

# **The legality of the use of force by the US against North Korea; in consideration of events on and up to 5<sup>th</sup> December 2017**

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## **Abstract**

The United States has considered the use of military force against North Korea in response to ongoing threats of nuclear attack. International law, stemming from the United Nations prohibits such action save for narrowly defined circumstances. This paper explores the web of customary and black letter law determining the current position of the United States and whether the use of military force would be considered a breach of the Charter of the United Nations (the Charter). It concludes that, in consideration of events up until 5 December 2017, the United States does not fall within the exception to the general prohibition on force due to the absence of sufficient action by North Korea which could be interpreted as an attack for the purposes of the Charter. Hypothetical situations are drawn on throughout the analysis to identify events which may alter the United States' position against North Korea.

## **Key words**

*use of force, self-defence, armed attack, prohibition of force, proportionality, necessity,*

## I. Introduction

How has North Korea arrived at its unique and perilous place in the world today?

In 1985 North Korea ratified the multilateral *Non-Proliferation of Nuclear Weapons Treaty 1968*<sup>1</sup> (NPT) as a non-nuclear state in which it states '[North Korea] undertake not to receive...nuclear weapons...manufacture or otherwise acquire nuclear weapons'.<sup>2</sup> Throughout its accession to the NPT North Korea's nuclear weapon status was unclear. By 2005 North Korea had withdrawn from the treaty announcing that it possessed nuclear weapons for 'self-defence to cope with the USA's ... policy to stifle the Democratic People's Republic of Korea'.<sup>3</sup>

As Member States to the United Nations (UN) both the US and North Korea are bound by international law and their declarations accepting the International Court of Justice's (ICJ) compulsory jurisdiction under Art.36 of the Statute of the Court.<sup>4</sup> By the powers invested in the UN Charter (the Charter),<sup>5</sup> the UN is authorised to do what is necessary to 'protect international peace and security'.<sup>6</sup> The United Nations Security Council (UNSC),<sup>7</sup> shall 'determine the existence of any threat to peace'<sup>8</sup> and is authorised to impose economic sanctions against States that violate international law.<sup>9</sup>

In the absence of a peace treaty to end the Korean War<sup>10</sup> theoretically the war has not formally ended. This has fuelled years of ongoing bellicose language directed at the US by North Korea.<sup>11</sup> The North Korean Foreign Minister recently threatened to 'strike a merciless blow at the heart of the US with our powerful nuclear hammer'.<sup>12</sup>

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<sup>1</sup> Non-Proliferation of Nuclear Weapons Treaty (opened for signature 1968) 729 UNTS 161

<sup>2</sup> *ibid* Art.II

<sup>3</sup> Caroline Mortimer, 'UN Talks On Unilaterally Banning Nuclear Weapons' (*The Independent*, 2017) <<http://www.independent.co.uk/news/world/americas/us-boycott-nuclear-weapons-bans-unilateral-un-talks-donald-trump-rex-tillerson-russia-a7653351.html>> accessed 4 January 2018

<sup>4</sup> United Nations, Statute of the International Court of Justice, (entered into force 18<sup>th</sup> April 1946)

<sup>5</sup> United Nations, Charter of the United Nations (entered into force 24<sup>th</sup> October 1945) I UNTX XVI

<sup>6</sup> *ibid* Preamble

<sup>7</sup> Charter UN (n 5) Chapter V

<sup>8</sup> Charter UN (n 5) Art.39

<sup>9</sup> Charter UN (n 5) Chapter IV

<sup>10</sup> Only a cease fire exists in the form of an Armistice

<sup>11</sup> Clark Mindock, 'Trump's Defence Secretary Has Warned Of 'Catastrophe' During A Visit To The North Korean Border' (*The Independent*, 2017) <<http://www.independent.co.uk/news/world/americas/us-politics/north-korea-latest-news-nuclear-attack-catastrophe-warning-matts-trump-defence-sec-a8024141.html>> accessed 29 December 2017

<sup>12</sup> Zachary Cohen and Barbara Starr, 'North Korea Threatens Nuclear Strike On US' (*CNN*, 2017) <<http://edition.cnn.com/2017/07/25/politics/north-korea-threatens-nuclear-strike-us/index.html>> accessed 20 December 2017

