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LEGALITY, LEGITIMACY AND JUSTIFICATIONS FOR MILITARY
ACTION AGAINST NORTH KOREA

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I. INTRODUCTION

Since the end of the 1950-1953 Korean War, tensions between the United States and the Democratic People's Republic of Korea

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("DPRK" or "North Korea") have endured.¹ Because the ending of the Korean War came in the form of an armistice rather than a peace treaty, North Korea is still technically at war with the United States.² Now, North Korea is apparently preparing itself for another war with the United States in the event that the two sides fail to forge a diplomatic solution to the current nuclear proliferation standoff.

Recent escalations mean that a future U.S.-North Korean confrontation may not be just a war on paper. Rather, a second war on the Korean peninsula will most likely be very real, and very deadly. At play will be a U.S. military that is clearly the most powerful and most sophisticated military force in the world against a DPRK military arsenal composed of an estimated 1.2 million soldiers, with massive artillery capabilities, and tactical nuclear and/or biological weapons capabilities.

From the early 1990s during the Clinton administration³ onward, relations between the U.S. and the DPRK have been fractious, and at times, confrontational. In the 1990s, U.S.-DPRK relations become so severely strained that then-U.S. Defense Secretary William Perry⁴ was

¹ A common cited example of such post-Korean War U.S.-DPRK tensions occurred on Jan. 23, 1968, when four North Korean gunboats and two MiG jet fighters attacked and captured the U.S. ship, *The Pueblo*, near Wonsan, just off the Korean peninsula. The *Pueblo* was accused of spy operations in the East Sea relating to DPRK activity, and was based in Yokosuka, Japan. This incident exemplifies North Korea's tense relations with and military operations relating to the U.S. In addition, other less-publicized DPRK attempts to intercept U.S. spy planes have been cited since the 1968 *Pueblo* incident.

² The armistice was signed on July 27, 1953. Military commanders from China and North Korea signed the agreement on one side, with the U.S.-led United Nations Command signing on behalf of the international community. South Korea was not a signatory. The armistice was only intended as a temporary measure. Major components of the armistice include: (i) a suspension of open hostilities; (ii) a 2.4 mile demarcation buffer zone ("DMZ" zone); and (iii) a procedure for the transfer of prisoners of war.

³ William Jefferson Clinton was the forty-second President of the United States from 1992-2000. Prior to being U.S. President, Clinton was the Governor for the State of Arkansas. Clinton attended Georgetown University (1968), Oxford University (1968-70), and Yale Law School (1973).

⁴ William J. Perry was U.S. Secretary of Defense from February 3, 1994 to January 23, 1997 under President Bill Clinton, and was the nation's nineteenth U.S. Secretary of Defense. He received his B.S. (1949) and M.A. (1950) degrees from Stanford University, and a Ph.D. in mathematics from Pennsylvania State University in 1957. Perry left the Pentagon in 1981 to become Managing Director with the San Francisco-based investment bank, Hambrecht and Quist. Thereafter, until 1993, before returning to the Pentagon as Deputy Secretary of Defense, he held positions as Chairman of Technology Strategies Alliances, Professor in the School of Engineering at Stanford University, and Co-Director of Stanford's Center for International Security and Arms

ordered to execute war game scenarios and generate military options relating to a preemptive military strike against North Korea. Possible targets included North Korea's Yongbyon nuclear facility,⁵ which was alleged to contain or be in the process of manufacturing tactical nuclear weapons. The brokering of a treaty in the form of the 1994 Agreed Framework temporarily eased tensions. However, in the aftermath of the September 11, 2001 terrorist attacks, President George W. Bush labeled North Korea as part of an "axis of evil" in his 2002 State of the Union speech.⁶ North Korea, in reaction to the U.S. efforts to isolate it from the international community, expelled International Atomic Energy Agency⁷ (IAEA) nuclear inspectors from its Yongbyon facility.⁸ It has since made concerted efforts to obtain, followed by several statements claiming that it now has, a "nuclear deterrent"⁹ to counter the United States.

Most recently, a series of six-way negotiations have been initiated, involving the United States, North Korea,¹⁰ South Korea,¹¹ China,

Control.

⁵ As the DPRK's main nuclear complex, the Yongbyon facility is the central focus of issues relating to DPRK nuclear inspections by the International Atomic Energy Agency (IAEA) and the ongoing six-way negotiations to resolve the North Korean nuclear standoff.

⁶ See generally Address Before a Joint Session of the Congress on the State of the Union, 38 WEEKLY COMP. PRES. DOC. 133 (Jan. 29, 2002) (stating that the other "axis of evil" countries apart from North Korea were Iran and Iraq); *id.* at 135.

⁷ See generally David Fisher, Excerpt from *History of the International Atomic Energy Agency: The First Forty Years* (IAEA 1997) (stating that President Eisenhower's Dec. 8, 1953 'Atoms for Peace' address to the U.N. General Assembly was the Agency's starting point, shaping the IAEA Statute, which sets out the Agency's 3 objectives: nuclear verification and security, safety, and technology transfer, and which Statute received the unanimous support of 81 nations in Oct. 1956), available at <http://www.iaea.org/About/history.html>.

⁸ See generally Jung Chang-hyun and Jeong Yong-su, *Power Shift is Reported in North Korea*, JOONGANG DAILY, Apr. 13, 2004, at 1 (stating that the removal of Kim Jong-il's brother-in-law, Jang Song-thaek, from his post as the First Vice Department Director of the Central Committee of the Worker's Party, which is considered the second most powerful post within North Korea, subordinate only to Kim Jong-il, exemplifies political instability within the DPRK regime), available at <http://joongangdaily.joins.com/200404/13/200404132255527009900090309031.html>.

⁹ See, e.g., CNN, *NK 'ready to unveil N-deterrence'* (Oct. 16, 2003), at <http://www.cnn.com/2003/WORLD/asiapcf/east/10/16/nkorea.nuclear/index.html>.

¹⁰ See generally Staff Reporter, *North Calls on U.S. to 'Verifiably' Pull Out*, JOONGANG DAILY, Mar. 9, 2004, at 1 (reporting North Korea's demand that the U.S. provide "complete, verifiable and irreversible security guarantees" and that the U.S. troops completely and verifiably withdraw from South Korea), available at <http://joongangdaily.joins.com/200403/09/200403090112050739900090309031.html>.

¹¹ See generally Choi Jie-ho, *South Praised for Tactics in Its Approach to North*,

Japan, and Russia.¹² The objective of the talks is to broker an agreement to halt and perhaps remove North Korea's nuclear capabilities.¹³ Meanwhile, the U.S. has strategically preserved all options in the event of diplomatic failure to resolve the issue peacefully, including the preemptive use of force on the Korean peninsula. Given these facts, this paper examines the important issue of what the justifications are, if any, from an international legal and international normative perspective, of a U.S. preemptive military strike against North Korea.

To reach a conclusion, this paper looks at: 1) international agreements (e.g., the 1994 Agreed Framework¹⁴ and the Nuclear Non-Proliferation Treaty¹⁵) and the legal status of actors; 2) codified international law; and 3) customary international law and just war theory, in terms of whether or not such actions could be justified. Upon examination of the relevant arguments, this paper concludes that no persuasive legal or normative justification exists for a preemptive military first strike against North Korea.

JOONGANG DAILY, Mar. 10, 2004, at 1 (quoting Wendy Sherman, former special advisor to President Bill Clinton, who, while speaking to students at Ewha Womans University and at a subsequent press conference on March 2004, criticized the Bush administration for not being "engaged in sincere negotiations" and also stated that the U.S.-South Korea relationship is in a state of transformation from "'paternalship' to 'partnership'"), available at <http://joongangdaily.joins.com/200403/10/200403102335548839900090309031.html>.

¹² See generally You Chul-jong, *Lack of Six-Party Progress Invites War, Russian Says*, JOONGANG DAILY, Mar. 1, 2004, at 2 (citing a quote by Russia's top envoy, Deputy Minister Alexander Losyukov, during the second round of six-way talks in early 2004, that "If this goes on, mistrust will grow on the peninsula," that "the situation could be aggravated and military intervention is possible," and that matters could be worsened by efforts to blockade or otherwise minimize North Korea's relations with other countries), available at <http://joongangdaily.joins.com/200403/01/200403012220128079900090409041.html>.

