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Preemptive Strikes and the Korean Nuclear Crisis: Legal and Political Limitations on the Use of Force

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PREEMPTIVE STRIKES AND THE KOREAN NUCLEAR CRISIS: LEGAL AND POLITICAL LIMITATIONS ON THE USE OF FORCE

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Abstract: On January 29, 2002, President George W. Bush linked North Korea, Iran and Iraq as members of an "Axis of Evil," alleging that North Korea's attempts to acquire weapons of mass destruction constituted a threat to international peace and security. On September 20, 2002, the Bush Administration released its National Security Strategy ("Strategy"). The Strategy adopted a doctrine of preemptive action that, although recognized historically, has been significantly limited by the U.N. Charter. In doing so, the Bush Administration has challenged traditional limits on the use of force, attempting to adapt the concept of "imminent threat" to the danger posed by rogue states such as North Korea. Through the Strategy, the administration asserted a right to use unilateral military force to prevent harm to the United States or its citizens.

Preemptive action has immense emotional appeal to the American public, particularly in the aftermath of September 11, 2002. Although the primary focus of the preemption doctrine relates to its application in Iraq, there is the potential that the Bush Administration could use this principle to justify the use of force against North Korea. The continued escalation of the nuclear crisis on the Korean peninsula makes the use of force increasingly possible.

A preemptive strike based on the presence or attempted acquisition of nuclear weapons, however, is not justified as an exercise of the right of self-defense under customary international law or the U.N. Charter. Moreover, the unilateral exercise of a right to use force preemptively is in direct opposition to the collective security structure established under the U.N. Charter. Furthermore, the use of force would undoubtedly result in massive casualties throughout Northeast Asia. Because of the Strategy's doubtful legality and potentially drastic consequences, a preemptive strike would not be justified in North Korea.

I. INTRODUCTION

On October 2, 2002 the Democratic People's Republic of Korea ("North Korea")[1] allegedly admitted to conducting a secret nuclear weapons development program.[2] Such nuclear program was in violation of several

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[1] At the end of World War II, the Korean Peninsula was divided along the 38th Parallel with the U.S.-backed Republic of Korea ("ROK") officially established August 15, 1948 and the Soviet-backed Democratic People's Republic of Korea ("DPRK") established on September 9, 1948. DON OBERDORFER, THE TWO KOREAS: A CONTEMPORARY HISTORY 7 (1997). This Comment will refer to the DPRK as North Korea and the ROK as South Korea, the more commonly used names for the respective nations.

[2] Although the Bush Administration stated that North Korea admitted that it had a uranium enrichment program, the North Korean government has subsequently denied making any such admission. Instead, North Korea contends that it merely acknowledged its sovereign right to have such a program. *See*

international treaties, including the 1994 Agreed Framework to Negotiate Resolution of the Nuclear Issue on the Korean Peninsula ("Agreed Framework") between North Korea and the United States;[3] the 1992 DPRK-Republic of Korea Joint Declaration on Denuclearization of the Korean Peninsula ("Joint Declaration");[4] and the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT").[5]

In response to North Korea's alleged violation of international law, the Bush Administration[6] has taken a hard-line approach.[7] In his 2002 State of the Union Address, President George W. Bush labeled North Korea as a member of the "Axis of Evil."[8] Later that year, President Bush suggested that the United States might employ preemptive strikes to curb the proliferation of weapons of mass destruction.[9] North Korea's current defiance of its treaty obligations provides an opportunity for the Bush Administration to make a preemptive strike, but acting on this opportunity is arguably unjustifiable.

This Comment asserts that the Bush Administration's new policy allowing the use of force in a preemptive strike based on the acquisition or possession of nuclear weapons violates customary international law's "necessity" requirement under the doctrine of anticipatory self-defense. Furthermore, the policy does not fit within Article 51 of the U.N. Charter's self-defense exception to the general prohibition of the "threat or use of force" against any state.[10] Lastly, the United States has not sufficiently explored diplomatic solutions to the current crisis; it has instead refused to

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Press Release, Press Conference by Permanent Mission of Democratic People's Republic of Korea (Oct. 25, 2002) *at* http://www.un.org [hereinafter *DPRK Press Conference*]; *North Korea's Response*, N.Y. TIMES, Oct. 26, 2002, at A8, LEXIS, News File.

[3] Democratic People's Republic of Korea—United States of America: Agreed Framework to Negotiate Resolution of the Nuclear Issue on the Korean Peninsula, 34 I.L.M. 603 (1995) [hereinafter Agreed Framework]. *See* David E. Sanger, *North Korea Says it Has a Program on Nuclear Arms: U.S. Not Certain it Has the Bomb—'Belligerent' Tone Noted*, N.Y. TIMES, Oct. 17, 2002, at A1; James Dao, *The Pact that the Koreans Flouted*, N.Y. TIMES, Oct. 17, 2002, at A8.

[4] Democratic People's Republic of Korea-Republic of Korea: Joint Declaration on Denuclearization of the Korean Peninsula, 33 I.L.M. 569 (1994) [hereinafter Joint Declaration].

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

[6] In this Comment, the Bush Administration refers to that of President George W. Bush.

[7] James T. Laney & Jason T. Shaplen, *How to Deal With North Korea*, FOREIGN AFF., Mar./Apr. 2003, at 16, 21.

[8] *Bush State of the Union Address*, CNN ONLINE (Jan. 29, 2002) *at* http://cnn.allpolitics.printthis.clickability.com/pt/cpt [hereinafter 2002 State of the Union].

[9] U.S. Dept. of State, *The National Security Strategy of the United States of America* (Sept. 2002) *available at* http://www.state.gov (last visited May 4, 2003) [hereinafter *Strategy*]; U.S. Dept. of State, *U.S. Approaches to Nonproliferation* (Sept. 6, 2002), *at* http://www.state.gov/t/np/rls/rm/9635.htm (last visited May 4, 2003).

[10] U.N. CHARTER art. 2, para. 4.

engage in negotiations[11] and ignored requests for a non-aggression pact by the North Korean government.[12]

Part II of this Comment outlines the legal justification for the use of force in self-defense under customary international law and the U.N. Charter. Part III summarizes the Bush Administration's recently announced doctrine of preemptive strike and seeks to illustrate its application to the North Korean crisis. Part IV of this Comment describes events leading to the current standoff between the United States and North Korea. Part V analyzes the doctrine of preemptive strike, as it would potentially apply to the current crisis on the Korean Peninsula, concluding that the doctrine does not meet the requirement of "necessity" under international law, nor would it be justified as an exercise of self-defense under the U.N. Charter.[13]

II. USE OF FORCE UNDER INTERNATIONAL LAW

Although the principle of anticipatory self-defense has been recognized throughout history, it has been significantly limited under customary international law and the U.N. Charter. Customary international law,[14] as expressed within the Caroline Doctrine,[15] requires that anticipatory self-defense be both necessary and proportional. Furthermore, states must exhaust all peaceful remedies before resorting to force under customary international law and the U.N. Charter. In addition, the use of force must fit within the specific parameters of the U.N. Charter.

A. Customary International Law: The Caroline Case

Under customary international law, the use of force in self-defense includes the right to protect oneself against a threat that is "imminent in point of time," as well as the right to respond to a past attack.[16] This rule has been formed over the centuries by leading political thinkers and its

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[11] Philip Shenon, *White House Rejects North Korean Offer for Talks*, N.Y. TIMES, Nov. 4, 2002, at A10, LEXIS, News File.

[12] *See* Laney & Shaplan, *supra* note 7, at 26 (discussing the Bush Administration's insistence that North Korea dismantle its nuclear program before even discussing security guarantees).

[13] U.N. CHARTER art. 51.

[14] "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES para. 102 (1987).

[15] *See* discussion *infra* Part II.A (describing the Caroline Doctrine under customary international law).

[16] Roger K. Smith, *The Legality of Coercive Arms Control*, 19 YALE J. INT'L L. 455, 479-80 (1994) (quoting Hugo Grotius).

application is the accepted practice of states.[17] A brief sojourn through the history of international law confirms the validity of this rule, limiting the use of force in self-defense prior to an actual attack. In 1625, Hugo Grotius recognized that "self-defense is to be permitted not only after an attack has already been suffered but also in advance, where 'the deed may be anticipated.'"[18] In 1758, Emmerich de Vattel expressed a similar view, stating that a nation has a right to anticipate aggressive actions while at the same time cautioning that this principle could be abused as a pretext for aggression.[19]

The modern right of anticipatory self-defense in international law has its origins in the Caroline incident.[20] In 1837, British soldiers seized an American ship for its alleged assistance of Canadian insurrectionists during the unsuccessful rebellion of 1837 in Upper Canada against British rule.[21] While the *Caroline* was in American waters, British troops boarded it, set it on fire and sent it over Niagara Falls, killing two U.S. citizens in the process.[22] When Americans made demands for compensation, the British argued their actions were justified by "the necessity of self-defense and self-preservation."[23]

In an exchange of diplomatic notes to resolve the issue, U.S. Secretary of State Daniel Webster stated three criteria for anticipatory self-defense under customary international law.[24] First, anticipatory self-defense should be limited to situations where the "necessity of self-defense is instant, overwhelming, and leav[es] no choice of means, and no moment for deliberation."[25] Second, the force used must be proportional.[26] Third, the

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[17] See Timothy Kearley, *Raising the Caroline*, 17 WIS. INT'L L.J. 325 (1999), for a discussion of the development of the Caroline Doctrine since its inception. Originally, the doctrine applied only to extra-territorial uses of force. *Id.* at n.22 and accompanying text. Today, however, it is generally perceived as applying to any use of force by a state in self-defense. *Id.* The Encyclopedic Dictionary of International Law defines the customary right of self-defense as being expressed within the principles of the Caroline Doctrine. *Id.*

[18] Louis Rene Beres, Perspective, *After the Gulf War: Israel, Pre-Emption, and Anticipatory Self-Defense*, 13 HOUS. J. INT'L L. 259, 263 (1991) (quoting Hugo Grotius).

