

NORTH KOREA: RISKING MORE THAN A BLOODY NOSE

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PUBLIC INTERNATIONAL LAW—US-NORTH KOREAN
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ABSTRACT

Between 2013 and 2018, the threat of nuclear war became far more tangible than in previous years, as actions and statements by both the Democratic People’s Republic of Korea and the United States of America indicated a willingness to use force against one another. This article argues that although the Democratic People’s Republic of Korea’s increasing nuclearization and inflammatory statements constitute a threat to use force, the United States is restricted from engaging in a ‘bloody nose’ strike because of the lack of available responses under international law. The United States ultimately does not have any means by which it could independently or collectively use force against the Democratic People’s Republic of Korea. Alternatively, it is apparent that the United States requires the authorisation of the United Nations Security Council before it could utilise force individually, collectively, or as a humanitarian response.

I INTRODUCTION

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The Democratic People's Republic of Korea ('North Korea') is a state that has been hostile to the outside world, at least to some extent, since the Korean War. In contemporary geopolitics, North Korea's acceleration of its nuclear weapons testing has sparked concern amongst its neighbours and other nuclear powers. The North Korean nuclear program has been a particular cause of consternation for the United States of America ('US'), leading to tenuous relations between the US and North Korea over the last few decades. In more recent years, North Korean-US relations have devolved significantly, and by early 2018, various news outlets reported on President Trump's alleged plans for a pre-emptive military strike against North Korea, labelled a 'bloody nose' attack.¹

This article argues that although North Korea's increasing nuclearisation and inflammatory statements constitute a threat to use force, the US is restricted from engaging in a 'bloody nose' strike because of the lack of available responses under international law. In order to demonstrate how North Korea's actions and statements constitute a threat to use force, the international law framework of *jus ad bellum* will be considered before ultimately concluding that North Korea's stated readiness to use weapons for an unauthorised purpose would be considered a threat to use force. The concept of *jus ad bellum* will then be considered in relation to the US' ability to respond to North Korea's threats, with specific focus on possible avenues of individual, collective (with Japan and South Korea) or humanitarian responses. This will be achieved by considering both international law and

¹ Gerald F Seib, 'Amid Signs of a Thaw in North Korea, Tensions Bubble Up', *The Wall Street Journal* (online, 9 January 2018) <<https://www.wsj.com/articles/amid-signs-of-a-thaw-in-north-korea-tensions-bubble-up-1515427541>>; Mira Rapp-Hooper, 'The Cataclysm That Would Follow a "Bloody Nose" Strike in North Korea', *The Atlantic* (online, 31 January 2018) <<https://www.theatlantic.com/international/archive/2018/01/the-cataclysm-that-would-follow-a-bloody-nose-strike-in-north-korea/551924/>>; Michael E O'Hanlon and James Kirchick, 'A "Bloody Nose" Attack in Korea Would Have Lasting Consequences', *Brookings* (Web Page, 26 February 2018) <<https://www.brookings.edu/blog/order-from-chaos/2018/02/26/a-bloody-nose-attack-in-korea-would-have-lasting-consequences/>>.

the US' existing state practice and by assessing the feasibility of a proposed 'bloody nose' attack on North Korea.

A limitation to the research contained within this article is the difficulty to accurately surmise the military capabilities of North Korea, given that a substantial proportion of available information originates from highly censored North Korean state news outlets. The lack of transparency in North Korea thus affects the reliability of information derived from state news sources. This article will also be limited to an analysis of the period from 2013 (when North Korea resumed its nuclear program) until the end of 2018. The selected timeframe between 2013 and 2018 saw an end to the exchange of threats between the US and North Korea but precedes the denuclearisation talks between the US and North Korea that remain unresolved. In any event, the current state of relations between the US and North Korea is constantly developing, and North Korea continues to test its weapons capabilities today.²

II CONTEXTUAL BACKGROUND

Despite the aforementioned tensions between the US and North Korea, North Korean-US relations have not always been so fractured. In 1994, President Bill Clinton and the North Korean government entered into an Agreed Framework³ to suspend the North Korean nuclear program in exchange for energy aid from the US.⁴ However, after George W Bush's ascension to US Presidency, the US became more distrustful of North Korea because of accusations made by the Bush administration that North Korea was in possession of nuclear weapons.⁵ In President Bush's State of the Union

² Oh Seok-min and Choi Soo-hyang, '(2nd LD) N Korea Fires Barrage of Missiles on Eve of Founder's Birthday, S Korea's Elections', *Yonhap News Agency* (online, 14 April 2020) <<https://en.yna.co.kr/view/AEN20200414006452325?section=nk/nk>>.

³ International Atomic Energy Agency, Agreed Framework of 21 October 1994 Between the United States of America and the Democratic People's Republic of Korea, Information Circular, INFCIRC/457 (2 November 1994).

⁴ Niv Farago, 'Washington's Failure to Resolve the North Korean Nuclear Conundrum: Examining Two Decades of US Policy' (2016) 92(5) *International Affairs* 1127, 1129.