¹³ See Joseph Kahn, *Cheney Gives China Update on North Korean Arms*, INT'L HERALD TRIB., Apr. 15, 2004, at 1, at <http://www.ihl.com/articles/515049.html> (quoting U.S. Vice President Dick Cheney's statement during his visit to Beijing, China that "time is not necessarily on our side" in ongoing negotiations), as an example that the U.S. may be losing patience for a diplomatic solution to the North Korean nuclear crisis. See also, Choi Jie-ho, *Nuclear Crisis, Alliance to Top Cheney Agenda*, JOONGANG DAILY, Apr. 14, 2004, at 1, at <http://joongangdaily.joins.com/200404/14/200404142304127539900090309031.html>.

¹⁴ See Agreed Framework Between the United States of America and the Democratic People's Republic of Korea, Oct. 21, 1994, U.S.-N. Korea, art. 3, 34 I.L.M. 603 [hereinafter Agreed Framework].

¹⁵ Treaty on the Non-Proliferation of Nuclear Weapons, Mar. 5, 1970, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

II. INTERNATIONAL AGREEMENTS AND ACTORS

The first set of justifications for U.S. action against North Korea concerns the status of the North Korean regime under international law. The status of the regime impacts the issue of possible U.S. justification in two ways. The first consideration is whether North Korea actually constitutes a state with all the privileges accorded to such an entity, and in particular the sovereign right to territorial integrity and political sovereignty which would be violated by any U.S. strike against the DPRK. The second consideration is whether North Korea by its persistent violation of international treaties has given up such rights (a “rogue state” with no respect for international law has little claim to its protection).

A. *Recognition*

Traditionally, international law defines a state as a legal person as a function of the three basic elements of: 1) a permanent population; 2) a defined territory; and 3) a government that is capable of governing its permanent population and defined territory, and capable of entering into “formal relations with other such entities.”¹⁶ Such entities, as legal persons, are entitled to the full protection offered by international law. The U.S. may regard the DPRK with different levels of state recognition, non-recognition, or derecognition. It is arguable whether the term “rogue state” is generally recognized under the ambit of international law. However, regardless of whether the U.S. grants North Korea the status of: 1) a state (either explicitly or implicitly); or 2) non-state and/or “rogue state,” there exists no justification to support a preemptive military strike against the DPRK under international law.

In practice, state recognition can be viewed as the willingness of one state to deal with another state with the assumption that such state is a member of the international community.¹⁷ Generally, state recognition can exist in two forms, explicit or implicit. Explicit recognition is the general rule in practice. The United States does not formally and/or explicitly recognize North Korea as a state.¹⁸ In the U.S., the

¹⁶ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (1987) [hereinafter RESTATEMENT]. See also LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 242 (3rd ed. 1993) [hereinafter HENKIN]; Convention on Rights and Duties of States, Dec. 26, 1933, art.1, 49 Stat. 3097, 165 L.N.T.S. 19.

¹⁷ See RAY AUGUST, PUBLIC INTERNATIONAL LAW: TEXT, CASES, AND READINGS 101 (1995) [hereinafter AUGUST].

¹⁸ See Aljazeera, *North Korea Rejects US Nuclear Offer* (July 24, 2004), at

Office of the President normally grants such recognition.

Common membership within an international organization does not constitute explicit state recognition. Although the United States and North Korea are both members of the United Nations, the United States maintains the policy of not recognizing North Korea. Only the U.S. President has the authority to grant such recognition. In the same way, many Arab nations are also UN member nations, as is Israel. However, many Arab nations do not recognize Israel as a state despite common UN membership.

State recognition can also come in the form of *de facto* and *de jure* recognition. *De facto* recognition exists when an entity is treated as a state even when having received no formal recognition, and when it is able to carry out the functions generally attributed to a state. On the other hand, *de jure* recognition exists when a government is lawfully in power and recognized as being the lawful regime, irrespective of whether such government retains significant or little actual control over its population or territory. North Korea would not qualify for *de jure* recognition, as many states view the DPRK as one of the most isolated countries in the world today.¹⁹ North Korea has a more persuasive argument for *de facto* recognition given that the DPRK's government could be viewed as having control over its population and territory.

Relating to *de jure* and *de facto* recognition, two theories of state recognition exist: the constitutive theory and the declaratory theory. The constitutive theory holds that an entity does not exist as a state until it has received state recognition by other states.²⁰ That is, such recognition constitutes the state. The constitutive theory, however, is not widely accepted today. The second theory, known as the declaratory theory, holds that a state exists when the three main elements of a state are satisfied (which are defined territory, fixed population, and a government that can: 1) govern such territory and population, and 2) enter into international relations), irrespective of whether formal recognition by other states is granted).²¹ Given that

<http://english.aljazeera.net/NR/exeres/0A6B4E4F-3C14-4B41-8D89-4566DC16469B.htm>.

¹⁹ Having said that, North Korea has made recent efforts to engage in international affairs in that it has embassies in forty-one countries and diplomatic ties with 155. In 2000, North Korea maintained embassies in nineteen countries. See Norimitsu Onishi, "U.S. Allies help break Pyongyang's isolation: Bush pressured to act on nuclear talks," INT'L HERALD TRIB., August 21, 2004 at 1 (supporting the argument that the DPRK is a *de facto* and/or *de jure* state, as opposed to a "stateless" or "rogue state" from an international law purview).

²⁰ See AUGUST, *supra* note 17, at 102-106.

²¹ See *id.* at 102.

North Korea possesses a defined territory and fixed population, which satisfies two of the three parts of the three-part test for a state under international law, the DPRK seemingly could qualify as a state under the declaratory theory of state recognition. However, the fact that the DPRK government is seemingly incapable or unwilling to enter into international relations may prevent North Korea from receiving recognition under the declaratory theory.

As a recognized state, North Korea would possess certain rights and obligations, such as the right of sovereignty, equality of states, the right of international discourse, and the right to defense.²² The right to defense gives a state the right to take the necessary steps to protect such state's national interests. The DPRK could argue that its development of nuclear weapons technology is a defensive measure in anticipation of a U.S. preemptive military strike.

However, the North Korean regime could claim further protection under international law as an implicitly recognized state. Implicit recognition can exist, typically, in one of the following two ways. First, entry into diplomatic relations can constitute implicit state recognition. Second, signing a bilateral treaty is evidence of implicit recognition in practice between the two parties concerned. According to the international legal concept of estoppel, a state may effectively estop itself from making territorial claims against another state or rejecting its sovereign claims: 1) if it has formally recognized that state; 2) if it has entered into normal diplomatic, political, economic and legal relations with it; and 3) if it has not, or not consistently, taken opportunities to establish its claim or rejection of the other's claim, or to restate its position over time. The concept of estoppel essentially prevents one from taking a position at odds with that upon which one has previously relied.

Formal and consistent diplomatic relations have never existed between the United States and North Korea. Some direct diplomatic interchange, however, has occurred during the six-way party talks relating to North Korea's nuclear weapons proliferation in 2004 between the representatives of the two respective nations. Although such interchange would not necessarily be deemed consistent enough to imply recognition, it may be enough to refute the concept of consistent resistance to the sovereign claims of North Korea. This would effectively estop the U.S. from claiming that because it had always opposed the regime's claims to statehood, it was not bound to accept state-centric limitations on its dealings with Pyongyang officials.

With regard to the signing of bilateral treaties, the United States

²² See *id.* at 529.

entered into the 1994 Agreed Framework with North Korea, which was certainly seen at the time as constituting a binding bilateral treaty. The substance of the Agreed Framework was a *quid pro quo* whereby North Korea: 1) agreed to freeze its plutonium enrichment program, including placing its unprocessed plutonium under international inspection; 2) agreed to eventually destroy the Yongbyon facility; and 3) agreed to export its plutonium out of the country in exchange for i) fuel oil from the United States and its allies and ii) two non-military nuclear power reactors.²³ The Agreed Framework is significant because it demonstrates the United States' willingness to enter into an international agreement with the Democratic People's Republic of Korea that at the time strategically prevented a potentially violent military confrontation in the Korean peninsula.

