.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-6-20-Add.1%20English.pdf (proposing to define the crime of aggression as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations," and the act of aggression as "the

aggression.¹⁹ Therefore, the ROK would have no currently available means by which to hold the North Korean leaders accountable. While there are international efforts underway to grant the ICC jurisdiction over the crime of aggression, the most recent of which was at the Review Conference of the Rome Statute in Kampala in 2010,²⁰ and the ICC anticipates gaining jurisdiction over the crime of aggression in 2017,²¹ the Rome Statute's principle of non-retroactivity is an obstacle in the quest to hold North Korean leaders accountable for the attacks on the *Cheonan* and Yeonpyeong Island.²² For that reason, this Article will focus on the central question of whether *jus in bello* was in effect at the time of the two military provocations, to determine the possibility of holding North Korean leaders accountable for war crimes.

This Article is divided into four main parts. First, I review the background history of the Korean War. Second, I examine the legal concepts of war and armed conflict to determine when *jus in bello* applies. Third, I analyze the effects of the Armistice on the status of the Korean conflict, looking comparatively at other armistices under international law, as well as bringing in scholarly opinions, state practices, and U.N. Charter principles. Fourth and finally, I assess both North Korea's denunciation of the Armistice and the recent small-scale resumption of hostilities. In 2009, North Korea declared that it was no longer bound to the Armistice.²³ This declaration may impact the status of the conflict, because it may be tantamount to a declaration of war. In addition, the attacks on the *Cheonan* and on Yeonpyeong Island may have resumed hostilities sufficiently to consider the situation one of "armed conflict," in which case *jus in bello* could be invoked regardless of whether the two states were in a state of war.

II. A BACKGROUND HISTORY OF THE KOREAN WAR

use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations").

¹⁹ See Rome Statute of the International Criminal Court, *supra* note 9, art. 5, ¶ 2, 2187 U.N.T.S. at 92 ("The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted . . .").

²⁰ *Review Conference of the Rome Statute Concludes in Kampala*, INT'L CRIMINAL COURT, <http://www.kampala.icc-cpi.info> (last visited Mar. 31, 2013). Actual jurisdiction for the crime of aggression is expected to take effect after January 1, 2017, provided that the majority of States Parties supports it, as is required to adopt an amendment to the Rome Statute. *Id.*

²¹ *Cf. id.*

²² See Rome Statute of the International Criminal Court, *supra* note 9, art. 24, 2187 U.N.T.S. at 105 ("No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.").

²³ See *infra* Section V.B.

The Korean War began on June 25, 1950, when North Korea invaded South Korea after tensions arose in the midst of negotiating Korean elections.²⁴ Shortly thereafter, the U.N. Security Council passed Resolution 82, stating that the invasion was a threat to international peace and security or a “breach of peace” and calling for the “immediate cessation of hostilities” by requesting that North Korea withdraw its troops.²⁵ In addition, the Security Council asked that members render assistance to the United Nations and refrain from supporting the North Korean authorities.²⁶ That same day, President Truman announced that United States armed forces would assist the ROK in thwarting the invasion,²⁷ which marked the beginning of the United States’ involvement in the Korean War. These resolutions were adopted without the Soviet Union’s involvement, because since early 1950 the U.S.S.R. had been boycotting meetings of the Security Council due to the Council’s failure to replace its Republic of China representative with a Communist following their victory in the Chinese Civil War in late 1949.²⁸

On July 7, 1950, the Security Council adopted Resolution 84, which gave the U.S.-led Unified Command full authority to use the United Nations flag at its discretion and to designate the commander of such forces.²⁹ As a result, under the aegis of the United Nations, and with the support of its allies, the United States took part in the conflict with General Douglas MacArthur as Commander-in-Chief of the U.N. forces. On October 18, Chinese forces crossed the Yalu River, which marks the border between China and North Korea, and joined the fight against the United Nations.³⁰ By this time, the Soviet Union had returned to the Security Council, immobilizing the Council’s ability to adopt further resolutions regarding the Korean War. Consequently, the General Assembly enacted its own resolutions, allowing the United Nations to participate further in the war.³¹

On July 27, 1953, representatives from the U.N. Command and from the combined Korean People’s Army and Chinese People’s Volunteers signed the Armistice Agreement to cease hostilities on the peninsula.³² The Agreement’s preamble states the cease-fire agreement will “insure a complete cessation of hostilities and of all acts of armed force in Korea until a final peaceful settlement

²⁴ Cf. S.C. Res. 82, pmb., art. I, U.N. Doc. S/RES/82 (June 25, 1950).

²⁵ *Id.*

²⁶ *Id.* art. III.

²⁷ SYDNEY D. BAILEY, THE KOREAN ARMISTICE 14 (1992).

²⁸ *Id.* at 12.

²⁹ S.C. Res. 84, art. III, U.N. Doc. S/RES/84 (July 7, 1950).

³⁰ BAILEY, *supra* note 27, at 34.

³¹ *See, e.g.*, G.A. Res. 377 (V), 5th Sess., U.N. Doc. A/RES/377(V) (Nov. 3, 1950) (assuming the right to exercise emergency powers when faced with a breach of the peace and Security Council inaction).

³² Korean Armistice Agreement, *supra* note 15, 4 U.S.T. at 261.

is achieved.”³³ It also states that “the conditions and terms of armistice . . . are intended to be purely military in character and to pertain solely to the belligerents in Korea.”³⁴ Paragraph 62 states that the Armistice “shall remain in effect until expressly superseded either by mutually acceptable amendments and additions or by provision in an appropriate agreement for a peaceful settlement at a political level between both sides.”³⁵ On August 29, 1953, the General Assembly passed a resolution “[noting] with approval the Armistice Agreement.”³⁶

A military demarcation line and a demilitarized zone (DMZ) were established on and around the 38th parallel, with North Korean troops on one side and South Korean, U.N., and U.S. troops on the other.³⁷ In addition, the Military Armistice Commission (MAC) and the Neutral Nations Supervisory Commission (NNSC) were created to supervise the implementation of the Armistice Agreement.³⁸ However, these commissions were immobilized when the DPRK refused to cooperate after disputing their neutrality.³⁹

In February 1954, the parties attempted to start negotiations for a peace agreement at the Geneva Conference, but talks foundered.⁴⁰ North Korea, South Korea, China and the United States made another attempt to reach a peace settlement during the Four-Party Talks in Geneva from 1997 to 1998, but failed to come to an agreement because of the DPRK’s request that U.S. troops withdraw from the peninsula.⁴¹ Further peace talks are not expected in the near future, due to the lack of progress in denuclearizing North Korea since the Six-Party Talks came to a halt in 2007.

While North Korea has called for peace negotiations,⁴² official statements by the ROK and United States have stated that signing a peace agreement is conditional on North Korea dismantling its nuclear weapons program. In 2009,

³³ *Id.* pmb., 4 U.S.T. at 236.

³⁴ *Id.*

³⁵ *Id.* ¶ 62, 4 U.S.T. at 261.

³⁶ G.A. Res. 711 (VII), ¶ 1, 7th Sess., U.N. Doc. A/RES/711(VII) (Aug. 28, 1953) (emphasis omitted).

³⁷ Korean Armistice Agreement, *supra* note 15, ¶ 1, 4 U.S.T. at 237.

³⁸ *Id.*

³⁹ BAILEY, *supra* note 27, at 171-88.

⁴⁰ *Id.* at 150.

⁴¹ See generally *Four-Party Talks on the Korean Peninsula, 1997-98*, U.S. DEP’T OF STATE, http://www.state.gov/www/regions/eap/korea_4party_talks_1997.html (last modified Dec. 2, 1998).

⁴² Choe Sang-Hun, *North Korea Calls for Peace Treaty Talks with U.S.*, N.Y. TIMES, Jan. 11, 2010, <http://www.nytimes.com/2010/01/12/world/asia/12korea.html> (“If a peace treaty is signed, it will help resolve hostile relations between North Korea and the United States and speed up the denuclearization of the Korean Peninsula,” the North Korean Foreign Ministry said in a statement carried by the North’s state-run news agency, K.C.N.A.”).

Stephen W. Bosworth, President Obama's special representative on North Korea, mentioned that the U.S. government envisions Northeast Asia with a denuclearized North Korea and a peace regime replacing the 1953 Armistice.⁴³ He asserted that the United States would discuss a peace treaty and other incentives only when the process of denuclearizing the Korean Peninsula had gained "significant traction."⁴⁴ Recent ROK administrations have taken similar positions that North Korea must show genuine willingness to abandon its nuclear weapons program before peace negotiations can resume.⁴⁵ Meanwhile, sporadic naval clashes and military provocations have continued on the Korean Peninsula, with military tensions peaking in 2010 due to the *Cheonan* and Yeonpyeong Island incidents.

In February 2012, the United States and North Korea agreed through bilateral talks in Beijing that North Korea would suspend nuclear weapons testing and uranium enrichment, and would comply with the Korean Armistice Agreement as part of a deal including an American pledge to ship food to North Korea.⁴⁶ But almost immediately afterwards, in April 2012, the DPRK fired a long-range rocket from the Tongchang-ri base, which South Korean authorities claimed disintegrated soon after its launch and fell into the Yellow Sea.⁴⁷ North

⁴³ Stephen W. Bosworth, Remarks at the Korea Society Annual Dinner (June 9, 2009), available at <http://www.state.gov/p/eap/rls/rm/2009/06/124567.htm>.

⁴⁴ Choe Sang-Hun, *North Korea Sees Progress in U.S. Envoy's Visit*, N.Y. TIMES, Dec. 10, 2009, <http://www.nytimes.com/2009/12/11/world/asia/11korea.html> ("[Stephen W.] Bosworth said that once six-nation talks reconvened and gained 'a significant traction' on denuclearizing the Korean Peninsula, the United States and its allies would be ready to discuss the incentives offered in the 2005 agreement: economic aid, security guarantees, normalized relations with Washington and a peace treaty.").

⁴⁵ See KOREAN INST. FOR NAT'L UNIFICATION, POLICY OF MUTUAL BENEFITS AND COMMON PROSPERITY 13 (2008) (expressing the Lee Myung-bak administration's position that "[i]t will be impossible to establish a genuine peace without resolving the North Korean nuclear issue"); see also Park Geun-hye, *A New Kind of Korea: Building Trust Between Seoul and Pyongyang*, FOREIGN AFF., Sept.-Oct. 2011, <http://www.foreignaffairs.com/articles/68136/park-geun-hye/a-new-kind-of-korea?page=show> ("Should the North relinquish its nuclear weapons and behave peacefully . . . [s]uch developments would contribute significantly to the establishment of a more enduring peace on the Korean Peninsula."). Ms. Park is the recently elected successor to President Lee.

⁴⁶ Jane Perlez, *U.S. and North Korea Hold Talks in China*, N.Y. TIMES, Feb. 24, 2012, at A12.

⁴⁷ (3rd LD) *N. Korea's Rocket Launch Appears to End in Failure: Officials*, YONHAP NEWS AGENCY (Apr. 13, 2012, 8:53 KST), <http://english.yonhapnews.co.kr/national/2012/04/13/56/0301000000AEN20120413001251315F.HTML>. For a chronology of North Korea's missile and rocket launches, see *Chronology of North Korea's Missile, Rocket Launches*, YONHAP NEWS AGENCY (Apr. 13, 2012, 10:53 KST),

Korea followed this with a rocket launch in December 2012,⁴⁸ and has promised to continue both its rocket launches and its nuclear weapons tests.⁴⁹ It remains to be seen whether the new government of Kim Jong-un will continue with the bait-and-switch tactics of the past, combined with periodic brinkmanship and provocation, or engage more seriously with its international commitments; however, the forecast is not promising.