⁵ Kelly Wallace, John King and Andrea Koppel, 'Rumsfeld: N Korea May Have Nuclear Weapons

address after the 9/11 attacks, he referred to North Korea as part of an ‘axis of evil’ and as a ‘regime arming with missiles and weapons of mass destruction, while starving its citizens’.⁶ By late 2002, the Agreed Framework had collapsed, with the US citing Pyongyang’s covert nuclear enrichment operations as the basis for its undoing.⁷

In 2003, North Korea withdrew from the *Treaty on the Non-Proliferation of Nuclear Weapons* (‘the NPT’)⁸ after being a state party since 1985, and the six-party talks ensued.⁹ These talks were a series of multilateral negotiations between the US, North Korea, South Korea, China, Russia and Japan, which sought to negotiate a reduction in North Korea’s nuclear programs.¹⁰ The talks failed to make any lasting impact, and after an abortive attempt at renegotiating the Agreed Framework, North Korea resumed its nuclear enrichment program,¹¹ stating that ‘the DPRK will boost its nuclear deterrent for self-defence in every way’.¹² Post-Bush, the Obama administration did not prioritise negotiating denuclearisation with North Korea. Instead, the Obama administration took the approach of ‘strategic patience’—an approach which entailed not alienating North Korea, but rather focusing on United Nations (‘UN’) sanctions and waiting for North Korea to be willing to enter further negotiations. Pyongyang dramatically increased its nuclear testing regime during this time, conducting 74 tests from 2008 to 2016, compared to 23 tests from 1984 to 2008.¹³

Already’, *CNN* (online, 17 October 2002) <<https://edition.cnn.com/2002/US/10/17/us.nkorea/>>.

⁶ George W Bush, ‘The President’s State of the Union Address’ (Speech, United States Congress, 29 January 2002) <<https://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020129-11.html>>.

⁷ Farago (n 4) 1129–30.

⁸ *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970).

⁹ Farago (n 4) 1135.

¹⁰ *Ibid* 1136–8.

¹¹ *Ibid* 1138–40.

¹² Democratic People’s Republic of Korea Foreign Ministry, ‘DPRK Foreign Ministry Vehemently Refutes UNSC’s “Presidential Statement”’ (Media Release, Korean Central News Agency, 14 April 2009) <<https://kcnawatch.org/newstream/1451886844-302374302/dprk-foreign-ministry-vehemently-refutes-unsccs-presidential-statement/>>.

¹³ The James Martin Center for Nonproliferation Studies, ‘The CNS North Korea Missile Test Database’, *Nuclear Threat Initiative* (Web Page, 16 October 2020) <<https://www.nti.org/analysis/articles/cns-north-korea-missile-test-database/>>.

While negotiations between North Korea and the US on the potential denuclearisation of North Korea stalled in 2020,¹⁴ the situation from 2013 to 2018 was far more tenuous, as North Korea carried out missile testing and dispensed increasingly aggressive threats towards the US. In 2018, President Trump responded to these threats in an equally hostile fashion by declaring on Twitter that the US possessed more powerful nuclear weapons.¹⁵ With North Korea having already withdrawn from the NPT by this time,¹⁶ Pyongyang's actions and statements appeared more credible than ever before. Overall, when considering US-North Korean relations, it is important to be conscious of the respective positions of the US and North Korea in the current geopolitical framework. The US is a state with extensive military capabilities and the largest economy in the world that upholds itself as a beacon of global security. It is this position as a global hegemon that drives the US' interventionist foreign policy and rationalises the US' desire to undertake a 'bloody nose strike' against North Korea.

III DID NORTH KOREA'S STATEMENTS OR ACTIONS CONSTITUTE AN ACTIONABLE THREAT TO USE FORCE?

A *What is a Threat to Use Force?*

To examine whether North Korea's actions may constitute an actionable threat to use force, it is important first to consider what a threat to use force is and when such a threat is actionable in international law. For the purposes of this article, the use of force refers to an armed attack initiated by one state against another, independent of the United Nations Security Council's

¹⁴ Josh Smith and Hyonhee Shin, 'North Korea Wasted Chance to Improve Relations Under Trump, US Envoy Says', *Reuters* (online, 10 December 2020) <<https://www.reuters.com/article/us-usa-southkorea-biegun-idUSKBN28K0FN>>.

¹⁵ @realDonaldTrump (Twitter, 3 January 2018, 8:49 am AWST) <<https://twitter.com/realDonaldTrump/status/94835557022420992>>.

¹⁶ Frederic L Kirgis, 'North Korea's Withdrawal from the Nuclear Non-Proliferation Treaty', *American Society of International Law* (Blog Post, 24 January 2003) <<https://www.asil.org/insights/volume/8/issue/2/north-koreas-withdrawal-nuclear-nonproliferation-treaty>>.

(‘UNSC’) authority. An armed attack was defined in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (‘*Nicaragua*’)¹⁷ as the sending of an armed band or army, provided that the scale and effects of the operation exceeded that of a mere frontier incident.¹⁸ Furthermore, an armed attack is not an objective assessment, but rather, the victim state must itself believe that such an attack occurred.¹⁹ For example, if North Korea were to deploy nuclear weapons against South Korea, Japan or the US, this would be considered an *actual* use of force.

The use of force is governed by the principles of *jus ad bellum*, conditions that establish what is a ‘just war’ and must be considered before engaging in war or the use of force. The *Charter of the United Nations* (‘*UN Charter*’) sets out what use of force is lawful and is the primary source of *jus ad bellum*. Article 2(4) of the *UN Charter* states:

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.

The wording of art 2(4) suggests that the use of force must have an interstate element, however, it does not otherwise go further in its characterisation of a ‘threat’. The discussions in UN forums surrounding the creation of art 2(4) also provide no further insight.²⁰ While the prohibition on a threat to use force is explicit in art 2(4), international law jurisprudence offers little guidance as to what constitutes a ‘threat’ to use force, with the question being the subject of much academic debate.²¹ Brownlie, a leading international law scholar,

¹⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 (‘*Nicaragua*’).