B. Treaty Violations

One issue often brought before the media concerns the DPRK's violations of international treaties to which it is a party. Crucially, it must be decided not only whether North Korea's actions have violated one or more sources of international law, but also whether as a result thereof the U.S. or any other state or international organization is justified in intervening militarily. Specifically, two related examples of treaty law concerning supposed North Korean violations will be discussed below: first, the Nuclear Non-Proliferation Treaty (NPT),²⁴ and second, the 1994 Agreed Framework.²⁵

To date, neither the NPT nor any other international treaty strictly prohibits the research and use of nuclear weapons in and of itself. No articles within the NPT expressly prohibit the use of nuclear energy. In fact, Article Four of the NPT expressly states that nothing shall prohibit member states from using nuclear energy technology for "peaceful purposes."²⁶ At the same time, articles one and two merely attempt to control the distribution and flow of nuclear weapons technology. If a prohibition on ownership of nuclear weapons existed, the U.S. itself would be in violation of the treaty. Thus it would be hard to condemn North Korea for its supposed violations of codified international law under this treaty framework. However, a clearer case can be built with regard to the other treaty which this paper considers.

²³ See Agreed Framework, *supra* note 14.

²⁴ See generally NPT, *supra* note 15.

²⁵ See generally Agreed Framework, *supra* note 14.

²⁶ NPT, *supra* note 15, art. 4, provision 1.

The 1994 Agreed Framework also stipulates the terms and conditions pursuant to a quid pro quo between North Korea and the U.S. In exchange for the U.S. providing the DPRK light-water reactor project and supply contracts, North Korea would agree to freeze and dismantle its graphite-moderated reactors and related facilities, and open its nuclear facilities to inspections by the International Atomic Energy Agency (IAEA).²⁷ Regarding these inspections, article three states that “throughout the freeze [of the DPRK’s graphite-moderated facilities], the IAEA will be allowed to monitor this freeze”²⁸ and further that the DPRK would provide “full cooperation”²⁹ to the IAEA in relation to such inspections. Article two, Provision four also creates the IAEA’s right to inspect at facilities “not subject to the freeze.”³⁰

However, in late 2002, North Korea forced all or almost all IAEA inspectors out of its nuclear facilities and the country.³¹ It was unclear exactly what motivated North Korea to make this move, but it resulted in allegations against the DPRK of breaching article three of the Agreed Framework.³² The language of article three reads that the IAEA “will be allowed”³³ (denoting a very clear intention of allowing IAEA inspectors with few or no qualifications in terms of inspection parameters)³⁴ as opposed to “will make best efforts” or “will attempt to provide for” IAEA inspections during the freeze period. With Pyongyang’s repeated confessions³⁵ in 2003 concerning the possession and production of nuclear weapons, and the expulsion of IAEA inspectors, a violation of the 1994 Agreed Framework is evident.

However, even assuming that the 1994 Agreed Framework provided implicit recognition to North Korea and that North Korea violated certain provisions of that treaty, a legal justification would still not exist for a U.S. military first strike against North Korea for the following reasons. First, if implicit recognition was given vis-à-vis the 1994 bilateral agreement between the U.S. and the DPRK, a mere

²⁷ Agreed Framework, *supra* note 14, art. 3.

²⁸ *See id.*

²⁹ *See id.*

³⁰ *See id.* at art. 2, provision 4.

³¹ *See* CNN, *North Korea expelling IAEA inspectors* (Dec. 27, 2002), at <http://archives.cnn.com/2002/WORLD/asiapcf/east/12/27/nkorea.expulsions/index.html>.

³² *See* CNN, *U.S.: North Korea admits nuke program* (Oct. 17, 2002), at <http://archives.cnn.com/2002/US/10/16/us.nkorea/index.html>.

³³ Agreed Framework, *supra* note 14, art. 3.

³⁴ *See generally id.*

³⁵ CNN, *Outrage over North Korean admission* (Sept. 18, 2002), at <http://archives.cnn.com/2002/WORLD/asiapcf/east/09/18/nkorea.japan/index.html>.

breach of the agreement does not justify the use of force under international law. Second, termination of state recognition, assuming implicit recognition, normally occurs not by treaty violation, but by recognition of a new regime over a formerly-recognized regime. Moreover, as long as a state continues to meet the aforementioned three basic standards for statehood, the status of a state is not “de-recognized.”³⁶ Third, the United Nations Charter (UN Charter) does not provide for military first-strike justification under article 2(4), which holds that all member states shall “refrain . . . from the threat or use of force.”³⁷ This provision is a fundamental feature under the UN Charter. Further, the UN Charter is an international convention that reflects customary international law,³⁸ whereby both international conventions and customary international law each separately represent explicit sources of international law under Article 38(1) of the Statute of the International Court of Justice (ICJ).³⁹

The counter argument is that such law is not absolute, as it relates to article 51 (which provides for self-defense) and UN enforcement actions under chapter VII of the UN Charter. Under both article 51 and customary international law, disagreement exists as to whether a state is justified in the use of force in anticipatory self-defense given an imminent attack. Daniel Webster set forth the requirements for a valid act of self-defense in the *Caroline* case⁴⁰ and the ICJ reaffirmed these in *Nicaragua v. United States*.⁴¹ First, there must be a “necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment of deliberation.”⁴² Second, the actions “must be limited by that necessity and kept clearly within it.”⁴³ The above two require-

³⁶ See RESTATEMENT, *supra* note 16, § 203 cmt. f. See also HENKIN, *supra* note 16, at 285.

³⁷ See U.N. CHARTER art. 2, para. 4 [hereinafter U.N. CHARTER].

³⁸ See HENKIN, *supra* note 16, at 56-57.

³⁹ See I.C.J. STATUTE art. 38, para. 1.

⁴⁰ In 1837, the British destroyed the *Caroline*, a U.S. steamer, not in response to a prior attack, but because they anticipated its use to support Canadian forces in their rebellion against the British monarch. This anticipation was based on its record of past support for the rebels. U.S. Secretary of State Daniel Webster is often quoted, from his correspondence with British Foreign Minister Lord Ashburton, as justifying action in self-defense in situations “leaving no choice of means and no moment for deliberation” and “must be limited by that necessity and kept clearly within it.” See 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 217, at 412 (1906) [hereinafter MOORE].

⁴¹ Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) [hereinafter *Nicaragua*].

⁴² MOORE, *supra* note 40, at 412.

⁴³ *Id.*

ments are collectively referred to as the requirements of “necessity and proportionality.”

In the situation at hand, the Article 51 Chapter VII threshold criteria are not satisfied, and thus, a military first strike is not justified. Specifically, the necessity and proportionality standard has not been met because the “necessity” element is not “instant, overwhelming, leaving no choice of means, and no moment of deliberation.” Rather, the alleged DPRK build-up of nuclear weapons has been slow and gradual, not sudden or “instant.” Further, time for “deliberation” does exist, which is evidenced by the multiple rounds of six-way talks relating to the North Korean nuclear issue.

Furthermore, even assuming a violation of such treaties amounted to a threat to the peace and security in the region, the legality of a possible U.S. military offensive against North Korea remains in question. On one hand, the international community seems to condone acts of anticipatory self-defense in certain cases. For example, in 1981, Israel attacked a nuclear reactor under construction in Iraq, which Israel claimed would be used to produce nuclear weapons.⁴⁴ This is very similar to the case between the United States and North Korea. The UN Security Council condemned Israel’s actions, but issued no sanctions against Israel. A second example was seen in 1986, when the U.S. used an anticipatory self-defense argument to justify bombing Libya in response to an alleged Libyan-sponsored attack against U.S. soldiers in West Berlin, which ultimately led to UN and U.S. sanctions.⁴⁵

On the other hand, the ICJ, the main judicial organ of the United Nations, offered more defined and restrictive boundaries relating to the right to self-defense in *Nicaragua v. United States*, concluding that the U.S. was not entitled to help defend El Salvador, Honduras, and Costa Rica because the U.S. was not asked to do so.⁴⁶ Moreover, the ICJ held in that case that even instances of humanitarian intervention did not justify use of force.⁴⁷

To reach some kind of definitive objective ruling on the justification for use or threat of military force available to the United States under international treaty law we must turn first and foremost to the UN Charter. This document is regarded as a foundation of

⁴⁴ See BBC, *Israel Bombs Baghdad Nuclear Reactor* (June 7, 1981), at http://news.bbc.co.uk/onthisday/hi/dates/stories/june/7/newsid_3014000/3014623.stm.