III. A KOREAN APPLICATION OF *JUS IN BELLO*

Article 2 common to the Geneva Conventions stipulates that “in addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”⁵⁰ Therefore, *jus in bello* applies when there is a “declared war” or “armed conflict.”⁵¹ However, the Geneva Conventions do not define these two terms, even though they are widely used throughout. It is also not clear that the terms differ in meaning: they seem to be used interchangeably, but sometimes in different contexts. For example, “war” is used as a broader concept with more political significance, while “armed conflict” is used to refer to actual hostilities. In order to better understand the two concepts, this Article will analyze the definitions provided in legal cases and by scholars.

A. Defining “War”

Lassa Oppenheim’s classic treatise, *International Law*, defines war as “a contention between two or more states through their armed forces, for the purpose

<http://english.yonhapnews.co.kr/northkorea/2012/04/13/29/0401000000AEN20120413003300315F.HTML>.

⁴⁸ Tania Branigan, *North Korea Defiant as UN Security Council Condemns Rocket Launch*, GUARDIAN, Jan. 23, 2013, <http://www.guardian.co.uk/world/2013/jan/23/north-korea-defiant-un-rocket-launch> (reporting on the DPRK’s December 2012 test and its “harsh response” to a resolution correspondingly extending sanctions on the country).

⁴⁹ Justin McCurry & Tania Branigan, *North Korea: Pyongyang Plans Nuclear Test Targeted at US*, GUARDIAN, Jan. 24, 2013, <http://www.guardian.co.uk/world/2013/jan/24/north-korea-nuclear-rocket-us> (relating Pyongyang’s promise of a nuclear test and rocket launches in the near future).

⁵⁰ First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 3116, 75 U.N.T.S. 31; Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Third Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [together, hereinafter, Geneva Conventions].

⁵¹ *Id.*

of overpowering each other and imposing such conditions of peace as the victor pleases.”⁵² A key element in this definition is that a war is an armed contention between states, which means that a civil war would not be considered “war” in the technical sense of the term.⁵³ This aspect may be obsolete, as common article 3 of the Geneva Conventions recognized that conflicts could be purely domestic.⁵⁴ Oppenheim’s definition of war also requires the use of armed force. While this would seem to be obvious, armed force is not necessarily a prerequisite under international law. For example, Ian Brownlie has argued that there are circumstances in which parties can be at war technically or *de jure* in its absence.⁵⁵ War *de jure* can exist, for example, during a cease-fire or when belligerents are not close enough to engage in hostilities, as sometimes was the case during the Second World War.⁵⁶

The International Court of Justice (ICJ) recognized the notion of a “technical” war in the *Corfu Channel* case, in which it ruled that Greece and Albania were “technically at war.”⁵⁷ The opposite, a *de facto* state of war, can exist when hostilities or fighting between two parties have commenced, even though no declarations of war have been made.⁵⁸ The distinction between these two conditions exists because in the early 20th century a formal declaration of war was an important criterion for determining the applicability of the laws of war. It was then common practice for states to declare war, as provided under the Conventions adopted at The Hague in 1907, in order to call upon the protection afforded under those rules.⁵⁹ For example, article 2 of the Convention (III)

⁵² 2 L. OPPENHEIM, INTERNATIONAL LAW 202 (H. Lauterpacht ed., 7th ed. 1952). Four elements are distinct here: (i) existence of contention, namely of a violent struggle involving the application of armed force, (ii) conflict between states (civil “wars,” and engagements with insurgents or pirates, do not qualify), (iii) use of armed forces (those private subjects of the belligerents who do not directly or indirectly belong to the armed forces do not take part in the fighting), and (iv) an aim of overpowering the enemy.

⁵³ *Id.* at 209.

⁵⁴ See Geneva Conventions, *supra* note 50, art. 3, 6 U.S.T. at 3116 (“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . .”). For a definition of “armed conflict,” see *infra* Section III.B.

⁵⁵ IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 26-28 (1963); see also YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 9-10 (4th ed. 2005).

⁵⁶ DINSTEIN, *supra* note 55, at 9; ARNOLD DUNCAN MCNAIR & ARTHUR D. WATTS, THE LEGAL EFFECTS OF WAR 3 (4th ed. 1966); Quincy Wright, *When Does War Exist?*, 26 AM. J. INT’L L. 362, 363 (1932).

⁵⁷ Memorial of United Kingdom, *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. 4 (Apr. 9).

⁵⁸ See BROWNLIE, *supra* note 55, at 26-28; DINSTEIN, *supra* note 55 at 9-10.

⁵⁹ See Convention (III) Relative to the Opening of Hostilities, art. 1, Oct. 18, 1907, 36 Stat. 2259, 2271 (“The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.”).

Relative to the Opening of Hostilities states that “[t]he existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification.”⁶⁰

As a result, it was common for the legal state of war to begin with a declaration of war. When a declaration of war was made, the laws of war became applicable and governed the conduct of hostilities, and relations with neutral parties became subject to the laws of neutrality.⁶¹ Therefore, a declaration of war was an important element in determining the legal status of a conflict, and was useful because it emphasized the parties’ intentions. Brownlie follows this logic when he argues that “[s]tate practice has emphasized that war is not a legal concept linked with objective phenomena such as large-scale hostilities between the armed forces of organized state entities but a legal status the existence of which depends on the intention of one or more of the states concerned.”⁶² Dr. (later Lord) McNair likewise emphasized that state intentions were determinative, and that war only existed if one of the parties declared itself at war.⁶³

While it had become the general rule that *jus in bello* applied either in the case of “declared war” or (declared or undeclared) actual “armed conflict,”⁶⁴ scholars are now revisiting the question of whether a declaration of war, standing alone, triggers the rules governing war. In the past, declarations were important, but this traditional means of instigating war has become increasingly uncommon. The adoption of the U.N. Charter, which prohibits the use of force under article 2, paragraph 4, has made members of the international community reluctant to announce their engagement in warfare.⁶⁵ Christopher Greenwood has questioned

⁶⁰ *Id.* art. 2, 36 Stat. at 2271.

⁶¹ See BROWNLIE, *supra* note 55, at 19; Christopher Greenwood, *The Concept of War in Modern International Law*, 36 INT’L & COMP. L.Q. 283, 284 (1987). Note the subtitle of the second volume of Oppenheim’s treatise: “Disputes, War and Neutrality.” See generally OPPENHEIM, *supra* note 52. Earlier editions were subtitled simply “War and Neutrality.” See, e.g., 2 L. OPPENHEIM, INTERNATIONAL LAW (2d ed. 1912).

⁶² BROWNLIE, *supra* note 55, at 26 (footnote omitted).

⁶³ See Arnold D. McNair, *The Legal Meaning of War, and the Relation of War to Reprisals*, 11 TRANSACTIONS GROTIUS SOC’Y 29, 29 (1925) (“[Courts] have consistently . . . adhered to the view that war is a matter peculiarly within the prerogative of the Crown, and that they ought to look to the Crown to give some indication of the existence of war, as indeed it usually does, by Proclamation. [B]oth as regards the beginning and the end of a war, an English Court is bound by the duly manifested opinion of the Crown on the question whether this country is at war or at peace with another.”); see also Greenwood, *supra* note 61, at 286 (identifying Lord McNair as a subjectivist and also identifying a rival objectivist school of thought).

⁶⁴ See Geneva Conventions, *supra* note 50, art. 2, 6 U.S.T. at 3116.

⁶⁵ See U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the

the current relevance of war as a legal concept, since it appears to be incompatible with the U.N. Charter.⁶⁶ He posits that a declaration ipso facto would violate the Charter because it would be a threat of force, and furthermore points out that a state could not validate an illegal hostile act by making a declaration of war.⁶⁷ Greenwood concludes by arguing that “[i]t is the factual concept of armed conflict rather than the technical concept of war which makes [the rules of war] applicable.”⁶⁸

Similarly, Jean Pictet’s commentary on the Geneva Conventions’ common article 2 indicates that a declaration of war no longer affects the status of a conflict.⁶⁹ Rather, he notes that the existence of an armed conflict among parties to

United Nations.”); *see also* INT’L LAW ASSOC., FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 7 (2010), *available at* <http://www.ila-hq.org/download.cfm/docid/2176DC63-D268-4133-8989A664754F9F87> (“The United Nations Charter . . . prohibits all use of force except in self-defence or with Security Council authorisation. After the adoption of the Charter, governments and jurists began to abandon the use of the term ‘war’. It is still possible for states to find themselves in a state of war or to make formal declarations Many national constitutions still require formal declarations of war in some circumstances. Such a declaration is not contrary to international law unless (depending on the context) it constitutes a threat within the meaning of Article 2(4) of the United Nations Charter.”). While the two Koreas have been members of the United Nations only since 1991, the United Nations is not only a party to the Armistice, but has been alert to the problems of Korean sovereignty and partition since at least 1947. *See Member States of the United Nations*, UNITED NATIONS, <http://www.un.org/en/members/> (last visited Mar. 30, 2013) (listing member states and dates of admission); Korean Armistice Agreement, *supra* note 15, 4 U.S.T. at 261 (naming the signatories to the Armistice as Nam Il, General of the Korean People’s Army, and Senior Delegate from the Delegation of the Korean People’s Army and the Chinese People’s Volunteers; and William K. Harrison, Jr., Lieutenant General in the United States Army, and Senior Delegate from the United Nations Command Delegation); G.A. Res. 112 (II), 2d Sess., U.N. Doc. A/RES/112(II) (Nov. 14, 1947) (establishing and appointing a U.N. Temporary Commission on Korea to oversee elections); *see also* G.A. Res. 195 (III), 3d Sess., U.N. Doc. A/RES/195(III) (Dec. 12, 1948) (recognizing the Republic of Korea as the only lawful and democratically elected government in the country); G.A. Res. 293 (IV), 4th Sess., U.N. Doc. A/RES/293(IV) (Oct. 21, 1949) (monitoring the rising potential for military conflict in Korea); S.C. Res. 82, *supra* note 24 (from 1950).

⁶⁶ *See generally* Greenwood, *supra* note 61.

⁶⁷ *Id.* at 301-02.

⁶⁸ *Id.* at 304.

⁶⁹ 1 JEAN S. PICTET, THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 32 (1952) (“There is no longer any need for a formal declaration of war, or for recognition of the state of war, as preliminaries to the application of the Convention. The Convention becomes applicable as from the actual opening of hostilities. The existence of armed conflict between two or more Contracting Parties brings it automatically into operation.”).

the Conventions automatically brings the Conventions into operation.⁷⁰ As a result, the term “war” is now being abandoned by “governments and jurists,” and has been replaced with the broader concept of “armed conflict.”⁷¹ However, this does not mean that the concept of “war” is insignificant in international law today. Under the Geneva Conventions, a declaration of war is one of the triggers for applying *jus in bello* and, although rare, there may be situations devoid of actual hostilities where such laws should be applied.⁷² For example, the Fourth Geneva Convention may apply if one state is interning nationals of another state, even if hostilities are absent between the two.⁷³ Yoram Dinstein further describes cases of “*status mixtus*” involving “a limited use of force ‘short of war,’” where “a state of peace continues to prevail” but “the actual fighting [is] regulated by the . . . rules of warfare.”⁷⁴ In sum, the concept of “war” is still significant in international law, but the adoption of the U.N. Charter has circumscribed its relevance.

B. Defining “Armed Conflict”

While the term “armed conflict,” is freely used throughout both the Geneva Conventions and its Additional Protocols, it is not defined.⁷⁵ There has been substantial debate in international tribunals and courts about the difference

⁷⁰ *Id.*; see also Geneva Conventions, *supra* note 50, art. 2, 6 U.S.T. at 3116 (“[T]he . . . Convention[s] shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. . . . Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.”).

⁷¹ INT’L LAW ASSOC., *supra* note 65, at 6-9 (“To summarise, although the term ‘war’ may still have some significance in a few areas such as for some national constitutions, or some domestic contracts, in international law the term ‘war’ no longer has the importance that it had in the pre-[U.N.] Charter period. . . . [The term ‘law of war’ is] still in use today although the [terms] ‘law of armed conflict’ or [‘international humanitarian law’ (IHL)] are more generally accepted.”). The authors note that the “so-called ‘war on terror’” marks an exception to this decline. *Id.* at 7.