¹⁸ *Ibid* 195.

¹⁹ *Ibid*.

²⁰ Romana Sadurska, ‘Threats of Force’ (1988) 82(2) *American Journal of International Law* 239, 248.

²¹ Kevin Jon Heller, ‘The Unlawfulness of a Bloody Nose Strike on North Korea’ (2020) 96 *International Law Studies Series* 1, 5; Tom Ruys, ‘The Meaning of Force and the Boundaries of the Jus ad Bellum: Are Minimal Uses of Force Excluded from UN Charter Article 2(4)?’ (2014) 108(2) *The American Journal of*

defines the threat of force as ‘an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government’.²² Brownlie’s definition appears to be favoured throughout the literature.²³

A seminal case in international law that assists in the interpretation of a ‘threat to use force’ is the advisory judgment *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (‘*Nuclear Weapons (Advisory Opinion)*’),²⁴ handed down by the International Court of Justice (‘ICJ’). The test for the use of force in *Nuclear Weapons (Advisory Opinion)* creates a hypothetical scenario, that if a state is going to use force, this use of force must conform with the Charter to be lawful.²⁵ The case also pertinently notes that where there is stated readiness to use force, it is considered an unlawful threat to use such force where the intended use of force itself would be illegal.²⁶ A threat would only be lawful if it fell within the accepted uses of force that already exist.²⁷ In *Nicaragua*, the ICJ held that states are free to determine their own militarisation (including the use and possession of weapons) under state sovereignty.²⁸ However, in *Nuclear Weapons (Advisory Opinion)*, the ICJ subsequently held that mere possession of nuclear weapons could be an implicit threat.²⁹ It should be noted that international law is continually developing, and while ICJ decisions provide guidance and may be persuasive, a country is not bound to act a certain way based on a previous ICJ decision that the country in question was not a party to.³⁰

International Law 158, 162; Charles J Moxley Jr, ‘The Sword in the Mirror: The Lawfulness of North Korea’s Use and Threat of Use of Nuclear Weapons Based on the United States’ Legitimization of Nuclear Weapons’ (2004) 27(4) *Fordham International Law Journal* 1379, 1478–81.

²² Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, 1963) 364.

²³ Hannes Hofmeister, ‘Watch What You Are Saying: The UN Charter’s Prohibition on Threats to Use Force’ (2010) 11(1) *Georgetown University Press* 107, 108; Sadurska (n 20) 242.

²⁴ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 (‘*Nuclear Weapons (Advisory Opinion)*’).

²⁵ *Ibid* 246.

²⁶ *Ibid* 244–5.

²⁷ Charter of the United Nations arts 39, 51 (‘UN Charter’).

²⁸ *Nicaragua* (n 17) 135.

²⁹ *Nuclear Weapons (Advisory Opinion)* (n 24) 246.

³⁰ Statute of the International Court of Justice arts 38, 59.

In the commentary on the International Law Commission's *Draft Code of Crimes against the Peace and Security of Mankind*,³¹ 'threat' was considered to mean 'acts undertaken with a view to making a state believe that force will be used against it if certain demands are not met by that state'.³² The Special Rapporteur on the *Draft Code of Crimes Against the Peace and Security of Mankind* also included another element to the definition of 'threat', contending that threat arises from the intention expressed by a state.³³ This can manifest as an act of aggression, intimidation, blackmail or other actions intended to appear threatening, such as increasing troops near an area of conflict.³⁴ As will be discussed further in this article, North Korea's reinstatement of its nuclear testing program may be considered a threat to use force, as it demonstrates an intent to use nuclear weapons if its demands of other nuclear powers are not met.

B *When is the Use of Force Permissible in International Law?*

Article 2(4) creates a general prohibition on the use of force. However, art 51 of the *UN Charter* confirms an exemption to this prohibition by maintaining the inherent right of Members to use individual or collective self-defence if an armed attack occurs. Pursuant to art 51, a Member is able to act in self-defence until the UNSC has 'taken measures necessary to maintain international peace and security'.³⁵ Article 39 of the UN Charter empowers the UNSC to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression' and to 'make recommendations, or decide what measures shall be taken in accordance with [arts] 41 and 42, to maintain or restore international peace and security'. Such measures may include the

³¹ International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind* (adopted 1996).

³² 'Draft Code of Crimes against the Peace and Security of Mankind with commentaries' (1989) II(2) *Yearbook of the International Law Commission* 1989 50, 68 ('Draft Code of Crimes Commentary'); Hofmeister (n 23) 108.

³³ Hofmeister (n 23) 108.

³⁴ *Draft Code of Crimes Commentary* (n 32) 73; Hofmeister (n 23) 108.

³⁵ *UN Charter* (n 27) art 51.

ability to authorise the use of force where there is a ‘threat to the peace, breach of the peace or act of aggression’. Together, arts 39 and 51 form the only exemptions to the prohibition on the use of force; they vest extensive authority in the UNSC to authorise force which, in turn, narrows the ability for member states to use force unilaterally—states may only act before the UNSC has authorised the use of force or before the UNSC has undertaken actions to restore peace and security.³⁶ An armed attack for any reason other than self-defence is therefore unlawful.³⁷ The intention behind these articles was ‘to state in the broadest terms an absolute all-inclusive prohibition; ...there should be no loopholes’.³⁸

C *Actions and Statements by North Korea*

In light of the above discussion, the question now turns to whether North Korea’s actions and statements can be considered an unauthorised threat to use force against the US. North Korea became a member of the UN in 1991 and is a signatory to the *UN Charter*.³⁹ However, despite being a signatory, North Korea’s state practice is inconsistent with the principles prescribed in the *UN Charter*. In particular, North Korea has displayed a questionable human rights record and an extensive and ongoing disregard for sanctions and resolutions imposed by the UN in relation to its nuclear program,⁴⁰ demonstrating its own state practice, as defined in *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark)*.⁴¹

Tensions between the US and North Korea were heightened in 2013 after the UNSC Resolution 2094⁴² was passed, imposing economic sanctions

³⁶ Ibid,

³⁷ Ibid arts 2(4), 51.