[19] *Id.* at 263-64 (quoting EMMERICH DE VATTEL, THE LAW OF NATIONS II (1758)).

[20] The Caroline Doctrine has been recognized by numerous scholars as encompassing the right of anticipatory self-defense under customary international law. *See, e.g.*, Anthony Clark Arend, *International Law and Rogue States: The Failure of the Charter Framework*, 36 NEW ENG. L. REV. 735, 750 (2002); Kearley, *supra* note 17, at 330; Major Michael Lacey, *Self-Defense or Self-Denial: The Proliferation of Weapons of Mass Destruction*, 10 IND. INT'L & COMP. L. REV. 293, 296 (2000); Rex J. Zedalis, *On the Lawfulness of Forceful Remedies for Violations of Arms Control Agreements: "Star Wars" and Other Glimpses at the Future*, 18 N.Y.U. J. INT'L L. & POL. 98 (1985).

[21] Beres, *supra* note 18, at 266.

[22] *See, e.g.*, Smith, *supra* note 16, at 480.

[23] *Id.*

[24] *See* Lacey, *supra* note 20, at 296.

[25] *Id.*

threatened nation must have exhausted all peaceful means of settlement.[27] Although scholars have suggested that a preemptive strike meeting these three requirements would be justified as a form of anticipatory self-defense under customary international law,[28] any such strike would still need to comply with the U.N. Charter.[29]

B. The U.N. Charter Generally Prohibits the Use of Force with Limited Exceptions

Article 2(4) of the U.N. Charter established the general prohibition on the threat or use of force in international relations.[30] This standard governs the use of force under international law with narrow exceptions permitted under Article 51 and Article 42 of the U.N. Charter. These exceptions allow the use of force in self-defense[31] or upon Security Council authorization.[32]

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[26] As Secretary of State Webster stated, the state must show that it "did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it." Smith, *supra* note 16, at 481.

[27] *Id.* Secretary of State Webster argued that the British had to show that "admonition or remonstrance to the persons on board the *Caroline* was impracticable or would have been unavailing." Letter from Mr. Webster to a Mr. Fox (Apr. 24, 1841), *reprinted in* 29 BRITISH AND FOREIGN STATE PAPERS 1129, 1138 (1857). Also, Samuel von Pufendorf recognized the right to anticipatory self-defense, "provided there be no hope that, when admonished in a friendly spirit, [the aggressor] may put off his hostile temper." Smith, *supra* note 16, at 480.

[28] *See, e.g.*, Beres, *supra* note 18, at 262 (suggesting that "pre-emption might be an entirely permissible option" since the right of anticipatory self-defense has been established under international law).

[29] There is some disagreement whether the "armed attack" requirement under the U.N. Charter has superseded the broader right represented in the Caroline Doctrine. Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 120 (1986). Legal scholars have suggested that the recognition of the inherent right of self-defense under the U.N. Charter incorporates the Caroline Doctrine's necessity and proportionality requirements, but conditions the right's exercise on an imminent attack. *See* Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559, 567 (2002); Colonel Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENV. J. INT'L L. & POL'Y 483, 484 (1999); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1635 (1984). This argument is particularly significant in the nuclear context because these scholars tend to advocate an adaptation of the concept of imminent threat to allow anticipatory self-defense based on the acquisition of weapons of mass destruction. *See generally* Beres, *supra* note 18; Oscar Schachter, *The Right of States to Used Armed Force*, *supra*.

[30] U.N. CHARTER art. 2, para. 4.

[31] *Id.* art. 51 (allowing the use of force in self-defense in response to an "armed attack").

[32] *Id.* art. 42 (allowing the use force to restore "international peace and security" upon Security Council authorization).

1. Article 2(4): General Prohibition of Force

The U.N. Charter was adopted with the goal of saving "succeeding generations from the scourge of war" and, to meet that end, it was designed to "ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest."[33] This principle is protected by Article 2(4)'s general prohibition on the use of force with limited exceptions for self-defense[34] and collective security upon authorization of the Security Council.[35] Article 2(4) reflects the Charter's commitment to a system of collective security,[36] rather than unilateral action on behalf of individual states.

Article 2(4) is the primary provision of the U.N. Charter establishing the prohibition of the use of force.[37] It requires that all members "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." This prohibition of both the actual and threatened use of force has been recognized as binding customary law and is considered *jus cogens*.[38] The U.N. Charter recognizes two limited exceptions to Article 2(4)'s strictures: self-defense under Article 51[39] and force authorized by the Security Council in accordance with Article 42.[40]

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[33] *Id.* pmbl.

[34] *Id.* art. 51.

[35] Article 39 states that "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 (measures not involving the use of force) and 42 (after a determination that peaceful measures have not or will not be adequate, the Security council may authorize the use of force to "maintain or restore international peace and security"). *Id.* arts. 39, 41, 42.

[36] *Id.* art. 1, para. 1 (taking collective measures to prevent and remove threats to the peace, suppressing acts of aggression, and bringing about pacific settlement of international disputes are listed among the "purposes of the United Nations").

[37] Arend, *supra* note 20, at 737 (referring to the "fundamental presumption" against the use of force established by Article 2(4)).

[38] RESTATEMENT OF THE LAW [THIRD] OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §905 cmt. g (1987). According to the Vienna Convention on the Law of Treaties, a *jus cogens* rule is a peremptory norm of international law. Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331. The Convention defines a peremptory norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.*

[39] Article 51 recognizes the "inherent right" of individual or collective self-defense. U.N. CHARTER art. 51.

[40] Article 42 authorizes the Security Council, should peaceful measures be inadequate, to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." *Id.* art. 42.

2. *Exceptions to the Prohibition of Force*

Although the self-defense exception to the general prohibition of force under international law is explicitly recognized within Article 51,[41] issues relating to the scope of that right remain unresolved.[42] According to Article 51, "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."[43] In parsing the text of the Charter, three primary questions exist relating to the permissible exercise of self-defense: (1) what exactly is meant by the "inherent right" of self-defense; (2) does reference to an "armed attack" limit the use of force by requiring an act of aggression;[44] and (3) is the use of force in self-defense permitted only until the Security Council decides to take action?[45] These questions are debatable and there is no concrete resolution to these issues. This has resulted in much of the current controversy over the Bush Administration's preemption doctrine.

There is debate as to whether Article 51 replaces the Caroline Doctrine under customary international law.[46] It is generally agreed that the better interpretation of this provision would preserve, rather than abolish, the customary right of self-defense—including the right of anticipatory self-defense.[47] As a result, states look to both the Caroline Doctrine and Article 51 to gauge whether military action will fall within the self-defense exception under the U.N. Charter.

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[41] *Id.* art 51.

[42] *See* RESTATEMENT OF THE LAW [THIRD] OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 38.

[43] U.N. CHARTER art. 51.

[44] *See* Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 14, at 103. "In the case of individual self-defence, the exercise of this right is subject to the state concerned having been the victim of an armed attack." *Id.* The court recognized that an armed attack is not limited to action by regular armed forces across an international border, but also includes more indirect aggression (i.e. "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 of such gravity as to amount to an actual armed attack conducted by regular forces" or "substantial involvement therein"). *Id.* at 103-04. In spite of this recognition that indirect aggression could "rise to the level of an armed attack," determining at what point covert actions would justify the use of force in self-defense remains difficult. *See, e.g.*, Arend, *supra* note 20, at 744-45.

[45] The phrase "until the Security Council has taken measures necessary to maintain international peace and security" could be read as placing a time limitation on the right of self-defense. *See* U.N. CHARTER art. 51.

[46] *See supra* note 29 and accompanying text.

[47] *See* Smith, *supra* note 16, at 482 (arguing that the negotiating history and technological advancement (the Charter is "pre-atomic") support the interpretation that the Charter intended to incorporate customary law in its entirety, including the right to anticipatory self-defense).

Article 42 contains another exception to the general prohibition of the use of force by allowing anticipatory military action after authorization by the Security Council. This exception has not been as controversial or as frequently utilized as the self-defense provision, primarily because the Security Council was essentially immobilized during the Cold War.[48] Under Article 39, the Security Council "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression" and recommend appropriate measures to restore international peace and security.[49] By its terms, the Council must first consider peaceful measures.[50] However, if those measures are shown to be or are considered inadequate, the Council "may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."[51] Articles 39, 41, and 42 demonstrate the U.N.'s commitment to ensuring that "armed force shall not be used, save in the common interest,"[52] and that the use of force by an individual state without Security Council authorization is strictly limited to the traditional right of self-defense.[53] These limitations on force have been challenged significantly by the Bush Administration's self-defense doctrine permitting the use of force in a preemptive strike.