⁷² See DINSTEIN, *supra* note 55, at 10 (“Of course, if a state of war exists in the technical sense only—and no hostilities are taking place—the issue of the application of the *jus in bello* rarely emerges in practice.”). Dinstein provides the example of one state threatening another with total war. *Id.* at 10 n.31.

⁷³ *Cf.* Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 50, art. 42, 6 U.S.T. at 3544 (“The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.”).

⁷⁴ DINSTEIN, *supra* note 55, at 16.

⁷⁵ See Jelena Pejic, *Status of Armed Conflicts*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 77, 78 (Elizabeth Wilmshurst & Susan Breau eds., 2007) (“[T]he relevant treaties . . . contain no general definition of what constitutes an armed conflict, whether international or non-international.”).

between an “international armed conflict” and a “non-international armed conflict,” but none of the treaties on armed conflict provide a legal definition for the term. “In practice . . . States, international organizations, non-governmental organizations, the ICRC [(International Committee of the Red Cross)], courts, scholars, and others” have identified various types of armed conflicts, but may reach conflicting and politically motivated conclusions.⁷⁶ Therefore, in this Section, this Article attempts to lay out some principles for defining “armed conflict.”

The United States needs to have a better understanding of what constitutes armed conflict under international law because the definition of the term affects whether the United States has the legal authority to exercise belligerent rights against terrorist groups in its “War on Terror.” “In May 2005, the Executive Committee of the International Law Association (ILA) approved a mandate for the Use of Force Committee to produce a report on the meaning of ‘war’ or ‘armed conflict’ in international law.”⁷⁷ It was tasked with distinguishing laws that apply during peacetime from laws applicable during armed conflict.⁷⁸ Although this distinction is muddled as conflicts become more complex, the Committee attempted to identify some core elements that differentiated the state of armed conflict from the state of peace.⁷⁹ In creating a legal definition for “armed conflict,” the Committee studied treaties, the practice of states, judicial decisions of international and regional courts, and opinions of legal scholars.⁸⁰

According to the Committee’s 2010 report, the modern international community shares a common understanding of armed conflict, and there are two minimum characteristics that distinguish armed conflict from non-armed conflict and from peace.⁸¹ These minimum characteristics are (i) “[t]he existence of organized armed groups,” and (ii) that such groups are “[e]ngaged in fighting of some intensity.”⁸² The Committee’s analysis was based on the Geneva Conventions,⁸³ the Rome Statute,⁸⁴ and, particularly, the International Criminal

⁷⁶ *Id.* at 79 (footnote omitted).

⁷⁷ INT’L LAW ASSOC., *supra* note 65, at 1 (reporting on how international law defines and distinguishes situations of armed conflict from those situations in which peacetime law prevails).

⁷⁸ *Id.*

⁷⁹ *Id.* at 1-2 (“All armed conflict has certain minimal, defining characteristics that distinguish it from situations of non-armed conflict or peace.”).

⁸⁰ *Id.* at 2 (“The Committee . . . examined treaties; state practice and *opinion juris*; and . . . judicial decisions, and the writing of scholars.”).

⁸¹ *Id.* (“The Committee confirmed that at least two characteristics are found with respect to all armed conflict.”).

⁸² *Id.*

⁸³ *See id.* at 29 (“The underlying theme is that there must be a sufficient level of organisation through a command structure in order for the basic requirements of Common Article 3 to the 1949 Geneva Conventions to be implemented.”) (footnote omitted); *id.* at

Tribunal for the Former Yugoslavia's (ICTY) decision in *Prosecutor v. Tadic*, which is recognized as the authoritative case defining both international and non-international armed conflict.⁸⁵

In *Prosecutor v. Milosevic*, the ICTY listed factors relevant to assessing armed groups' levels of military organization: command structures, exercise of leadership control, rule-based governance, provision of military training, organized acquisition and provision of weapons and supplies, recruitment of new members, existence of communications infrastructure, and space to rest.⁸⁶ After investigating a situation in the Republic of Kenya, the ICC affirmed this standard

29 n.178 (“See Common Article 2 of the 1949 Geneva Conventions (referring to High Contracting Parties); Common Article 3 of the Geneva Conventions (‘organised military forces’); art 1 of Additional Protocol II (‘or other organised armed groups’) and Rome Statute art 8(2)(e).”); *see also* Geneva Conventions, *supra* note 50, art. 2, 6 U.S.T. at 3116 (applying “the present Convention . . . to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties,” or to the “occupation . . . of a High Contracting Party,” implying that the actors that the Conventions take cognizance of have sufficient degrees of organization to sign treaties, wage wars, and occupy territories); *id.* art. 3, 6 U.S.T. at 3116-18 (referring to, “[i]n the case of armed conflict not of an international character,” the requirement that “each Party to the conflict . . . be bound to” treat non-combatants humanely and to “collect[] and care[] for” “[t]he sick and wounded,” likewise implying significant organizational structure, control, and resources).

⁸⁴ *See* INT’L LAW ASSOC., *supra* note 65, at 29 n.178.

⁸⁵ *See* *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (“[An armed conflict] exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State These hostilities [infighting within the former Yugoslavia] exceed the intensity requirements applicable to both international and internal armed conflicts. There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups.”); *see also* *Prosecutor v. Limaj et al*, Case No. IT-03-66-T, Trial Judgment, ¶ 84 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); *Prosecutor v. Halilovic*, Case No. IT-01-48-T, Trial Judgment, ¶ 24 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005); *Prosecutor v. Blagojevic & Jokic*, Case No. IT-02-60-T, Trial Judgment, ¶ 536 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005); *Prosecutor v. Galic*, Case No. IT-98-29-T, Trial Judgment, ¶ 9 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003); *Prosecutor v. Stakic*, Case No. IT-97-24-T, Trial Judgment, ¶¶ 566-68 (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2003). *See generally* *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment (Int’l Crim. Trib. for Rwanda Sept. 2, 1998).

⁸⁶ *See* *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, ¶ 19 (Int’l Crim. Trib. for the Former Yugoslavia June 16, 2004).

in a pre-trial decision, asserting that it would have to recognize a non-state actor as organized before it would recognize a situation as an armed conflict.⁸⁷

Factors determining a conflict's intensity include the number of fighters involved, the types and quantities of weapons used, the duration and territorial extent of the fighting, the number of casualties, and the extent of destruction of property.⁸⁸ Other factors include population displacement and the involvement of the Security Council or of other actors to broker a cease-fire.⁸⁹ However, in *Prosecutor v. Haradinaj*, the ICTY Trial Chamber ruled that these factors were not determinative, and that hostilities at a lower level of intensity might be classified as armed conflict if other criteria were met.⁹⁰ In addition, the *Tadic* decision indicated that armed hostilities had to occur over a "protracted" period of time for an armed conflict to be found.⁹¹ Duration of conflict thus is an important factor in determining the existence of non-international armed conflict, as distinguished from other "internal disturbances and tensions, such as riots, [or] isolated and sporadic acts of violence," as carved out by article 1, paragraph 2 of the second Additional Protocol to the Geneva Conventions or, similarly, as exempt under article 8 of the Rome Statute.⁹² *Tadic* does not specify how long this "protracted" period of time should last, but no tribunal has recognized an armed conflict which lasted for fewer than thirty hours, and did not result in casualties and property destruction, as "protracted."⁹³

⁸⁷ See *Situation in the Republic of Kenya*, Case No. ICC-01/09, Pre-Trial Chamber Authorization, ¶ 53 (Mar. 31, 2010).

⁸⁸ See *Prosecutor v. Boskoski & Tarculovski*, Case No. IT-04-82-T, Trial Judgment, ¶ 177 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008).

⁸⁹ INT'L LAW ASSOC., *supra* note 65, at 30.

⁹⁰ See *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Trial Judgment, ¶ 49 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

⁹¹ *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). For the interpretation of "protracted armed violence" by the ICTY, see *Haradinaj*, Case No. IT-04-84-T, ¶¶ 40-49.

⁹² See Protocol II, *supra* note 13, art. 1, ¶ 2, 1125 U.N.T.S. at 611 ("This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."); see also Rome Statute of the International Criminal Court, *supra* note 9, art. 8, ¶ 2(c)-(d), 2187 U.N.T.S. at 97 (defining certain actions committed against non-combatants in contravention of "article 3 common to the four Geneva Conventions" as war crimes, "[i]n the case of an armed conflict not of an international character," and clarifying that this definition "applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.").

⁹³ See INT'L LAW ASSOC., *supra* note 65, at 2; see also *Abella v. Argentina*, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L/V/II.98, doc. 6 rev. ¶¶ 149-51 (1997) (characterizing an engagement of armed forces with militants that lasted thirty hours as an armed conflict).

As the nature of conflict has become more complex, it has become more difficult to determine the existence of armed conflict. This difficulty is at issue because the ILA report states that armed conflicts should be distinguished, *inter alia*, from “incidents,” “border clashes,” “internal disturbances,” “terrorism,” and tensions such as riots or other isolated and sporadic acts of violence.⁹⁴ When compared with war, armed conflict is defined by more-objective criteria that consider the facts at hand, while war is defined by subjective criteria that look to the parties’ intentions. Accordingly, the Geneva Conventions could apply during a state of war even if there were no hostilities, while the Geneva Conventions could apply to a state of armed conflict only if there were actual hostilities. However, because the U.N. Charter has made the concept of war increasingly meaningless, it is rare to attempt to apply *jus in bello* to a state of war in the absence of hostilities.

C. Application

When the DPRK invaded South Korea on June 25, 1950, the beginning of large-scale hostilities made it clear that the peninsula was in a state of armed conflict.⁹⁵ At that time, the United Nations General Assembly recognized the ROK as the only government with a legitimate right to control the Korean Peninsula.⁹⁶ Nevertheless, North Korea had a large *de facto* military that possessed a command structure that would have satisfied the *Milosevic* test. In response, the United Nations recognized North Korea as a belligerent in Security Council Resolution

⁹⁴ INT’L LAW ASSOC., *supra* note 65, at 28.

⁹⁵ See BAILEY, *supra* note 27, at 10 (“At 4.a.m. (local time) on Sunday, 25 June (24 June in the United States), in driving rain, over 100 000 North Koreans struck across the 38th parallel, the main thrust being in the Haeju sector and towards Seoul, the South Korean capital.”) (footnote omitted).

⁹⁶ G.A. Res. 195 (III), *supra* note 65; see also S.C. Res. 82, *supra* note 24 (“The Security Council, [r]ecalling the finding of the General Assembly in its resolution 293 (IV) of 21 October 1949 that the Government of the Republic of Korea is a lawfully established government having effective control and jurisdiction over that part of Korea where the United Nations Temporary Commission on Korea was able to observe and consult and in which the great majority of the people of Korea reside; that this government is based on elections which were a valid expression of the free will of the electorate of that part of Korea and which were observed by the Temporary Commission; and that this is the only such government in Korea”) (emphasis omitted). A Joint Commission had been established to set up a provisional Korean government, and the General Assembly had passed a resolution calling for elections held under the auspices of the U.N. Temporary Commission on Korea. See G.A. Res. 112 (II), *supra* note 65. Therefore, an election was held in May 10, 1948 with Syngman Rhee being elected as President, but the Soviet Union refused to permit the members of the Commission to enter the portion of the peninsula, which it occupied. A People’s Committee adopted a constitution for North Korea in July 1948, and Kim Il-sung became the Prime Minister of Democratic People’s Republic of Korea. Cf. S.C. Res. 82, *supra* note 24.