³⁸ United Nations Conference on International Organization, 11th mtg, UN Doc I/1/27 (5 June 1945) 335.

³⁹ UN Charter (n 27).

⁴⁰ Bruce E Bechtol Jr, ‘North Korean Illicit Activities and Sanctions: A National Security Dilemma’ (2018) 51(1) *Cornell International Law Journal* 57, 58.

⁴¹ *North Sea Continental Shelf (Federal Republic of Germany v Denmark)* [1969] ICJ Rep 3, 43.

⁴² SC Res 2094, UN Doc S/Res/2094 (7 March 2013).

on North Korea for conducting nuclear tests. UNSC Resolution 2094 was partially drafted by China, which particularly offended North Korea as China had been one of the few states to support Pyongyang and continues to be North Korea's strongest trading partner.⁴³ In response to UNSC Resolution 2094, North Korea abandoned its long-standing armistice with South Korea and resumed its nuclear development program, conducting nuclear tests in defiance of UNSC resolutions and sanctions.⁴⁴ Between 2013 and 2018, North Korea radically increased its missile testing.⁴⁵ The nuclear missile testing program expanded to include intercontinental ballistic missiles⁴⁶ and hydrogen bombs⁴⁷—dangerous weapons that posed a more potent threat to the US than ever before. While these tests were carried out in North Korea or international waters, arguably, the most overtly threatening action by North Korea was the ballistic missiles that landed in Japanese territorial waters. These missiles were launched without the Japanese government's consent or prior knowledge and triggered public warning systems in northern Japan.⁴⁸ Despite the missiles not being armed, Japan's Prime Minister called the launch an 'unprecedented, serious and grave threat'.⁴⁹

⁴³ Morse Tan, 'International Humanitarian Law and North Korea: Another Angle for Accountability' (2015) 98(3) *Marquette Law Review* 1147, 1152.

⁴⁴ Additional sanctions were imposed on North Korea in response to nuclear tests: SC Res 2087, UN Doc S/Res/2087 (22 January 2013); UNSC condemned, in strongest possible terms, nuclear tests and demanded compliance with international obligations: SC Res 2270, UN Doc S/Res/2270 (2 March 2016); UNSC imposed sanctions as a reaction to North Korean nuclear tests: SC Res 2321, UN Doc S/Res/2321 (30 November 2016); UNSC condemned ballistic missile launches by North Korea: SC Res 2371, UN Doc S/Res/2371 (5 August 2017); UNSC expanded on previously imposed sanctions on North Korean economy, in response to nuclear testing: SC Res 2375, UN Doc S/Res/2375 (11 September 2017); UNSC tightened sanctions on North Korea: SC Res 2397, UN Doc S/Res/2397 (22 December 2017) ('Resolution 2397').

⁴⁵ Kelsey Davenport, 'Chronology of US-North Korean Nuclear and Missile Diplomacy', *Arms Control Association* (Fact Sheet, April 2020) <<https://www.armscontrol.org/factsheets/dprkchron#2000>>.

⁴⁶ 'North Korea: Second ICBM test proves US in strike range', *Al Jazeera* (online, 29 July 2017) <<https://www.aljazeera.com/news/2017/07/north-korea-icbm-test-proves-strike-range-170729042200736.html>>.

⁴⁷ Jack Kim and Soyoung Kim, 'North Korea Says Conducts "Perfect" Hydrogen Bomb Test', *Reuters* (Online, 3 September 2017) <<https://www.reuters.com/article/uk-northkorea-nuclear/north-korea-says-conducts-perfect-hydrogen-bomb-test-idUSKCN1BD0VY>>.

⁴⁸ 'North Korea Fires Missile Over Japan', *Al Jazeera* (online, 29 August 2017) <<https://www.aljazeera.com/news/2017/08/north-korea-fires-unidentified-missile-south-170828211447636.html>>.

⁴⁹ 'North Korea Fires Missile Over Japan' (n 48); 'North Korea Fires Ballistic Missile', *Al Jazeera* (online, 29 November 2017) <<https://www.aljazeera.com/news/2017/11/north-korea-fires-ballistic-missile-reports-171128183017472.html>>.

Coupled with these tests, North Korea has made various inflammatory statements, threatening to ‘sink’ Japan and reduce the US to ‘ashes and darkness’.⁵⁰ This rhetoric was fuelled by US President Donald Trump, who labelled Kim Jong-un ‘rocket man’ in a speech delivered to the UN General Assembly in 2017.⁵¹ In response, North Korea contended that Trump’s comments were a declaration of war on their nation, which would justify countermeasures such as shooting down US strategic bombers outside of the North Korean airspace.⁵² While it has not been expressly stated, there is also an underlying risk that North Korea will utilise its nuclear weapons, if not against the US, then against one of the US’ allies, such as South Korea or Japan.