The threats from North Korea are increasingly credible with the unexpected rapid developments in their nuclear weapons capabilities.<sup>13</sup> Throughout 2017 North Korea has boosted its weapons programme and is now in possession of Intercontinental Ballistic Missiles (ICBM) allegedly capable of reaching mainland US.<sup>14</sup> Despite thoughts that North Korea lacked the sophistication to make nuclear warheads, Pyongyang announced that it has successfully tested a miniaturised hydrogen bomb capable of fitting on its ICBM.<sup>15</sup>

In response to North Korea's engagement in a nuclear weapons programme, in an attempt to persuade, the North Korean Leader, Kim Jong Un to negotiate a disarmament, the UN has passed a number of sanctions such as Security Council Resolution 2375<sup>16</sup> limiting crude oil and petroleum, Security Council Resolution 2371<sup>17</sup> banning all exports of coal and iron, and Security Council Resolution 2270<sup>18</sup> banning the exports of materials such as gold and vanadium.

Whilst Kim Jong Un declines to disarm North Korea, in the US Congress has announced that 'any use of nuclear weapons by the North will be met by a massive, effective and overwhelming military response by the USA'.<sup>19</sup>

In order to use force against North Korea the US will need to consider *jus ad bellum*, a set of conditions under which States may resort to war lawfully.<sup>20</sup> It is necessary to consider the prohibitions on force and the exceptions which may be available to the US.

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<sup>13</sup> Rachel Roberts, 'War between US and North Korea 'increasingly likely every day', warns Trump's National Security chief' (*The Independent*, 2017) <<http://www.independent.co.uk/news/world/asia/war-north-korea-us-increasing-every-day-hr-mcmaster-a8089036.html>> accessed 29 December 2017

<sup>14</sup> Anna Fifield, 'North Korea's Latest Missile Much More Technologically Advanced Than Predecessors, Experts Warn' (*The Independent*, 2017) <<http://www.independent.co.uk/news/world/asia/north-korea-crisis-latest-new-missile-advanced-hwasong-15-kim-jong-un-pyongyang-a8086156.html>> accessed 29 December 2017

<sup>15</sup> BBC, 'North Korea: Does This Mean War?' (*BBC News*, 2017) <<http://www.bbc.co.uk/news/world-asia-41150291>> accessed 29 December 2017

<sup>16</sup> UNSC Res 2375 (11<sup>th</sup> September 2017) UN Doc S/Res/2375

<sup>17</sup> UNSC Res 2371 (5<sup>th</sup> August 2017) UN Doc S/Res/2371

<sup>18</sup> UNSC Res 2270 (2<sup>nd</sup> March 2016) UN Doc S/Res/2270

<sup>19</sup> 'National Security - Cnnpolitics' (*CNN*, 2017) <<http://edition.cnn.com/specials/politics/us-security>> accessed 29 December 2017

<sup>20</sup> Jeremy B White, 'Top US General Says He Would Resist Illegal Nuclear Strike Order From Donald Trump' (*The Independent*, 2017) <<http://www.independent.co.uk/news/world/americas/us-politics/donald-trump-nuclear-war-strike-illegal-resist-general-hyten-north-korea-iran-air-force-military-a8063156.html>> accessed 30 December 2017

## II. The general prohibition on the use of force

Historically there was no objective legal test to determine a State's right to use force. The US could rely on their sovereign right to resort to war, a development of the earlier just war doctrine.<sup>21</sup> International law regulated the conduct of war, *ius in bello*<sup>22</sup> but did not interfere with the sovereign right to pursue it. By the time the Covenant of the League of Nations (the Covenant)<sup>23</sup> was introduced military force used for a specific purpose, such as self-defence or reprisal was identified as *force short of war* and was not subjected to the procedural restraints introduced by the Covenant. Thus pre-1945 the US would have been able to rely on their sovereign right to use force against North Korea; either in self-defence in response to the threats, or by reprisal in response to the illegal weapons testing subject to principles of proportionality in the *Naulilaa Arbitration (Portugal v Germany)*.<sup>24</sup> On 25 April 1945, restrictions were imposed on this sovereign right at the Sans Francisco Conference:

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<sup>25</sup>

The UN Charter introduces a more robust prohibition of force 'to save succeeding generations from the scourge of war',<sup>26</sup> prima facie prohibiting the US from using force against North Korea. The principle of Art.2(4) of the UN Charter has been reaffirmed by the UN General Assembly (UNGA); 'No State ... has the right to intervene, directly or indirectly ... in the internal or external affairs of any other State'<sup>27</sup> whilst judicially the prohibition has been equated with *jus cogens* in *Nicaragua v USA*.<sup>28</sup> UN Member States, including the US have demonstrated acceptance of the ban on using force. In Iraq's invasion of Kuwait and the US led invasion of Iraq the States using violence never claimed that all uses of force is lawful.

