

Pre-Emption Against Pyongyang: is a Military First Strike on the Korean Peninsula Legal?

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Abstract

North Korea and the U.S. still remain technically at war. This tense state of affairs is a legacy of the 1950-53 Korean conflict. However, recent evidence suggests that the U.S. and North Korea may be on the verge of another bloody war on the Korean peninsula, this time triggered by a possible U.S. military first strike against the D.P.R.K.

The impetus for a second Korean war stems, in part, from events in the early 1990s under the Clinton administration, which have been exacerbated under the current U.S. President, George W. Bush, as discussed herein. Evidence that the U.S. and North Korea may be on the brink of a second Korean war also represented a motivating factor in deciding that the issue discussed in this paper was both urgent and ripe for public discussion.

Thus, this paper examines the primary legal justifications for a U.S. military first-strike against North Korea, from both an international law and international relations perspective. To make the relevant analysis, this paper focuses on three (3) main sources of international law, specifically (i) international agreements; (ii) codified international law; and (iii) customary international law. This paper concludes by arguing that neither a convincing nor persuasive argument exists to justify a military first strike on the Korean peninsula.

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I. Introduction

Military tensions between the United States¹⁾ and North Korea²⁾ have lasted for decades, since the end of the 1950-53 Korean War.³⁾ 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.⁴⁾ 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.

This time, however, the U.S.-North Korean war may not be just a war on paper. Rather, a second war on the Korean peninsula will mostly 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 North Korean military arsenal composed of at least 1.2 million soldiers, with massive artillery capabilities, and tactical nuclear and/or biological weapons capabilities.

From the early 1990s during the Clinton administration⁵⁾ onwards, relations between the U.S. and the Democratic People's Republic of Korea have been fractious, and at times, confrontational. At that time, U.S.-D.P.R.K. relations had

1) All references to the "United States," the "U.S.," or "United States of America," shall all denote the same country and have the same meaning.

2) All references to "North Korea," the "D.P.R.K.," or "Democratic People's Republic of Korea," shall denote the same country and have the same meaning.

3) One of the more cited examples of such post-Korean war U.S.-D.P.R.K. tensions occurred on Jan. 23, 1968. At that time, four North Korean gunboats and two MiG jet fighters attacked and captured the U.S. ship *Pueblo* near Wonsan, just off the Korean peninsula. The *Pueblo* was accused of spy operations in the East Sea relating to D.P.R.K. activity, and was based in Yokosuka, Japan. The capture of the USS *Pueblo* by North Korea exemplifies the apparently tense nature of its relations and military operations relating to the U.S. In addition, other less publicized D.P.R.K. attempts to intercept U.S. spy planes have been cited since the 1968 *Pueblo* incident.

4) The armistice was signed on 27 July 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.

5) William Jefferson Clinton was the 42nd President of the United States from 1992-2000. Previous to being U.S. President, Clinton was the governor for the state of Arkansas. President Clinton attended Georgetown University (1968), Oxford University (1968-70), and Yale Law School (1973).

become so severely strained that U.S. Defense Secretary, William Cohen⁶⁾, was ordered to execute war game scenarios and generate military options relating to a pre-emptive military strike against North Korea, including North Korea's Yongbyon nuclear facility,⁷⁾ which was alleged to contain or be in the process of manufacturing tactical nuclear weapons. FN Tensions were temporarily eased by the brokering of a treaty between the two sides in the form of the 1994 Agreed Framework. FN However, in the aftermath of the September 11, 2001, terrorist attacks on targets in the U.S., President George W. Bush labeled North Korea part of an "axis of evil" in his 2002 State of the Union speech.⁸⁾ North Korea⁹⁾, in reaction to the U.S. attempts to isolate it from the international community, expelled International Atomic Energy Agency (IAEA)¹⁰⁾ nuclear inspectors from its Yongbyon facility, and has since made concerted efforts, followed by several statements claiming that it now has a "nuclear deterrent,"¹¹⁾ to counter the United States.

Most recently, a series of six-way negotiations have been initiated, involving the United States, North Korea¹²⁾, South Korea¹³⁾, China, Japan, and Russia¹⁴⁾. The

6) William S. Cohen was sworn in as the nation's 20th Secretary of Defense on January 24, 1997. His nomination was announced in White House ceremonies on Dec. 5, 1996, and he was confirmed by the U.S. Senate on Jan. 22, 1997. He previously served three terms in the U.S. Senate for the State of Maine (1979-1997) and three terms in the House of Representatives from Maine's Second Congressional District (1973-1979).

7) The Yongbyon facility is the D.P.R.K.'s main nuclear complex, and is therefore the central focus of issues relating to D.P.R.K. nuclear inspections by the IAEA and the ongoing six-way negotiations to resolve the North Korean nuclear standoff.

8) See generally, President of the United States George W. Bush, State of the Union Address to the United States Congress (Jan. 29, 2002). The other "axis of evil" countries apart from North Korea were Iran and Iraq. *Id.*

9) As an example of an indicator of political instability within the D.P.R.K. regime, Kim Jong-il's brother-in-law Jang Song-thaek, was removed from his first vice department director of the Central Committee of the Workers' Party post. The post was viewed as the second most powerful within North Korea, subordinate only to Kim Jong-il. See Chang-hyun Jung and Yong-su Jeong, Power Shift is Reported in North Korea, JoongAng Daily, April 15, 2004, at 1. The apparent power shift resulted from a power struggle with Pak Pong-ju, the D.P.R.K. prime minister. *Id.*

10) The IAEA was created in 1957 in response to the concerns relating to the discovery of nuclear energy. The Agency's genesis was U.S. President Eisenhower's "Atoms for Peace" address to the General Assembly of the United Nations on 8 December 1953. These ideas helped to shape the IAEA Statute, which 81 nations unanimously approved in October 1956. The Statute outlines the three objectives of the Agency's work - nuclear verification and security, safety and technology transfer. See History of the IAEA, at <http://www.iaea.org/About/history.html>.

11) See *infra* note 75.

objective of the talks is to broker an agreement to halt and perhaps remove North Korea's nuclear capabilities.¹⁵⁾ Meanwhile, the U.S. has strategically preserved all options in the event of diplomatic failure to peacefully resolve the issue, including the pre-emptive use of force on the Korean peninsula. Given these facts, this paper examines the important issue of what are the justifications, if any, from an international law and international relations perspective, of a U.S. pre-emptive military strike against North Korea.

To analyze the problem, this paper looks at (i) international agreements (e.g., the 1994 Agreed Framework FN¹⁶⁾ and the Nuclear Non-Proliferation Treaty¹⁷⁾); (ii) codified international law; and (iii) customary international law, in terms of whether or not such actions could be justified. Upon examination of the relevant arguments, this paper concludes that no persuasive legal justification exists for a pre-emptive

12) In reaction to the U.S. position during the second round of six-way talks that it wanted a complete, irreversible, and verifiable nuclear weapons program dismantling, North Korea has demanded from the U.S. a "complete, verifiable and irreversible security guarantees" and also stated, "we cannot but demand the complete, verifiable withdrawal of U.S. troops in South Korea." See Staff Reporter, *North Calls on U.S. to 'Verifiably' Pull Out*, JoongAng Daily, March 9, 2004, at 1.