⁴⁵ See BBC, *Timeline: Libya Sanctions* (Oct. 15 2004), at <http://news.bbc.co.uk/2/hi/africa/3336423.stm>.

⁴⁶ See *Nicaragua*, *supra* note 41.

⁴⁷ *Id.*

codified international law, as the constitutive document of the most universal international legal body ever seen, and has a great claim to impartiality and objective representation of international law. The specific articles of the Charter have subsequently been elaborated and interpreted in a wider body of codified international law, and a brief summary of the relevant provisions and discussions concludes the following section.

III. CODIFIED INTERNATIONAL LAW

As a UN member state, in order to justify any military action against North Korea under codified international law, the United States should seek UN Security Council approval relating to the authorization of use of force.⁴⁸ Such action may include demonstrations, blockade, and other operations by air, sea, or land forces.⁴⁹ Examples of Security Council authorization regarding the use of force include the 1950-53 Korean War, the 1990 Iraqi conflict, and the 1992 Somalia humanitarian relief mission.⁵⁰ The United States would be hard-pressed to find an exception under international law to authorize a preemptive use of force, albeit under the anticipatory self defense or humanitarian intervention argument for the aforementioned reasons.

A. Charter Provisions of the United Nations

Article 2(4) of the United Nations Charter⁵¹ requires states to refrain from the threat or use of force against the territorial integrity or political independence of a state, or in any other manner inconsistent

⁴⁸ Article 42 of the UN Charter states that the Security Council “may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.” *See* U.N. CHARTER, *supra* note 37, art. 42.

⁴⁹ *Id.*

⁵⁰ *See* HENKIN, *supra* note 16, at 29.

⁵¹ *See generally* G.A. Res. 2330, U.N. GAOR, 22d Sess., at 84, U.N. Doc. A/6988 (1967) (making efforts to define aggression, and establishing a Special Committee on the Question of Defining Aggression). *See also* G.A. Res. 3314, U.N. GAOR, 29th Sess., Annex 1 art. 3, U.N. Doc. 9619 (1974) (stating that irrespective to formal declarations of war, to qualify as acts of aggression: “attack by the armed forces of a State,” “Bombardment by the armed forces of a State,” “Blockade” of ports, “An attack by the armed forces of a State,” “action of a State in allowing its territory to be used by [another] State for perpetrating an act of aggression against a third State,” and “[the] sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State.”).

with the purposes of the United Nations.⁵² Given the language, one could argue that Article 2(4) justifies the preservation of a state's "territorial integrity" vis-à-vis a need to act, even forcibly, in the face of threats to such interests.⁵³ However, most jurists would not agree with this argument.⁵⁴ Further, this argument goes against the general rule of state deference to domestic matters, with the exceptional case made in instances of cruelties and punishments by a state such as to deny fundamental human rights which "shocks the conscience" of humankind.⁵⁵

Pursuant to Article 51, states may only legally resort to force in the interest of individual or collective self-defense.⁵⁶ Under Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties,⁵⁷ the prohibition in Article 2(4) of the Charter is part of *jus cogens* (a principle from which no derogation is permitted) and is often reflected in the drafting of international treaties. Essentially, the UN position is that the only military intervention that can be justified is one to resist or reverse an act of aggression. One major limitation within the UN

⁵² U.N. CHARTER, *supra* note 37, art. 2, para. 4.

⁵³ The argument for preserving humanitarian interests can create the basis for intervening within a state's affairs (a piercing of the state doctrine). See Choi Jie-ho, *US Accuses Pyongyang of Worldwide Drug Dealing*, JOONGANG DAILY, Mar. 2, 2004, at 1 (stating that in early March 2004, the U.S. accused Pyongyang of illegal narcotics trading internationally), available at <http://joongangdaily.joins.com/200403/02/200403022345170209900090309031.html>.

⁵⁴ See HENKIN, *supra* note 16, at 930.

⁵⁵ *Id.* The issue of humanitarian intervention pursuant to the issue of state responsibility began in the 17th century by such people as Hugo Grotius (1583-1645) and other writers during the same period. During the 19th century, however, a wide perception existed that the humanitarian intervention doctrine was abused by states who wished to further their own national interests. The classic example is the French occupation of Syria. In the late 20th century, the humanitarian intervention doctrine, along with U.N. Charter Article 2(4), led to the 1992 UN mission to Somalia "to provide humanitarian and other assistance to the people of Somalia in rehabilitating their political institutions and economy, and to promote political settlement and national conciliation." See AUGUST, *supra* note 17, at 251.

⁵⁶ U.N. CHARTER, *supra* note 37, art. 51, para. 1 (stating that "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.").

⁵⁷ On May 22, 1969, the Convention was adopted and the next day, it was opened for signature. Pursuant to General Assembly resolutions 2166 (XXI) of 5 Dec. 5, 1966 and 2287 (XXII) of Dec. 6, 1967, the Conference was called together. Two sessions were held at the Neue Hofburg in Vienna, from March 26 to May 24, 1968 and April 9 to May 22, 1969, respectively. The Convention came into force on January 27, 1980. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

Charter provisions, however, exists in Article 2(7), which states, “Nothing contained in the present [UN] Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State.”⁵⁸ In effect, Article 2(7) allows for added deference to states for acts within their territorial borders.⁵⁹

Under Chapter VII, Article 39, the UN Security Council is responsible for determining threats to international peace, breaches of the peace or acts of aggression. Under Article 42, the Security Council – not individual Member States – is empowered to authorize a response.⁶⁰ Thus each state, according to international law, has a duty of non-intervention into the affairs of other states. At the basis of this duty lies the concept of state sovereignty. Further confirmation can be found in ICJ rulings. In the *Corfu Channel Case*,⁶¹ the ICJ denounced any pretend right to intervention in international law. In *Nicaragua v. US*,⁶² the court held that “the principle of non-intervention is an integral part of customary international law.”⁶³

⁵⁸ In addition to U.N. Charter Article 2(7), the Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States proclaims “No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against the political, economic and cultural elements, are condemned.” G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 12, U.N. Doc. A/6220 (1965).

⁵⁹ As an example, at the end of World War II, the United States, United Kingdom of Great Britain and Northern Ireland, France, and the Soviet Union established the Nuremberg Military Tribunal (“Tribunal”). The Tribunal’s mission was “for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.” See HENKIN, *supra* note 16, at 880-82, and more generally 381-86. The German defendants in the Tribunal were charged under Article VI of the Charter of the International Military Tribunal with Crimes against the Peace, War Crimes, and Crimes Against Humanity. As a legal defense, the German defendants argued that its actions, even assuming that such actions were acts of aggression, (i) constituted acts of “self-defense”; and (ii) that the German government should be the sole determinants as to whether the legalities of such acts constituted “self-defense.” The defendants, during testimony, did admit that their actions were acts of aggression in violation of certain international treaties.

⁶⁰ See U.N. CHARTER, *supra* note 37, art. 39 (stating “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”).

⁶¹ See *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4 (Apr. 9) [hereinafter *Corfu Channel*].

⁶² See *Nicaragua*, *supra* note 41.

⁶³ See *Corfu Channel*, *supra* note 61 (stating that

International law, however, does outline some conditions under which military intervention is permitted. UN Charter Articles 41 and 42 allow for the isolation of an aggressor state in economic, diplomatic and political terms and, if such measures prove inadequate, military action to give effect to Security Council decisions.⁶⁴

Article 51, relating to the preemptive use of force as self-defense,⁶⁵ states that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense 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.”⁶⁶ The requisite standard, under Article 51, is that military self-defense is triggered only by an “armed attack” occurring against a state.⁶⁷ That is, from a legal purview, first the “armed attack” criteria must be satisfied, and second, the “occurs” criteria must be satisfied. If

The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.).

See also HENKIN, *supra* note 16, at 82-86 (discussing the Nicaragua case).