III. BUSH ADMINISTRATION POLICY: ZERO TOLERANCE DIPLOMACY AND THE DOCTRINE OF PREEMPTIVE STRIKE

Academics and commentators have suggested several potential methods of addressing the current crisis in North Korea. These include: a return to the carrot-and-stick approach taken by the Clinton Administration;[54] imposition of economic sanctions and further isolation;[55]

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[48] *Id.* at 461. This was due, in large part, to the deadlock that resulted from frequent use of the veto power by the United States and the Soviet Union. *Id.* Prior to the Gulf War, the Security Council authorized the use of force only once, during the Korean War. *Id.*

[49] U.N. CHARTER art. 39 (emphasis added).

[50] *Id.* art. 41 (listing measures such as the 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).

[51] "Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." *Id.* art. 42. *See also* Smith, *supra* note 16, at 462-63 (discussing the connection between Articles 41 and 42 of the Charter).

[52] U.N. CHARTER pmbl.

[53] Zedalis, *supra* note 20, at 121.

[54] This approach has generally been favored by China, Russia and South Korea. *See, e.g.*, Charles Whelan, *China, Japan, Russia Uneasy Over U.S. Pressure on North Korea*, AGENCE FR. PRESSE, Dec. 30, 2002, LEXIS, News File. The Russian Government has discussed a possible "package solution" that would include "maintaining the nuclear-free status of the Korean Peninsula, strict observance of the NPT, and fulfillment of Agreed Framework promises; conducting bilateral and multilateral talks with North Korea

referring North Korea to the U.N. Security Council for the application of additional economic sanctions;[56] or, finally, referral to the U.N. Security Council for possible military action as a collective security measure.[57] Recent U.S. policy pronouncements of the preemption doctrine and the current military escalation in Iraq suggest, additionally, that force might be used to eliminate North Korea's nuclear facilities.[58]

A. The Adoption of the Preemptive Strike Doctrine: Responding to the Threat Posed By Weapons of Mass Destruction and Terrorism

In September 2002, the Bush Administration released the "U.S. National Security Strategy," adopting a doctrine allowing preemptive action to "counter a sufficient threat to our national security."[59] This Strategy was developed in recognition of the uniquely dangerous and complex threat posed to U.S. security by rogue regimes and terrorist organizations.[60] Considering this threat, the Bush Administration stated that "the United States can no longer solely rely on a reactive posture as [it] ha[s] in the past."[61] Instead, President Bush suggested an adaptation of the concept of imminent threat to deal with terrorism and the proliferation of weapons of mass destruction by terrorist regimes.[62] This new doctrine would permit preemptive action in self-defense, "even if uncertainty remains as to the time and place of the enemy's attack."[63]

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that would produce security guarantees, and resuming humanitarian and economic aid programs in North Korea." Cristina Chuen, *Russian Responses to the North Korean Crisis, at* http://cns.miis.edu/research/korea/rusdprk.htm (last visited Jan. 25, 2003).

[55] *See* James Dao, *Nuclear Standoff: Bush Administration Defends Its Approach on North Korea*, N.Y. TIMES, Feb. 6, 2003, at A13, LEXIS, News File (stating that "no option" has been taken off the table, including sanctions or military options).

[56] *Weapons of Mass Destruction on the Korean Peninsula: Hearing Before the Senate Foreign Relations Committee*, 108th Cong. (Feb. 4, 2003) (statement of Richard L. Armitage, Deputy Sec'y of State), *available at* http://www.state.gov/s/d/rm/17170.htm (suggesting that, unless North Korea takes immediate action to comply with its treaty obligations, the IAEA Board of Directors will likely report North Korea's continuing noncompliance to the Security Council).

[57] *Id.*

[58] The United States, although affirming its belief that the situation can be resolved diplomatically, has consistently stated that all options must remain on the table. *See* Dao, *supra* note 55.

[59] *National Security Strategy*, *supra* note 9, at 15.

[60] *Id.* sec. V.

[61] *Id.* at 15.

[62] *Id.*

[63] *Id.*

B. *The Potential for U.S. Preemptive Action Against North Korea*

The Bush Administration has taken a proactive approach in using the preemption doctrine to justify the use of force in response to the attempted acquisition of weapons of mass destruction in Iraq.[64] The United States worked with the Security Council for authorization of "serious consequences" should Saddam Hussein be found guilty of a "material breach" under the U.N. Resolution requiring full compliance with weapons inspections.[65] When failure of passing a second resolution appeared imminent, the Bush Administration chose to invade Iraq without prior Security Council authorization.[66]

Although the Bush Administration has suggested that a different strategy will be employed with North Korea, and has repeatedly expressed its desire for a diplomatic and peaceful solution,[67] it is possible that these statements are more representative of a desire to avoid a "two-front" conflict than an actual policy toward North Korea.[68] Moreover, the Administration has stated that it will keep all options open, including military action.[69] The possibility remains that the United States will silence North Korea's nuclear brinkmanship with a preemptive military strike.[70]

IV. THE DEVELOPMENT OF CRISIS ON THE KOREAN PENINSULA

In the parts that follow, this Comment outlines North Korea's treaty obligations under the NPT[71] and the Joint Declaration,[72] the crisis of 1993, and the remarkably similar nuclear brinkmanship North Korea is engaging in today. Next, the doctrine of preemptive strike is applied to the current crisis, leading to the conclusion that a preemptive military response against North Korea would lack legal support under both customary international law and the U.N. Charter.

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[64] *See* David Von Drehle, *Bush Walks a Thin Tightrope of Expansive Goals*, WASH. POST, Mar. 21, 2003, LEXIS, News File.

[65] David Sanger, *The World: Over There; A New Front Opens but It's Still One War*, N.Y. TIMES, October 20, 2002, LEXIS, News File.

[66] Drehle, *supra* note 64.

[67] Press Statement, Richard Boucher, Spokesman, Dept. of State, North Korean Nuclear Program (Oct. 16, 2002), http://www.state.gov/r/pa/prs/ps/2002/14432.htm (last visited May 4, 2003).

[68] Sanger, *supra* note 65.

[69] Dao, *supra* note 55.

[70] *See id.*

[71] NPT, *supra* note 6.

[72] Joint Declaration, *supra* note 4.

A. *North Korea's Pre-1993 Obligations Under the International Non-Proliferation Regime*

North Korea's treaty obligations prior to the 1993 crisis were contained within the NPT[73] and a Joint Declaration,[74] relating to the de-nuclearization of the Korean Peninsula. These obligations were designed to prevent a nuclear arms race in Northeast Asia, particularly between North and South Korea. The United States, due to its security commitments in South Korea and Japan, had a significant interest in maintaining a nuclear-free North Korea prior to the 1993 crisis and still does today.[75]

1. *The NPT Established North Korea's Non-Proliferation Obligations*

The international community has long recognized the potential dangers of proliferation and the massive destructive power of nuclear weapons.[76] In response to an increasing number of nuclear states,[77] the United States began to work urgently towards developing an international nonproliferation treaty during the 1950s.[78] On August 17, 1965 the United States submitted a draft nonproliferation treaty to the U.N. General Assembly that was considered along with a Soviet version.[79] The combined and revised draft of the NPT was opened for signature on June 12, 1968, and entered into force on March 5, 1970.[80] It has since been joined by 187 countries and is the most widely ratified arms limitation and disarmament agreement in history.[81]

The primary goals of the NPT are to prevent the spread of nuclear weapons, promote cooperation in the peaceful use of nuclear energy, and

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[73] NPT, *supra* note 5.

[74] Joint Declaration, *supra* note 4.

[75] *Id.*

[76] U.S. State Dept., *Treaty on the Non-Proliferation of Nuclear Weapons*, *at* http://www.state.gov/global/arms/treaties/npt1.html (last visited Dec. 14, 2002).

[77] In addition to the United States, the Soviet Union in 1949, Great Britain in 1952, France in 1960 and China in 1964 became nuclear weapon states. *id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] United Nations, *Treaty on the Non-Proliferation of Nuclear Weapons: Brief Background*, *at* http://www.un.org (last visited Jan. 1, 2003) [hereinafter *Treaty on the Non-Proliferation of Nuclear Weapons: Brief Background*]. The United States ratified the NPT in 1969 while North Korea did not accede to the treaty until 1985. *Id. See also* Shariff Shuja, *Looking Forward by Looking Back, a Pragmatic Look at Nuclear Non-Proliferation, Disarmament and Arms Control*, NATIONAL OBSERVER—AUSTRALIA AND WORLD AFFAIRS, Spring 2002, at 59 (recognizing the NPT as the "centerpiece" of the International Non-Proliferation Regime).

work towards eventual nuclear disarmament.[82] In order to achieve these goals, the treaty contains four primary provisions. Article I prevents the transfer of nuclear weapons or explosives to any non-nuclear state[83] while Article II forbids the receipt of these materials from nuclear states.[84] Article III requires that non-nuclear states accept safeguards to verify nonproliferation compliance[85] that are implemented by the International Atomic Energy Agency ("IAEA").[86] Article VI is designed to achieve the eventual goal of complete nuclear disarmament, calling for the good faith pursuit of negotiations "relating to [the] cessation of the nuclear arms race."[87]

2. *The Joint Declaration Established Regional Standards Prohibiting Nuclear Proliferation on the Korean Peninsula*

With the NPT already in place, North Korea and South Korea began developing methods of ensuring regional security. On January 20, 1992, North and South Korea signed the Joint Declaration "[w]ith a view to

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[82] *Treaty on the Non-Proliferation of Nuclear Weapons: Brief Background*, *supra* note 81.