13) Ms. Wendy Sherman, former special advisor to President Bill Clinton, recently offered a critical analysis of the Bush administration for not being "engaged in sincere negotiations" with respect to the six-way talks. See Jie-ho Choi, *South Praised for Tactics in Its Approach to North*, JoongAng Daily, March 11, 2004, at 1. Ms. Sherman also stated that the U.S.-ROK relationship was in a state of transformation from "paternalism" to "partnership." See *id.* Ms. Sherman made these comments while speaking to students at Ewha Womans University and at a subsequent press conference on March 2004. *Id.*

14) During the second round of six-way talks in early 2004, Russia's top envoy, Deputy Minister Alexander Losyukov was quoted by Russia's Itar-Tass as stating, "If this goes on, mistrust will grow on the peninsula. The situation could be aggravated and military intervention is possible." See Chul-jong You, *Lack of 6-Party Progress Invites War, Russian Says*, JoongAng Daily, March 2, 2004, at 2. The Deputy Minister also stated that he foresaw blockade attempts or other efforts to minimize North Korea's relations with other countries, which could "worsen the situation." *Id.*

15) As an example, however, that the U.S. may be losing patience relating to a diplomatic solution to the North Korean nuclear crisis can be seen in U.S. Vice President Dick Cheney's recent visit to Beijing, China. During his visit, Mr. Cheney was quoted as saying that "time is not necessarily on our side" in ongoing negotiations. See Joseph Kahn, *U.S. Prods Beijing on Talks with Pyongyang*, April 14, 2004, Int'l Herald Tribune, at 1. See also, Jie-ho Choi, *Nuclear Crisis, Alliance to Top Cheney Agenda*, JoongAng Daily, April 14, 2004, at 1.

16) Agreed Framework Between the United States of America and the Democratic People's Republic of Korea, October 21, 1994, U.S.-D.P.R.K. [hereinafter Agreed Framework].

17) Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968 (entered into force March 5, 1970) [hereinafter NPT].

military first-strike against North Korea.

II. International Agreements

A. 1994 Agreed Framework (“Agreed Framework”)

1. Situation Prior to the 1994 Agreed Framework

North Korea and the United States were on the brink of a second Korean war in 1993-94. At the time, U.S. intelligence sources were deeply concerned that North Korea¹⁸⁾ was nearing the final stages of developing nuclear capabilities. In particular, a facility based in Yongbyon, North Korea, was suspected of plutonium extraction efforts that would have led to the possible creation within several months of up to six nuclear warheads. FN

The U.S. view at this time was that a nuclear North Korea, that is a North Korea with nuclear arms capabilities, was an unacceptable threat to both U.S. security interests as well as a threat to the security interests of several key U.S. allies in the region, most notably South Korea and Japan. The U.S. proposed solution to the North Korean nuclear threat was militarily based rather than diplomacy-based.¹⁹⁾ Specifically, a pre-emptive surgical military strike was planned by then Secretary of Defense William Cohen against the Yongbyon facility. The rationale behind the

18) For a general overview of North Korean foreign policy, see generally, Byung-Chul Koh, *The Foreign Policy Systems of North and South Korea* (University of California Press, 1984). In the text, the author notes that North Korea, much like South Korea, pursues the “common strategic goals of legitimacy, security, and development.” *Id.* at 229. Further, that relative to other countries, the issue of nationalism plays the “single most important ideological dimension” for North Korea relating to its foreign policy. *Id.* at 235. These observations may provide valuable insight into how to deal with the D.P.R.K., and thus, may play an important role in developing strategic policy formation towards an acceptable solution to the North Korean nuclear issue, from the perspectives of both the U.S. and D.P.R.K.

19) See BBC News website, Steve Schifferes, *U.S. Weighs North Korea’s Threat*, April 25, 2003, at <http://news.bbc.co.uk/1/hi/world/americas/2974287.stm>. The article notes that even prior to the six-way talks between the U.S., North Korea, South Korea, China, Russia, and Japan, that U.S. Defense Secretary, Donald Rumsfeld, circulated a memo advocating policy change rather than negotiation to resolve the North Korean nuclear threat.

military “first-strike” option was that only limited time existed before North Korea could fully develop one or more nuclear weapons. It was thus the view that sufficient time might not exist for a diplomatic solution.

The stakes of a second Korean war would have been substantial. At the time, approximately 37,000 U.S. troops were strategically positioned along or near the southern half of the demilitarized zone (“DMZ”)-the border that separates North and South Korea pursuant to the 1953 armistice ending the 1950-53 Korean War—alongside thousands of South Korean troops. On or near the northern half of the DMZ were approximately one million plus North Korean troops and approximately 11,000 artillery shells²⁰⁾ aimed at strategic positions in South Korea, including South Korea’s capital city of Seoul a mere 40 miles south of the DMZ, which in itself is home to about twelve million people.

The war game scenario conclusions were that a U.S. pre-emptive military strike would result in thousands of U.S. troops killed, tens of thousands of South Korean troops killed, the city of Seoul being leveled flat, and that a mass refugee problem from the north to the south would ensue.²¹⁾

Despite this drastic scenario, Defense Secretary Cohen was nonetheless “highly confident” that the Yongbyon facility could be destroyed without causing a meltdown that would release radioactivity into the air.²²⁾ The plutonium would be entombed, and the special buildings nearby designed to reprocess the reactor fuel into bomb material would also be leveled.”²³⁾

As evidence of the U.S. willingness to engage in war with North Korea, the U.S. executed troop movements along the DMZ and positioned military forces in striking range of the Yongbyon plant. At this point, the two countries were on the verge of a second Korean war.²⁴⁾

War was diverted, however, as a result of the brokering of the 1994 Agreed Framework (“Agreed Framework”), a bilateral agreement between the United States and North Korea. The substance of the Agreed Framework was a *quid pro quo*²⁵⁾

20) See generally, Ashton B. Carter and William J. Perry, *Back to the Brink*, Washington Post, October 20, 2002.

21) *Id.*

22) *Id.*

23) *Id.*

24) *Id.*

whereby North Korea (i) agreed to freeze its plutonium enrichment program, including placing its unprocessed plutonium under international inspection; (ii) agreed to eventually destroy the Yongbyon facility; and (iii) 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.

The Agreed Framework is significant because it is the predominant international bilateral agreement between the United States and the Democratic People's Republic of Korea that at the time strategically prevented a potentially violent military confrontation in the Korean peninsula.

Now, nearly a decade later, the issue of North Korean nuclear proliferation has resurfaced with a vengeance. The issue took center stage during President George W. Bush's State of the Union address on January 29, 2002, whereby Mr. Bush proclaimed North Korea to be a member of the "axis of evil" along with Iraq and Iran.²⁶⁾ Thereafter on October 2002, North Korea confessed to possessing nuclear capabilities²⁷⁾ and that it was in the process of reprocessing approximately 8,000 spent fuel rods,²⁸⁾ enough material for the D.P.R.K. to produce four to eight nuclear bombs.

25) Meaning something given or received as consideration for something else ("something for something").