82.⁹⁷ The existence of an “armed conflict” on the Korean Peninsula became official when the U.N. Security Council adopted Resolution 82, which declared that the invasion constituted a “breach of the peace.”⁹⁸ In addition, the Security Council called for the immediate cessation of hostilities and the withdrawal of North Korean forces to the 38th parallel.⁹⁹ Even though the two Koreas were not parties to the Geneva Conventions at the time of the invasion,¹⁰⁰ the Supreme Commander of the U.N. Forces and the Minister of Foreign Affairs of the DPRK both declared that they would abide by the Conventions, which implied that both sides considered themselves to be in a state of war or armed conflict.¹⁰¹ As a result, the Korean War became an internationalized, yet not an international, armed conflict once the United Nations became involved.

Whether that state of war or armed conflict continued to exist after the belligerent parties signed the Armistice Agreement is ambiguous, because actual hostilities ended on July 27, 1953. Gerhard von Glahn has argued that even if a state of armed conflict ended, the Korean “War” remains ongoing, because the parties have never signed a peace agreement.¹⁰² Although article 62 of the Armistice Agreement merely states that it is to remain in effect until a peace settlement is reached, the treaty’s language implies that the parties anticipated reaching a peace agreement in the near future to permanently end the war.¹⁰³ The ongoing implications of the Armistice have become more complex with North Korea’s 2009 and 2013 declarations that it is no longer to be bound to the agreement.¹⁰⁴ While such statements could be regarded as new declarations of war,

⁹⁷ See G.A. Res. 195 (III), *supra* note 65, at pmbl. (“The Security Council . . . [n]oting with grave concern the armed attack on the Republic of Korea by forces from North Korea, [d]etermines that this action constitutes a breach of the peace; and [c]alls for the immediate cessation of hostilities”) (emphasis omitted).

⁹⁸ *Id.*

⁹⁹ See *id.* art. I.

¹⁰⁰ The ROK became a party to the 1949 Geneva Conventions in 1966, whereas the DPRK became a party in 1957. See INT’L COMM. OF THE RED CROSS, STATES PARTY TO THE FOLLOWING INTERNATIONAL HUMANITARIAN LAW AND OTHER RELATED TREATIES AS OF 15-NOV-2012, at 4 (2012), available at [http://www.icrc.org/IHL.nsf/%28SPF%29/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/%28SPF%29/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf).

¹⁰¹ LESLIE GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 55 (1993).

¹⁰² GERHARD VON GLAHN, LAW AMONG NATIONS 727 (6th ed. 1992).

¹⁰³ Cf. Korean Armistice Agreement, *supra* note 15, ¶ 60, 4 U.S.T. at 260 (“[T]he military Commanders of both sides hereby recommend to the governments of the countries concerned on both sides that, within three (3) months after the Armistice Agreement is signed and becomes effective, a political conference of a higher level of both sides be held . . . to settle through negotiation the questions of the withdrawal of all foreign forces from Korea, the peaceful settlement of the Korean question, etc.”).

¹⁰⁴ See *infra* Section V.B.

it is unclear whether a belligerent party is able to terminate an armistice, or this one in particular, through a mere unilateral declaration or announcement.¹⁰⁵

If a state of war continues to exist, both North and South Korea may permissibly exercise belligerent rights. Although scholars such as Greenwood have argued that war has become legally insignificant as a result of its incompatibility with article 2, paragraph 4 of the U.N. Charter, and that only an actual armed conflict can trigger the applicability of the laws of war,¹⁰⁶ it may be possible to apply *jus in bello* in the absence of an armed conflict if there is a state of war in the technical sense. Dinstein argues that even though the application of *jus in bello* rarely emerges in practice for such situations, in extreme instances—even if a state of war only exists in a technical sense—a belligerent may be in breach of *jus in bello*.¹⁰⁷ Therefore, it is possible that *jus in bello* presently applies to the parties on the Korean Peninsula, even absent major ongoing hostilities.

IV. THE LEGAL EFFECT OF ARMISTICES

Armed conflicts between states were traditionally terminated through conclusions of peace agreements. For example, the Peace of Westphalia treaties, which in 1648 concluded the Thirty Years' War and the Eighty Years' War, and the Treaty of Versailles, which in 1918 ended World War I, are two of the most-recognized peace treaties of our time. However, whether a war can be terminated only through the conclusion of a peace agreement, or whether it can be concluded by an Armistice, is ambiguous. This Part will analyze the ability of an Armistice to end a war in the context of general international law principles, established through the practices of states and the opinions of legal scholars, to determine how these principles can be applied to the conflict on the Korean Peninsula.

¹⁰⁵ See Korean Armistice Agreement, *supra* note 15, ¶ 62, 4 U.S.T. at 261 (“The Articles and Paragraphs of this Armistice Agreement shall remain in effect until expressly superseded either by mutually acceptable amendments and additions or by provision in an appropriate agreement for a peaceful settlement at a political level between both sides.”).

¹⁰⁶ See generally Greenwood, *supra* note 61.

¹⁰⁷ See DINSTEIN, *supra* note 55, at 10 n.31 (“In some extreme instances, even when the state of war exists only in a technical sense, a belligerent may still be in breach of the *jus in bello*. Thus, the mere issuance of a threat to an adversary that hostilities would be conducted on the basis of a ‘no quarter’ policy constitutes a violation of Article 40 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, [1977] *UNJY* 95, 110. Cf. Article 23(d) of the Regulations Respecting the Laws and Customs of War on Land (Annexed to Hague Convention (II) of 1899 and (IV) of 1907), *Hague Conventions* 100, 107, 116.”).

A. General Principles

The Annex to the Hague Convention (IV) Respecting the Laws and Customs of War on Land provides the definition of an “armistice” under international law.¹⁰⁸ Article 36 states that “[a]n armistice suspends military operations by mutual agreement between the belligerent parties.”¹⁰⁹ Further, it states, “the belligerent parties may resume operations at any time, provided always that the enemy is warned.”¹¹⁰ The key words are “suspend” and “resume,” which imply that an armistice is a temporary, not a permanent, termination of war. In addition, an armistice’s temporary and limited nature is reflected in article 40, which provides that a serious violation of the armistice is grounds for denunciation and, in cases of urgency, the immediate recommencement of hostilities.¹¹¹

International law scholars such as Oppenheim and Howard Levie have claimed that an armistice agreement does not terminate a state of war between belligerents, and have emphasized that an armistice agreement is not a peace treaty.¹¹² Specifically, Levie states, “[I]t may be stated as a positive rule that an armistice does *not* terminate the state of war existing between the belligerents, either *de jure* or *de facto*, and that the state of war continues to exist and to control the actions of neutrals as well as belligerents.”¹¹³ These scholars believe that a state of war continues to exist, with all its implications for belligerent and neutral parties, after an armistice agreement is concluded. Additionally, Lord McNair has claimed that it is traditionally accepted under international law that an armistice agreement does not bring an end to a “state of war”; rather, the agreement temporarily suspends it.¹¹⁴

However, Dinstein and Julius Stone have argued that, as armistice agreements have gained importance internationally, they rarely have been succeeded by peace agreements, but often remain the only agreements entered into

¹⁰⁸ Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex, arts. 36-41, Oct. 18, 1907, 36 Stat. 2277, 2305-06.

¹⁰⁹ *Id.* art. 36, 36 Stat. at 2305.

¹¹⁰ *Id.*

¹¹¹ *See id.* art. 40, 36 Stat. at 2305-06.

¹¹² OPPENHEIM, *supra* note 52, at 546; *see also* Howard S. Levie, *The Nature and Scope of the Armistice Agreement*, 50 AM. J. INT’L L. 880, 884 n.28 (1958) (“Oppenheim (*op. cit.* 546) states that during a general armistice ‘the condition of war remains between the belligerents themselves, and between the belligerents and neutrals, on all points beyond the mere cessation of hostilities.’ And . . . Fiore goes even further, cautioning that ‘both in the relations of public internal law and in those of international law, during an armistice, however long protracted, the law of war, not the law of peace, must be applied.’”).

¹¹³ Levie, *supra* note 112, at 884.

¹¹⁴ *See* MCNAIR & WATTS, *supra* note 56, at 13-14.

by the belligerents.¹¹⁵ Dinstein cites Israel's wars with Egypt, Lebanon, and Jordan to argue that these modern armistice agreements have brought de facto terminations of war, rather than just cessations of hostilities.¹¹⁶ Dinstein and Stone claim that the modern definition of an armistice agreement has evolved over the last half-century to mean the termination of a war, if the significance of a peace agreement is lost, and belligerent rights cannot continue.¹¹⁷ Further, Dinstein points to, in the case of the Korean Armistice Agreement, language in the document providing for "a complete cessation of hostilities and of all acts of armed force in Korea until a final peaceful settlement is achieved," which indicates that the Agreement was not intended to be a suspension of hostilities, but rather to be a complete cessation of them, leading to the end of the war.¹¹⁸ In contrast, Oppenheim, Levie, and McNair believe that an armistice does not terminate a state of war, and so they would argue that the Korean Peninsula remains in a de jure state of war and that the rules of warfare still apply there.

¹¹⁵ See DINSTEIN, *supra* note 55, at 42 ("As for armistice, in the current practice of States, it denotes a termination of hostilities . . . a modern armistice completely divests the Parties of the right to renew military operations at any time and under any circumstances whatever. By putting an end to war, an armistice today does not brook resumption of hostilities as an option."); JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 644 (1954).

¹¹⁶ See DINSTEIN, *supra* note 55, at 45-46 ("It is noteworthy that when the Security Council, in 1951, had to deal with an Israeli complaint concerning restrictions imposed by Egypt on the passage of ships through the Suez Canal, the Council adopted Resolution 95 pronouncing that the armistice between the two countries 'is of a permanent character' and that, accordingly, 'neither party can reasonably assert that it is actively a belligerent' [T]he Council totally rejected an Egyptian contention that a state of war continued to exist with Israel after the Armistice."). In addition, the November 11, 1918 armistice between Germany and the Allies brought about the termination of World War I and established a de facto peace. *See id.* at 42.

¹¹⁷ *See id.*; STONE, *supra* note 115, at 644.

¹¹⁸ See DINSTEIN, *supra* note 55, at 43-44 (arguing that the Armistice Agreement terminated the Korean War, although it "did not produce peace in the full meaning of the term. . . . [t]he thesis (advanced in 1992) that 'the Korean War is still legally in effect,' is untenable") (footnote omitted). For the original language, see Korean Armistice Agreement, *supra* note 15, pmbl., ¶ 12, 4 U.S.T. at 236, 239 ("The undersigned . . . in the interest of stopping the Korean conflict, with its great toil of suffering and bloodshed on both sides, and with the objective of establishing an armistice which will insure a *complete cessation of hostilities and of all acts of armed force in Korea until a final peaceful settlement is achieved*, do . . . agree to accept and to be bound and governed by the conditions and terms of armistice set forth in the following articles and paragraphs, which said conditions and terms are intended to be purely military in character and to pertain solely to the belligerents in Korea The Commanders of the opposing sides shall order and enforce a *complete cessation of all hostilities in Korea* by all armed forces under their control, including all units and personnel of the ground, naval, and air forces, effective twelve (12) hours after this armistice agreement is signed.") (emphasis added).

Scholars in a third group, including Georg Schwarzenberger and Phillip Jessup, suggest the recognition of a “*status mixtus*,” or a state of intermediacy, between war and peace.¹¹⁹ Classical international law scholars such as Grotius deny the existence of a *status mixtus*.¹²⁰ McNair has stated, “[W]ar and peace are alternatives between which no intermediate state exists.”¹²¹ However, Schwarzenberger believes that the existence of a *status mixtus*, which has features of both a state of peace and a state of war, can be observed through examining state practice.¹²² He asserts that, ultimately, third parties must subjectively determine whether a *status mixtus* exists.¹²³

Dinstein denies that such an independent third rubric exists, maintaining that only the states of war and peace legally exist, but grants that there could be situations in which the laws of war might apply during peacetime, and vice versa.¹²⁴ For example, a state at peace might commit an act that is “short of war” but still regulated by the basic rules of warfare, which he terms “peacetime *status mixtus*.”¹²⁵ In addition, a situation where the parties are at war, but still maintaining diplomatic and trade relations and pursuing trade with one another, he refers to as a “wartime *status mixtus*.”¹²⁶ As such, there is some room for debate about whether an armistice agreement terminates a state of war completely, merely ceases hostilities, or creates an intermediate state where the rules of warfare and laws of peace can apply simultaneously.