[83] "Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly or indirectly . . ." NPT, *supra* note 5, art. I.

[84] "Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices directly, or indirectly . . ." NPT, *supra* note 5, art. II.

[85] Under Article III, each non-nuclear-weapon State Party to the Treaty is required to accept safeguards negotiated between itself and the International Atomic Energy Agency ("IAEA"). NPT, *supra* note 6, art. III, para. 1. The purpose of these safeguards is to verify that nuclear energy is being used for peaceful purposes and not diverted to nuclear weapons or other explosive devices. *Id.* North Korea concluded a safeguards agreement with the IAEA that went into force on April 10, 1992, DPRK-IAEA: Agreement for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, Jan. 30, 1992, DPRK-IAEA, 33 I.L.M. 315 (1994) [hereinafter Safeguards Agreement]. However, in a 2002 report on DPRK safeguards, the IAEA stated that, due to North Korea's non-compliance, it has "never had the complete picture regarding DPRK nuclear activities and has never been able to provide assurances regarding the peaceful character of the DPRK nuclear programme." IAEA, *Fact Sheet on DPRK Nuclear Safeguards*, (Dec. 16, 2002), *at* www.iaea.org/worldatom/PressP_release/2002/med-advise_052.shtml (last visited Jan. 4, 2003).

[86] On December 8, 1953, U.S. President Dwight D. Eisenhower proposed to the U.N. General Assembly the creation of an organization to promote peaceful uses of nuclear energy while preventing its use for military purposes. DAVID FISCHER, HISTORY OF THE INTERNATIONAL ATOMIC ENERGY AGENCY: THE FIRST FORTY YEARS 9 (1997). This proposal then led to the creation of the IAEA with its statute coming into force July 29, 1957. Statute of the International Atomic Energy Agency, *opened for signature* Oct. 26, 1956, 8 U.S.T. 1093, 276 U.N.T.S. 3, *available at* www.iaea.or.at/worldatom/Documents/statute.html (last visited Mar. 8, 2003) [hereinafter Statute of the IAEA].

[87] "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control." NPT, *supra* note 5, art. VI.

denuclearizing the Korean Peninsula and thus removing the danger of nuclear war, creating conditions and [an] environment favorable for peace and peaceful reunification of [their] country and contributing to peace and security in Asia and the rest of the world."[88] Under the Joint Declaration, both states agreed that:

> (1) The North and South shall refrain from testing, manufacture, production, acceptance, possession, stockpiling, deployment, and use of nuclear weapons;
> (2) The North and South shall use nuclear energy only for peaceful purposes;
> (3) The North and South shall not possess nuclear reprocessing and uranium enrichment facilities; and
> (4) The North and South shall make an inspection of objects chosen by the other side and agreed upon between the sides through procedures and methods defined by the North-South Joint Committee of Nuclear Control in order to verify the denuclearization of the Korean Peninsula.[89]

In spite of North Korea's non-proliferation commitments, its refusal to allow complete inspections of alleged nuclear facilities led to the crisis of 1993.

B. The 1993 Crisis Led to the Clinton Administration's Bargaining for North Korean Compliance with the NPT

Concerns over North Korea's attempted withdrawal from the NPT in 1993 led to the creation of a landmark agreement, providing economic incentives for North Korea's compliance with its obligations under the NPT.[90] Before this compromise was achieved, however, there were concerns that the escalation of military tensions would result in the use of force on the Korean peninsula.[91] This situation is remarkably similar to the current crisis. The primary difference between the two lies in the Bush

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[88] Joint Declaration, *supra* note 4.

[89] *Id.*

[90] *See* Agreed Framework, *supra* note 3.

[91] OBERDORFER, *supra* note 1, at 311-16 (discussing the military buildup in response to escalating tension between the United States and North Korea).

Administration's hard-line response to North Korea's nuclear brinkmanship.[92]

1. Events Leading to the Crisis: North Korea's Attempted Withdrawal from the NPT

Although North Korea signed the NPT in 1985;[93] as of 1992, it had yet to fully comply with its obligation to allow full inspections of its nuclear facilities.[94] North Korea finally concluded a "safeguards agreement"[95] with the IAEA on January 30, 1992.[96] Under this agreement, North Korea was "obligated to accept safeguards on all fissionable materials, provide a preliminary accounting of materials and facilities, maintain a system for accounting and control of fissionable materials, and provide annual reports of safeguarded materials inventory."[97] Even after the safeguards agreement was in place, North Korea refused to allow inspections of all military sites.[98] This refusal set off a chain of events that led to North Korea's eventual attempted withdrawal from the NPT.[99]

By a letter addressed to the President of the U.N. Security Council on March 12, 1993,[100] the government of North Korea became the first and only country to attempt withdrawal from the NPT in accordance with Article X, paragraph 1 of the Treaty.[101] The letter stated that the behavior of South

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[92] *See generally* Laney & Shaplan, *supra* note 7, discussion of the Bush Administration's "hard-line" response to North Korea's alleged admission of having a secret nuclear program and a comparison of that response to the more diplomatic approach of the Clinton Administration.

[93] *Fact Sheet on DPRK Nuclear Safeguards*, *supra* note 86.

[94] Helen M. Cousineau, *The Nuclear Non-Proliferation Treaty and Global Non-Proliferation Regime: A U.S. Policy Agenda*, 12 B.U. INT'L L.J. 407, 426 (1994).

[95] *See supra* note 86 and accompanying text (discussing the NPT's requirement that a safeguards agreement be completed between non-nuclear-weapons states parties to the treaty. NPT, *supra* note 5, art. III).

[96] Mark E. Newcomb, *Non-Proliferation, Self-Defense and the Korean Crisis*, 27 VAND. J. TRANSNAT'L L. 603, 610 (1994).

[97] *Id.*

[98] *See id.* at 611-12.

[99] *Id.* at 610-13. *See also* Jeong Pires, *North Korean Time Bomb: Can Sanctions Defuse It? A Review of International Economic Sanctions as an Option*, 24 GA. J. INT'L & COMP. L. 307, 320-23 (1994) (discussing events leading to North Korea's attempted withdrawal from the NPT in 1993).

[100] *Democratic People's Republic of Korea Withdraws from Non-Proliferation Treaty*, 32 I.L.M. 602 (1993).

[101] Article X, paragraph 1 of the NPT states that:

> Each party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council

Korea and the United States jeopardized the "supreme interests" of North Korea.[102] In particular, North Korea cited the resumption of Team Spirit[103] joint military exercises and accused the United States of influencing the IAEA to adopt a resolution demanding that North Korea open particular military sites for inspection as evidence of "strong-arm" behavior. North Korea proffered that this behavior necessitated its withdrawal from the NPT.[104]

Because three months advance notice is required for withdrawal under Article X of the NPT, North Korea's withdrawal was not scheduled to become effective until June 12, 1993.[105] During this interval, the international community used diplomatic pressure to encourage North Korea to reconsider its actions. On May 11, 1993, the U.N. Security Council adopted Resolution 825, calling for North Korea's submission to inspections and reconsideration of its withdrawal from the NPT.[106] After Resolution 825 was essentially ignored by North Korea,[107] the Clinton Administration stepped in to apply additional pressure.[108]

2. *The Clinton Administration's Approach: Diplomacy and Bartering for Non-Proliferation Compliance*

The Clinton Administration displayed its commitment to the NPT and nonproliferation in 1993 by attempting to use diplomatic and economic pressure to prevent North Korea's withdrawal from the Treaty.[109] During that time of crisis, the Clinton Administration also moved additional troops

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three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.

NPT, *supra* note 5, art. X, para. 1.

[102] *Democratic People's Republic of Korea Withdraws from NPT, supra* note 100.

[103] Team Spirit is the name for a long-running series of joint military maneuvers involving U.S. and South Korean troops east of Seoul. OBERDORFER, *supra* note 1, at 76. The North Korean government has viewed Team Spirit exercises as hostile acts—as "dress rehearsals for an invasion from the South." *Id.* at 77.

[104] *Democratic People's Republic of Korea Withdraws from NPT, supra* note 100.

[105] *Id.*

[106] U.N. Security Council Res. 825, U.N. SCOR, 3212th Sess., U.N. Doc. S/RES/825 (1993) [hereinafter Res. 825].

[107] *See* Ryan Barilleaux & Andrew Ilsu Kim, *Clinton, Korea, and Presidential Diplomacy*, 162 WORLD AFF. 29 (1999).