26) Iran is in the midst of a nuclear standoff with the U.S. and the international community much like that of North Korea. For example, on March 2004, Iranian officials stated that they were unsure as to exactly when U.N. atomic inspectors would be allowed back into the country, and that the decision to prohibit such inspectors was a direct result of an "insulting" IAEA Board of Governors resolution against Iran. See Reuters Staff Writer, *Iran Refuses to Set Timetable for Inspections*, Int'l Herald Tribune, March 15, 2004, at 9. See also, BBC News website, *U.N. Condemns Iran Nuclear Secrecy*, March 13, 2004 at http://news.bbc.co.uk/2/hi/middle_east/3507970.stm. This resolution "deplores" Iran's key atomic technology omissions including undeclared research on "P2" centrifuges that enable the production of bomb-grade uranium. *Id.*

27) During the D.P.R.K.'s October 2002 statement, the North Korean government admitted to U.S. representatives that it possessed a highly enriched uranium program. See Jean-Pierre Leng, *The Reactor That Was Never Finished*, Int'l Herald Tribune, March 4, 2002, at 9. Subsequently, North Korea quickly retracted its statement, leaving it unclear whether it was bluffing or whether internal policy confusion existed within the ranks of the D.P.R.K. leadership. Nonetheless, KEDO then moved to suspend fuel oil deliveries promised in the 1994 Agreed Framework. *Id.* North Korea then countered by suspending and ejecting IAEA inspectors from all its nuclear facilities, and then pulling out of the Nuclear Non-Proliferation Treaty. *Id.*

28) The use and inspection of the 8,000 nuclear rods were under IAEA supervision until on or about January 1, 2003. See David E. Sanger, *U.S. Voices New Worry on Nuclear Bomb Fuel*, Int'l Herald Tribune, March 4, 2004, at 1. Subsequently, the fuel rods were reported to have been removed from the Yongbyon storage facility. *Id.*

Moreover, various six-way talks to solve the North Korean nuclear issue, involving the U.S., North Korea, South Korea, Japan, China, and Russia, have led to little substantive progress. If the next round of six-way talks again fails to bring further progress, then a higher possibility exists that the U.S., under President Bush, may authorize a pre-emptive military strike against North Korea, either with or without its allies, which may mirror the military scenario mapped out by then Secretary of Defense William Cohen nearly ten years earlier in 1993-94.

Prior to any such pre-emptive strike, U.S. decisions on whether and/or when to use its military options may be based in part on the opinion of the international community. Prior to the 2003 Iraq invasion, the U.S. was perceived to have little patience or interest in consulting with the international community and/or the United Nations.²⁹⁾ However, in the post-2003 Iraq invasion period, the U.S. has become increasingly cognizant of the need, or at least the perception of the need, of seeking the international community's support for its acts of war beyond its territorial borders.

The level of such international support will then be based on the apparent justifications, or lack thereof, of a U.S. military strike against North Korea, based on

In a statement to a U.S. Senate panel by President George W. Bush's chief negotiator with North Korea, James Kelley (U.S. assistant secretary of state for Asia) on or about early March 2004, stated that it was "quite possible" that the D.P.R.K. has converted all 8,000 of its spent nuclear fuel rods into plutonium to fuel nuclear weapons. See David E. Sanger, *U.S. Voices New Worry on Nuclear Bomb Fuel*, Int'l Herald Tribune, March 4, 2004, at 1. In addition, North Korea is believed to have also produced one to two weapons in the early 1990s during the first Bush administration prior to the 1994 Agreed Framework. *Id.*

29) The Bush administration's foreign policy may be viewed as "unilateralist." That is, a reluctance or even refusal by the U.S. to seek the approval and/or consultation of other members of the international community. George W. Bush is quoted as saying, "My attitude all along was, if we have to go it alone, we'll go it alone. See Bob Woodward, *Bush At War 45* (Simon & Schuster, 2001) [hereinafter Woodward]. This may be a result of a neo-conservative ("neo-con") presence, who generally tend to favor the unilateralist approach, within key members of the Bush administration and cabinet, including U.S. Vice President Dick Cheney, Secretary of Defense, Donald Rumsfeld, and Deputy Defense Secretary Paul Wolfowitz.

Some Korean scholars argue that President Bush should instead take on a multilateralist (not unilateralist) approach with respect to the North Korean nuclear standoff. See generally, Tae-hwan Kwak, *Nuclear Talks and a U.S. Election*, JoongAng Daily, March 7, 2004, at 7. For example, Mr. Tae-hwan Kwak argues that President Bush has two choices. Option one is to side with the neo-cons in his administration which may lead to a further crisis on the Korean peninsula (*i.e.*, a continuance of the "unilateralist" approach). Option two is to side with the negotiators to reach a joint compromise (*i.e.*, a "multilateralist" approach). *Id.*

international law. Specifically, the U.N. Security Council's decision to allow or not allow such acts of aggression will most likely be based upon the alleged violations of international law, including international agreements (such as the Agreed Framework and Nuclear Non-Proliferation Treaty), codified international law, and customary international law³⁰⁾ relating to North Korea.

For this reason, it is of critical importance to determine if and how certain Agreed Framework provisions were breached from an international law perspective. Consequently, this section (i) discusses and analyses relevant Agreed Framework provisions; and (ii) posits certain legal arguments, both pro and con, relating to alleged breaches of such relevant provisions.

2. Relevant Agreed Framework³¹⁾ Provisions

(1) Provision One

Article One - Article One of Provision One of the Agreed Framework discusses the issue of a provision by the U.S. of a light-water reactor project ("LWR Project") in an attempt to replace the D.P.R.K.'s graphite-moderated reactors and related facilities.³²⁾

In the first paragraph of Article One, the language reads that the LWR Project has a "target date of 2003." So far, the LWR Project has not yet been officially completed. One could argue that the U.S. is therefore in breach of Provision One. But at least two persuasive rebuttals exist to refute this allegation.

First, Article One's language states that the U.S. "...will make arrangements for the provision" to the D.P.R.K. of the LWR Project.³³⁾ This select word choice of

30) I.C.J. Statute Article 38(1) lists sources of international law that it will apply in resolving disputes, which include (a) international conventions; (b) international custom; (c) "general principles of law recognized by civilized nations;" and (d) "teachings of the most highly qualified publicists." See I.C.J. Statute art. 38(1)(a)-(d).

31) The 1994 Agreed Framework froze the North Korean nuclear program at the Yongbyon nuclear facility, which consisted of an active research reactor and three unsafe reactors. All such locations were then placed under IAEA inspection. In consideration for this, North Korea was to receive heavy fuel oil annually until the Korean Peninsula Energy Development Organization ("KEDO") completed its first proliferation-resistant and safe reactor. See generally, Jean-Pierre Leng, *The Reactor That Was Never Finished*, Int'l Herald Tribune, March 4, 2004, at 9.

32) See Agreed Framework art. 1.

“will make arrangements” is clearly intended as a non-binding objective rather than a legal obligation upon the parties, specifically the U.S. Conversely, if both parties wanted a legally binding effect relating to the LWR Project issue, then the language could have instead been written as “will provide to the D.P.R.K.” or “will ensure that the LWR Project will be completed,”³⁴⁾ but such language was not used here. Second, in the same paragraph, the “arrangements” for the LWR Project is given a “target date of 2003.”

Such language is a strong indicator that no exact timeline for final completion of the LWR Project was intended by the parties. For example, the parties agreed to use the language of “target date” (which implies an approximation and thus no legal obligation) rather than “completion date” or “end date” (which denotes definitiveness and thus legal obligation upon the U.S.). Further, as additional evidence that the U.S. did not breach this provision, the U.S. is merely seeking “arrangements”³⁵⁾ for the LWR Project which, from a common sense approach, would be at least one step removed from the act itself (i.e., of actually and/or physically providing for the LWR Project).