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<sup>21</sup> developed by St Augustine and Grotius

<sup>22</sup> Which considers humanitarian laws seeking to limit suffering

<sup>23</sup> Covenant of the League of Nations (entered into force 10<sup>th</sup> January 1920) 1 LNTS IXI

<sup>24</sup> (1928) 2 RIAA 1012

<sup>25</sup> Charter UN (n 5) Art.2(4)

<sup>26</sup> Charter UN (n 5) Preamble

<sup>27</sup> UNGA, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (24 October 1970) A/RES/2625(XXV)

<sup>28</sup> Military and Paramilitary Activities In and Against Nicaragua Case (*Nicaragua v United States of America*) ICJ [1986]

The term ‘force’ in Art.2(4) has been broadened to encompass a variety of unconventional methods, such as the illegal occupation of land, *Congo v Uganda*.<sup>29</sup> Broadening to incorporate different methods of force strengthens the prohibition of the use of force helping to advance the UN Charter and its purposes. It would be unusual for the Charter to convey the same weaknesses as its failed predecessor, *General Treaty for the Renunciation of War* which was only successful in prohibiting war; ‘[signatories] condemn recourse to war for the solution of international controversies...’.<sup>30</sup>

The principles of jurisdiction flowing from the *Lotus Case*<sup>31</sup> further protect North Korea from US intervention, *par in parem non habet imperium*. ‘[T]he first and foremost restriction imposed ... upon a state is that it may not exercise its power...in the territory of another state’,<sup>32</sup> thus Kim Jong Un can exercise jurisdiction freely within the isolated walls of North Korea, maintaining the Kim-regime free from any lawful interference by the US. Though the use of military force to achieve US-goals is not a foreign concept.

Both North Korea and the US are recognised as sovereign States,<sup>33</sup> although victory in the Cold War made the US the hegemon in a unipolar world. As the global superpower and a permanent member of the UNSC, America is arguably *hierarchically superior* to other States. Historically it has abused its high ranking position to engineer changes in States whilst blocking any potential sanctions. The *American Comprehensive Anti-Apartheid Act 1986*<sup>34</sup> made a significant contribution towards ending the South African system of apartheid. Demonstrating the effects doctrine, the US imposed sanctions against South Africa which would not be lifted until steps were taken towards meeting the preconditions of the Act. The Grenada invasion was masked by a mission to rescue nationals when in reality the mission aimed to force a change in a Marxist government. Finally in *Nicaragua*<sup>35</sup> the US was found in violation of international law when it supported the Contras in their rebellion against the Nicaraguan Government. Controversially, as a permanent member of UNSC the US was able to block any sanctions being imposed upon it. Considering the above, one could suggest that if the US did resort to

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<sup>29</sup> Armed Activities on the Territory of Congo (*Democratic Republic of Congo v Uganda*) Judgement ICJ [2005] 168

<sup>30</sup> League of Nations, General Treaty for the Renunciation of War (opened for signature 27<sup>th</sup> August 1927) XCIV LNTS 1-4

<sup>31</sup> The Lotus Case (France v Turkey) (1927) P.C.I.J. (ser. A) No. 10

<sup>32</sup> *ibid*

<sup>33</sup> Montevideo Convention (26<sup>th</sup> December 1934) 165 LNTS 19; 49 Stat 3097

<sup>34</sup> Comprehensive Anti-Apartheid Act 1986 22 USC Foreign Relations and Intercourse

<sup>35</sup> Nicaragua (n 28)

aggressive<sup>36</sup> war against North Korea in violation of Art.2(4), it may be left formally unpunished.