In 1951, the legal effects of armistice agreements actually were contested before the U.N. Security Council as a result of the conflict between Israel and Egypt.¹²⁷ Egypt declared that sailing its ships through the Suez Canal was a lawful exercise of its belligerent rights, while Israel argued that no state of war had ever

¹¹⁹ See DINSTEIN, *supra* note 55, at 15-16; Phillip C. Jessup, Editorial Comment, *Should International Law Recognize an Intermediate Status between War and Peace?*, 48 AM. J. INT’L L. 98, 100-03 (1954); Georg Schwarzenberger, *Jus Pacis Ac Belli?: Prolegomena to a Sociology of International Law*, 37 AM. J. INT’L L. 460, 470 (1943).

¹²⁰ See LESLIE C. GREEN, *ESSAYS ON THE MODERN LAW OF WAR* 76 n.9 (2d ed. 1999) (“Inter bellum et pacem nihil est medium.”) (quoting Grotius and, through him, Cicero); 3 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 1595 (Richard Tuck ed., Liberty Fund 2005) (Jean Barbeyrac trans., 1738) (1625) (“For as Cicero says, in his eighth *Philippick*, there is no Middle between War and Peace.”) (footnote omitted).

¹²¹ MCNAIR & WATTS, *supra* note 56, at 3.

¹²² GREEN, *supra* note 120, at 77; see also Schwarzenberger, *supra* note 119, at 470.

¹²³ GREEN, *supra* note 120, at 79.

¹²⁴ DINSTEIN, *supra* note 55, at 16.

¹²⁵ *Id.*

¹²⁶ *Id.* at 18-19; see also *id.* at 18 n.61 (“The Soviet-Japanese armed conflict of 1939 may serve as a good example.”).

¹²⁷ Greenwood, *supra* note 61, at 287.

existed and, if it had, their 1949 armistice agreement had terminated it.¹²⁸ Israel claimed that a state of war was incompatible with the U.N. Charter, because:

The Charter has created a new world of international relations within which the traditional “rights of war” cannot be enthroned. Members of the United Nations are pledged to refrain entirely in their international relations from the threat or use of force, except on behalf of the purposes of the United Nations. There can, therefore, be no room within the regime of the Charter for any generic doctrine of belligerency since belligerency is nothing but a political and legal formula for regulating the threat or use of force . . . Israel is in no state of war with Egypt and denies that Egypt has the least right to be at war with Israel.¹²⁹

On September 1, 1951, the U.N. Security Council sided with Israel and declared:

[S]ince the armistice regime, which has been in existence for nearly two and a half years, is of permanent character, neither party can reasonably assert that it is actively a belligerent or required to exercise the right of visit, search, and seizure for any legitimate purpose of self-defence¹³⁰

As such, the changes in international law as a result of the adoption of the U.N. Charter indicate that the United Nations has taken a strict approach in recognizing belligerent rights and the effects of laws of war after the conclusion of an armistice agreement.

These scholarly opinions and the Israel–Egypt case show that armistice agreements may, depending on the circumstances, terminate the state of war and the belligerent rights that accompany it. Since states have duties to refrain from using force under article 2, paragraph 4 of the U.N. Charter, there is a tendency to hold that armistice agreements terminate the state of war. Nevertheless, there may also be instances where a state is in a *status mixtus*, in which it experiences elements of both war and peace or, as Dinstein has proposed, there may be situations both of peacetime *status mixtus* and of wartime *status mixtus*. These situations must be examined on a case-by-case basis, taking into account the intentions of the parties and the facts particular to each case.

¹²⁸ *Id.*

¹²⁹ *Id.* (footnote omitted) (quoting the Israeli representative).

¹³⁰ *Id.* at 287-88 (quoting S.C. Res. 95, U.N. Doc. S/RES/95 (Sept. 1, 1951)).

B. Application

The preamble to the Korean Armistice Agreement states that the Agreement's objective is to "insure a complete cessation of hostilities and of all acts of armed force in Korea until a final peaceful settlement is achieved."¹³¹ In article I, the Agreement fixes a military demarcation line and a demilitarized zone.¹³² The Agreement does not establish a maritime border between the two Koreas; rather, the U.N. Command fixed the NLL as the maritime border after the Agreement was signed. Article II provides concrete arrangements for implementing the cease-fire and the Armistice.¹³³ For example, it requires the parties' commanders to "withdraw all of their military forces, supplies, and equipment from the demilitarized zone,"¹³⁴ and establishes the Military Armistice Commission and the Neutral Nations Supervisory Commission.¹³⁵ These commissions were established to supervise the implementation of the Agreement by making periodic reports through Joint Observer Teams, conducting inspections through Neutral Nations Inspection Teams, and acting as intermediaries for transmitting communications between the commanders of both sides.¹³⁶ However, these supervising bodies became immobilized after the North refused to cooperate in these mechanisms, disputing the neutrality of the commissions.¹³⁷ Other regulations include provisions on the status of prisoners of war, and paragraph 61 states that "[a]mendments and additions to this Armistice Agreement must be mutually agreed to by the Commanders of the opposing sides."¹³⁸

Based on these and other similar terms, one can infer that the parties intended that the Korean Armistice Agreement would terminate the war, not merely suspend it. First, the parties called for "a complete cessation of all hostilities" and "concrete arrangements" to implement the Agreement.¹³⁹ Second, the Agreement provided for military demarcation lines, the withdrawal of military forces, and the establishment of two commissions to ensure that there would be no hostilities on the ground.¹⁴⁰ Third, there are no provisions governing the resumption of hostilities,¹⁴¹ which indicates that the parties did not intend to

¹³¹ Korean Armistice Agreement, *supra* note 15, pmb1., 4 U.S.T. at 236.

¹³² *Id.* ¶¶ 1-3, 4 U.S.T. at 237.

¹³³ *Id.* art. II, 4 U.S.T. at 239-53.

¹³⁴ *Id.* ¶ 13(a), 4 U.S.T. at 239.

¹³⁵ *Id.* art. II, §§ B-C, 4 U.S.T. at 244-53.

¹³⁶ *Id.*

¹³⁷ See BAILEY, *supra* note 27, at 171-88; CHI YOUNG PAK, KOREA AND THE UNITED NATIONS 85 (2000).

¹³⁸ Korean Armistice Agreement, *supra* note 15, ¶ 61, 4 U.S.T. at 261.

¹³⁹ *Id.* art II, ¶ 12, 4 U.S.T. at 239.

¹⁴⁰ *Id.* ¶¶ 1, 4, 11, 4 U.S.T. at 237-38.

¹⁴¹ *Cf. id.* ¶ 1, 4 U.S.T. at 237 ("A demilitarized zone shall be established as a buffer zone to prevent the occurrence of incidents which might lead to a resumption of hostilities.").

resume armed conflict. Although the Agreement recommends that the parties begin negotiations for a peace settlement, the peace settlement would have been targeted towards establishing a positive peace by building diplomatic relations. Overall, the parties seem to have intended to terminate the war completely, which means they would not have intended the rules of warfare to apply after they had signed the Armistice Agreement.

However, there has been imperfect compliance with the Agreement. The political and military relations between the two Koreas remain tense, and the situation is aggravated by North Korea's consistent development of nuclear weapons and its sporadic military provocations near the Yellow Sea maritime border. Since it signed the Armistice Agreement, the DPRK has committed many military provocations against South Korea by armed invasions, infiltration attempts, and terrorist acts.¹⁴²

Specifically, North Korea made 3,693 infiltration attempts into the South between 1954 and 1992.¹⁴³ It has committed terrorist acts, such as the 1968 and 1974 attempts to assassinate ROK President Park Chung-hee,¹⁴⁴ the 1983 attempt to assassinate President Chun Doo-hwan by a bombing in Rangoon, and the 1987 bombing of a South Korean Boeing 707 passenger plane.¹⁴⁵ In addition, naval skirmishes have taken place near the DPRK–ROK maritime border. On June 15, 1999, the First Battle of Yeonpyeong occurred off the coast of Yeonpyeong Island. North Korea claimed, through the Korean Central News Agency (KCNA),¹⁴⁶ that South Korean warships had violated the “sea boundary line,” which prompted

¹⁴² See HANNAH FISCHER, CONG. RESEARCH SERV., RL 30004, NORTH KOREAN PROVOCATIVE ACTIONS, 1950–2007, at summary (2007) (“North Korea . . . [has] staged a series of limited armed actions against South Korean and U.S. security interests. Infiltration of armed agents . . . was the most frequently mentioned type of provocation, followed by kidnaping and terrorism (actual and threatened). . . . North Korea’s major terrorist involvement includes attempted assassinations of President Park Chung Hee in 1968 and 1974; a 1983 attempt on President Chun Doo Hwan’s life in a bombing incident in Rangoon, Burma (Myanmar); and a mid-air sabotage bombing of a South Korean Boeing 707 passenger plane in 1987. Reported provocations have continued intermittently in recent years, in the form of armed incursions, kidnappings, and occasional threats to turn the South Korean capital of Seoul into ‘a sea of fire’ and to silence or tame South Korean critics of North Korea.”); see also PAK, *supra* note 137, at 84-87 (discussing North Korea’s violations of the Armistice Agreement); Mark Tran, *North and South Korea: A History of Violence*, GUARDIAN, May 20, 2010, <http://www.guardian.co.uk/world/2010/may/20/korea-assassination-attempts-clashes-standoffs> (outlining violent conflicts between North and South Korea).

¹⁴³ FISCHER, *supra* note 142, at summary, 4 n.6.

¹⁴⁴ See *id.* at summary, 4, 6; Tran, *supra* note 142.

¹⁴⁵ See FISCHER, *supra* note 142, at summary, 8-10.

¹⁴⁶ The KCNA is also known as the Chosun Central News Agency, in reference to Korea’s Joseon Dynasty.

DPRK ships to cross the NLL.¹⁴⁷ The South Korean navy began to respond forcibly, and the incident led to a military confrontation.¹⁴⁸ More naval skirmishes have occurred since, such as the Second Battle of Yeonpyeong in 2002 and the Battle of Daecheong in 2009, which have increased tensions between the DPRK and ROK governments.¹⁴⁹ In 2010, tensions escalated again due to the sinking of the ROK warship *Cheonan* and the shelling of Yeonpyeong Island. Such military provocations are often left unresolved because the supervising agencies are immobilized.

In addition, the DPRK and ROK governments have not established amicable relations: while they occasionally hold inter-Korean dialogues through high-level military talks, and have concluded several inter-Korean agreements, they presently do not have economic or diplomatic relations.¹⁵⁰ As a result, the

¹⁴⁷ See Balderdash About “Northern Limit Line”, KOREAN CENT. NEWS AGENCY, DEMOCRATIC PEOPLE’S REPUBLIC OF KOR. (July 11, 1999), <http://www.kcna.co.jp/item/1999/9907/news07/11.htm> (“The South Korean war hawks, far from making an apology for the premeditated armed provocation committed by them in the West Sea of Korea on June 15, keep peddling the ‘northern limit line,’ raising a hue and cry over someone’s ‘violation’ of the Armistice Agreement (AA). Commenting on this, Rodong Sinmun today says the ‘northern limit line’ on their lips is a ‘ghost line’ which is not stipulated in the AA and upon which no agreement was reached by both sides.”); *S. Korean Warships Intrude into North*, KOREAN CENT. NEWS AGENCY, DEMOCRATIC PEOPLE’S REPUBLIC OF KOR. (June 6, 1999), <http://www.kcna.co.jp/item/1999/9906/news06/06.htm> (“The South Korean ruling quarters committed a grave military provocation of illegally intruding warships deep into the territorial waters of the north side southeast of Ssanggyo-ri, Kangryong county, South Hwanghae Province, on June 5, military sources said. Three warships of South Korea, having watched the movement of fishing boats of the north, which were catching fish at sea off Soyonphyong Islet, proceeded northward at full steam across the *sea boundary line* in an attempt to commit hostile acts. No sooner had a patrol boat of the Navy of the Korean People’s Army defending the sea post of the country with vigilance sailed to the scene than the enemy’s warships fled southward in a hurry. This provocation act is a premeditated move to lead the inter-Korean confrontation to its extreme pitch by artificially aggravating the situation on the Korean peninsula.”) (emphasis added); see also FISCHER, *supra* note 142, at 19 n.38 (citing KCNA propaganda reports).