In the third paragraph of Provision One, additional language exists that the U.S. and its consortium will make “best efforts”³⁶⁾ to secure a supply contract relating to the LWR Project. From a legal perspective, “best efforts” has little or no substantive significance because no legal obligation is imposed when using such language.³⁷⁾ If the parties intended to invoke legal obligations, then the parties would have simply stated that the U.S. and its consortium “will secure” the conclusion of a supply contract with the D.P.R.K. But once again, no such language exists in this provision.

The overall analysis relating to Article One of the Agreed Framework is that no breaches existed by either the U.S. or the D.P.R.K.

Article Three - This article stipulates the terms and conditions pursuant to the *quid pro quo* between North Korea and the U.S. whereby in exchange for the LWR

33) *Id.*

34) *Id.*

35) *Id.*

36) *Id.*

37) See generally, Konrad Zweigert and Hein Kotz, INTRODUCTION TO COMPARATIVE LAW, 323-324 (3RD ED., Clarendon Press, 1998).

Project and supply contracts orchestrated by the U.S., North Korea would agree to freeze and dismantle North Korea's graphite-moderated reactors and related facilities. Even more sensitive, Article Three discusses the issue of opening up North Korea's nuclear facilities to inspections by the IAEA.³⁸⁾

Regarding IAEA inspections, Article Three states that "throughout the freeze [of the D.P.R.K.'s graphite-moderated facilities], the International Atomic Energy Agency (IAEA) will be allowed to monitor this freeze" and further that the D.P.R.K. would provide "full cooperation" to the IAEA in relation to such inspections. Provision Four, Article Two also creates the IAEA's right to inspections at facilities "not subject to the freeze."

On or about early 2003, North Korea forced all or substantially all IAEA inspectors out of its nuclear facilities and the country. It was unclear exactly what motivated North Korea to make this move. The net effect, however, from a legal standpoint, were allegations against the D.P.R.K. of breaching Article Three of the Agreed Framework. The language reads that the IAEA "will be allowed" (denoting very clear language reflecting a very clear intention of allowing IAEA inspectors with few or no qualifications) as opposed to "will make best efforts" or "will attempt to provide for" IAEA inspections during the freeze period.³⁹⁾

The overall analysis is that the D.P.R.K. can have very little defense against the assertion that it breached Article Three of the Agreed Framework.

(2) Provision Two

Provision Two discusses the status of diplomatic relations between the U.S. and North Korea. No material breaches have occurred regarding this provision.⁴⁰⁾

Issues covered include reducing "barriers to trade and investment," the opening of "liaison" offices, and upgrading of "bilateral relations to the Ambassadorial level." But the legal language surrounding these objectives includes broad-based condition precedents, such as "resolution of consular and other technical issues" or "[a]s progress is made on issues of concern for each side..."⁴¹⁾ Therefore it would

38) See *supra* note 10. See Agreed Framework art. 3.

39) *Id.*

40) See Agreed Framework provision 2.

prove extremely difficult to argue that a material breach occurred under Provision Two of the Agreed Framework.

(3) Provision Three

Provision Three states that both the U.S. and North Korea will “work together for peace and security” for a nuclear-free Korean peninsula.⁴²⁾ The horatory language⁴³⁾ of “work together” acts to set a mere standard or objective with little or no legal obligation.⁴⁴⁾ Notwithstanding this, as of the Agreed Framework’s signing, evidence that both parties are seeking to work together towards “peace and security” are apparent. The most obvious examples are the various rounds of six-way talks in Beijing to resolve the North Korean nuclear proliferation issue.

Article One - Provision Three, Article One, states that the U.S. will provide “formal assurances” to North Korea “against the threat or use of nuclear weapons by the U.S.”⁴⁵⁾ What is not exactly clear from the language is whether such “formal assurances”⁴⁶⁾ must be in written form or whether a mere verbal “formal assurance” would be sufficient to meet the provision. Because the language is silent, interpretations can and have varied. For example, during recent six-way talks in Beijing, the U.S. claimed that they had no intent to invade North Korea.⁴⁷⁾ In return, North Korea demanded that the U.S. put such language on paper, separate from the language in Provision Three, Article One, which the U.S. has yet to do.⁴⁸⁾

41) *Id.*

42) See Agreed Framework provision 3.

43) The use of horatory language, such as “should,” “promote,” and “strives for,” are interpreted by some courts not to have legal significance. Rather, such courts view the use of horatory language as setting forth guidelines or objectives which have the option, but not the legal obligation, of adherence. See generally, *Sei Fujii v. State*, California Reports, Second Series, vol. 38, p. 718 (1952) (holding that the U.N. Charter is not a self-executing treaty because of the existence of horatory language).

44) *Id.*

45) See Agreed Framework provision 3, art. 1.

46) See generally, CNN website, *U.S. Security Pledge for N. Korea*, at <http://edition.cnn.com/2003/ALLPOLITICS/10/10/nkorea/>. (last visited April 9, 2004).

47) *Id.*

48) *Id.*

An additional relevant point is that the “formal assurances” sought by North Korea deal with “nuclear” weapons only, as opposed to non-nuclear (i.e., conventional) weapons. The Agreed Framework appendix adds that such “formal assurances” against the use or threatened use of “nuclear weapons” exist only so long as North Korea remains a “member in good standing of the NPT regime.” Therefore, from a strict interpretation, the U.S. would not be in breach of this provision if (i) the U.S. used or threatened to use nuclear weapons after the D.P.R.K. was no longer in good standing with the NPT regime; or (ii) the U.S. used or threatened to use conventional non-nuclear weapons against the D.P.R.K. Also, the prohibition against the use of “nuclear weapons” applies only to the U.S. and not its allies.⁴⁹⁾ An attack therefore by a U.S. ally, such as the United Kingdom, would not be a breach of this provision under the Agreed Framework, from a strict interpretation, separate from other binding international law agreements.

Provision Four

Article One - Article One states that the D.P.R.K. “will remain a party to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).”⁵⁰⁾ This provision was breached by North Korea on or about late 2002 to early 2003 when the D.P.R.K. expressed its intent to force out IAEA inspectors from its Yongbyon plant and the country. The D.P.R.K. argued that its actions were done because of its belief that some of the IAEA inspectors were intelligence agents.⁵¹⁾ Little evidence was given to support North Korea’s claim.⁵²⁾

Article Two - Article Two, as mentioned earlier, discusses the issue of “ad hoc and routine” IAEA inspections with respect to D.P.R.K. facilities not subject to the freeze.⁵³⁾ This provision therefore was breached at the same time as Provision Four,

49) See Agreed Framework provision 3, art. 1.

50) See Agreed Framework provision 4, art. 1.

51) See CNN website, *North Korea Expelling IAEA Inspectors*, at <http://edition.cnn.com/2002/WORLD/asiapcf/east/12/27/nkorea.expulsions/>. (Last visited, April 9, 2004). The article noted that the U.S. position was that such expelling of IAEA inspectors from the Yongbyon facility was “unacceptable,” and that by doing so, North Korea “was isolating itself from the rest of the world.” *Id.*

52) *Id.*

Article One, on or about late 2002 to early 2003, when the D.P.R.K. forced IAEA inspectors⁵⁴⁾ out of its Yongbyon plant. North Korea made the same argument here as it did for Provision Four, Article One, in claiming that its actions were justified because of its belief that certain IAEA inspectors were acting as intelligence agents.