Having explored the history and the various ways the US has managed to disguise military action so as not to violate the terms of the UN Charter, it is necessary to consider the formal exceptions to the general prohibition on force. Academics such as Brownlie in his own book; *International Law and the Use of Force by States*<sup>37</sup> proposes that Article 2(4) only allows two lawful exceptions to the absolute prohibition; self-defence under Art.51 of the UN Charter and Security Council authorisation of military action under Chapter VII

### **III. Security Council authorisation of military action under chapter VII**

The US could rely on UNSC authorisation of military action to use armed force against North Korea. ‘The Security Council ... may take action by air, sea or land forces as may be necessary to maintain or restore international peace’.<sup>38</sup> If the UNSC deems that the ‘continuance of the dispute is ... likely to endanger international peace...it shall decide whether to take action under Article 36’.<sup>39</sup> In order to pass a UNSC resolution ‘an affirmative vote of nine members including the concurring votes of the permanent members’<sup>40</sup> needs to be achieved. This means that neither of the five permanent members of the UNSC can veto authorisation for it to go ahead. This in itself is an issue for the US, when States such as Russia/China have socio-political interests in the maintenance of peace in North Korea.

According to a 2014 UN Human Rights Committee resolution, the North Korean regime ‘inflicts crimes against humanity on its 25 million citizens’<sup>41</sup> One might argue that if the US needed *any purpose* to use force against North Korea, humanitarian intervention could present a viable option. The *Legality of the Use of Force Case*<sup>42</sup> set out two principles, one of which requires that the intervention be authorised by a competent international organisation (UNSC), which as discussed above presents a hurdle for the US.

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<sup>36</sup> UNGA Definition on Aggression (14 December 1974) A/Res/3314

<sup>37</sup> Ian Brownlie, *International Law And Use Of Force By States* (Clarendon Press 1991)

<sup>38</sup> Charter UN (n 5) Art.42

<sup>39</sup> Charter UN (n 5) Art.37(2)

<sup>40</sup> Charter UN (n 5) Art.27(3)

<sup>41</sup> UNHRC 2213 (21<sup>st</sup> March 2013) A/HRC/Res/22/13

<sup>42</sup> *Legality of the Use of Force Case* (Yugoslavia v Belgium) [1999] 39 ILM 950

In the absence of UNSC authorisation under Chapter VII,<sup>43</sup> the only available exception to the prohibition on force available to the US is self-defence.

#### IV. Self-defence

As a Member State of the UN, the US must exhaust all alternative pacific options laid out in Chapter VI of the UN Charter prior to resorting to any military force in self-defence against North Korea; ‘parties to any dispute ... which is likely to endanger...international peace...shall first seek a solution by negotiation, enquiry, mediation ...’.<sup>44</sup> If the crisis can be avoided or if the danger is too remote, self-defence by the US is not justified and will be deemed as aggressive force.<sup>45</sup>

Pre-1945 the customary right of self-defence was first articulated in *The Caroline Incident 1837*.<sup>46</sup> The acting state relying on the concept must show a ‘necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation’ and do ‘nothing unreasonable or excessive’.<sup>47</sup> Thus the customary right to self-defence is determined using the objective legal criteria of necessity, immediacy and proportionality.

Under customary law, self-defence is permitted when the conditions regarding necessity and proportionality are met. The principles of proportionality are much the same as those introduced in the *Naulilaa*<sup>48</sup> case which concerned the use of force in reprisals. The conditions of proportionality and necessity can also be applied to pre-emptive action if a state legitimately anticipates an attack by another state. Necessity refers to the state’s choice to resort to force whilst proportionality refers to the actual force used such as the type of weapon and collateral damage. Proportionality is co-dependent on necessity as force used unnecessarily will never be proportionate and vice versa.<sup>49</sup> Each case of self-defence will be determined on its unique circumstances making it difficult to lay down an objective test for proportionality alone. State capability and objectivity can also influence the concept of proportionality. The Bush administration argued that the US ‘[emphasis added] must adapt the concept of *imminent threat*

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<sup>43</sup> Charter UN (n 5) Chapter VII

<sup>44</sup> Charter UN (n 5) Art.33

<sup>45</sup> Definition of Aggression (n 36)

<sup>46</sup> *The Caroline v United States* 11, US 496 (1813)

<sup>47</sup> *ibid*

<sup>48</sup> *Naulilaa* (n 24)

<sup>49</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)* Case [2003] ICJ 127

to the capabilities and objectives of today's adversaries', in the US National Security Strategy 2002.<sup>50</sup>

In consideration of the above, if North Korea is not capable of using force against the US then force in self-defence is not necessary. Other nuclear-states<sup>51</sup> are *capable* of causing harm to the US but lack the objective to do so. At present North Korea has verbalised its objective (as above), although both that objective and North Korea's nuclear capabilities are debatable: i.e. can the Hwasong-15 missile maintain its trajectory armed with a nuclear warhead? As yet there is no evidence that North Korea has the sophistication to marry the ICBM and the warhead or to accurately hit a target. There is speculation that Kim Jong Un's belligerence is 'part of a conscious strategy', designed to protect North Korea 'from what [Kim] sees as US intention to end his regime'.<sup>52</sup> Until the above capability is established any pre-emptive action might be illegal.