¹⁴⁸ See FISCHER, *supra* note 142, at 18-19 (summarizing the conflict).

¹⁴⁹ See, e.g., *id.* at 24 (“6/29/02—A gun battle erupted between South and North Korean naval ships in the Yellow Sea. North Korean patrol boats allegedly crossed the Northern Limit Line and opened fire on a South Korean patrol boat. Four South Koreans and an undetermined number of North Koreans were killed.”); see also *Northern Limit Line (NLL) West Sea Naval Engagements*, GLOBAL SEC. (last modified Nov. 8, 2011), available at <http://www.globalsecurity.org/military/world/war/nll.htm> (listing and describing North and South Korean naval engagements from 1999 to 2011).

¹⁵⁰ See JAE-CHEON LIM, KIM JONG IL’S LEADERSHIP OF NORTH KOREA 119 (2009) (“Before the [2000 Inter-Korean] summit, there were several meaningful inter-Korean events and agreements—the 4 July joint communiqué of 1972; the ‘Agreement on

Korean Peninsula cannot be completely at peace because it still faces elements of war today. The Korean Peninsula is instead in Dinstein's "peacetime *status mixtus*," a state of peace that possesses certain elements of war.¹⁵¹ More specifically, Dinstein states:

Because a state of peace continues to prevail, (i) most of the relations between the States concerned are still governed by the laws of peace, and (ii) the laws of neutrality are not activated between the antagonists and third Parties. Nevertheless, the actual fighting will be governed by the *jus in bello*.¹⁵²

The parties intended to end the war, and modern armistice agreements are held to terminate war under international law; consequently, absent special circumstances, *jus in bello* should not apply and belligerent rights should not be recognized, since the parties have signed an armistice agreement. However, *jus in bello* can apply when there are actual hostilities between parties in a state of peacetime *status mixtus*, even if such hostilities do not rise to the level of "armed conflict"; therefore, when armed hostilities occur, the laws of war may still be applicable to the DPRK–ROK conflict today, because the Korean Peninsula is in a state of peacetime *status mixtus*.

V. THE LEGAL EFFECTS OF DENOUNCING AN ARMISTICE OR OF RESUMING HOSTILITIES

Even though the ROK and DPRK are obligated to abide by the terms of the Armistice Agreement and not to resume armed hostilities, a resumption of

Reconciliation, Nonaggression, and Exchanges and Cooperation (North–South Basic Agreement)"; and the 'Joint Declaration of Denuclearization of the Korean Peninsula' in 1991. But those events and agreements had occurred irregularly and intermittently"); see also James M. Minnich, *Resolving the North Korean Nuclear Crisis: Challenges and Opportunities in Readjusting the U.S.–ROK Alliance*, in *A TURNING POINT: DEMOCRATIC CONSOLIDATION IN THE ROK AND STRATEGIC READJUSTMENT IN THE US–ROK ALLIANCE* 268, 281 (Alexandre Y. Mansourov ed., 2005) ("With the exception of the 1972 South–North Joint Communiqué, which addressed unification issues, these two antithetical nations remained bitterly opposed until 1990, when great initial strides were taken towards normalization. As mentioned, the 1990s ushered in momentous changes in North Korea's habitual relations with the Soviet Union (and later Russia) and China, resulting in the DPRK's acceptance of a more conciliatory policy toward its traditional opponents—the ROK and Japan. By the fall of 1991, prime ministerial talks, which had begun a year earlier, began making rapid progress towards rapprochement, culminating with the signing in December of two major agreements—the Agreement on Reconciliation, Nonaggression and Exchanges and Cooperation between the South and the North; and the Joint Declaration on the Denuclearization of the Korean Peninsula.").

¹⁵¹ DINSTEIN, *supra* note 55, at 16.

¹⁵² *Id.*

hostilities may be justified under chapter V of the Annex to the Hague Convention (IV).¹⁵³ In addition, the Geneva Conventions' provisions apply, and belligerent rights can be recognized, when there is a declared war or an armed conflict.¹⁵⁴ Therefore, if either party declared war or another armed conflict began, belligerent rights could be recognized on the Korean Peninsula. In this context, this Article will examine how the DPRK's denouncements of the Armistice Agreement in 2009 and in early 2013, potentially tantamount to declarations of war, and the 2010 confrontations, could affect the applicability of the Geneva Conventions.¹⁵⁵

A. General Principles

After signing an armistice agreement, parties will aim to limit future acts of force in order to effectively implement the agreement. Therefore, chapter V of the Hague Convention (IV) sets forth certain conditions that must be met before hostilities are recommenced.¹⁵⁶ Article 36 stipulates that "if [the armistice agreement's] duration is not fixed, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice."¹⁵⁷ Thus, to resume hostilities, a party must first warn the enemy within the agreed-upon time; if there is no agreed-upon time, the notification presumably must be made within a reasonable period of time.¹⁵⁸ Second, hostilities must resume according to the terms of the armistice, which implies that the armistice agreement may provide conditions for the resumption of hostilities.¹⁵⁹ The reference to a defined duration of an armistice implies that military operations cannot resume during that time. However, under

¹⁵³ See Hague Convention (IV) Respecting the Laws and Customs of War on Land, *supra* note 108, Annex, art. 40, 36 Stat. at 2305-06 ("Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.").

¹⁵⁴ See Geneva Conventions, *supra* note 50, art. 2, 6 U.S.T. at 3116 ("[T]he present Convention shall apply to all cases of declared war or of any other armed conflict . . .").

¹⁵⁵ North Korea has made similar declarations attempting to withdraw from the Agreement in the past. Its repeated claimed desire to abrogate the Agreement raises the juxtaposed questions of whether such an oft-condemned document could still be in effect, and whether Pyongyang doth protest too much; clearly, its unilateral attempts to withdraw have been either legally unsuccessful or practically ignored, if it has had to resort to the same tactic repeatedly. For a legal discussion of withdrawal, see *infra* Section V.B.

¹⁵⁶ Hague Convention (IV) Respecting the Laws and Customs of War on Land, *supra* note 108, Annex, arts. 36-41, 36 Stat. at 2305-06.

¹⁵⁷ *Id.* art. 36, 36 Stat. at 2305.

¹⁵⁸ DINSTON, *supra* note 55, at 59. Alternatively, it is possible that if no resumption rights are specified, none exist. For the United Nations' take on armistice termination, see Chang, *infra* note 175; *infra* note 178.

¹⁵⁹ Again, if resumption is not provided for in the document, it is possible that the parties to it did not (at the time of signing) intend for hostilities to be able to reoccur.

article 40, a party can resume hostilities when one of the contracting parties to the agreement commits a serious violation of the armistice.¹⁶⁰

Therefore, chapter V provides that the parties cannot as a general rule denounce the armistice, and that hostilities can recommence only if there has been either a serious violation of the armistice or if the fixed time of the armistice has elapsed.¹⁶¹ The condition for notification only seems to be a procedural requirement. Any “serious violation” of the agreement should be in accordance with the “material breach” provision under the Vienna Convention on the Law of Treaties, which is defined as a “repudiation of the treaty not sanctioned by the present Convention” or a “violation of a provision essential to the accomplishment of the object or purpose of the treaty.”¹⁶²

Additionally, since the adoption of the U.N. Charter, the principles in the Hague Convention (IV) should be interpreted to comply with the U.N. Charter’s principles on the use of force.¹⁶³ While the use of force is expressly prohibited

¹⁶⁰ Hague Convention (IV) Respecting the Laws and Customs of War on Land, *supra* note 108, Annex, art. 40, 36 Stat. at 2305-06.

¹⁶¹ *Id.* arts. 36, 40, 36 Stat. at 2305-06.

¹⁶² Vienna Convention on the Law of Treaties, art. 60, ¶¶ 1, 3, May 23, 1969, 1155 U.N.T.S. 331, 346 (“A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. . . . A material breach of a treaty, for the purposes of this article, consists in: (a) A repudiation of the treaty not sanctioned by the present Convention; or (b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.”); *see also* DINSTEIN, *supra* note 55, at 57-58 (discussing the implications of “material breach” with relation to “cease-fire arrangement[s]”); Quincy Wright, Editorial Comment, *The Termination and Suspension of Treaties*, 61 AM. J. INT’L L. 1000, 1005 (1967) (examining the language of the draft Vienna Convention). The Vienna Convention is more precatory than controlling in this case, as the United States signed but never ratified it, North Korea is not a signatory, and South Korea only acceded to the Convention in 1977. *See Vienna Convention on the Law of Treaties*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (last visited Mar. 31, 2013). Articles 1 and 2 lay out the Convention’s scope as applying only to “treaties between States,” defined as “international agreement[s] concluded between States,” which may not apply to the Armistice, particularly given its execution by a U.N. representative. *See* Vienna Convention on the Law of Treaties, *supra* note 172, arts. 1-2, 1155 U.N.T.S. at 333. Article 4 states that “[w]ithout prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under any international law independently of the Convention, the Convention applies only to treaties which are concluded by states after the entry into force of the present Convention with regard to such States.” *Id.* art. 4, 1155 U.N.T.S. at 334.

¹⁶³ *See* U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political

during times of peace, it is a *jus cogens* norm that must be complied with at all times.¹⁶⁴ Greenwood has clarified that, as a general rule, the use of force is prohibited under international law, and resumption of hostilities would be a violation of the U.N. Charter unless a state needed to act in self-defense under article 51 because “the behaviour of the other party to the armistice or ceasefire amounted to an armed attack or the threat of an armed attack.”¹⁶⁵ A party should not resume hostilities except to protect itself from a threat or an actual armed attack. If a party has no choice but to resume hostilities, Greenwood emphasizes that its actions must constitute a “necessary and proportionate” response to the threat or initial armed attack that it is responding to.¹⁶⁶

B. North Korea’s Declaration Not to Be Bound to the Armistice

North Korea has made several attempts to nullify the Korean Armistice since the 1990s. For example, on May 27, 2009, the DPRK announced through the KCNA that its military would no longer be bound by the Korean Armistice Agreement,¹⁶⁷ on the grounds that South Korea had breached the Agreement by

independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

¹⁶⁴ See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 510-11 (7th ed. 2008) (“Jurists have from time to time attempted to classify rules, or rights and duties, on the international plane by use of terms like ‘fundamental’ or . . . ‘inalienable’ Such classifications have not had much success, but have intermittently affected the interpretation of treaties by tribunals. In the recent past both doctrine and judicial opinion have supported the view that certain overriding principles of international law exist, forming a body of *jus cogens*. The major distinguishing feature of such rules is their relative indelibility. They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect. The least controversial examples of the class are *the prohibition of the use of force*, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slavery and piracy. In the *Barcelona Traction* case . . . the majority judgment . . . drew a distinction between obligations of a state arising *vis-à-vis* another state and obligations ‘towards the international community as a whole.’”) (emphasis added) (footnotes omitted).

¹⁶⁵ Christopher Greenwood, *Scope of Application of Humanitarian Law*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 45, 68 (Dieter Fleck ed., 2d ed. 2008); see also U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”).

¹⁶⁶ Greenwood, *supra* note 165, at 68.