B. Nuclear Non-Proliferation Treaty (“NPT”)

The Treaty on the Non-Proliferation of Nuclear Weapons (“NPT”) was signed in Washington D.C., London, and Moscow on July 1, 1968, and entered into force on March 5, 1970.⁵⁵⁾ With nearly 190 member states, the NPT is arguably one of the most recognized and adhered to arms control treaties since the World War II.⁵⁶⁾

The main rationale behind discussing the NPT here is to observe what types of rules and regulations were placed on the D.P.R.K. until its early 2003 pull out of the NPT, and to understand the NPT’s significance as it relates to North Korea. The ideal scenario would be for an amicable compromise among the six nations involved in the North Korean nuclear issue and for North Korea to rejoin as a NPT member.⁵⁷⁾

The NPT includes seven main articles, each focusing on related but slightly different issues relating to nuclear non-proliferation.⁵⁸⁾ The following will provide a

53) See Agreed Framework provision 4, art. 2.

54) See Agreed Framework provision 4, art. 1.

See generally, CNN website, North Korea Expelling IAEA Inspectors, at <http://edition.cnn.com/2002/WORLD/asiapcf/east/12/27/nkorea.expulsions/>. (Last visited, April 9, 2004).

55) See generally, NPT. The NPT is a landmark international treaty whose objective is to prevent the spread of nuclear weapons and weapons technology, to promote the peaceful use of nuclear energy and to further the goal of achieving nuclear disarmament. The NPT represents the only binding commitment in a multilateral treaty to the goal of disarmament by the nuclear-weapon states. The NPT was signed in 1968, and entered into force in 1970. A total of 187 parties have joined the Treaty, including the five nuclear-weapon States. More countries have ratified the NPT than any other arms limitation and disarmament agreement, which reflects the treaty’s significance. For more background concerning the NPT and its mission, see U.N. website, <http://www.un.org/Depts/dda/WMD/treaty/>.

56) See *id.*, at U.N. website, <http://www.un.org/Depts/dda/WMD/treaty/>. (last visited April 9, 2004).

57) North Korea first joined the NPT in 1985. See *id.* at U.N. website, <http://www.un.org/Depts/dda/SMD/treaty/>, (First visited April 9, 2004). In January 2003, however, North Korea then announced its intention to withdraw from the NPT.

58) Samuel R. Berger, national security advisor to President Bill Clinton, argues for several amendments to the NPT. See generally, Samuel R. Berger and Flynt Leverett, *Let’s Get Serious About Nuclear Proliferation*, March 3, 2004, Int’l Herald Tribune, at 7. Suggestions include tighter regulation of fuel cycle activities, keeping states being

theoretical analysis for legal arguments relating to possible breaches of the NPT by the D.P.R.K., irrespective of the D.P.R.K.'s announcement of its intent to withdraw from the treaty.

Article One - This provision provides for each NPT state party not to transfer “nuclear weapons or other nuclear explosive devices” to “any recipient,” and further, not to “assist, encourage, or induce” the manufacturing or acquisition of nuclear weapons or “other nuclear explosive devices.”⁵⁹⁾

In this article, a NPT state party would have to provide or help provide, not accept, nuclear weapons to any other “recipient.”⁶⁰⁾ The language here is interesting in that the term “recipient” is extremely broad. Such language could, in theory, include individuals (including “stateless persons”), groups and/or organizations, corporations, as well as states.⁶¹⁾ However, no credible and verifiable evidence yet exists to suggest that North Korea has acted or has planned to act in a way inconsistent with this provision.

Article Two - This provision provides for each NPT state party not to “receive” from “any transferor whatsoever” nuclear weapons or nuclear explosive devices, and further, not to manufacture or “seek or receive any assistance in the manufacture” of such nuclear weapons or nuclear explosive devices.⁶²⁾

In this article, a NPT state party in possible breach would have had to act as the “recipient” of nuclear weapons or nuclear explosive devices, unlike Article One (which covers the instance in which the NPT state party is the provider of such

investigated by the IAEA of its board of governors, and state assistance to others for peaceful nuclear energy, and assurances that spent fuel rods be returned to places of international storage under international inspection. *Id.* Moreover, Mr. Berger suggests making it “illegal” for states to withdraw from the NPT while being investigated. *Id.*

59) See NPT art. 1.

60) One example would be the provision to North Korea of nuclear fuel, centrifuges and one or more warhead designs from a NPT member state. Such an allegation was made by the U.S. on or about March 2004 that Pakistan had given such materials and information to North Korea, in much the same way that Pakistan did with Libya. See David E. Sanger, *CIA Report Widens View of Pakistani Nuclear Link to North Korea*, Int'l Herald Tribune, March 15, 2004, at 3. However, given that Pakistan is not a NPT member, no violation would exist.

61) See Louis Henkin, Richard Pugh, Oscar Schachter, and Hans Smit, *INTERNATIONAL LAW: CASES AND MATERIALS* 930 (3RD ED. 1993).

62) See NPT art. 2.

weapons or devices).⁶³⁾

On February 2004, the D.P.R.K. was accused of receiving nuclear technology from Pakistan, which may constitute a possible violation of article two.⁶⁴⁾

Pakistan was charged with sending C-130 military cargo aircraft to North Korea on or about July 2002. The allegation was confirmed in part and denied in part. Specifically, Pakistani officials confirmed that such a flight did occur, but claimed that “no nuclear technology” was on board said flight. Pakistani officials were fervent in their denials, further stating that such allegations were “utter nonsense.”⁶⁵⁾

Pakistani’s top nuclear scientist, Abdul Qadeer Khan, was also documented by U.S. intelligence to have traveled to the United Arab Emirates, Malaysia, Libya, Iran and North Korea. During such trips, Mr. Khan was alleged to have had details of meetings with black market figures, documents, and bank account information.⁶⁶⁾

Because these issues are unconfirmed, and no other undisputed evidence exists to suggest that North Korea acted as receiver of nuclear weapons or devices, no strong argument can be made that the D.P.R.K. breached this article.

Article Three - This provision provides for, among other things, the implementation of IAEA “safeguards” for purposes of verifying the agreed upon terms of the NPT articles and preventing diversion from nuclear peaceful usage to nuclear weapons or related devices.⁶⁷⁾ Another feature of this provision provides that parties shall not provide “special fissionable material” to any non-nuclear-weapon state unless such material can be subject to the verifications described in this provision.⁶⁸⁾

On or about late December 2002, North Korea stated its intent to expel all IAEA inspectors within its Yongbyon facility and its territorial borders, and later fulfilled their promise to do so. As a result, no IAEA “safeguards” currently exist within the

63) See *id.*

64) See generally, David E. Sanger, *CIA Report Widens View of Pakistani Nuclear Link to North Korea*, Int’l Herald Tribune, March 15, 2004 (discussing the alleged links between Pakistan’s Khan Laboratories with North Korea).

65) *Id.*

66) *Id.*

67) See NPT art. 3.

68) *Id.*

D.P.R.K. Thus, the D.P.R.K. is in breach of this provision.

Article Four - This provision reiterates the parties' "inalienable right" to pursue research and use of nuclear energy for "peaceful purposes," so long as such actions are consistent with Articles One and Two herein.⁶⁹⁾ This provision, unlike most others, is a positive right rather than a negative restriction in terms of setting forth the boundaries of permissible (positive) and impermissible (negative) actions and resources related to nuclear technology.