The tendency of the state acting in self-defence will be to use only necessary force to remove the threat, though this in itself is also a tricky balance to achieve because where would the legitimate end of a threat be? The UN agrees that a state may act in self-defence to stop an ongoing armed attack<sup>53</sup> but what if the US use force to disarm North Korea of its nuclear capability and in addition used force to safeguard the US's future? Would this additional force be interpreted as unnecessary and illegal, as the concepts allowing force to be used to distinguish a current threat cannot be relied upon to use force to distinguish any potential threat in the future?

The UN Charter described the right to self-defence in 1945 at Art.51.<sup>54</sup> It has arguably curtailed the broader right available under pre-Charter customary international law relieving states of their sovereign right to determine when they need to defend themselves. It cannot be suggested that the provisions of the Charter are mere codifications of pre-existing customary law as the language has changed to introduce new concepts, such as collective self-defence and the use of *force* as opposed to *war*.

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<sup>50</sup> 'National Security Strategy Archive' (*National Security Strategy Archive*, 2018) <<http://nssarchive.us>> accessed 9 January 2018

<sup>51</sup> NPT (n 1) 161

<sup>52</sup> John Haltiwanger, 'Experts Say Kim Jong Un Doesn't Really Want War, But Trump's Wild Threats and Tweets Make It More Likely' (*Newsweek*, 2018) <<http://www.newsweek.com/does-kim-jong-un-really-want-war-united-states-673800>> accessed 4 January 2018

<sup>53</sup> Charter (n 5) Art.51

<sup>54</sup> *ibid*



Art.51 reads, '[n]othing 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'.<sup>55</sup> On initial reading of the article it is clearly a narrower right than that allowed under customary law. This then leads the US to question whether it can rely on the broader, more permitting customary defence or whether the Charter provision supersedes that right, limiting US action to the literal provisions of Art.51 only?

The language used in the article is a little ambiguous and there remains some doubt as to the existence of the pre-existing customary right. The insertion of the phrase 'inherent right' partly suggests that Art.51 intends to preserve the customary right to self-defence as opposed to abolish it. Again, on analysis of the travaux préparatoires it appears that Art.51 was added to clarify the relationship of regional organisations and the UNSC, rather than to define self-defence as it says 'measures taken by Members in the exercise of this right ... shall be immediately reported to the Security Council'.<sup>56</sup>

If the US had to rely on the restrictive approach to Art.51 their right to pre-emptive self-defence would be denied as it only exists under *Caroline*.<sup>57</sup> It would be replaced with a practical result that they can only resort to self-defence 'if an armed attack occurs'<sup>58</sup> such as the self-defence of Kuwait against Iraq in 1990, as authorised by UNSC Resolution 678.<sup>59</sup>

Is North Korea's recent conduct sufficient to be recognised as an armed attack against the US for the purposes of Art.51? The judicial interpretation is that not all armed activities amount to an armed attack, 'encounters between small infantry units, even those involving loss of life do not constitute armed attack for the purposes of the Charter',<sup>60</sup> this principle was reaffirmed in the *Congo*<sup>61</sup> case. Although the UN has condemned North Korea's weapons testing as illegal, it does not automatically give rise to the use of force by the US.<sup>62</sup> However, if the action of missile testing by North Korea is interpreted as a small-scale incident, multiple incidents such as this might allow it to fall under the definition of attack for the purposes of Art.51.<sup>63</sup> Although

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<sup>55</sup> *ibid*

<sup>56</sup> *ibid*

<sup>57</sup> *Caroline* (n 45)

<sup>58</sup> Charter (n 5) Art.51

<sup>59</sup> UNSC Res 678 (29<sup>th</sup> November 1990) UN DOC S/Res/678

<sup>60</sup> *Democratic Republic of Ethiopia v The State of Eritrea* Case [2005] ICGJ 362 PCA

<sup>61</sup> *Congo* (n 29)

<sup>62</sup> *Naulilaa* (n 24)

<sup>63</sup> *Oil Platforms* (n 47)

Bowetts' accumulation of events theory failed the US in the *Iran v United States of America*,<sup>64</sup> the ICJ avoided deciding that such events could not trigger the right of self-defence.