[108] *Id.*

[109] See *id.* for a more complete discussion of the Clinton Administration's response to the potential Korean nuclear crisis in 1993.

into the region, setting the stage for possible military action.[110] Eventually, a compromise was reached through negotiation of the Agreed Framework.[111]

The Agreed Framework's primary purpose was to establish a nuclear-free Korean peninsula.[112] To accomplish this, the Clinton Administration offered North Korea economic incentives, including two light-water reactors with a target date of 2003 for completion and free oil shipments until the reactors' completion,[113] in exchange for continued compliance with the NPT and its safeguards.[114] In addition to direct aid, the United States pledged to move towards full normalization of political and economic relations,[115] an important step for the historically isolated North Korea towards joining the international community.

The Agreed Framework was greeted with a rather lukewarm reception.[116] North Korea's recent admission to having a program that produces enriched uranium for nuclear weapons, however, suggests that skepticism was reasonable. First, it was not effective in completely preventing proliferation in North Korea.[117] Moreover, one scholar has argued that the Agreed Framework established a dangerous precedent as a "multi-billion dollar 'sale' of North Korean compliance with the NPT."[118] The Bush Administration has relinquished the more lenient negotiation strategy of the Clinton Administration for a policy of zero tolerance diplomacy[119] and the doctrine of preemptive strike.[120]

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[110] *See* OBERDORFER, *supra* note 1, at 324-26 (discussing three options for the buildup of U.S. troops within the region).

[111] *See* Office of the Historian, Bureau of Public Affairs, U.S. Dept. of State, *History of the Department of State During the Clinton Presidency (1993-2001)*, Section 4, Arms Control, *at* www.state.gov/r/pa/ho/pubs/c6059.htm; Barilleaux & Kim, *supra* note 107 (discussing tension and negotiations eventually leading to the conclusion of the Framework Agreement); *Democratic People's Republic of Korea Withdrawal from Non-Proliferation Treaty*, *supra* note 100.

[112] Agreed Framework, *supra* note 3.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] Congress reacted strongly to the Agreed Framework, proposing several amendments that would have prevented the United States from providing funds to the light-water reactor project and calling for stricter terms for the deal with North Korea. *See* Barilleaux & Kim, *supra* note 107. In spite of this dissatisfaction, most legislators were unable to propose an alternative and eventually grudgingly supported the Framework Agreement. *Id.* The American public was also not prepared for such a broad agreement with a "pariah" nation. OBERDORFER, *supra* note 1, at 358.

[117] *North Korean Nuclear Program*, *supra* note 67. It is important to note that, although officials in the North Korean government initially admitted to having a nuclear program, they later stated that their policy was to neither confirm nor deny its existence. *See* Don Kirk, *Threats and Responses: The Asian Front; North Korea Softens its Tone on Nuclear Arms Agreement*, N.Y. TIMES, Nov. 7, 2002, at A22.

[118] *See* Shuja, *supra* note 81.

[119] *See, e.g.*, Laney & Shaplen, *supra* note 7 (noting the Bush Administration's "hard-line" response to North Korea's nuclear admission); *Strategy*, *supra* note 9, at 15 (outlining the Bush Administration's doctrine of preemptive strike in response to the proliferation of weapons of mass destruction).

C. *The Current Crisis on the Korean Peninsula*

On October 4, 2002, Assistant Secretary James A. Kelly and a delegation of senior U.S. officials traveled to North Korea in order to begin talks on several issues, including North Korea's nuclear program.[121] At these talks, Assistant Secretary Kelly informed North Korean officials that the United States had information indicating that North Korea had a program to enrich uranium for nuclear weapons, a serious violation of the Agreed Framework and the NPT.[122] According to Secretary Kelly, North Korea initially acknowledged that it did have such a program.[123] North Korean officials then blamed the United States for its breach—stating that the Agreed Framework had been nullified due to a series of U.S. actions, particularly the failure to deliver two civilian nuclear power plants that were promised under the agreement.[124] In October 2002, North Korea backed off from its contention that the Agreed Framework was null and void, suggesting instead that it was "hanging by a thread."[125]

Although North Korea has attempted to characterize the current crisis as a bilateral issue between itself and the United States, the international community has also been involved in the attempt to regain North Korean compliance with its treaty obligations.[126] A resolution passed by the IAEA Board of Governors[127] on November 29, 2002 expressed concern over reports of North Korea's un-safeguarded[128] uranium enrichment program

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[120] *See* David Sanger, *Bush to Outline Doctrine of Striking Foes First*, N.Y. TIMES, Sept. 19, 2002, at A1 (contrasting the Bush Administration's preemption doctrine with the Clinton Administration's policy emphasizing international cooperation and non-proliferation treaties to combat the development of weapons of mass destruction).

[121] *See* Sanger, *supra* note 3; *North Korean Nuclear Program*, *supra* note 67.

[122] *North Korean Nuclear Program*, *supra* note 67.

[123] *Id.*

[124] *See id.*; Shenon, *supra* note 11. North Korea alleged that the United States has not observed any of the four articles contained within the Framework Agreement and has made threatening statements toward North Korea, including it in an "Axis of Evil" and labeling the North as a target for preemptive nuclear strikes. *DPRK Press Conference*, *supra* note 2.

[125] Kirk, *supra* note 117.

[126] *See* James Brooke, *Japan Hopes to Use Aid to Press North Korea to End A-Bomb Plan*, N.Y. TIMES, Oct. 19, 2002, at A6; James Dao, *U.S. Seeks Support to Press North Korea: China is Urged to Try to Halt Pyongyang's Nuclear Arms Program*, N.Y. TIMES, Oct. 19, 2002, at A6; Press Statement, Philip T. Reeker, Deputy Spokesman, U.S. Dept. of State, International Atomic Energy Agency Adopts Resolution on North Korea (Nov. 29, 2002), *at* http://www.state.gov/r/pa/prs/ps/2002/15582.htm (last visited May 4, 2003).

[127] The Board of Governors is a thirty-five member board responsible for overseeing and undertaking the responsibilities of the IAEA. *See* Statute of the IAEA, *supra* note 86, art. VI.

[128] Article 3, paragraph 1 obligates non-nuclear weapons states to accept the safeguards of the IAEA "with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices." NPT, *supra* note 5. North Korea completed a safeguards agreement with the IAEA, which went into force in 1992. *See* Safeguards Agreement, *supra* note 85. North Korea's expulsion

and the repeated statements by North Korea's government that it is entitled to possess nuclear weapons, contrary to its obligations under the Agreed Framework and the NPT.[129] This resolution also called on North Korea to cooperate with the IAEA to meet the inspection requirements contained within the IAEA-DPRK Safeguards Agreement and for North Korea to "give up any nuclear weapons programme, expeditiously and in a verifiable manner."[130] In response, North Korea's Foreign Minister Paek Nam Sun stated that North Korea could not accept the resolution, stating the IAEA was employing a "unilateral and unfair approach."[131]

Pressure by the United States and the IAEA has not eliminated the nuclear threat posed by North Korea's weapons program. Tensions within the region have escalated in response to North Korea's nuclear brinkmanship.[132] North Korea has removed its nuclear program from the watchful eyes of the IAEA;[133] it has expelled IAEA Inspectors from the country, disabled cameras within Yongbyon (a fuel reprocessing plant), and started reopening Yongbyon and a small nuclear reactor that had been closed since 1994.[134] Furthermore, conventional military concerns have escalated due to two recent events: the interception of an unarmed American spy plane in international airspace by a North Korean fighter jet[135] and the test of an anti-ship missile on February 25, 2003.[136]

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of inspectors and removal of cameras at Yongbyon was a violation of the Safeguards Agreement, leaving the IAEA without any ability to ensure North Korea's nuclear technology is being used only for peaceful purposes. *See id.* art. 9.

[129] Press Release, IAEA Press Centre, IAEA Board of Governors Adopts Resolution on Safeguards in the DPRK (Nov. 29, 2002), *at* http://www.iaea.org/worldatom/Press/P_release/2002/med-advise_033.shtml (last visited May 4, 2003) [hereinafter IAEA Board Resolution]. The resolution represents a non-binding statement of concern that was transmitted to North Korea. Interestingly, this resolution both refers to and echoes Res. 825, issued by the Security Council during the 1993 Crisis, which was essentially ignored by the North Korean Government during that previous crisis. Res. 825, *supra* note 106.

[130] IAEA Board Resolution, *supra* note 129, at (h)8, #9.

[131] *Fact Sheet on DPRK Nuclear Safeguards*, *supra* note 85. This statement echoes the accusations levied at the IAEA in North Korea's statement of withdrawal from the NPT in 1993, accusing the IAEA of succumbing to pressure from a heavy-handed United States in ordering inspections of two nuclear facilities. *See Democratic People's Republic of Korea Withdraws from Non-Proliferation Treaty*, *supra* note 100.

[132] Barbara Demick, *The World: North Korea's Bellicose Rhetoric Against U.S. is Seen as Mostly Brinkmanship*, L.A. TIMES, Nov. 8, 2002, at A4, LEXIS, News File; Sanger, *supra* note 3.