The D.P.R.K. could argue that the Yongbyon nuclear facility is in use for "peaceful purposes" and is therefore in complete conformity with NPT Article Four. However, two rebuttals challenge such an assertion. First, evidence to the contrary, in the form of U.S. intelligence from 1993-94, that culminated into the 1994 Agreed Framework. Second, the D.P.R.K.'s confession on or about April 2003 that it possessed nuclear capabilities.

Article Five - This provision acts to extend Article Four by stating that any benefits gained from "peaceful applications" of nuclear technology be made available to parties on a nondiscriminatory basis.⁷⁰⁾ The same aforementioned arguments and rebuttals relating to Article Four exist for Article Five.

Article Six - This provision holds that each of the parties must enter into negotiations in "good faith"⁷¹⁾ relating to the cessation of nuclear arms proliferation.⁷²⁾ The issue of good faith is a commonly held concept under international law and many municipal law jurisdictions. However, both the U.S. and the D.P.R.K. can be held to be in violation of this provision.

69) See NPT art. 4.

70) See NPT art. 5.

71) Regarding good faith intentions to enter into and fulfil international agreements, see generally, Oscar Schachter, THE TWILIGHT EXISTENCE OF NONBINDING INTERNATIONAL AGREEMENTS, 71 A.J.I.L. 296 (1977) in Louis Henkin, Richard Pugh, Oscar Schachter, and Hans Smit, INTERNATIONAL LAW: CASES AND MATERIALS 426 (3RD ED. 1993) [HEREINAFTER HENKIN]. The author states that a common consensus exists among international lawyers that international agreements are not legally binding unless the parties intend it to be so. *Id.* And if such intent does not exist, then the agreement will be considered not to be legally binding. *Id.*

72) See NPT art. 6.

Regarding a U.S. breach, the argument can be made that the U.S. is using the recent rounds of six-way talks as a mere formality so as to appear less unilateralist and therefore attract more international community support if and when the U.S. does decide to launch a pre-emptive military first-strike in North Korea. For example, James Kelly (U.S. representative to the most recent round of six-way talks held in Beijing, China) stated the U.S. position for the “complete, irreversible, and verifiable” disarmament of North Korea’s nuclear capabilities.⁷³⁾

This language denotes a relatively high standard for North Korea to meet in terms of its exact and extreme language, and also in that the requirement is a three-step process of nuclear weapons dismantlement verification. Further, the U.S. may have stated this high standard as their official position with the knowledge that North Korea would probably never accede to such terms. Given this, therefore, the intent may not have constituted “good faith” as it relates to this article.

Regarding a D.P.R.K. breach, North Korea may want to conclude a formal agreement with the U.S., and possibly other member states involved in the six-way talks. However, the issue is exactly when North Korea would want to enter into such an agreement. North Korea very clearly wants to maximize what it receives for what it has to offer on the international bargaining table. Currently, the D.P.R.K. has the claim of a “nuclear deterrent”⁷⁴⁾ and the perception by many in the international community, including the many policy “hawks”⁷⁵⁾ within the current Bush

73) See generally, Undersecretary for Arms Control and International Security James R. Bolton, Address at the American Spectator Dinner, *The Continuing Threat of Weapons of Mass Destruction* (November 12, 2003) (restating the U.S. position of a “complete, irreversible, and verifiable” nuclear program dismantlement by the D.P.R.K.).

74) See BBC News website, *N. Korea Shows ‘Nuclear Deterrent’* (January 10, 2004), at <http://news.bbc.co.uk/2/hi/asia-pacific/3384815.stm>. (last visited April 9, 2004). The article noted how North Korean officials attempted to provide evidence of its claimed “nuclear deterrent” to a designate U.S. delegation, headed by Stanford University Professor Emeritus John Lewis. *Id.* The apparent consensus view of the U.S. delegation was that it was unclear whether North Korea had actually developed a nuclear deterrent or not.

75) The term “hawks” is a colloquial term for policymakers advocating the use of force, rather than diplomatic channels, in relation to dispute resolution methods, while the converse term is “dove.” Further, a perception exists that the only prominent “dove” amongst the current Bush administration is Secretary of State Colin Powell. This may seem ironic in that Secretary Powell is the only cabinet member to have substantive on-the-ground military combat experience (during the Vietnam War), in addition to being a military general, and Chairman of the Joint Chiefs of Staff under the first Bush administration as well as under the Clinton administration.

administration, that North Korea may be willing and able to use such a nuclear deterrent against South Korea, Japan, and even parts of the United States.⁷⁶⁾

The North Korea strategy seems to be that stalling such talks for as long as possible will maximize the financial aid, security assurances, and diplomatic leverage that it can receive for its playing cards of its claimed nuclear deterrent.⁷⁷⁾ Therefore, North Korea may also not be entering into each dialogue, including the six-party talks, based on the principles of “good faith” per this provision and international law.⁷⁸⁾

III. Codified International Law

A. Charter Provisions of the United Nations (“Charter”)

Article 2(4) of the United Nations Charter⁷⁹⁾ requires states to refrain from the

76) See generally, David E. Sanger, *CIA Report Widens View of Pakistani Nuclear Link to North Korea*, Int’l Herald Tribune, March 15, 2004, at 3. Evidence in a brief by U.S. national security advisor, Condoleezza Rice, on March 4 and 5, 2004, was that North Korean scientists worked at the Khan Laboratories in the late 1990s in some sort of *quid pro quo* arrangement such that North Korea could receive much needed nuclear technology from Pakistan.

77) See David E. Sanger, *Koreans Showed Nuclear Weapons*, April 15, 2004, Int’l Herald Tribune, at 1. In the most concrete example of North Korea actually possessing nuclear capabilities, Abdul Qadeer Khan, the Pakistani scientist who sold nuclear technology during a trip to North Korea five years ago, Khan has claimed that he was taken to a secret underground nuclear plant and shown three nuclear devices, according to U.S. officials who were briefed by Pakistani authorities. *Id.* Further, Khan also informed Pakistani officials that he began dealing with North Korean relating to an alternative method of producing nuclear weapons through the enrichment of uranium, rather than plutonium, since the early 1980s. *Id.* See also generally, Jie-ho Choi, *Seoul Shies Over Nuclear Claim*, JoongAng Daily, April 15, 2004, at 1. See also generally, Staff Writer, *Unveiling the North’s Weapons*, JoongAng Daily, April 15, 2004, at 7.

78) NPT article provisions seven through eleven merely address the procedural issues relating to certain aspects of signing and executing the NPT. Such articles are therefore not directly relevant to the issue of military first-strike justifications, and thus, will not be discussed in this paper.

79) The original U.N. Charter did not explicitly define what constituted “acts of aggression.” However, in 1967, the U.N. General Assembly made efforts to define aggression, and established a Special Committee on the Question of Defining Aggression. See G.A.Res. 2330. The Committee came to a consensus in 1974 and recommended it for General Assembly adoption. In particular, Article 3 includes the following, 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

threat or use of force against the territorial integrity or political independence of a state, or in any other manner inconsistent with the purposes of the United Nations.⁸⁰⁾ Given the language, one could argue that Article 2(4) justifies the preservation of a state's "territorial integrity" vis-a-vis a need to act, even forcibly, in the spirit of preserving humanitarian interests.⁸¹⁾ However, most jurists would not agree with this argument.⁸²⁾ 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 that deny fundamental human rights and "shock the conscience" of humankind.⁸³⁾

Pursuant to Article 51, states may only legally resort to force in the interest of individual or collective self-defense.⁸⁴⁾ Under Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties, the prohibition in Article 2(4) of the Charter is

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."