⁶⁴ *See* U.N. CHARTER, *supra* note 37, art. 41 (stating that

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.).

See id. art. 42 (stating that

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.).

⁶⁵ *See generally* MOORE, *supra* note 40.

⁶⁶ *See* U.N. CHARTER, *supra* note 37, art. 51.

⁶⁷ Despite the “armed attack” requirement pursuant to U.N. Charter Article 51 (self-defense) on paper, many states in practice seem to exercise a broader interpretation of the self-defense requirement. For example, shortly after the Sept. 11 attacks on the World Trade Center and the Pentagon, U.S. President George W. Bush claimed, “This is the time for self-defense,” and stated, “We have made the decision to punish whoever harbors terrorists” *See* BOB WOODWARD, BUSH AT WAR 31 (2001) [hereinafter WOODWARD].

both parts are met, then the use of force will mostly likely be held as not violative of international law. However, if either or both parts are not met, then the use of force will mostly likely be held not to satisfy Article 51, and thus, be viewed as a violation of international law.

Regarding the first part of the two-part test, what will most likely be viewed to constitute an “armed attack” is a conventional state-sponsored military attack⁶⁸ by a hypothetical state⁶⁹ (“State A”) against military forces and/or civilians of another targeted state (“State B”). What is slightly less clear, but will most likely not be considered to constitute an “armed attack,” and therefore a violation of Article 51 and international law, would be a paramilitary attack by State A against State B’s military forces and/or civilians.⁷⁰ If a non-state (i.e., a “stateless person”) attacked State B, or alternatively, State A used non-conventional military tactics (i.e., chemical and/or biological weapons), then it is much less clear whether Article 51 would apply.⁷¹

Regarding the second part of the two-part test, the term “occurs” used in Article 51 relating to self-defense is written in its present verb case. That is to say, “military attacks” that will or may occur (future and conditional verb cases, respectively) will not be captured under Article 51. This distinction is important, as a matter of practice and law, because otherwise states could use this article to justify preemptive military offensive measures based on mere conjecture, theory, suspicion, and/or unsubstantiated, rumored,⁷² misleading,

⁶⁸ The definition of “military attack” used herein is a military offensive using personnel and/or resources, provided for by its home state, to protect and defend its home state and its national interests.

⁶⁹ See generally RESTATEMENT (THIRD), *supra* note 16, § 201 (defining “state” as “entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities”). See also HENKIN, *supra* note 16, at 242.

⁷⁰ See Nicaragua, *supra* note 41, at 123 (holding that “collective self-defence against an alleged armed attack . . . advanced by the United States to justify its conduct toward Nicaragua, cannot be upheld; and accordingly that the United States has violated the principle prohibiting recourse to the threat or use of force . . .”).

⁷¹ See generally *Tel-Oren v. Libyan American Republic*, 726 F.2d 774 (1984) (discussing the Palestine Liberation Organization and whether the individuals are normally subjected to the rights and duties under international law). See also *Matimak Trading Co. v. Khalily et al.*, 118 F.3d 76 (1997) (holding that since Hong Kong is not a “state,” and since appellant is an entity incorporated in Hong Kong, appellant is a “stateless” person. In dictum, the court noted that U.S. state, not federal, courts may serve as the more appropriate forum for such “stateless” persons).

⁷² For example, on April 14, 1993, there was a report that Kuwaiti forces had thwarted an assassination attempt on then President George Bush, who was scheduled to shortly visit the country. It was also reported that the highest levels of the Iraqi government, mostly likely including then Iraqi President Saddam Hussein, were

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and/or false national intelligence.

B. The Wider Codified International Legal Regime

The Charter exists as the central plank of a larger raft of international legislation to which the United States, in any attempt to justify an armed assault on North Korea, is also beholden, but within which the United States may find alternative sources of international legal justification. The 1928 Kellogg-Briand Pact⁷³ essentially outlawed war as an instrument of national policy except (implicitly) when fought in self-defense or (as it only referred to national policy, and did not supersede the Covenant of the League of Nations) when authorized by the Council of the League of Nations.⁷⁴

implicated in the assassination plot. In response, the U.S. referred to Article 51, self-defense, as justification under international law to “respond directly” to such a threat. However, the U.S. position, per the analysis of this paper, assumes that even a threatened and/or anticipatory attack is enough to trigger Article 51 of the U.N. Charter, and further, that an assassination attempt equates to an “armed attack,” which may not be in conformity with the plain meaning of U.N. Charter Article 51.

⁷³ As of the early 1990s, more than sixty states were parties to the Kellogg-Briand Pact. The full legal title of the Kellogg-Briand Pact, effective on July 24, 1929, is the General Treaty for the Renunciation of War. Article One states, “The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.” Kellogg-Briand Pact, Aug. 27, 1928, art. 1, 46 STAT. 2343, 94 L.N.T.S. 57 (1928).

⁷⁴ The Kellogg-Briand Pact provides that war is to be renounced and that if any signatory Power continues to promote its national interests through war it will be denied the protection furnished by the Treaty. *Id.* at A. The League of Nations Covenant states that “The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League.” LEAGUE OF NATIONS COVENANT art. 10. Articles 12, 13 and 15 of the League of Nations Covenant provide alternative means for peaceful settlement and procedures to be followed before war could be considered. According to Article 16,

Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not. It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the

The Nuremberg trials also established a limit to state sovereignty – states could no longer do as they wished with their citizens, and the UN Charter Preamble reaffirms faith in fundamental human rights without discrimination. This is also reflected in the wording of Articles 1(3), 55 and 56 in the Charter. Other relevant examples include the 1948 Universal Declaration of Human Rights, and the 1966 Covenants on Civil and Political Rights and Economic and Social Rights.

The Convention on the Prevention and Punishment of the Crime of Genocide has been ratified by 120 countries and, according to the ICJ, holds to generally accepted values which oblige all states, even those which have few links with the international community, to “punish and prevent genocide.”⁷⁵ Thus the main legal justifications⁷⁶

covenants of the League.

LEAGUE OF NATIONS COVENANT art. 10, paras. 1-2.

⁷⁵ See G.A. Res. 260, U.N. GAOR, 3d Sess., Annex 1, at art. 3, U.N. Doc. A/810 (1948).

⁷⁶ Another legal argument justifying armed intervention relates to promoting democracy. This argument holds that states may initiate use of force against another state for purposes of preserving, maintaining, or possibly, initiating democracy. U.N. Charter art. 2(4), is the most commonly referred to source of international law relating to this position. International law scholars, however, disagree as to the justification of such an action. On the one hand, scholars like Professor W. Michael Reisman of Yale Law School argue that Article 2(4) must be used to increase opportunities for self-determination. See W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT’L L. 642, 643-45 (1984). On the other hand, Professor Oscar Schachter of Columbia Law School disagrees with Professor Reisman, noting that “invasions may at times serve democratic values must be weighed against the dangerous consequences of legitimising armed attacks against peaceful governments.” Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT’L L. 645, 649-50 (1984). Professor Schachter further argues that Professor Reisman’s position may be inappropriate because such a position would condone the overthrow of peaceful weaker governments by larger stronger governments as acceptable. Further, Schachter argues that the individual governments themselves should be the main decision makers as to their own self-determination, including issues of democracy. *Id.* Thus one legal position allows intervention to support insurgents in a civil war, whereas a second, more conservative position, would essentially only allow intervention to support a fellow sovereign state. The principle of neutral non-intervention is the third legal position on this issue, whereby states must refrain from aiding either side in a civil war. An example of an application of this third position is demonstrated in *Nicaragua v. United States*, 1984 I.C.J. 392, in which the I.C.J. concluded that the principle of non-intervention is part of customary international law. See also Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, UN Doc. A/8028 (1970); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protections of their Independence and Sovereignty, G.A. Res. 2131 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (1965).

for an American preemptive military strike against North Korea available under international law are: 1) Security Council Authorized Action; 2) Self-Defense; 3) Human Rights;⁷⁷ and 4) Genocide.