In *Nicaragua*<sup>65</sup> the ICJ has shown a willingness to interpret the meaning of *armed attack* for the purposes of Art.51. One might suggest that the interpretation could be stretched to encompass North Korea's verbal threats and weapons testing as sufficient to give rise to the US's right under Art.51. Although allowing such an interpretation would set a new precedent, which would in turn allow states to forcefully defend themselves in a variety of unnecessary situations. The concepts of proportionality and necessity might be lost and the purposes of the Charter would be weakened as wars in 'self-defence' could become more likely.

In the absence of the availability of the customary defence, missions such as Operation Opera,<sup>66</sup> which is materially similar to the topic of this essay, would be deemed as scalable violations of international law.

Operation Opera is an example of pre-emptive self-defence and was the world's first airstrike against a nuclear plant. Israel bombed Baghdad's nuclear reactor because 'the atomic bombs which that reactor was capable of producing would be of the Hiroshima size [endangering] the people of Israel'.<sup>67</sup> The Prime Minister, Menachem Begin, described the attack as 'anticipatory self-defence at its best',<sup>68</sup> thus developing the Israeli's counter-proliferation policy known as the Begin doctrine. At the time, the attack was strongly criticised by the New York Times as 'inexcusable and short-sighted aggression',<sup>69</sup> although uninformed states are inevitably going to have a different perspective than those involved. On the surface, the then Israeli position was materially similar to the US now with Congress debating striking North Korea as Israel had Iraq. It could be argued that the proximity of Baghdad's nuclear reactor, just 18 miles from the border of Israel made the threat to the Israeli people more tangible. Although the flying capabilities of North Korea's Hwasong-15 missiles demonstrate

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<sup>64</sup> *ibid*

<sup>65</sup> *Nicaragua* (n 28)

<sup>66</sup> The BBC, 'BBC ON THIS DAY | 7 | 1981: Israel Bombs Baghdad Nuclear Reactor' (*News.bbc.co.uk*, 2018) <[http://news.bbc.co.uk/onthisday/hi/dates/stories/june/7/newsid\\_3014000/3014623.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/june/7/newsid_3014000/3014623.stm)> accessed 28 March 2018

<sup>67</sup> The BBC, 'BBC ON THIS DAY | 7 | 1981: Israel Bombs Baghdad Nuclear Reactor' (*News.bbc.co.uk*, 2018) <[http://news.bbc.co.uk/onthisday/hi/dates/stories/june/7/newsid\\_3014000/3014623.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/june/7/newsid_3014000/3014623.stm)> accessed 4 January 2018

<sup>68</sup> *ibid*

<sup>69</sup> David Shipler, 'Israeli Jets Destroy Iraqi Atomic Reactor' (*The New York Times*, 2018) <<http://www.nytimes.com/1981/06/09/world/israeli-jets-destroy-iraqi-atomic-reactor-attack-condemned-us-arab-nations.html>> accessed 4 January 2018

that the US and North Korea are more proximate in terms of missiles than they appear geographically.

The restrictive approach to self-defence arguably puts the US in a vulnerable position, in terms of North Korea's ongoing threats it is hard to know which are genuine. On analysis of occasions where something did happen, such as the artillery attack on a South Korean island in 2010 there were clear advanced warnings.