[133] *See* James Brooke, *Japan Fears North Korea; U.S. Promises Defense Shield*, N.Y. TIMES, Dec. 26, 2002, at A7.

[134] *Id.*

[135] Four North Korean MIGs intercepted the American spy plane and, according to reports, made universally recognized hand signals for the crew of the American plane to follow them. Eric Schmitt, *North Korean Fliers Said to Have Sought Hostages*, N.Y. TIMES, Mar. 8, 2003, at A1. This led U.S. officials to conclude that the North Korean pilots were attempting to force the aircraft to land in order to take the crew hostage. *Id.* However, there was no direct radio communication, so there is no way to confirm this hypothesis. *Id.*

[136] *Id.*

On January 10, 2003, North Korea issued a statement announcing its "automatic and immediate effectuation of its withdrawal from the NPT."[137] In its statement, North Korea revoked its suspension of withdrawal from the NPT issued during the 1993 crisis, therefore bypassing the three-month time period required under the NPT for effective withdrawal.[138] Along with its withdrawal, North Korea announced that it was "totally free from the binding force of the safeguards agreement with the IAEA."[139] According to Central Intelligence Agency ("CIA") estimates, with these nuclear facilities reopened, North Korea could potentially produce five or six nuclear weapons within six months.[140]

V. PREEMPTIVE STRIKE AND INTERNATIONAL LAW: APPLYING THE DOCTRINE TO THE KOREAN NUCLEAR CRISIS

Since there is currently no Security Council Resolution authorizing the use of force in response to the nuclear standoff on the Korean Peninsula,[141] any military action taken by the United States would have to be justified as an act of self-defense under customary international law or the U.N. Charter.[142] There are three rationales upon which the United States could use the principle of self-defense to justify the use of preemptive force

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[137] *North Korea: Statement on Pullout*, N.Y. TIMES, Jan. 11, 2003, at A7, LEXIS, News File.

[138] *See id. See also* NPT, *supra* note 5, art. X, para. 1 (recognizing states parties' right to withdraw from the Treaty upon a decision that "extraordinary events" have jeopardized the "supreme interests of its country" while requiring three months advance notice for such withdrawal to be effective).

[139] *North Korea: Statement on Pullout*, *supra* note 137.

[140] The CIA estimates that North Korea already has one or two nuclear weapons. Although this alone is troubling, the potential threat posed by North Korea would significantly increase if it were to acquire several more nuclear weapons; with only one or two nuclear weapons, a State is less likely to use or sell them to other countries or terrorist groups. *See, e.g.*, David Sanger, *President Makes Case That North Korea is No Iraq*, N.Y. TIMES, Jan. 1, 2003, LEXIS, News File. The two weapons North Korea is believed to already possess were made prior to the 1994 Framework Agreement. *See* David Sanger, *Bush Plays Down Rift With Allies Over U.S. Stance on North Korea*, N.Y. TIMES, Jan. 3, 2003, LEXIS, News File. Therefore, North Korea has actually been an undeclared nuclear power for years. *Id.* In spite of these concerns, North Korea's Ambassador, Pak Gil Yon, has stated that, although Pyongyang was withdrawing from the Treaty, it "had no intention of producing nuclear weapons or using its nuclear technology for anything other than peaceful purposes, such as generating electricity. *Security Council Notified of DPRK's Withdrawal from Nuclear Arms Accord* (Jan. 13, 2003), *at* http://www.iaea.or.at/worldatom/Press/Focus/IaeaDprk/archive/SC_Notified_of_DPRK_withdrawal_10Jan.pdf (last visited May 4, 2003).

[141] Nor is it likely that the Council will authorize the use of force in the future, considering their China and Russia's veto capabilities and their opposition to pressuring North Korea. *See* Phillip Saunders & Jing-dong Yuan, *Korea Crisis Will Test Chinese Diplomacy*, ASIAN TIMES, Jan. 8, 2003, http://cns.miis.edu/pubs/other/chidiplo.htm (last visited Jan. 23, 2003); Whelan, *supra* note 54.

[142] Since it is debatable to what extent the U.N. Charter has revised or replaced customary international law with respect to the use of force in self-defense, *supra* note 29, this Comment will analyze the doctrine of preemptive strike with respect to both custom and the principles embodied in Article 51 of the U.N. Charter.

against North Korea. First, the attempt to develop or acquire additional weapons of mass destruction might upset the nuclear balance in Northeast Asia, thereby constituting an "imminent threat" to international security.[143] Second, North Korea's actions might present an imminent threat because North Korea could sell weapons to terrorist organizations.[144] Finally, threat or use of force might be necessary to enforce North Korean compliance with its treaty obligations.[145]

These justifications for preemptive action do not meet any internationally acceptable rationale for self-defense. First, they do not meet the standards of necessity and proportionality established under the Caroline Doctrine and customary international law. Second, it would be inappropriate to even consider military action in the North Korea situation, given the requirement that states exhaust all peaceful remedies before resorting to the use of force,[146] a principle that has been affirmed by the collective security structure established within the U.N. Charter. Third, the use of force in self-defense has been limited under Article 51 to being in response to an "armed attack"[147] which, by definition, would not allow preemptive action against North Korea or its alleged nuclear facilities.

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[143] The United States has not endorsed this argument, probably because of its own vast nuclear arsenal; a number of non-nuclear states, however, have argued in favor of the illegality of nuclear weapons. The International Court of Justice ("ICJ") addressed this debate in a recent advisory opinion. *See* I.C.J., Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, para. 48 (1996) (acknowledging that possession of nuclear weapons may indeed justify an inference of preparedness to use them, while also recognizing the principle of deterrence relying on a credible threat).

[144] See 2002 State of the Union, *supra* note 8, for statements by the Bush Administration linking North Korea, Iraq and Iran as an Axis of Evil and connecting their development of weapons of mass destruction with the activities of terrorist organizations.

[145] *See generally* Smith, *supra* note 16 (discussing coercive arms control as an attack on state sovereignty and suggesting that the Security Council's decision not to denounce a U.S. strike on an Iraqi nuclear complex is evidence of an emerging norm allowing the use of military force to control the production or use of particular weapons); Zedalis, *supra* note 20 (noting that Soviet and American efforts to destroy missile defense systems violating the ABM treaty would likely be unable to satisfy the strict standard of "imminent threat" required under customary international law).

[146] The requirement that states exhaust peaceful measures before resorting to force was established customary international law. *See supra* note 27 and accompanying text. This principle has also been reaffirmed within the U.N. Charter. *See* U.N. CHARTER art. 33, para. 1 (requiring that parties to any dispute "first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice").

[147] U.N. CHARTER arts. 39-51. Although some have argued that a broader right to use force is necessary to deal with the uniquely destructive power of nuclear weapons, the text of Article 51 explicitly limits self-defense to being in response to an "armed attack." *Id.* art. 51. Furthermore, U.N. members generally favor this more restrictive interpretation. *See* Schachter, *In Defense of International Rules on the Use of Force*, *supra* note 29, at 133.

A. The Caroline Doctrine: Necessity and Proportionality of Preemptive Military Action on the Korean Peninsula

Under customary international law, any preemptive strike by the United States against North Korea's alleged nuclear facilities would have to meet the requirements of necessity and proportionality established in the Caroline Doctrine. A preemptive strike would not be justified based solely on North Korea's possession of nuclear weapons or its violation of arms control agreements due to a lack of necessity.

1. Necessity and the Doctrine of Preemptive Strike: The Difficulty of Proving Imminence in the Face of an Uncertain Threat

One of the primary difficulties in applying the doctrine of preemptive strike in the Korean Peninsula lies in meeting the requirement that North Korea's actions constitute an imminent threat to U.S. security. As established in the Caroline Doctrine,[148] the necessity of self-defense must be "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[149] This concept is often expressed today in terms of "imminence."[150] Although the attempt to acquire and possess nuclear weapons is troubling, especially considering their devastating character, the International Court of Justice ("ICJ") has recognized that these activities are not per se illegal.[151] In making its decision, the ICJ emphasized the tension between an emerging custom—prohibiting the manufacture, possession, and use of nuclear weapons and represented by current non-proliferation treaties on the one hand—and the continuing practice of nuclear deterrence on the other.[152] This distinction between law and practice makes it extremely

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[148] *See* discussion *infra* Part III.A.

[149] Lacey, *supra* note 20, at 296.

[150] *See, e.g., Strategy, supra* note 9, at 15 (stating that, for centuries, international law had recognized that nations need not wait to be attacked before they defend against an "imminent danger").

[151] *See ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, supra* note 143, para. 105(2). The Court found that neither customary nor international law comprehensively or universally prohibits the threat or use of nuclear weapons. *Id.* para. 105(2)B. It also found, however, that the use of nuclear weapons that is contrary to Article 2, paragraph 4 (general prohibition of the use of force) and Article 51 (self-defense) of the U.N. Charter is unlawful. *Id.* para. 105(2)C. Furthermore, the threat or use of nuclear weapons should also comply with the international law of war, humanitarian principles and relevant treaty obligations. *Id. But see id.* para. 62 (recognizing that Treaties, such as the NPT, could be "seen as foreshadowing a future general prohibition of the use of [nuclear] weapons").