Among the four justifications,⁷⁸ the international community views the self-defense and genocide positions with the least skepticism. At present, no Security Council resolution has passed with regard to the North Korean issue. Likewise, North Korea has yet to attack another country since the conclusion of the Korean War (this is addressed in more detail below). The existence of human rights violations⁷⁹ has been asserted but because of the DPRK's secrecy and lack of

⁷⁷ Examples of international law agreements relating to human rights include: Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948); International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); and Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 99 U.N.T.S. 302 (collectively, the International Bill of Rights) (entered into force Mar. 23, 1976). *See generally* U.N. CHARTER, *supra* note 37, art. 55, 56. However, a British Government commission set up to investigate justifications for going to war based on human rights violations found, "The overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention [F]inally, on prudential grounds, that the scope for abusing such a right [of humanitarian intervention] argues strongly against its creation." United Kingdom Foreign Office Policy Document No.148 *reprinted in* 57 BRIT. Y.B. INT'L L. 614, 619 (1986), *and in* Mark Littman QC, *Kosovo: Law & Diplomacy*, London: Centre for Policy Studies, at 2 -3 (1999).

⁷⁸ Other justifications for military intervention include the Reagan Doctrine and the Breshnev Doctrine. The Reagan Doctrine, named after former U.S. President Ronald Reagan (1981-1988), originated from a speech by him on March 1, 1985. In the speech, Reagan pointed to "freedom movements" in Afghanistan, Angola, and Central America, proclaiming that individuals involved was owed "help" from the US. *See* HENKIN, *supra* note 16, at 938. A corollary to the Reagan Doctrine is the Breshnev Doctrine, which claimed the right of one socialist state to assist another socialist state if socialism was threatened there. *Id.* at 939.

⁷⁹ *See generally* *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) (holding that "international law confers fundamental rights upon all people vis-a-vis their own governments" and that "the right to be free from torture is now among them."). *But see* *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985) (holding that the international human rights doctrine should be constrained to instances of

basic [human] rights as the right not to be murdered, tortured, or otherwise subjected to cruel, inhuman or degrading punishment; the right not to be a slave; and the right not to be arbitrarily detained [reiterating the traditional view of international law, in that] [I]nternational law does not generally govern disputes between a state and its own nationals).

transparency, no confirmation relating to gross human rights violations has been adequately sustained.⁸⁰ Similarly, no substantiated and sustained acts of genocide have been evidenced for the same reasons.

In summation, the mere breach of an international agreement is not viewed as sufficient justification, in and of itself, for the use of force⁸¹ under international law.⁸² Thus, even assuming that North Korea breached the aforementioned provisions of the Agreed Framework and Non-Proliferation Treaty, no general rule of international law exists to justify a preemptive military strike.⁸³

Regarding self-defense, the United States must convincingly prove to the international community, as a matter of both law and practice, that an “armed attack” occurred against it to satisfy UN Charter

⁸⁰ Although no sustained cases of gross human rights violations within the DPRK have yet been fully demonstrated, the U.N. has begun the process of selecting an “expert who will [investigate] allegations that North Korea was testing chemical weapons on its political prisoners.” *See UN Considers Looking into Rights in North*, JOONGANG DAILY, Apr. 8, 2004, at 1, available at <http://joongangdaily.joins.com/200404/08/200404080016445509900090309031.html>. Moreover, the E.U. “soon plans to place a new resolution before the U.N. Human Rights Commission, asking an investigator [to] review the activities at political camps in North Korea.” *See id.* The new resolution’s language is much tougher than a similar 2003 resolution which characterized North Korean human rights violations as “systemic, widespread and grave.” *See id.* A key element of the resolution is language to appoint a special rapporteur to monitor human rights activity in the DPRK.

⁸¹ *See generally* Henkin, *supra* note 16, at 870. Distinct and separate from the use of force, the U.S. may consider the option of retortion, that is, measures that are viewed as unfriendly but not counter to international law. Examples of retortion include the shutting of ports, imposition of travel restrictions to the unfavored nation, revocation of tariff concessions granted by treaty, and the display of naval forces around the territorial boundaries of the unfriendly state.

⁸² *See generally* U.N. CHARTER, *supra* note 37, art. 2(3) (providing that “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered”). *See also id.*, art. 2(4) (providing that “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”); *see also* Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 12, U.N. Doc. A/6220 (1965) (providing that “No State has the right to intervene, directly or indirectly . . . in the internal or external affairs of any other State”).

⁸³ However, the U.S. could act unilaterally irrespective of international law principles. In doing so, the main issue would be the ramifications of such actions with respect to the international community. The U.S. has experienced clear instances of backlash from the international community relating to its military offensive in Iraq in 2003. Any further preemptive military action may further such anti-U.S. sentiment among the international community.

Article 51. But to date, North Korea has not lodged an armed attack, in the traditional sense, against the United States. What has occurred are verbal exchanges between the two countries, especially relating to nuclear non-proliferation, testing of missiles (albeit toward Japan rather than the United States), and minor skirmishes of fishing boats and naval ships within disputed waters near the South and North Korean borders.⁸⁴ Each incident viewed separately cannot reasonably be construed to constitute an “armed attack.” Even viewed collectively, the summation of all such events would mostly likely not constitute an “armed attack.” Further, because the term “occurs” is in present tense, any use of force in anticipation of an “armed attack” would still not satisfy the requisite standard set forth by Article 51 to justify self defense.

It seems that the U.S. is not currently, nor is it likely to be in the future, in a position to claim the support of codified international law for any putative military action against the DPRK. We turn now therefore to our final set of justifying criteria available to the United States in attempting to demonstrate the legality and legitimacy of an armed attack upon North Korea.

IV. CUSTOMARY INTERNATIONAL LAW AND CONVENTIONS

The *Paquete Habana Case* established that “where there is no treaty and no controlling executive or legislative act or judicial decision (i.e., codified or positive law), resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators.”⁸⁵ This ruling is reiterated in Article 38 of the Statute of the ICJ, which refers to “international custom, as evidence of a general practice accepted as law” and “the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”⁸⁶ Further, in *Nicaragua v. United States*, clarity was provided relating to international customary law and self-defense. There, the ICJ held that:

[a]t all events, the Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defense in the absence of a request by the State which regards itself as the

⁸⁴ See Dick Nanto, *North Korea: Chronology of Provocations: 1950-2003* (2003), available at <http://www.fas.org/man/crs/RL30004.pdf>.

⁸⁵ The *Paquete Habana*, 175 U.S. 677 (1900).

⁸⁶ See I.C.J. STATUTE, *supra* note 39.

victim of an armed attack.⁸⁷

These legal concepts hold important implications for our analysis of a pending U.S. military strike against North Korea. If states generally act as if, and leading publicists recognize, that sovereignty is not inviolate, then indeed, an international legal justification of military action in violation of sovereignty may be available. If sovereignty can be challenged, and there are certain things that states may not do to or with their citizens, then the normative value attached to non-intervention must be weighed against that attached to other commonly-held values that are being violated in order to judge the legitimacy of intervention. This implies a crucial theoretical shift from an interpretation of justification based purely upon codified international law (legality) towards one embracing wider principles of just war (legitimacy).

A. *Just War Theory*

Just war theory concerns both the legitimacy of the decision to go to war (the *jus ad bellum*) and the legitimacy of the war as it is waged (the *jus in bello*). In the absence of any specific UN Security Council resolution giving legal endorsement to military action against North Korea, the United States and her allies would be forced to rely on these more vague principles of “legitimacy.” The essential canons of this tradition with regard to the *jus ad bellum* clearly advocate several requirements, explained below.

Just cause is usually perceived as resistance to aggression, or the prevention of horrific practices.⁸⁸ Unless North Korea should undertake some new course of action that clearly shocks the conscience of mankind, American action could falter at this hurdle. The cause is only just if it prevents such an ongoing situation, not if it is merely punishment for past transgressions, or preemptive of future threats.⁸⁹

Wars for revenge, wars to satisfy bloodlust or imperial ambition, are not justifiable under the tradition’s criterion of “right intention.” There are at least suspicions regarding American motives. Recent American military interventions have secured ‘imperial ambitions’ concerning oil and the encirclement of China. While North Korea has no oil, its absorption into the ‘American Empire’ would certainly

⁸⁷ See Nicaragua, *supra* note 41, at 123.