Many scholars, including Steven Welsh and Guy Roberts, argue that the mere proliferation of nuclear weapons by rogue states such as North Korea give rise to pre-emptive defensive action.<sup>70</sup> Welsh argues that the threat need not be imminent in the traditional sense but purely by the illicit acquisition of such weapons the requisite threat to peace is present<sup>71</sup>. In theory this would allow the US to rely on pre-emptive self-defence without any further action by North Korea. Roberts identifies such defensive action as examples of counter-proliferation self-help paradigm.<sup>72</sup>

In cases of conflict it is vital to determine which source of law concerning self-defence shall prevail. The question for the US is whether 'a general customary law ... has developed as a result of the influence of the Charter provisions'<sup>73</sup> so that the Charter provisions on force and self-defence generated a rule which has since passed into the general corpus of international law and is accepted as *opinio juris*. This question was satisfied by Judge Jennings in *Nicaragua* 'after the charter, there exists alongside those Charter provisions...an independent customary law that can be applied as alternative to ... Article 51 of the Charter'.<sup>74</sup>

This tells the US that they are able to rely on the customary right to pre-emptive self-defence whilst adhering to the principles set forth in *Caroline*.<sup>75</sup> In reliance of this there must be a corresponding imminent threat and the defensive action must not outweigh this threat. Whilst the threshold for the prerequisite threat may have been heightened by the Charter the availability of the customary defence allows the US to use armed action in a broader variety of circumstances.

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<sup>70</sup> Niaz A. Shah, 'Self-Defence, Anticipatory Self-Defence and Pre-Emption: International Law's Response to Terrorism' (2007) 12 *Journal of Conflict and Security Law* 95

<sup>71</sup> Marc Weller (ed.), *The Oxford Handbook Of The Use Of Force In International Law* (Oxford University Press 2015)

<sup>72</sup> *ibid*

<sup>73</sup> *Nicaragua* (n 28) Judge Jennings dissenting opinion

<sup>74</sup> *ibid*

<sup>75</sup> *Caroline v United States* 11, US 496 [1813]

The threat of rogue states nuclear capabilities has resulted in conflict all over the world, despite the efforts of the NPT to lead to global disarmament<sup>76</sup> many states continue to develop weapons programmes such as North Korea. In 2003 US intelligence agencies determined that Iraq had powerful weapons of mass destruction that might be sold to terrorist groups endangering the American people. The Bush administration claimed necessity and proportionality under *Caroline*<sup>77</sup> taking pre-emptive action. It was later revealed that the intelligence was inaccurate and Saddam Hussein did not possess any nuclear capability, thus the defensive action was unnecessary and disproportionate to the threat posed. From the 'United Nations Charter point of view, the [Iraq War] was illegal'.<sup>78</sup> The controversial and condemned Iraq war highlights the requirement for intelligence to be accurate, to prevent an armed attack later being deemed a violation of international law. However, despite North Korea's debatable competencies, the US has increased its military defence funding, as the US 'cannot rule out the possibility that [it] could announce its completion of nuclear force within one year'.<sup>79</sup>

In the hypothetical situation that North Korea demonstrates full nuclear capability, it remains uncertain when the use of nuclear weapons by the US could be a proportionate and legal defence measure. This debate was not resolved by the *Advisory Opinion on the Legality of the Threat/Use of Nuclear Weapons*.<sup>80</sup> On observation of the Charter the ICJ determined that the provisions relating to the threat/use of force referred to *any* force irrespective of the weapons employed to inflict it. The principle of proportionality does not exclude the use of nuclear-weapons in self-defence although use of such weapons would still have to comply with the principles and rules of humanitarian law. In light of this, the court laid emphasis on two principles;

states must never make civilians the object of an attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets whilst unnecessary suffering should not be caused to combatants<sup>81</sup>

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<sup>76</sup> Shah (n 70)

<sup>77</sup> *Caroline v United States* 11, US 496 [1813]

<sup>78</sup> Changrok Soh, 'United States Foreign Policy and United Nations: The Case Of The War In Iraq' (2004) 44 *The Korean Journal of International Studies* 45

<sup>79</sup> Myoung-gyon Cho, 'the unification minister for South Korea' as reported by Yonhap News Agency

<sup>80</sup> UNGA Advisory Opinion Concerning the Legality of the Threat or Use of Nuclear Weapons ICJ Reports 1996, 288

<sup>81</sup> *ibid*

This ICJ Opinion is not binding although the absence of the use of nuclear weapons since Hiroshima could be argued to demonstrate widespread state practice accepted as *opinio juris*, making the non-use of nuclear weapons binding as customary international law. This will influence the US when determining what forceful action to take. The use of nuclear weapons in self-defence would certainly violate the principles of humanitarian laws and could be deemed by the ICJ as a violation of customary law also.