D *Analysis of North Korean Actions and Statements*

For North Korea to be able to legitimately undertake any of the aforementioned actions, it would need to establish that doing so is an act of self-defence against an armed attack.⁵³ North Korea has repeatedly claimed its actions are in self-defence, as it still technically remains at war with South Korea, having never signed a treaty.⁵⁴ However, no armed attacks occurred in the period 2013 to 2018, nor have any since occurred—the action that immediately precipitated North Korea’s reinstatement of its nuclear development program was the implementation of sanctions by the UNSC rather than any kind of armed attack. Furthermore, the statements of the Trump Administration also could not be considered an armed attack, which

⁵⁰ Jack Kim and Kiyoshi Takenaka, ‘North Korea Threatens to “Sink” Japan, Reduce US to “Ashes and Darkness”’, *Reuters* (online, 14 September 2017) <<https://www.reuters.com/article/us-northkorea-missiles/north-korea-threatens-to-sink-japan-reduce-u-s-to-ashes-and-darkness-idUSKCN1BPOF3>>.

⁵¹ Donald Trump, ‘Remarks by President Trump to the 72nd Session of the United Nations General Assembly’ (Speech, United Nations General Assembly, 19 September 2017) <<https://www.whitehouse.gov/briefings-statements/remarks-president-trump-72nd-session-united-nations-general-assembly/>>.

⁵² Reuters Staff, ‘Update 1: North Korea Accuses US of Declaring War, Says Can Take Countermeasures’, *Reuters* (online, 25 September 2017) <<https://www.reuters.com/article/northkorea-missiles-minister/update-1-north-korea-accuses-u-s-of-declaring-war-says-can-take-countermeasures-idUSL2N1M60TX>>.

⁵³ *UN Charter* (n 27) art 51.

⁵⁴ Tan (n 43) 1198.

would give rise to an argument of self-defence,⁵⁵ as it appears clear that calling the leader of state ‘rocket man’ and other comparatively minor actions by the US are insufficient to claim there is an imminent threat of attack. Consequently, in establishing a ‘lawful act of self-defence’ under art 51 of the *UN Charter*, North Korea’s claims fail to satisfy that there has been an ‘armed attack’.⁵⁶

Therefore, North Korea’s stated readiness to use weapons for a purpose not authorised under international law would be considered a threat to use force. This view is strengthened by a consideration of Brownlie’s definition, which incorporates demands by a government.⁵⁷ North Korea’s ultimate aim has been to reunite the Korean Peninsula under the Pyongyang government. As a result, much of North Korea’s foreign policy has been undertaken in pursuit of this goal, for example, by attending potential peace talks with South Korea and by threatening South Korea’s other allies, the US and Japan, wherever possible. The ultimate demand could be interpreted to be reclaiming South Korea and forcing US involvement out of the Korean Peninsula. Despite the missiles that landed in Japanese territorial waters being unarmed, this action does exhibit a hostile intent and an act of aggression by North Korea.⁵⁸ This argument is strengthened by the *Nuclear Weapons (Advisory Opinion)*, which states that mere possession of nuclear weapons could be an implicit threat.⁵⁹ The continued defiant possession and development of nuclear weapons by North Korea and demonstrations of nuclear capability indicate a clear example of a threat to use force rather than a mere frontier incident.

⁵⁵ *Definition of Aggression*, GA Res 3314, UN Doc A/RES/3314(XXIX) (14 December 1974) art 2 (‘*Definition of Aggression*’); Ruys (n 21) 172; Heller (n 21) 9.

⁵⁶ *UN Charter* (n 27) art 51; James Crawford, *Brownlie’s Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 748.

⁵⁷ *Ibid* 748; Brownlie (n 22) 364.

⁵⁸ Ruys (n 21) 172.

⁵⁹ *Nuclear Weapons (Advisory Opinion)* (n 24) 246.

IV WAS THE USE OF FORCE LAWFULLY AVAILABLE TO THE US?

The US has reacted in no uncertain terms to the statements and actions of North Korea, stating in its 2018 Nuclear Posture Review that ‘any North Korean nuclear attack against the United States or its allies and partners is unacceptable and will result in the end of that regime’.⁶⁰ However, as will be demonstrated, if the US were to utilise force against North Korea, relying on art 51 of the *UN Charter*, it would be difficult to justify self-defence if it were to act individually. Collective self-defence would also have limited justification. The option to use force in a lawful manner could be open to the US if it were to receive authorisation from the UNSC; however, this decision is made by the UNSC and, as such, is not technically *open* to the US. In reality, it is also likely that China (as a major trading partner with North Korea) would veto any proposal to use force, rendering the option for UNSC intervention unlikely to eventuate. In addition, as will be explored further in this article, the Responsibility to Protect could further empower the US to use force against North Korea.⁶¹

A *Was the Use of Force available to the US acting individually?*

The US may choose to act unilaterally against North Korea using its own nuclear or defence capabilities, citing North Korea’s threats as the basis for its action. However, it is unlikely that such use of force would be permissible under international law. In carrying out the aforementioned threats, North Korea has demonstrated that it possesses weapons of mass destruction and may possess the ability to attack the US.⁶² However, the US cannot attack

⁶⁰ United States of America Department of Defense, ‘Nuclear Posture Review: February 2018’ (Review, February 2018) 33; Jina Kim and John K Warden, ‘Limiting North Korea’s Coercive Nuclear Leverage’ (2020) 62(1) *Survival* 31, 36.