⁸⁸ See Brendan Howe, *Conflicting Normative Dimensions of Justification: The Gulf War*, in JUST WAR IN COMPARATIVE PERSPECTIVE 201 (Paul Robinson ed., 2003) [hereinafter Howe].

⁸⁹ See *id.*

contribute to the encirclement of the nation viewed by most geopoliticians as posing the greatest imperial threat. In the modern international political arena the justice of one's cause can best be summed up by its acceptance by international public opinion. This means that America needs to demonstrate that it has competent authority, which can be shown through the support of the international community rather than just one or two close friends.⁹⁰ Competent authority is most clearly achieved through UN endorsement.⁹¹

Another factor the U.S. should consider is its chance of success – just how realistic are the various and widely divergent American plans of attack? The suffering likely to be caused by any military intervention can only be justified if the legitimate goals of the intervention are achieved. The U.S. must also consider the proportionality of ends. Certainly war is hell, and a fair degree of suffering is to be anticipated, but in assessing the proportionality of ends, leaders must consider not just the likely effects of intervention, but also those of non-intervention. This is becoming the prime justification offered up by America and her supporters – that if Kim Jong-Il and his evil regime are left in place, more human suffering will come about than will be occasioned by allied intervention.⁹² Furthermore, all reasonable efforts at a non-military solution should have been tried before resort to war, bearing in mind the continued costs in terms of human suffering caused by any further delay. This is clearly a problem for the American case, as many more diplomatic avenues await exploration. Most clearly there remains hope that the Six-Way Talks will lead to a de-escalation of tension, and both European and Asian powers are currently engaged in bilateral diplomacy with Pyongyang. However, George W. Bush might consider all such efforts doomed to fail, as he did with the previous member of the “Axis of Evil,” Saddam Hussein.⁹³

⁹⁰ See *id.* at 202.

⁹¹ See *infra* Part IV.B for further elaboration of this point.

⁹² Alongside the “nuclear issue,” the “human rights issue” has been the focus of resentment in North Korea. It is viewed as a “hostile policy [meant] to isolate and stifle (North Korea)” and would require “the latter [to] react... by further increasing its self-defensive deterrent force.” See *North Korea threatens to strengthen deterrent against US*, Channel NewsAsia (Dec. 20, 2004), at http://www.channelnewsasia.com/stories/afp_asiapacific/view/123207/1/.html.

⁹³ George W. Bush, speaking in Washington on September 18, 2002 as British and U.S. diplomats tried to win over members of the U.N. Security Council who were skeptical about the need for a new resolution in view of Saddam's offer to admit weapons inspectors, claimed that Saddam Hussein “deceives, delays and denies” while killing his own people, terrorizing his neighborhood and developing weapons of mass destruction. Toby Harnden, *Bush Renews His Drive for War*, DAILY TELEGRAPH (London), Sept. 19, 2002, available at <http://www.telegraph.co.uk/news/main.jhtml>. It is

The goal of peace is the final principle of the just war theory. It is claimed that peace cannot be achieved as long as Kim Jong-Il remains in power, and that the replacement of his regime with a more democratic one will contribute to the peace and stability of the whole region.⁹⁴ Of course a subtext to this is that a democratic regime in North Korea, and perhaps eventually a unified Korean Peninsula, would be likely to ally itself with Washington rather than Beijing or Moscow.

It might seem unusual to talk about the actions taken within a war that has yet to happen when looking at the justifiability of taking military action, but in recent years just war theory has moved on from the state-centric focus of *jus ad bellum* to a position where greater emphasis is placed on *jus in bello* – i.e., the ends no longer necessarily justify the means, but rather how the war is to be fought must now form an integral part of the analysis of the legitimacy of going to war. The binding principles related to this tradition are described below.

The proportionality of means doctrine is a vital component which dictates that no more military force is used than is necessary in order to achieve morally legitimate political and military objectives.⁹⁵ Any American or allied action must be planned with this in mind, and must be legitimated by consultation with the wider international community. This links closely with the later section on internal and external constituencies.

Secondly, a state should exercise discrimination in launching military action. Every effort should be made to preserve civilian life, even in the face of increased costs on behalf of the belligerents. In order to claim any degree of legitimacy, any military intervention must take far greater care to avoid civilian casualties than was the case in the first Gulf War or the Kosovo intervention – international public

quite likely that, given Bush's "loathing" of the North Korean leader whom he describes as a spoilt child and an evil man who threatens the world while letting his people starve, he could make similar claims about Kim Jong-Il.

⁹⁴ For example, "The risk of starvation, the threat of persecution, and the lack of freedom and opportunity in North Korea have caused large numbers, perhaps even hundreds of thousands, of North Koreans to flee their homeland, primarily into China." North Korean Human Rights Act of 2004, H.R. 4011, 108th Cong. § 4 (2004). In addition to the North Korean government's human rights abuses at home, it has been "responsible in years past for the abduction of numerous citizens of South Korea and Japan, whose condition and whereabouts remain unknown." *Id.* The issues of human rights abuses, democracy, and regional stability have been tied together in the North Korean Human Rights Act, as the President is authorized to promote human rights and democracy programs, and proposes a multilateral initiative similar to the Organization for Security and Cooperation (OSCE).

⁹⁵ See Howe, *supra* note 88, at 202.

opinion is no longer prepared to accept massive “collateral damage” as a result of bombs going astray while American pilots fly at an altitude too high for accuracy in the name of self-preservation and a reduction in the number of American body bags.

A more recent addition to the just war tradition is the concept of limited war, which restricts the targets of belligerent states to those that will directly contribute to the reversal of the wrong that legitimized the intervention in the first place.⁹⁶ For instance, targets that help perpetuate the wrong are legitimate up to the point where the wrong has been reversed. After that time, there are no legitimate targets, and during that period, it is unjust to develop alternative agendas and authorize military action to achieve goals other than those sanctioned by the original mandate. Thus if it is agreed that the legitimate aim is the “unfettered access” of UN weapons inspectors to all North Korean sites and the elimination of any and all weapons of mass destruction, should Kim Jong-Il eventually agree to these demands and they are indeed implemented, it would probably not then be legitimate for military action to take place.

B. Internal and External Constituencies

The time of absolute and exclusive sovereignty . . . has passed; its theory was never matched by reality. It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world.⁹⁷

In such a fashion and in the aftermath of what has come to be seen as the ‘First’ Gulf War, the former Secretary General of the United Nations outlined the central tenets of the New World Order – i.e. no state could consider itself immune to the demands and rights of its internal and external constituencies, and that the United Nations as the embodiment of the international community would not tolerate the hindrance of its ‘great objectives’ of peace and security, justice and human rights and ‘social progress and better standards of life in larger freedom.’⁹⁸ Thus the rights of individuals and the demands of international communities constitute the final set of justifying criteria we

⁹⁶ *Id.* at 208.

⁹⁷ Boutros Boutros-Ghali, *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peace-Keeping*, U.N. Doc. A/47/277 – S/24111 (1992) [hereinafter Boutros-Ghali].

⁹⁸ *Id.* at 2.

will consider.

For David Luban, “if the rights of states are derived from the rights of humans, and are thus in a sense one kind of human rights, it will be important to consider their possible conflict with other human rights.”⁹⁹ He agrees wholeheartedly with Gerald Doppelt that “an illegitimate and tyrannical state cannot derive sovereign rights against aggression from the rights of its own oppressed citizens, when it is itself denying them those same rights,”¹⁰⁰ and is concerned that in the communitarian justification “somehow oppression of domestic vintage carries a *prima facie* claim to legitimacy which is not there in the case of foreign conquest.”¹⁰¹ In Luban’s opinion, the majority of states have therefore forfeited their rights which in truth are only privileges granted them in trust, whereas human beings really do have rights. Thus, although not every infringement is a *casus belli* (the proportionality of means doctrine still applies – see above), he implies not only that any state can intervene, but that every state has a duty to intervene in any other as long as it has a better human rights record.