¹⁶⁷ The United Nations did not accept the North’s declaration as a valid or meaningful nullification or withdrawal. See Chang, *infra* note 175; *infra* note 178.

announcing that it would join the U.S.-led Proliferation Security Initiative (PSI).¹⁶⁸ North Korea claimed that the ROK's participation was a violation of the Armistice Agreement, because the PSI potentially committed South Korea to interdict DPRK ships, if they were "suspected of carrying nuclear weapons."¹⁶⁹ North Korea based its argument on provisions of the Korean Armistice Agreement, which states that "all opposing naval forces . . . shall respect the waters contiguous to the Demilitarized Zone and to the land area of Korea under the military control of the opposing side, and shall not engage in blockade of any kind of Korea."¹⁷⁰ South Korea was not a member of the PSI movement until May 26, 2009, when the ROK government officially announced its intention to join approximately ninety other member countries.¹⁷¹ In March 2013, the DPRK made a similar announcement, which drew condemnation from both the United States and South Korea.¹⁷²

The question is whether North Korea has the right to terminate the Armistice Agreement by this kind of declaration. Dapo Akande, Lecturer at

¹⁶⁸ Heejin Koo & Indira A.R. Lakshmanan, *Clinton Warns North Korea for 'Belligerent' Behavior in Region*, BLOOMBERG (May 27, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aS17xp.yHokM>.

¹⁶⁹ *Id.*

¹⁷⁰ Korean Armistice Agreement, *supra* note 15, ¶ 15, 4 U.S.T. at 243.

¹⁷¹ *S. Korea Joins PSI, North Irate*, UNITED PRESS INT'L (May 27, 2009, 2:07 AM), http://www.upi.com/Top_News/2009/05/27/S-Korea-joins-PSI-North-irate/UPI-37271243404462.

¹⁷² See Anne Gearan & Chico Harlan, *U.S. Officials Warn N. Korea After It Scraps Armistice*, WASH. POST, Mar. 11, 2013, http://www.washingtonpost.com/world/n-korea-says-it-has-scrapped-armistice-that-ended-korean-war/2013/03/11/47762d7a-8a2c-11e2-98d9-3012c1cd8d1e_story.html (describing U.S. threats of "use [of] military force if necessary," "fresh sanctions against North Korea," and "joint exercises with . . . South Korea," in conjunction with the North's announcement "that it had 'completely scrapped' the 1953 armistice agreement," and noting that "North Korea has made several similar announcements in the past, most recently in 2009, and analysts cautioned this latest declaration could prove to be bluster[;] [e]xperts also noted that Pyongyang—whether bound by the cease-fire or not—has occasionally ignored its terms, most notably with fatal attacks on the South in 2010"); *N. Korea Says Korean War Armistice Can Be Nullified Unilaterally*, YONHAP NEWS AGENCY (Mar. 14, 2013, 18:46 KST), <http://english.yonhapnews.co.kr/news/2013/03/14/47/0200000000AEN20130314011900315F.HTML> ("The announcement by Pyongyang comes as both Seoul and Washington said the ceasefire agreement can only be scrapped or changed if all signatories agree to it."); see also Chico Harlan, *S. Korea Says It Will Strike Against North's Top Leadership if Provoked*, WASH. POST, Mar. 6, 2013, http://www.washingtonpost.com/world/s-korea-says-it-will-strike-against-norths-top-leadership-if-provoked/2013/03/06/817eedfe-8671-11e2-a80b-3edc779b676f_story.html?tid=pm_world_pop ("South Korea's military warned Wednesday that it would respond to any attack from North Korea with 'strong and stern measures' against Pyongyang's top leadership, a particularly vivid threat that comes after the North vowed to nullify the armistice agreement ending the Korean War. The tit-for-tat threats could prove to be mere bluster, analysts said.").

Oxford Law, argues that a mere verbal termination will not cause an armed conflict to resume, and the actual use of force is required to trigger belligerent rights.¹⁷³ Even though such a denouncement may be considered a declaration of war under the Geneva Conventions, Akande emphasizes that recognizing a verbal termination as such would present serious legal consequences, because it would provide the parties with a legal basis to use force against one another.¹⁷⁴ For example, Gordon Chang has argued that the United States ought to recognize belligerent rights, so that it can inspect more robustly North Korean vessels under U.N. Security Council Resolution 1874, which requires states to inspect vessels on the high seas if they are believed to violate U.N. sanctions against North Korea.¹⁷⁵

In addition, it is generally recognized that the effects and significance of declared wars have been restricted since the adoption of the U.N. Charter. Previously, a declaration of a war was a prerequisite to allowing the laws of armed conflict to take effect. However, today, actual armed hostilities must resume before belligerent rights can be recognized. In this case, armed hostilities had not been initiated at the time of the DPRK's announcement. Furthermore, under article 40 of the Hague Convention (IV), North Korea is entitled to resume armed conflict only if South Korea commits a serious violation of the Armistice Agreement.¹⁷⁶

¹⁷³ Dapo Akande, *The Korean War Has Resumed!! (Or So We Are Told)*, EJIL: TALK! (July 22, 2009), <http://www.ejiltalk.org/the-korean-war-has-resumed-or-so-we-are-told/>.

¹⁷⁴ *Id.*

¹⁷⁵ Gordon G. Chang, *How to Stop North Korea's Weapons Proliferation*, WALL ST. J., July 1, 2009, <http://online.wsj.com/article/SB124640610149276731.html>. He writes:

The North Koreans have, inadvertently, given the U.S. a way to escape from the restrictions of the new Security Council measure. On May 27, the Korean People's Army issued a statement declaring that it "will not be bound" by the armistice that ended fighting in the Korean War. This was at least the third time Pyongyang has disavowed the interim agreement that halted hostilities in 1953. Previous renunciations were announced in 2003 and 2006.

The U.N. Command, a signatory to the armistice, shrugged off Pyongyang's belligerent statement. "The armistice remains in force and is binding on all signatories, including North Korea," it said immediately after the renunciation, referring to the document's termination provisions. That may be the politically correct thing to say, but an armistice as a legal matter cannot remain in existence after one of its parties, a sovereign state, announces its end. Today, whether we like it or not, there is no armistice.

Id.

¹⁷⁶ Hague Convention (IV) Respecting the Laws and Customs of War on Land, *supra* note 108, Annex, art. 40, 36 Stat. at 2305-06 ("Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.").

However, the ROK's participation in the PSI movement does not seem to rise to "material breach" of the Agreement, as expounded by the Vienna Convention on the Law of Treaties.¹⁷⁷

Finally, commentators, scholars, and government representatives generally view the DPRK's declarations as political statements threatening South Korea, and not as official declarations of war.¹⁷⁸ It is common for North Korea to use such harsh rhetoric and the DPRK has made similar statements to the United States and South Korea in the past, such as declaring that it would initiate an "all-out war." For example, North Korea threatened "a sea of fire" upon the ROK's presidential office after South Korea conducted military drills.¹⁷⁹ On February 25, 2012, the DPRK vowed a "sacred war" against the United States and the ROK, as a response to their planned joint military exercises.¹⁸⁰ Moreover, paragraph 61 of the Armistice Agreement states that "[a]mendments and additions to this Armistice Agreement must be mutually agreed to by the Commanders of the opposing sides," implying that North Korea cannot unilaterally abrogate or terminate the agreement.¹⁸¹ As a result, international law is unlikely to support these statements as resulting in the resumption of war and the recognition of belligerents' rights.

¹⁷⁷ See *supra* note 162 (explaining relevant terms of the Vienna Convention).

¹⁷⁸ See, e.g., Interview by World Politics Review with Balbina Y. Hwang, Visiting Professor, Georgetown Univ. (Mar. 20, 2013), available at <http://www.worldpoliticsreview.com/trend-lines/12807/global-insider-north-korea-s-armistice-nullification-is-more-bark-than-bite>; Associated Press, *U.N.: Korean War Armistice Still in Force*, USA TODAY (Mar. 11, 2013, 1:13 PM), <http://www.usatoday.com/story/news/world/2013/03/11/un-korea-armistice/1978909/>; Alastair Gale, *North Korea (Again) Claims It Will Nullify Armistice*, WALL ST. J. (Mar. 7, 2013, 7:15 PM), <http://blogs.wsj.com/korearealtime/2013/03/07/north-korea-again-claims-it-will-nullify-armistice/>; Bruce Klingner, *North Korea Abandons Armistice . . . Again*, FOUNDRY, HERITAGE FOUNDATION (Mar. 5, 2013, 4:45 PM), <http://blog.heritage.org/2013/03/05/north-korea-abandons-armisticeagain/>; Ed Krayewski, *The Korean War Is Not Over: North Korea Declares Armistice Null, United Nations Disagrees*, REASON (Mar. 11, 2013, 6:20 PM), <http://reason.com/blog/2013/03/11/the-korean-war-is-not-over-north-korea-d>; Howard LaFranchi, *Why North Korea Threat to Abandon Armistice Rings Hollow*, CHRISTIAN SCI. MONITOR (Mar. 5, 2013), <http://www.csmonitor.com/USA/Foreign-Policy/2013/0305/Why-North-Korea-threat-to-abandon-armistice-rings-hollow>.

¹⁷⁹ *North Korea Threatens 'a Sea of Fire' upon South Korea*, CNN (Nov. 24, 2011), http://articles.cnn.com/2011-11-24/asia/world_asia_north-korea-sea-of-fire_1_yeonpyeong-island-north-korea-military-provocation?_s=PM:ASIA.

¹⁸⁰ Sung-won Shim, *North Korea Vows "Sacred War" Against S. Korea, U.S.*, REUTERS (Feb. 25, 2012), <http://www.reuters.com/article/2012/02/25/us-korea-north-idUSTRE81O0AK20120225>.

¹⁸¹ Korean Armistice Agreement, *supra* note 15, ¶ 61, 4 U.S.T. at 261; see also Rick Gladstone, *Threats Sow Concerns over Korean Armistice*, N.Y. TIMES, Mar. 9, 2013, <http://www.nytimes.com/2013/03/10/world/asia/threats-sow-concerns-over-korean-armistice.html> ("The armistice states that any change must be agreed to by all the signers

C. *The Sinking of the Cheonan and the Shelling of Yeonpyeong Island*

The *Cheonan* and Yeonpyeong Island incidents may be “armed conflict[s]” under international law for the purpose of applying *jus in bello*. If they are, regardless of whether the Korean Peninsula is at war or in a peacetime *status mixtus*, the incidents themselves could be sufficient for the laws of war to apply, since the Geneva Conventions apply to “armed conflict[s].”¹⁸² This Section will analyze whether the incidents constitute one or more armed conflicts within the term’s meaning under international law, by examining tribunal jurisprudence and scholarly opinions.

The ILA’s 2010 report states that “at least two characteristics are found with respect to all armed conflict: 1.) The existence of organized armed groups 2.) Engaged in fighting of some intensity.”¹⁸³ The second Additional Protocol to the Geneva Conventions provides that armed conflicts must be distinguished from “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature”¹⁸⁴ If attacks are recognized as armed conflicts under international law, the ICC has jurisdiction to try, and potentially hold accountable, the perpetrators for war crimes, provided that the case is otherwise admissible to the court. Depending on how the conflict is characterized in terms of whether it is an international or a non-international conflict, different specific provisions under article 8 of the Rome Statute for war crimes would apply.¹⁸⁵

The shelling on Yeonpyeong Island met the organization criterion. The incident included fighting between two organized armed groups: the ROK and the DPRK. Both groups have substantial command structures, the abilities to exercise control through stable leadership, governance by rules, provision of military training, organized acquisition and provision of weapons and supplies, recruitment of new members, existence of communication infrastructure, and space to rest, as

and that unilateral declarations are unacceptable—a point reiterated Thursday by Gen. James D. Thurman, the American commander in charge of enforcing the armistice conditions. He was responding to the North’s assertion that it would consider the armistice null and void as of Monday, when military exercises by the United States and South Korea get under way. . . . Last week, North Korea’s main party newspaper said that the country was justified in unilaterally nullifying the armistice because its repeated demands for peace talks since the 1970s had been snubbed by Washington.”).