⁶¹ 2005 *World Summit Outcome*, GA Res 60/1, UN GAOR, 60th Sess, 8th plen mtg, Agenda items 46–120, Supp No 49, UN Doc A/RES/60/1 (24 October 2005) 138–9 (‘2005 *World Summit Outcome*’).

⁶² Josh Smith and Michelle Nichols, ‘US Warns North Korean Leadership Will Be “Utterly Destroyed” in Case of War’, *Reuters* (online, 29 November 2017) <<https://www.reuters.com/article/us-northkorea-missiles/north-korea-says-breakthrough-puts-u-s-mainland-within-range-of-nuclear-weapons->

North Korea based on statements alone, as there must be an actionable threat to use force, prompting the US to act in self-defence.

Following the tense exchanges in late 2017, the US considered a proposal for a ‘bloody nose strategy’ against North Korea.⁶³ This strategy would involve the US to ‘react to some nuclear or missile test with a targeted strike against a North Korean facility to bloody Pyongyang’s nose’ and make clear that the US will not tolerate threats. The overriding motive for such an attack would be to make a decisive statement without inciting a war with North Korea.⁶⁴ The US would likely describe such a strategy as self-defence, as this would be the only justification available under international law for the proposed ‘bloody nose’ attack, and it would mean that the US could avoid accusations of inciting nuclear war. As discussed above, there are various international statutes that prohibit the US’ proposed ‘bloody nose’ strike; article 2(4) of the *UN Charter* and art 8 of the *Rome Statute of the International Criminal Court* (‘*Rome Statute*’)⁶⁵ both prevent such an action. Furthermore, art 51 of the *UN Charter* requires an armed attack to occur in order to act in self-defence, which has not in any way occurred.

In the absence of an actual armed attack, the US has utilised criteria set out in customary international law as a legal justification for the use of force, citing the need underscored in the Caroline Affair (‘Caroline’)⁶⁶ for an immediate necessity of response and proportionality of response.⁶⁷ However,

idUSKBN1DS2MB>; Eleanor Albert, ‘North Korea’s Military Capabilities’, *Council on Foreign Relations* (Web Page, 20 December 2019) <<https://www.cfr.org/background/north-koreas-military-capabilities>>.

⁶³ Seib (n 1); Shane Reeves and Robert Lawless, ‘Is There an International Legal basis for the “Bloody Nose” Strategy?’, *Lawfare* (Blog Post, 19 January 2018) <<https://www.lawfareblog.com/there-international-legal-basis-bloody-nose-strategy>>.

⁶⁴ Reeves and Lawless (n 63); Michael Schmitt and Ryan Goodman, ‘Best Advice for Policymakers on “Bloody Nose” Strikes against North Korea: It’s Illegal’, *Just Security* (Blog Post, 23 January 2018) <<https://www.justsecurity.org/51320/advice-policymakers-bloody-nose-strike-north-korea-illegal/>>.

⁶⁵ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 8 (‘*Rome Statute*’).

⁶⁶ ‘Correspondence between Great Britain and the United States, Respecting the Arrest and Imprisonment of Mr McLeod, for the Destruction of the Steamboat Caroline’ (1840–41) 29 *British States Papers* 1137 (Daniel Webster) (‘Correspondence’); *Nuremberg Trial Proceedings* (Judgment) 30 September 1946 [447].

⁶⁷ Crawford (n 56) 751; Correspondence (n 66) as cited by A Aust, *Handbook of International Law* (Cambridge University Press, 2nd ed, 2010) 209.

the requirement from *Caroline* that there is an ‘instant and overwhelming’ necessity for self-defence would be hard to satisfy, as there has been no moment at which it appeared North Korea was imminently going to launch an attack that would be capable of reaching and causing damage to the US.

However, the US has previously engaged in state practices inconsistent with customary international law—pre-emptive self-defence.⁶⁸ This practice was used to justify the US-led invasion of Iraq, after the 9/11 terrorist attacks, on the American understanding that Iraq’s alleged development of weapons of mass destruction and support for international terrorist groups constituted a threat to the US. This practice became known as the ‘Bush Doctrine’ and is inconsistent with art 51 of the *UN Charter*, which requires an armed attack to occur to justify self-defence.⁶⁹ The Bush Doctrine undermines the purpose of the UNSC as a means for countries to seek recourse and resolve disputes without resorting to the use of force themselves, as it circumvents the need to approach the UNSC for authorisation to use force.⁷⁰ Ultimately, to justify the use of force in Iraq, the allied forces claimed that the UNSC had consented to the campaign. However, this argument has no grounding in international law, as the UNSC did not grant consent for the use of force in this way.⁷¹

As a result, there is currently no lawful justification for any individual use of force by the US against North Korea. It is unlikely that even the Bush Doctrine could be utilised again, given the resistance of UNSC members, such as China, to the use of force against North Korea. For a state such as China to authorise the use of force against North Korea would be to unreasonably prejudice its own interests in favour of US interests—to

⁶⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 223–4 (‘*Armed Activities*’); Crawford (n 56) 752.

⁶⁹ Christine Gray, *International Law and the Use of Force* (Oxford University Press, 3rd ed, 2008) 160–1.

⁷⁰ Crawford (n 56) 750.

⁷¹ John D Negroponte, Letter Dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc S/2003/351 (21 March 2003) 1; Crawford (n 56) 752.

authorise force would likely sacrifice Chinese-North Korean relations, potentially irrevocably.