[152] *Id.* para. 65-6.

difficult to argue that the attempt to develop, acquire, or possess nuclear weapons justifies a preemptive strike under customary international law.[153]

The Bush Administration's attempt to justify the use of force against states based on their alleged attempts to acquire nuclear weapons is especially troubling because it creates a double standard. The United States, Great Britain, China, Russia, and France maintain nuclear arsenals[154] and have been accused of violating arms control agreements[155]—similar actions to those currently being taken by North Korea. Labeling North Korea's nuclear program as an "imminent threat" would further aggravate claims that the United States engages in nuclear hypocrisy.[156] Moreover, the "mere possession of weapons [does] not constitute an imminent threat of their use."[157]

The sale of nuclear weapons to terrorists is an admittedly troubling possibility, particularly in the wake of September 11, 2001. In spite of these reasonable concerns, mere speculation that North Korea might provide weapons of mass destruction to terrorist organizations does not justify the use of force under international law.[158] Currently, there has been no connection established between North Korea and Al Qaeda, or any other terrorist organization.[159] Furthermore, the CIA estimates that North Korea has only one or two nuclear weapons,[160] making it highly unlikely they

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[153] This is a particularly difficult argument to make because the United States is one of five nuclear states recognized under the NPT. *See* HARALAMBOS ATHANASAOPULOS, NUCLEAR DISARMAMENT IN INTERNATIONAL LAW 134 (2000). France, China, Germany and Russia are the other four nuclear powers—states that the U.S. does not view as a threat and also, for the most part, are currently considered U.S. allies. *Id.* It is interesting to note that the nuclear states also tend to be considered the Great Powers internationally. *See* Gavin McCormack, *North Korea in the Vice*, 18 NEW LEFT REV. 5, 2002. As a result, it is rational to conclude that a state would desire nuclear weapons for reasons other than aggression, i.e., prestige or as a deterrent against aggression. *Id.* This double standard has resulted in criticism of U.S. nuclear policy as hypocritical. *Id.*

[154] McCormack, *supra* note 153.

[155] *Id.*

[156] *See id.* (discussing U.S. nuclear hypocrisy).

[157] Arend, *supra* note 20, at 750.

[158] Although the Bush Administration has attempted to use the link between Iraq and Al Qaeda to bolster the U.S. argument for the use of force to disarm Saddam Hussein, this attempt has been viewed with some skepticism. This perception is evident in France and Germany's opposition to military action against Iraq without U.N. authorization. *See* Steven R. Ratner, *Jus Ad Bellum and Jus in Bello After September 11*, 96 AM. J. INT'L L. 905, 920-21 (2002) (suggesting that an expansive view of jus ad bellum, such as that expressed in President Bush's "Axis of Evil" speech and the Administration's assertion of the right of anticipatory self-defense, is "not infinitely elastic"); Fareed Zakaria, *The Arrogant Empire*, NEWSWEEK Mar. 24, 2003, at 18.

[159] Although the Bush Administration has attempted to "equate weapons of mass destruction with support for terrorism," the international community has not been very receptive to this idea. *See generally* Zakaria, *supra* note 158 (noting international opposition to the war in Iraq).

[160] *See, e.g.*, Sanger, *supra* note 140 (suggesting the different approach taken by the Bush Administration toward North Korea, as opposed to Iraq, is due to "the North's existing nuclear capability and its ability to wreak enormous damage on Seoul with its conventional weapons").

would deplete their entire stock by selling to terrorists.[161] Even if North Korea were to increase the size of its nuclear arsenal, this would not necessarily mean that it would sell additional weapons to terrorists.[162] There are important distinctions between the possession, sale, and use of nuclear weapons in terms of their potential threat.[163] The speculative and indirect fear that North Korea may sell nuclear weapons to terrorists does not constitute an imminent threat justifying the use of force in self-defense.

Furthermore, the use of preemptive force in North Korea in response to violations of arms control agreements also fails to meet the Caroline standard due to a lack of necessity. Violations of arms control agreements are of significant international concern; however, this behavior is actually fairly common among states.[164] In fact, North Korea has consistently accused the United States of violating its commitments under the Agreed Framework.[165]

The support of the United States for the Agreed Framework has been inconsistent, particularly under the current Bush Administration.[166] As the target date for delivery of two light-water reactors approached, North Korean leaders became increasingly doubtful that they would actually be built.[167] Furthermore, the Agreed Framework called for the United States to

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[161] Logically, it would not make sense for North Korea to deplete its entire stockpile, particularly because its nuclear arsenal may be able to deter preemptive action by the United States—even in the face of current military tensions and escalation. *See id.*

[162] If North Korea did sell a nuclear weapon to Al Qaeda, or a similar terrorist organization, this would undoubtedly change the analysis and it would be difficult to argue that the use of force would not be justified self-defense. *See* Christopher Clarke Posteraro, *Intervention in Iraq: Towards a Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention*, 15 FLA. J. INT'L L. 151, 180 (noting that international legal scholars and state practice support the view that state support of terrorist bombings qualify as an armed attack justifying the use of force under the U.N. Charter). Although mere possession does not link weapons of mass destruction to terrorism, the sale of nuclear weapons to a terrorist organization with the knowledge that they will most likely be used against another state would qualify as an armed attack. *See also* Nicaragua v. United States, 1986 I.C.J. 14, at 103, para. 195 (stating that an armed attack includes "not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support"). It is difficult, however, to speculate that such a sale will occur in the absence of evidence or ability.

[163] *See* Arend, *supra* note 20, at 750 (noting that the "mere possession of weapons would not constitute an imminent threat of their use").

[164] U.N. Secretary-General Kofi Annan, speaking in front of the U.N. Disarmament Board, called for the preservation and consolidation of existing multi-lateral norms through "adherence to treaties and fulfillment of treaty obligations." *See Secretary-General Warns of "Disturbing" Erosion in International Norms on Weapons of Mass Destruction, in Remarks to Disarmament Board* (Feb. 6, 2003), UN Doc. SG/SM/8598 DC/2853. In doing so, he noted that North Korea and Iraq are "only the tip of the iceberg" contributing to the gradual erosion of international norms on weapons of mass destruction. *Id.*

[165] *See* Demick, *supra* note 132; *DPRK Press Conference*, *supra* note 2; Shenon, *supra* note 11.

[166] Laney & Shaplen, *supra* note 7, at 21 (noting that "Bush's support of the 1994 Agreed Framework was lukewarm at best" and that his Administration viewed it as a form of blackmail).

[167] Toby Dalton, *U.S. Policy on North Korea: The View from Seoul* (Mar. 25, 2002), *at* www.ceip.org/files/nonprolif/templates/Publications.asp?p=8&PublicationID=939; Demick, *supra* note

work towards normalization of diplomatic and economic ties with North Korea.[168] Economically destitute and isolated, North Korea desperately needs normalization,[169] but the United States has been reluctant to instigate change due to its distrust of Kim Jong Il and his reclusive regime.[170] North Korea has cited the failure to deliver light-water reactors by the target date and to normalize relations as breaches of the Agreed Framework by the United States,[171] an example of the finger pointing that can occur in connection with violations of arms control agreements.

Although there has been some support for the concept of coercive arms control,[172] this has been done through Security Council Resolutions.[173] Unilateral action without Council authorization has been condemned as a "clear violation of the United Nations and the norms of international conduct."[174] Considering the wide-ranging violations of arms treaties, it would be difficult to distinguish which acts constitute a threat and which do not. This suggests the need for debate and multilateral action through the auspices of the Security Council.[175]

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132. Reactor construction delays have resulted in the date for completion being pushed back from 2003 to 2008.

[168] Agreed Framework, *supra* note 3, at II.

[169] Kim Jong Il has pursued normalization of economic and political relations with the United States and a peace settlement formally ending the Korean War without success since signing the Framework Agreement in 1994. Normalization would potentially unlock economic aid from not only the United States, but also from Japan, Western Europe and the World Bank. *See* Selig S. Harrison, *Time to Leave Korea*, FOREIGN AFF., Mar.-Apr. 2001, LEXIS, News File.

[170] *See* Demick, *supra* note 132 (according to Rhee Bong Jo, an assistant South Korean Minister who visited Pyongyang in October, 2002, "North Korea wants very badly to establish relations with the U.S. . . . Their admission was for the sake of negotiation. This was brinkmanship").

[171] *See, DPRK Press Conference*, *supra* note 2.

[172] Smith *supra* note 16, at 507 (suggesting that, although the U.N. Charter mentions neither anticipatory self-defense nor coercive arms control, both have been endorsed by the Security Council, as evidenced by the Security Council's endorsement of U.S. strikes against Iraqi reactors in 1991).

[173] *Id.*

[174] *Id.* at 455.