80) U.N. CHARTER, art. 2, para. 4.

81) The argument for preserving humanitarian interests can go the other, in the form of creating an argument for intervening within a state's affairs (a piercing of the state doctrine). For example, in early March 2004, the U.S. accused Pyongyang of illegal narcotics trading internationally. See Jie-ho Choi, *U.S. Accuses Pyeongyang of Worldwide Drug Dealing*, JoongAng Daily, March 5, 2004, at 1. The U.S. further stated that such involvement in the international narcotics trade industry was "highly likely," and further asserted, from the testimony of an unidentified North Korean defector, that poppy cultivation for heroin production was under D.P.R.K. government control. *Id.*

82) See Henkin at 930.

83) *Id.* Moreover, the issue of humanitarian intervention pursuant to the issue of state responsibility began in the 17th century by writers such as Hugo Grotius (1583-1645) 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. article 2(4), led to the 1992 U.N. 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 Ray August, *Public International Law: Text, Cases, and Readings* 251 (Prentice Hall, 1995).

84) While Article 51 states that "Nothing 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....", it also adds the important proviso "... until the Security Council has taken measures necessary to maintain international peace and security."

part of *jus cogens*, a principle from which no derogation is permitted, and is often reflected in the drafting of international treaties. Essentially, the U.N. 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 U.N. Charter provisions, however, exists in Article 2(7), which states, “Nothing contained in the present [U.N.] Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State.”⁸⁵⁾ In effect, Article 2(7) allows for added deference to states for acts within their territorial borders.⁸⁶⁾

Under Chapter VII, Article 39, the U.N. Security Council is responsible for determining threats to international peace, breaches of the peace or acts of aggression, and under Article 42 the Security Council - not individual Member States - is empowered to authorize a response.⁸⁷⁾ 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. The prohibition against intervention was embodied in General Assembly Resolution 2625, as one of the “Principles of International Law Concerning Friendly Relations Among States.” Further confirmation can be found in the rulings of the International Court of Justice(ICJ). In the Corfu Channel Case,⁸⁸⁾ the ICJ denounced any false right to

85) In addition to U.N. 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.”

86) 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.” 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.

87) See U.N. Charter art. 39, “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.”

intervention in international law; whereas in *Nicaragua v. U.S.*⁸⁹⁾, the court held that “the principle of non-intervention is an integral part of customary international law.”⁹⁰⁾

International law, however, does outline some conditions under which military intervention is permitted. Article 41 of the U.N. Charter allows the isolation of an aggressor state in economic, diplomatic and political terms and, (under Article 42), if such measures prove inadequate, military action to give effect to Security Council decisions.⁹¹⁾

Article 51, relating to the pre-emptive use of force as self-defense⁹²⁾, states that “Nothing 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.” The requisite standard, under Article 51, is that military self-defense is triggered only upon the fact that an “armed attack occurs”

88) See *Corfu Channel (U.K. v. Albania)*, 1949 I.C.J. 4 (1949).

89) See *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States (Merits))*, 1986 I.C.J. 14 (1986).

90) In the *Corfu Channel Case (United Kingdom v. Albania)*, the ICJ stated, “International Court of Justice 1949 The Court cannot accept these lines of defence. It can only regard the alleged right of intervention as the manifestation of a policy of force which cannot find a place in international law.” See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States (Merits))* International Court of Justice 1986, in Henkin at 82-86.

91) See U.N. CHARTER, art. 41, “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.* at art. 42, “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.”

92) In *THE CAROLINE* case, the court held that self-defense should be confined to cases where the “necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation.” See MOORE, *DIGEST OF INTERNATIONAL LAW* 412 (1906). In the case, the *Caroline* (a small steamer ship) was boarded by British armed forces from the Canadian side, while on the American side of the Niagara River. The *Caroline* was destroyed and several were killed and wounded as a result of the British contingent’s actions. Lord Palmerston of Britain took responsibility for the actions, but argued that the *Caroline*’s destruction was a public act of force in self-defense by persons in the British service. *Id.*

against a state.⁹³⁾ That is, from a legal purview, first the “armed attack” criteria must be satisfied, and second, the “occurs” criteria must be satisfied. If both parts are met, then the use of force will mostly likely be held not to be in violation of international law. However, if either or both parts are not met, then the use of force will most likely be held not to satisfy Article 51, and thus, be viewed as in 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 attack⁹⁴⁾ by a hypothetical state⁹⁵⁾ (“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 para-military attack by State A against State B’s military forces and/or civilians.⁹⁶⁾ 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.⁹⁷⁾

93) Despite the “armed attack” requirement pursuant to U.N. 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 September 11 attacks on the World Trade Center and Pentagon, U.S. President George W. Bush claimed, “This is the time for self-defense,” and further stated, “We have made our decision to punish whoever harbors terrorists.” See Woodward at 31.

94) 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.

95) The definition of “state” by the Third Restatement, pursuant to § 201 is “an 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 Henkin at 242

96) See *Nicaragua v. United States* (MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA), 1986 I.C.J. 14, 103-123. In this case, the ICJ held 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...” *Id.*

97) As one example of how an international tribunal may interpret this, see generally, *Tel-Oren v. Libyan American Republic*, F.2d, vol. 726, p. 774 (1984) (relating to the issue of the Palestine Liberation Organization (“PLO”), and the status of individuals as not normally being subject to the rights and duties required under international law). See also *Matimak Trading Co. v. Khalily and D.A.Y. Kids Sportswear Inc.*, F.3d. vol. 118, p. 76 (1997) (holding that Hong Kong is not a “state” and therefore the appellant being a Hong Kong incorporated entity was deemed 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).

Regarding the second part of the 2-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 pre-emptive military offensive measures based on mere conjecture, theory, suspicion, and/or unsubstantiated, rumored⁹⁸⁾, misleading, and/or false national intelligence.

B. Other Codified Sources of International Law

The 1928 Kellogg-Briand Pact⁹⁹⁾ 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.¹⁰⁰⁾

98) For example, on April 14, 1993, a report existed 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 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, and further, that an assassination attempt equates to an “armed attack,” which may not be in conformity with the plain meaning of U.N. Article 51.

99) As of 1993, 66 states were parties to the Kellogg-Briand Pact. See 46 STAT. 2343, 94 L.N.T.S. 57 (AUGUST 27, 1928). 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.”

100) Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy. Signed at Paris, August 27, 1928 (*a.k.a.* the Treaty of Paris). The Pact noted that war was to be renounced except in the case of any signatory Power which continued to promote its national interests in such a manner, and which was thereby denied the protection furnished by the Treaty. Article 10 of the Covenant of the League of Nations notes, “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.” Articles 12, 13 and 15 provided alternative means for peaceful settlement and procedures to be followed before war could be considered. According to Article 16 of the Covenant of the League of nations, “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

The Nuremberg trials also established a limit to state sovereignty - states could no longer do as they wished with their citizens, and the U.N. Charter Preamble reaffirms faith in fundamental human rights without discrimination. This is also reflected in the wording of Articles 1(3), 55 and 56. 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 International Court of Justice, holds to generally accepted values which oblige all states, even those which have few links with the international community, to “punish and prevent genocide.”¹⁰¹⁾ Thus the main legal justifications for an American pre-emptive military strike against North Korea available under international law are ¹⁰²⁾:

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 covenants of the League.”