B *Was the Use of Force available to the US collectively with South Korea and Japan?*

Despite the US's inability to lawfully use force against North Korea individually, the question remains as to whether it is permissible to use force collectively. The option of collective self-defence is created in art 51 of the *UN Charter* and is supported by the existence of collective self-defence treaties between the US and both South Korea and Japan.⁷² In *Nicaragua*, it was held that a victim state must make a request for assistance before another state can act in collective self-defence with the victim state.⁷³ There has been little state practice of collective self-defence,⁷⁴ despite the existence of large-scale collective self-defence treaties, such as the *North Atlantic Treaty*,⁷⁵ and bilateral treaties to this effect between states.

Given its proximity to a hostile nuclear power, South Korea exists on the brink of danger as a state. Though the Korean Armistice was signed in 1953, North and South Korea currently have no permanent peace treaty and continue to have one of the world's most heavily militarised borders.⁷⁶ Although the two states are still at war with each other, North Korea has expressed a strong intention to reunify with the South under the Pyongyang regime.⁷⁷ Even so, North Korea's missile testing in Japanese territory has

⁷² *Mutual Defense Treaty Between the United States and the Republic of Korea*, signed 1 October 1953, 5 UST 23602376 (entered into force 17 November 1954) art II; *Security Treaty Between the United States and Japan*, signed September 8 1951, 3 UST 3329-3340 (entered into force 28 April 1952) art I.

⁷³ *Nicaragua* (n 17) 196-8.

⁷⁴ Gray (n 69) 167.

⁷⁵ *The North Atlantic Treaty*, signed 4 April 1949, 34 UNTS 243 (entered into force 24 August 1949) art 5.

⁷⁶ Tan (n 43) 1151.

⁷⁷ Kim Jong-un, 'New Year's Address' (Speech, Pyongyang, 1 January 2018) <<https://www.ncnk.org/node/1427>>.

been a cause for concern for both South Korea and Japan, given their evident proximity and North Korea's notable increase in nuclear testing.⁷⁸

As explored in pt III, the use of force is lawful where it is carried out in self-defence prior to any intervention by the UNSC.⁷⁹ While the US does not have an individual right to self-defence, at the request of Japan and South Korea, it is possible that the US could have a legitimate right to use force against North Korea on the basis of collective self-defence.⁸⁰ The US has been invested in its relations with Japan and South Korea and has military bases in both states⁸¹—the annual combined training exercise, Foal Eagle, is conducted annually by South Korean and US militaries and is one of the largest military exercises in the world.⁸²

In *Nicaragua*, the Court found 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-defence in the absence of a request by the state which regards itself as the victim of an armed attack.⁸³

This position was supported in *Oil Platforms (Islamic Republic of Iran v United States of America) (Judgment)*,⁸⁴ and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*.⁸⁵ Thus, for the US to lawfully implement a collective response to use force against North Korea, either South Korea or Japan must suffer an armed attack and request the assistance of the US. The right to engage in collective response in these circumstances fails to satisfy the initial requirement of such

⁷⁸ Eitan Oren and Matthew Brummer, 'How Japan Talks About Security Threats', *The Diplomat* (online, 14 August 2020) <<https://thediplomat.com/2020/08/how-japan-talks-about-security-threats/>>.

⁷⁹ *UN Charter* (n 27) art 51.

⁸⁰ *UN Charter* (n 27) art 51.

⁸¹ Shea Cotton, 'Understanding North Korea's Missile Tests', *Nuclear Threat Initiative* (Web Page, 24 April 2017) <<https://www.nti.org/analysis/articles/understanding-north-koreas-missile-tests/>>.

⁸² Mats Engman, 'US-ROK Military Exercises: Provocation or Possibility?', *Institute for Security & Development Policy* (Blog Post, March 2018) <<https://isdip.eu/publication/u-s-rok-military-exercises-provocation-possibility/>>.

⁸³ *Nicaragua* (n 17) 105.

⁸⁴ [2003] ICJ Rep 161, 186.

⁸⁵ *Armed Activities* (n 65) 222.

a response, as neither South Korea nor Japan suffered an ‘armed attack’ by North Korea between 2013–2018 to warrant the use of force by the US.⁸⁶ As noted by Ruys in his analysis of the scope of art 51, ‘armed attack’ has a much narrower scope than ‘use of force’.⁸⁷ Therefore, not every use of force gives rise to an argument of self-defence—the requirement is that only the ‘most grave forms of the use of force’ qualify as armed attacks.⁸⁸ The missile tests that landed in Japanese territorial waters were unarmed, did not cause any damage to Japanese people, and functioned primarily as intimidation without causing harm. Therefore, there is not an *action* that could be considered a threat that would give rise to a response of self-defence. Similarly, South Korea has also not fallen victim to an armed attack by North Korea, despite a history of tenuous relations.

Schmitt and Goodman noted in their assessment of the feasibility of a bloody nose strike that North Korea’s threats against the US and Japan could certainly be characterised as acts of aggression by North Korea under the UN’s *Definition of Aggression*.⁸⁹ Under the *Rome Statute*, an act of aggression is grounds for referral to the International Criminal Court.⁹⁰ However, the threats made by North Korea lack the grave nature required to constitute an armed attack, as there has been no actual damage done to South Korea or Japan. There is a compelling argument that the continuous testing and violation of a peace agreement could provide grounds for the use of force in self-defence.⁹¹ However, considering the chances of mutually assured destruction in response to what is essentially not a particularly grave offence, this kind of action would be exceedingly difficult to justify. Thus, unless a US ally, such as South Korea or Japan, suffers an armed attack at the hands

⁸⁶ Heller (n 21) 9.

⁸⁷ Ruys (n 21) 165.