¹⁸² Geneva Conventions, *supra* note 50, art. 2, 6 U.S.T. at 3116.

¹⁸³ INT’L LAW ASSOC., *supra* note 65, at 2.

¹⁸⁴ Protocol II, *supra* note 13, art. 1, ¶ 2, 1125 U.N.T.S. at 611.

¹⁸⁵ Rome Statute of the International Criminal Court, *supra* note 9, art. 8, ¶ 2, 2187 U.N.T.S. at 94-98. The war crimes listed under article 8, paragraph 2(a) and (b), are applicable only in international armed conflicts; in contrast, the war crimes under paragraph 2(c) and (e) are applicable to non-international armed conflicts. *Id.*

specified in *Milosevic*.¹⁸⁶ Since an international investigation group determined that North Korea was responsible for the sinking of the *Cheonan*,¹⁸⁷ the incident was caused by an attack of an organized armed group. The international team confirmed that the torpedo was highly explosive, with a net explosive weight of about 250 kilograms, and had been manufactured by North Korea.¹⁸⁸ The propulsion motor with propellers and a steering section were found at the site of the sinking, and there were Hangeul markings inside one propulsion section, which read “No. 1.”¹⁸⁹ This marking matched, in size and shape, the drawings and specifications that North Korea had provided to foreign countries in introductory exporting materials.¹⁹⁰ Even if the DPRK’s claims that it was not the perpetrator are true, the intensity of the attack is per se sufficient evidence that it was perpetrated by a well-organized group.

The sinking of the *Cheonan* also met the intensity criterion. In the international investigation group’s May 2010 presentation reporting its findings, it concluded that the 1200-ton warship was sunk by a North Korean torpedo.¹⁹¹ Furthermore, the team concluded, based upon an objective scientific investigation, that an underwater torpedo explosion had caused a shockwave and bubble effect, which split apart and sunk the *Cheonan*.¹⁹² There was no direct fighting between the parties, but there were a significant number of casualties. Moreover, the incident attracted international attention; for example, on July 9, 2010, the U.N. Security Council released a Presidential Statement condemning the attack, determining that such an incident endangered regional peace and security, and calling for the parties to adhere to the Korean Armistice Agreement.¹⁹³

However, it is not clear whether the shelling on Yeonpyeong Island satisfied the intensity criterion. The DPRK perpetrated artillery attacks against the ROK, openly targeting civilians on the island.¹⁹⁴ According to news reports, at least 50 shells landed on the island, most of which hit the South Korean military base; in response, South Korea fired back approximately 80 shells.¹⁹⁵ The shelling lasted for about an hour. The number of North Korean casualties is unknown.¹⁹⁶

¹⁸⁶ Prosecutor v. Milosevic, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, ¶ 19 (Int’l Crim. Trib. for the Former Yugoslavia June 16, 2004).

¹⁸⁷ The Joint Civilian-Military Investigation Group, *supra* note 2.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ S.C. Pres. Statement 2010/13, *supra* note 4.

¹⁹⁴ Mark McDonald, *Anxiety in Seoul as Civilian Deaths Are Reported*, N.Y. TIMES, Nov. 24, 2010, <http://www.nytimes.com/2010/11/25/world/asia/25seoul.html>.

¹⁹⁵ See, e.g., *North Korean Artillery Hits South Korean Island*, BBC NEWS (Nov. 23, 2010), <http://www.bbc.co.uk/news/world-asia-pacific-11818005>.

¹⁹⁶ See *id.*

The DPRK justified its actions by claiming that South Korea had committed reckless military provocations against its territory, although the South had actually been conducting regular military drills in the sea off of Yeonpyeong Island's coast and had not intended to fire on North Korea.¹⁹⁷ Based on these reports, the facts may not meet the ILA's proposed intensity criterion.

The biggest challenge to recognizing these two attacks as armed conflicts is that they did not last for protracted periods of time, which is an element of the *Tadic* test.¹⁹⁸ An armed conflict usually arises through retaliation against a single armed attack; however, the ROK did not retaliate against North Korea in the *Cheonan* incident, even though it had the right to use force in self-defense under article 51. In the Yeonpyeong Island incident, South Korea fired shells back in self-defense, which was necessary and proportionate to North Korea's attack, but the shelling only lasted an hour. Nevertheless, the ILA report states, “[e]ven in the absence of armed conflict, a member of the armed forces may invoke IHL [(international humanitarian law)] to justify the use of lethal force,” and refers to the sinking of the *Cheonan* as an example of such a situation.¹⁹⁹ As such, it is not clear whether these two confrontations should be identified as armed conflicts, but all in all this Article posits that the laws of warfare applied at the times of the confrontations. The intensity of the attacks against the *Cheonan* and against the civilians on Yeonpyeong Island indicates that these attacks were not border clashes, but rather military confrontations that arose amidst constant political and military tensions.

¹⁹⁷ *See id.*

¹⁹⁸ Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); *see also* Prosecutor v. Haradinaj, Case No. IT-04-84-T, Trial Judgment, ¶¶ 40-49 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008) (reviewing interpretations of the term “protracted armed violence”); *supra* Section III.B.

¹⁹⁹ INT'L LAW ASSOC., *supra* note 65, at 31 (“Even in the absence of armed conflict, a member of the armed forces may invoke IHL to justify the use of lethal force. The case of the South Korean warship *Cheonan* provides an example. . . . This type of attack could give rise to a right to respond in self-defence under Article 51 of the United Nations Charter, given either additional information about likely future attacks or Security Council authorization. Nevertheless, South Korea has not responded with military force.”). It is unclear whether North Korea intended for the laws of warfare to apply when it engaged in its two military provocations. Regardless, as a party to the Geneva Conventions (albeit with some reservations) and to their Additional Protocol I, it is subject to their precepts. *See North Korea—International Treaties Adherence*, RULE OF LAW IN ARMED CONFLICTS PROJECT, http://www.adh-geneva.ch/RULAC/international_treaties.php?id_state=50 (last visited Mar. 29, 2013). South Korea has also ratified the Geneva Conventions, including the two Additional Protocols. *See South Korea—International Treaties Adherence*, RULE OF LAW IN ARMED CONFLICTS PROJECT, http://www.adh-geneva.ch/RULAC/international_treaties.php?id_state=51 (last updated Nov. 30, 2009).

VI. CONCLUSION

As a result of the attacks' intensities and the status of the military conflict on the Korean Peninsula, this Article proposes that *jus in bello* has been invoked and applies to the sinking of the *Cheonan* and to the shelling on Yeonpyeong Island. Some scholars believe that the two incidents fall short of "armed conflict[s]" in which *jus in bello* could be invoked because they did not last for protracted periods of time, instead merely rising to the level of border clashes. As a result, the incidents and their collateral effects would not be recognized as war crimes. However, even if these attacks did not match the definition of "armed conflict" under international law, the application of *jus in bello* should be possible, because the Korean Peninsula is in a peacetime *status mixtus*. In that condition, most peacetime laws apply; however, when there are armed hostilities, the rules of warfare apply whether or not the hostilities constitute "armed conflict." Therefore, it is possible that these two confrontations are violations of the laws of war; however, whether these acts meet the definition of "war crimes," as acts directly attacking civilians or causing excessive incidental deaths, injuries, and damage, and whether they are admissible before the ICC, will have to be examined further. Essentially, recognizing the Korean Peninsula to be in a peacetime *status mixtus* can provide the ICC with grounds and jurisdiction to hold the leaders of the attacks accountable. If the laws of war were inapplicable, the ICC would not have jurisdiction over these attacks.

In addition, recognizing the laws of war during a peacetime *status mixtus* does not mean that the parties can exercise belligerent rights freely. Belligerent rights should be recognized only when there are actual armed hostilities on the ground. A party to the Korean Armistice should use force only as an act of self-defense, in accordance with article 51 of the U.N. Charter.²⁰⁰ Furthermore, force should be used only when it is necessary for self-defense, and such force should be proportionate to the threat or attack being responded to. Otherwise, the respondent itself may be responsible for violating article 2, paragraph 4 of the U.N. Charter, which prohibits any armed attack.

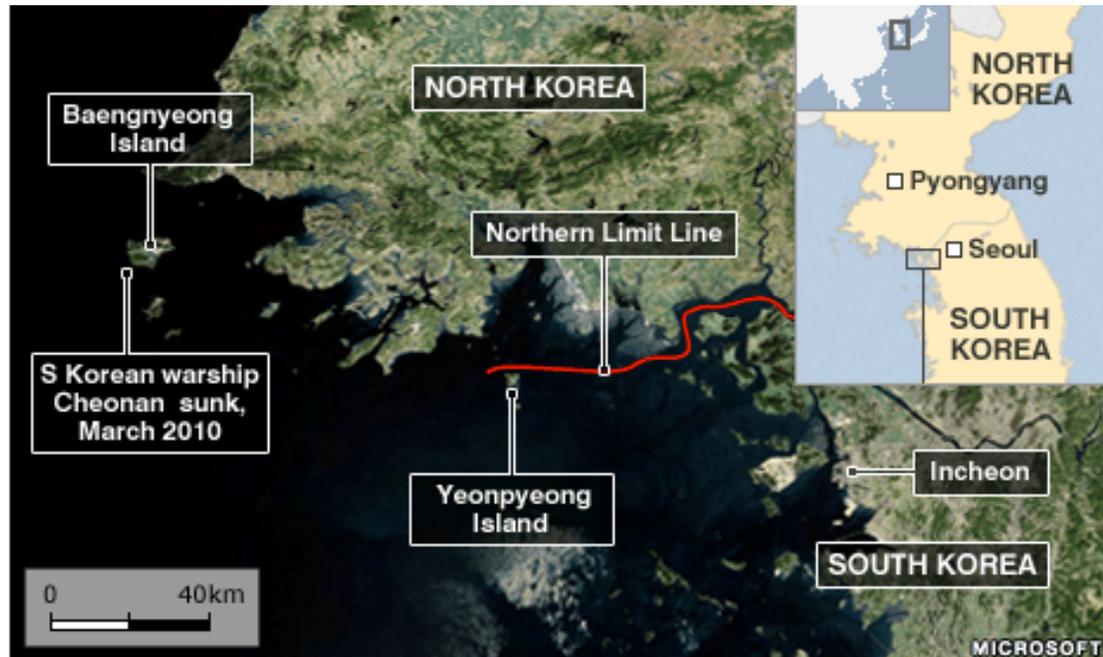
During the Yeonpyeong Island hostilities, each party justified using force: North Korea claimed that South Korea's drills were a threat, while South Korea stated that it retaliated to protect its civilians. The sinking of the *Cheonan* was a clearer and unilateral violation of article 2, paragraph 4 of the U.N. Charter, but North Korea continues to deny its involvement. Tensions on the Korean Peninsula are unlikely to ease anytime soon. North Korea may threaten to initiate another war with the ROK, as it often does through the KCNA. South Korea likely will

²⁰⁰ See U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.").

continue conducting military drills with the United States. The ideal solution would be to resolve the problem through diplomatic talks, but the Six-Party Talks came to a halt in 2007, and North Korea's development of nuclear weapons has been a constant challenge for the parties involved.

In the future, both North and South Korea should comply with the terms of the Armistice to prevent future attacks. In addition, the ICC should continue its preliminary examination into the sinking of the *Cheonan*, while bearing in mind the question of the current legal status of the conflict on the Korean Peninsula. It is not yet clear whether the *Cheonan* and Yeonpyeong Island incidents are admissible at the ICC, but it is clear that *jus in bello* was in effect at the time these attacks occurred, providing a possible legal basis for holding the perpetrators accountable for war crimes.

VII. APPENDIX: DETAILED COASTAL MAP



Source: *North Korean Artillery Hits South Korean Island*, *supra* note 195.