The US defence department might propose two methods of attack in self-defence, airstrikes or to send conventional ground forces across the 38th parallel. Airstrikes increase the safety of the pilots and provide a good short-term solution to a pressing threat,<sup>82</sup> although the ability to accurately hit a target during an airstrike is greatly reduced and the number of innocent victims will increase.<sup>83</sup> This could potentially be held to be disproportionate and unnecessary against the threat posed by North Korea. Notably Operation Opera took place on a non-working day, deliberately to reduce the number of victims. Conventional ground combat troops require more security and a larger number of troops. The US Obama administration never embraced the idea of *boots on the ground* due to the inherent risks it posed to the troops themselves. However, the ability to accurately hit a target is greatly improved with this method, reducing collateral damage consistent with humanitarian laws, thus increasing the likelihood of adherence to the concepts of proportionality and necessity.

Alternatively, the US has advanced technological defence strategies in recent years. Ground Based Mid-Course Defence (GMD) is a major component in the US missile-defence strategy. It is designed to intercept ICBMs in space during the mid-course phase of the ballistic trajectory. GMD is administered by the Missile Defence Agency who conducted ICBM test: FTG - 15 in 2017 following North Korea's recent threats. Thus far the GMD is said to be capable of 'intercepting a simple threat in a limited way'<sup>84</sup> but it continues to be developed by the US military with the aim to eventually being able to combat all types of weaponry used to penetrate the US via airspace.

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<sup>82</sup> The BBC, 'BBC ON THIS DAY | 7 | 1981: Israel Bombs Baghdad Nuclear Reactor' (*News.bbc.co.uk*, 2018) <[http://news.bbc.co.uk/onthisday/hi/dates/stories/june/7/newsid\\_3014000/3014623.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/june/7/newsid_3014000/3014623.stm)> accessed 28 March 2018

<sup>83</sup> Kareem Shaheen, 'US-Led Coalition Says Its Strikes Have Killed Over 800 Iraqi And Syrian Civilians' (*The Guardian*, 2018) <<https://www.theguardian.com/world/2017/nov/30/us-coalition-airstrikes-iraqi-syrian-civilians>> accessed 28 March 2018

<sup>84</sup> National Security Strategy (n 48)

## V. Conclusion

In consideration of the prohibition on force and the available exceptions, I am led to the conclusion that if the US used conventional military action against North Korea *tomorrow* it would be deemed as a violation of Article 2(4) of the Charter. Despite the availability of ‘an independent customary law that can be applied as alternative to ... Article 51 of the Charter’<sup>85</sup> the prerequisite conditions of the *Caroline*<sup>86</sup> formula are yet to be satisfied. Necessity refers to the US’s choice to resort to war, whilst at present the US is yet to exhaust all pacific alternatives as provided by the Charter. Proportionality is the method of equating the force used against the threat, as Pyongyang is yet to demonstrate full nuclear capabilities, the verbal threats could be determined to be *empty* so any force used by the US would be disproportionate and deemed unnecessary immediate action.

If North Korea demonstrate a full nuclear capability, the US’s options are more variable. By demonstrating capability, it increases the legitimacy of the threat. The US in these circumstances could use conventional military force against North Korea. Combat ground troops would be deemed as most proportionate, airstrikes could still potentially be deemed as proportionate if the threat cannot be distinguished by ground troops.

The use of nuclear force by the US against North Korea will never be legal in respect of international law. In addition to the fact it would be difficult to prove that a nuclear response is proportionate to any threat or attack, the non-use of nuclear force for 72 years demonstrates widespread state practice and a deliberate subjective acceptance by *opinio juris*. Arguably the non-use of nuclear weapons, complimented by adherence to international humanitarian laws, has encroached into customary law. Notably it is further suggested that widely ratified multilateral treaties which have established human rights prohibitions are binding upon all states, and not just the signatories. Therefore, even if the US was not a member of the UN, it is likely the customary prohibition flowing from international treaties, would still be binding upon it.

Finally, it is unlikely the US would ever receive authorisation of military action under the Charter. Certain permanent members of the UNSC will continue to block this due to a number of geopolitical and socio-political matters. i.e. China is unwilling to deal with the resulting flood of refugees that would pour over the border in the event of Kim’s demise, and has no

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<sup>85</sup> Nicaragua (n 28) Judge Jennings dissenting opinion

<sup>86</sup> *Caroline v United States* 11, US 496 [1813]

wish to see a US-allied unified Korea potentially bringing American troops right up to its border.

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