⁸⁸ *Nicaragua* (n 17) 191; Ruys (n 21) 165; Heller (n 21) 9.

⁸⁹ Schmitt and Goodman (n 62); *Definition of Aggression* (n 54) art 2.

⁹⁰ *Definition of Aggression* (n 54) art 2; *Rome Statute* (n 65) art 8.

⁹¹ Reeves and Lawless (n 63).

of North Korea, it is not permissible for the US to engage in a collective use of force on the basis of self-defence against North Korea.

C *Was the Use of Force available to the US as a form of Humanitarian Intervention?*

Humanitarian intervention represents another possible means by which force could be exercised by the US against North Korea. However, such use of force would require the authorisation of the UNSC. The Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea investigated reports of severe human rights violations occurring in North Korea and found 'systematic, widespread and gross human rights violations', some of which 'entailed crimes against humanity based on State policies'.⁹² The exact extent of these crimes is unclear, given that the Human Rights Council was not provided access to North Korea and was instead forced to rely on witness testimony.⁹³ The UN itself has arguably contributed to the current state of human rights in North Korea, with UNSC sanctions (particularly UNSC Resolution 2397)⁹⁴ inhibiting the delivery of essential humanitarian aid.⁹⁵ UNSC Resolution 2397 has affected the population of North Korea as a whole and, in particular, has disproportionately impacted already vulnerable groups.⁹⁶

However, the US cannot bypass the UNSC and unilaterally use force to carry out humanitarian intervention, as held in *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania) (Merits)*⁹⁷ and

⁹² Human Rights Council, Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, UN Doc A/HRC/25/63 (7 February 2014) 6.

⁹³ Ibid 4.

⁹⁴ Resolution 2397 (n 44).

⁹⁵ Final Report of the Panel of Experts Established Pursuant to Resolution 1874 (2019), UN Doc S/2019/171 (5 March 2019) [175]–[180].

⁹⁶ Korea Peace Now, The Human Costs and Gendered Impact of Sanctions on North Korea (Report, October 2019) 1–2.

⁹⁷ [1949] ICJ Rep 4, 35.

Nicaragua.⁹⁸ The Responsibility to Protect ('R2P') operates as an alternative to humanitarian intervention, empowering the international community to use 'collective action, in a timely and decisive manner ... should peaceful means be inadequate'.⁹⁹ R2P is a global political commitment, developed at the 2005 World Summit and adopted by the UN General Assembly, that compels the international community to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.¹⁰⁰ As the International Commission on Intervention and State Sovereignty ('ICISS') noted in its 2001 Report, military intervention on this basis requires the authorisation of the UNSC.¹⁰¹ The UN General Assembly affirmed the ICISS' report but remained silent on the notion of the use of force. Therefore, this area remains untested, although the existing body of international law suggests that acting without some form of UN authorisation would be unlawful, and once again, it would be unlikely that the UNSC would consent to this kind of action as a result of the operation of the veto power.

Despite the ostensibly dire human rights situation in North Korea and the fact that there may be grounds for the international community to intervene and protect the North Korean population from its governing regime, it is still unclear whether humanitarian intervention would constitute an authorisation by the UNSC to use force. Furthermore, attempted intervention could trigger a violent reaction from North Korea that may result in retaliation against the international community and the North Korean public. Ultimately, it appears that there is currently no avenue for the US to lawfully use force against North Korea in the proposed 'bloody nose' strike, as the US is likely

⁹⁸ *Nicaragua* (n 17) 134; Young Sok Kim, 'Responsibility to Protect, Humanitarian Intervention and North Korea' (2006) 5 *International Business and Law* 74, 82–4.

⁹⁹ 2005 World Summit Outcome (n 61) 138–9.

¹⁰⁰ *Ibid* 138.

¹⁰¹ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Report, December 2001) xii.

unable to use force individually, collectively, or as a form of humanitarian intervention.

V CONCLUSION

While there are certainly valid points to the contrary, it is clear that North Korea has indeed made threats to use force, consistent with the definitions set out in the *Nuclear Weapons (Advisory Opinion)*, Brownlie and others.¹⁰² Acting individually, the US instituting a ‘bloody nose strike’ would be acting outside of what is considered a lawful use of force. For the US to use force in response to North Korea’s possession of weapons of mass destruction would be outside the bounds of any acceptable use of force, and the Bush Doctrine would not be a legitimate justification. The impact of using any force against North Korea could have devastating effects for the US, Japan and South Korea, as well as any country within striking distance of North Korea.

There are also no options to use force available to the US if it were to act collectively with South Korea and Japan. Neither country has suffered an armed attack between 2013 and 2018 that would justify self-defence, given the high standard of what fulfils an armed attack, compared to what constitutes a use of force. This gap, between what is an actual or threatened use of force, and what is required for a country to use force lawfully in self-defence, is what regulates the international system, and prevents rampant and retaliatory actions by powerful states. In considering the actions and statements of North Korea as ‘aggressive’, rather an ‘armed attack’, the ability to use force is withheld, promoting the peaceful resolution of disputes instead. Furthermore, it is also unlikely that the US would be able to use force against North Korea as a form of humanitarian intervention.

¹⁰² Brownlie (n 22) 364; Hofmeister (n 23) 108; Sadurska (n 20) 242.

Ultimately, the initiation of the 2019 summit between the US and North Korea does signal an easing of tensions between the two states. However, given the lack of success in previous negotiations, it is unclear how US-North Korean relations will eventuate in the future, particularly under a new administration in 2021.