Unless we say that morality is conditional upon the nationality of the aggressor, we have a duty to defend the victims of internal as well as external aggression. Thus Luban defines a just war as being:

- (i) a war in defense of socially basic human rights (subject to proportionality); or (ii) a war of self-defense against an unjust war. An unjust war is (i) a war subversive of human rights, whether socially basic or not, which is also (ii) not a war in defense of socially basic human rights.¹⁰²

This leaves us in a position where “the legitimacy of the state is conferred in two forms: externally by other members of the society of states, and internally by its own citizens.”¹⁰³ Thus America could claim that North Korea has forfeited its right not to be attacked due to violations of the human rights of its own citizens – i.e. that it is no longer representative of the interests of those individuals whom it has a duty to serve.

However, Luban’s position raises serious questions of its own – namely, if we are to give the right of intervention to those states who

⁹⁹ David Luban, *Just War and Human Rights*, in *INTERNATIONAL ETHICS* 195, 201 (Charles K. Beitz et al. eds., Princeton University Press 1985).

¹⁰⁰ *Id.* at 204.

¹⁰¹ *Id.* at 214.

¹⁰² *Id.* at 210.

¹⁰³ Mark Hoffman, *States, Cosmopolitanism and Normative International Theory*, 2 No. 1 *PARADIGMS* 188 (June 1988).

are morally superior, who decides which states qualify and on what criteria? Furthermore, what constitutes a human right, and when do we decide that it is being infringed?¹⁰⁴ A common concern is that those values purported to be universal, are in fact, merely an extension of the world dominance of Western culture. Perhaps a truly just international society would follow George Bernard Shaw's maxim: "Do not unto others as you would that they should do unto you. Their tastes may not be the same."¹⁰⁵

It is difficult to justify military action against North Korea on the grounds that the regime does not represent the interests of the majority of its internal constituencies, given that there is little evidence of widespread dissent. While it is quite clear that the periodic farcical endorsements of the regime through parades or "spontaneous" outpourings of affection for the "Dear Leader" hold little or no legitimacy, it is also apparent that the United States does not have sufficient evidence to prove that Kim Jong-Il is ruling against the wishes of the majority of his subjects. Thus attempts by the Bush camp to conflate the threat posed by Kim Jong-Il to his own people with that he may pose to the rest of the world also lack legitimacy. It is unjust to strike out at a country because its leaders are considered the "bad guys"; merely being the "good guys" does not bestow *de facto* legitimacy.

In terms of a possible legitimating internal constituency, we must turn instead to whether at the very least western protagonists have the support of their subjects. Here our task is somewhat easier, as in the relatively open western democratic regimes dissent is more easily expressed and noticed. Democratic leaders automatically acquire *prima facie* legitimacy by virtue of (at least theoretically) gaining the support of something approaching the majority of the voters. The fact that this was not the case for George W. Bush could have undermined his endorsement credentials. However, since September 11, 2001, opinion polls have consistently shown high public support for the

¹⁰⁴ Or in Michael Walzer's words,

To whom is this far-reaching license granted? Who is to make the crucial calculations? In principle, I suppose, the license is extended to any and all foreigners; in practice, today, to the officials of foreign states; tomorrow, perhaps, to some set of global bureaucrats acting by themselves or as advisors to and agents of a Universal Assembly.

Michael Walzer, *The Moral Standing of States: A Response to Four Critics*, in *INTERNATIONAL ETHICS* 232 (Charles R. Beitz et al. eds., Princeton Univ. Press 1985).

¹⁰⁵ See George Bernard Shaw, Miracle Salad.com (2004), at <http://quotes.miraclesalad.com/list.php?source=26> (last visited Feb. 25, 2005).

President's handling of the "War on Terrorism."¹⁰⁶

However, criticism of the intervention in Iraq has been growing in America, and the reality of body bags being filled on an almost daily basis has dampened the American public's enthusiasm for military escapades.¹⁰⁷ It would be difficult for Bush to convince the majority of his electorate, Congress, or the press that enforced regime change in a distant land was in the interests of the United States. Thus any military intervention in North Korea would likely have to take place against the wishes of American internal constituencies and thus would be of dubious legitimacy. It is probable that the only way Bush could garner enough support from internal constituencies would be if he was able to gain the endorsement of external communities, and indeed, this forms our final set of justifying criteria.

As mentioned above, for the United States to demonstrate comprehensively the legality of its actions in intervening militarily against North Korea, it would need to receive explicit United Nations Security Council endorsement. For such actions to be considered at least somewhat legitimate, even if not fully legal, the U.S. would need to secure and demonstrate the support of a wide body of nations. This could be done through either Security Council resolutions, or through those of the General Assembly of the United Nations. In the absence of endorsement from either of these two bodies, the United States would need to build a broad-based coalition to actually take part in the fighting.

Such legitimizing support appears increasingly unlikely. Iraq reconstruction allies are facing increasingly vocal opposition at home as human and financial costs mount.¹⁰⁸ By acting in defiance of international public opinion over Iraq, George W. Bush is undermining the "New World Order," proclaimed by his father in the aftermath of the Cold War and at the time of the First Gulf War.¹⁰⁹ The essentially unilateral action has led to increased anti-

¹⁰⁶ See *Public Support for War Resilient*, The Pew Research Center Survey Reports (June 17, 2004), at <http://people-press.org/reports/display.php3?ReportID=216>.

¹⁰⁷ See *generally Give UN Control in Order to Get More Foreign Troops*, The Pew Research Center Survey Reports (Sept. 23, 2003), at <http://people-press.org/reports/display.php3?ReportID=193>.

¹⁰⁸ See *Multinational Force in Iraq*, Wikipedia (2005), at http://en.wikipedia.org/wiki/U.S.-led_coalition_against_Iraq (last visited Feb. 25, 2005).

¹⁰⁹ "A New World Order . . . to achieve the universal aspirations of mankind – peace and security, freedom and the rule of law." See George H.W. Bush, State of the Union Address (Jan. 1991) in PHILIP ROSS, A NON-LIBERAL APPROACH TO THE CONCEPT OF AN 'INTERNATIONAL ORDER,' IN HUMAN RIGHTS AND MILITARY INTERVENTION 247 (Alexander Mosely and Richard Norman eds., 1992).

Americanism, anti-war expressions and international resistance to further attempts at leadership and coalition building. In particular China and Russia, Permanent Members of the Security Council and great regional powers, would actively oppose a further act of intervention in their own back yard, while both Japan and Korea would be unlikely to be supportive. If anything, a U.S. strike against Pyongyang would likely be even more unilateral than that against Iraq, and thus even more illegitimate.

Finally, even assuming the above conditions are fulfilled, a duty is incumbent upon the intervening state to demonstrate that a clearly superior outcome (in terms of the greater good) would be produced through intervention than would endure as a result of non-intervention. In utilitarian terms, this can be evaluated bluntly in terms of body bags. It is not certain that more people would die if the United States were not to intervene than would be the case as a result of the “successful”¹¹⁰ conclusion of a second Korean War. As previously mentioned, the death toll in both North and South Korea, primarily of civilians, as a result of military action would be unacceptably high.

Furthermore, normative calculations also require analysis of rule-utilitarian costs and benefits. Calculations must take into account the costs to the international system of establishing a precedent of preemptive intervention. If a norm is established whereby any state that considers itself morally superior to its neighbors, or feels itself threatened by them, is justified in taking military action, many more deaths (both innocent and battle-related) would result and the international system could degenerate into a truly anarchical war of all against all.¹¹¹

V. CONCLUSION

If diplomacy fails to provide an amicable solution, the United States and North Korea are directly poised for another war on the Korean peninsula. Since September 11th, U.S. foreign policy has primarily been dominated by a unilateralist approach defined by military preemption, with self-defense as the primary legal justification to the international community. Such hawkish positioning may serve

¹¹⁰ The term “successful” denotes the U.S. reaching its military objective of either nuclear deproliferation, and/or possibly regime change, in the DPRK.

¹¹¹ See generally THOMAS HOBBS, *LEVIATHAN OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL* (Oxford: Basil Blackwell 1947).

as a catalyst for open hostilities.

This paper explains that the legal arguments for preemption, including the self-defense argument, as it relates to the discussed sources of international law, lacks justification. Likewise, other normative justifications are without foundation. By providing this discussion, perhaps reason and the rule of law can persuade one or more of the relevant parties to reach a peaceful and diplomatic de-escalation, as opposed to a military resolution, to the ongoing North Korean nuclear crisis.