101) See Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 A (III), December 9, 1948 (entered into force on January 12, 1951).

102) One additional legal argument justifying armed intervention relates to the promotion of 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. Article 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 William Reisman of Yale Law School argue that Article 2(4) must be used to increase opportunities for self-determination. See William Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 A.J.I.L. 642, 643-45 (1984). On the other hand, Professor Louis Henkin 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.” See Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 A.J.I.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

1. Security Council Authorized Action
2. Self-Defense
3. Human Rights
4. Genocide

Among the four justifications¹⁰³⁾, the international community views the self-defense and genocide positions with the least skepticism. Regarding the other two justifications listed, at present, no Security Council resolution has passed (Justification One) with regard to the North Korean issue. The existence of human rights violations¹⁰⁴⁾ has been asserted but because of the D.P.R.K.'s secrecy and lack of transparency, no confirmation relating to gross human rights violations¹⁰⁵⁾ has

in a civil war. An example of an application of this third position is demonstrated in *U.S. v. Nicaragua* (1984 I.C.J. 392), whereby the ICJ concluded that the principle of non-intervention is part of customary international law. See also, Declaration of International Law Friendly Relations and Cooperation Among States, U.N.G.A. Res. 2625 (xxv), 25 U.S. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of the States, U.N.G.A. Res. 2131 (xx) (1966).

103) Other justifications for military intervention include the Reagan Doctrine and the Breshnev Doctrine. The Reagan Doctrine, named after former U.S. President Ronald Reagan (1980-1988), 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 U.S. See Henkin, 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. See Henkin, at 939.

104) See generally, *Filartiga v. Pena-Irala*, F.2d., vol. 630, p. 876 (1980) (whereby, the court held that "international law confers fundamental rights upon all people vis-à-vis their own governments" and that "the right to be free from torture is now among them." *Id.* at 885. Further, the court concluded that "official torture violates international law even if practiced on a state's own citizens." *Id.* However, later court decisions held that the international human rights doctrine should be constrained to instances of : "basic human rights such 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." See *De Sanchez v. Banco Central de Nicaragua*, F.2d, vol. 770, p. 1385 (1985). In the *De Sanchez* case, the court reiterated the traditional view of international law, in that "international law does not generally govern disputes between a state and its own nationals." *Id.*

105) Although no sustained cases of gross human rights violations within the D.P.R.K. 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 Staff Reporter, *U.N. Considers Looking into Rights in North*, JoongAng Daily, April 8, 2004, at 1. Moreover, the European Union (EU) soon plans to bring forth a resolution before the U.N. Human Rights Commission requesting an investigator to review the activities within North Korean political camps. The new resolution contains language much tougher than a similar resolution brought forth last year which used the words "systemic, widespread and grave," when referring to North Korean human

been adequately sustained (Justification Three).¹⁰⁶⁾ Similarly, no substantiated and sustained acts of genocide have been evidenced for the same reasons (Justification Four).¹⁰⁷⁾

As a note, the mere breach of an international agreement is not viewed as sufficient justification, in and of itself, for the use of force¹⁰⁸⁾ under international law¹⁰⁹⁾. Thus, even assuming the aforementioned provisions of the Agreed

rights violations. *Id.* A key element of the resolution is language to appoint a special rapporteur to monitor human rights activity in the D.P.R.K. *Id.*

106) Examples of international law agreements relating to human rights include The Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights (along with its Optional Protocol), and the International Covenant on Economic, Social, and Cultural Rights (collectively, the International Bill of Rights). Typical examples of human rights freedoms include the provision of torture, slavery, racial discrimination, and gender discrimination. See also generally U.N. Articles 55 and 56.

107) Article II of the Convention on the Prevention and Punishment of Genocide defines the crime as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting upon the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (c) Imposing measures intended to prevent births within the group;
- (d) Forcibly transferring children of the group to another group.

However, legal positivists sometimes reject such conventions and covenants, due to the fact that General Assembly resolutions are only considered “advisory” rather than “binding” upon U.N. members. The positivist approach to international law focuses almost exclusively upon codified law - what is actually written. The reasoning behind this is that states are sovereign, and as such are above the law, except where they have consented to be bound by it. Thus, “[t]he essential characteristic of the positivist approach to international rules is its insistence that such rules are binding only if they are grounded in state consent.” See R.J. BECK, A.C.A. AREND & R.D. VANDER LUGT, *INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW* 56 (1996). [hereinafter BECK]. Hence, “Legal Positivists seek fundamentally to ascertain what the law is, rather than what it *ought* to be. *Id.* They are also united in rejecting the Naturalist premise that law can be rationally derived from some metaphysical source.” In order to move beyond this positivist position, we must accept alternative sources of legal justification. *Id.* This is possible through an examination of customary international law and generally established international norms and rules of behavior that may be considered enabling or binding even if not enshrined in a particular written document.

108) Distinct and separate from the use of force, the U.S. may consider the option of retaliation, that is, measures that are viewed as unfriendly but not counter to international law. Examples of retaliation 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. See Henkin, at 870.

Framework and Non-Proliferation Treaty were breached by North Korea, no general rule of international law exists to justify a pre-emptive military strike.¹¹⁰⁾

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 U.N. article 51. But to date, no armed attack in the traditional sense has occurred by North Korea against the United States. What has occurred are verbal exchanges between the two countries, especially relating to nuclear non-proliferation, testing of missiles (albeit towards 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. Each incident viewed separately cannot reasonably be construed to constitute an “armed attack.” And even viewed collectively, the summation of all such events would most likely not constitute an “armed attack.” Further, because the term “occurs” is in present form, 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.

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”.¹¹¹⁾ This ruling is

109) See U.N. CHARTER art. 2(3), “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 U.N. CHARTER art. 2(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.” See also DECLARATION ON THE INADMISSIBILITY OF INTERVENTION INTO THE DOMESTIC AFFAIRS OF STATES (1965), art. 1, “No State has the right to intervene, directly or indirectly...in the internal or external affairs of any other State.”

110) 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 pre-emptive military action may further such anti-U.S. sentiment among the international community.

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

reiterated in Article 38 of the Statute of the International Court of Justice, 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.”¹¹²⁾

Further, in *Nicaragua v. United States*, clarity was provided relating to international customary law and self-defense. There, the ICJ held that “At 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 victim of an armed attack.”¹¹³⁾

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).

Even assuming the above, a duty exists upon an incumbent upon the intervening state to demonstrate that a clearly superior outcome (in normative terms) would be produced through intervention than what 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”¹¹⁴⁾ conclusion of a second Korean War. 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

112) See generally, I.C.J. STATUTE art. 38 (entered into force on June 26, 1945).

113) See *supra* note 91.

114) The term “successful” denotes the U.S. reaching its military objective of either nuclear non-proliferation, and possibly regime change, in the D.P.R.K.

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.¹¹⁵⁾

V. Conclusion

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

This paper explains that the legal arguments for pre-emption, including the self-defense argument, as it relates to the discussed sources of international law, lacks justification. 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.

¹¹⁵⁾ See generally, HOBBS, LEVIATHAN OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIAICAL AND CIVIL (OXFORD: BASIL BLACKWELL 1947).