[175] The United States has also been accused numerous times of violating treaty agreements, including the Agreed Framework. *DPRK Press Conference*, *supra* note 2; *See also* McCormack, *supra* note 153 (discussing nuclear hypocrisy, particularly the United States' refusal to ratify the Comprehensive Test Ban Treaty and the placement of nuclear weapons in South Korea up until 1991). Furthermore, the entire doctrine of preemptive strike appears to violate U.S. security assurances in connection to the NPT. See *U.S. Presidential Declaration Delivered to the First Committee of the United Nations General Assembly on November 17, 1978, reprinted in* THE UNITED NATIONS AND NUCLEAR NON-PROLIFERATION, Sales No. E. 95.I.17, at 20-21 (1995), which states:

> The United States will not use nuclear weapons against any non-nuclear weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons or any comparable internationally binding commitment not to acquire nuclear explosive devices, except in the case of an attack on the United States, its territories or armed forces, or its allies, by such a State allied to a nuclear-weapon State or associated with a nuclear-weapon State in carrying out or sustaining the attack.

2. *Difficulties in Gauging the Proportionality of the Use of Force in a Preemptive Strike*

Another dilemma that arises in using force before an overt aggressive act has occurred is the difficulty in evaluating the proportionality of a particular response. In 1993, it was estimated that there would be as many as one million casualties, including 80,000 to 100,000 Americans, if full-scale war resumed on the Peninsula.[176] Moreover, out-of-pocket costs to the United States would exceed an estimated US$100 billion and the destruction of property and interruption of business activity would cost more than US$1 trillion.[177] Military action today would likely produce similar casualties to those estimates that led the United States to balk at the use of force during the crisis in 1994.[178] It is difficult to speculate on the appropriateness of potential action—particularly in light of the uncertain nature of the threat to U.S. security.[179]

3. *The Bush Administration Has Not Exhausted Peaceful Remedies in Dealing With the North Korean Nuclear Crisis*

Although not cited as often as other aspects of the Caroline Doctrine, the exhaustion of peaceful remedies is an important principle of customary international law that has been reinforced by the U.N. Charter.[180] This principle reiterates the idea that force should not be used except in cases of absolute necessity.[181] The importance of utilizing diplomacy and negotiation is evident when one compares the 1993 crisis with the current crisis in North

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[176] OBERDORFER, *supra* note 1, at 324.

[177] *Id.*

[178] McCormack, *supra* note 153.

[179] This analysis would necessarily change if North Korea were to engage in acts of aggression against the United States. If North Korea were to attack the United States, a military response would be justified as an act of self-defense. U.N. CHARTER art. 51. In this situation, the appropriate level of force would still be governed by the requirement of proportionality. *See generally I.C.J. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, *supra* note 143. A nuclear strike on North Korea would justify a conventional military response and might even justify a nuclear response; however, the use of nuclear weapons by the United States in response to a conventional attack would not be justified under international law. *Id.* These situations, however, are distinct from the problems posed by the doctrine of preemptive strike, because there is an attack upon which to evaluate proportionality. *Id.*

[180] U.N. CHARTER art. 33.

[181] The exhaustion of peaceful remedies is closely related to the requirement of necessity under the Caroline Doctrine. *See* Smith, *supra* note 16, at 480. As a result, the Bush Administration's failure to exhaust peaceful remedies further cautions against the use of force on the Korean Peninsula as being unnecessary or, at minimum, premature.

Korea. As the United States refuses to negotiate with North Korea,[182] the situation on the Korean Peninsula has escalated to the point that North Korea is no longer a party to the NPT, has expelled IAEA inspectors, and is restarting nuclear facilities at Yongbyon that had been frozen since 1994 under the Agreed Framework.[183] Although diplomacy would not necessarily resolve this problem, it seems illogical, especially considering the stakes, not to attempt to negotiate an Agreement that would resolve the security concerns of the United States and North Korea.[184] In any event, the use of force without exhausting all peaceful remedies is not permitted under international law.[185]

B. *The U.N. Charter's Limitations on the Use of Force: The Requirement of an "Armed Attack"*

Article 51 of the U.N. Charter provides for self-defense in the case of an "armed attack."[186] There has been debate as to whether the provision was intended to limit the right to self-defense strictly, to allow force only in response to an actual act of armed aggression upon another nation's territory.[187] The explicit purposes of the U.N., to avoid the recurrence of war and to maintain a collective security structure, suggest, however, that the right to self-defense should be viewed narrowly—with its exercise conditioned on the occurrence of an aggressive act.[188]

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[182] Laney & Shaplen, *supra* note 7, at 18 (noting that the United States "hardened" its stance against dialogue with North Korea—despite ally encouragement to reach a diplomatic solution).

[183] *See id.*

[184] North Korea has, since its alleged admission, stated its willingness to engage with the United States to resolve the current problems. *Id.* at 17. In making these requests for dialogue, North Korea has actually made very few demands—it seems to be primarily concerned with gaining some form of non-aggression pact from the United States and possibly working towards economic and diplomatic normalization. *Id.* (discussing North Korea's attempts to engage the United States, Japan and South Korea over the past several years and the North's offer to give up its nuclear program in exchange for a nonaggression pact from the United States).

[185] Secretary of State Daniel Webster, describing what became the Caroline Doctrine, stated that Britain had to show "that admonition or remonstrance to the persons on board the 'Caroline' was impracticable, or would have been unavailing" for force to be justified in self-defense. Kearley, *supra* note 17, at 346.

[186] U.N. CHARTER art. 51.

[187] *See* Scachter, *In Defense of International Rules on the Use of Force*, *supra* note 29, at 120 (noting there is some disagreement whether Article 51 has superseded the customary law right of self-defense but suggesting this difference is narrow if "imminent attack is strictly construed"). *See also* Beard, *supra* note 29 at 567 (discussing the debate regarding the "armed attack" requirement under Article 51 of the U.N. Charter and concluding that a narrow view of self-defense is appropriate). As a result, the author asserts that "[s]tates do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack.'" *Id.*

[188] *See, e.g.*, Scachter, *The Right of States to Use Armed Force*, *supra* note 29, at 1646 (suggesting that, although not perfect, using the limitations of international institutions to justify ignoring their

Although the Charter is not a "suicide pact,"[189] Article 51 appears to require at least some signs of preparation or planning and the intent to attack before permitting the use of force in self-defense.[190] In cases where self-defense is utilized without a preceding overt act of aggression, a high burden should rest upon the state claiming a right to self-defense to protect against abuse.[191] In the current nuclear crisis, North Korea has not engaged in aggressive acts to the level that would amount to an "imminent threat" to the United States; in fact, the Peninsula has been relatively stable since the Armistice was signed ending the Korean War fifty years ago.[192] Furthermore, North Korea has been more concerned with its own security and national survival—Kim Jong Il has requested that the United States sign a non-aggression pact in exchange for North Korea's ending its nuclear program—than with planning an aggressive war.[193]

VI. CONCLUSION

In the aftermath of September 11, 2001, the Bush Administration announced a right to use force preemptively against threats to U.S. security. This policy was an attempt to deal with the increasing threat of international terrorism and the proliferation of weapons of mass destruction. The doctrine of preemptive strike is of questionable legality under international law, particularly with respect to its potential application in the current nuclear crisis with North Korea. The use of force in response to North Korea's alleged development, acquisition, or possession of nuclear weapons does not meet the requirements of necessity and proportionality under customary international law allowing anticipatory self-defense. This is also true for the use of force in response to speculative fears North Korea might sell nuclear weapons to terrorist organizations.

Under customary international law, it is not appropriate to even consider force until all diplomatic means have been exhausted. This

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restraints will only increase insecurity). Furthermore, it is in states' best interests to maintain restraints on force. Scachter, *In Defense of International Rules on the Use of Force*, *supra* note 29, at 124.

[189] Beres, *supra* note 18, at 263.

[190] This conclusion was supported by the I.C.J. in Case Concerning Military and Paramilitary Activities in and Against Nicaragua, *supra* note 44 and accompanying text.

[191] *See* VATTEL, *supra* note 19.

[192] *See* OBERDORFER, *supra* note 1 (regarding the relative peace that has been established on the Korean Peninsula). However, it is important to note that this stability has been maintained through the presence of U.S. troops along one of the most heavily militarized areas in the world—ironically named the Demilitarized Zone. *Id.*

[193] See *supra* note 184 and accompanying text with regard to North Korea's request for a non-aggression pact from the United States.

standard has certainly not been met with respect to the Korean nuclear crisis, considering U.S. refusal to engage in any discussions with North Korea until it meets certain conditions. Furthermore, the preemptive use of force is not justified under the U.N. Charter's self-defense requirement since an "armed attack" has not occurred, nor does such an attack appear to be in the planning stages.[194]

Potential acquisition, possession, or sale of nuclear weapons and violations of non-proliferation treaty obligations are not appropriate areas for unilateral military action. If the United States asserted and exercised an expansive right of self-defense based on its individual determination of "threat" that is not truly imminent, a dangerous precedent would be established. The United Nations was created with the purpose of saving future generations from the "scourge" of war and, in doing so, established a system of collective security. Although labeling North Korea as a rogue regime or as "evil" is very powerful in terms of sentiment, this characterization is without legal significance. In fact, it may even be, as one South Korean former foreign-ministry official described the "Axis of Evil" speech—"diplomatically wayward, strategically unwise and historically immoral."[195]

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[194] In fact, North Korea seems to be more concerned by the potential of U.S. aggression. *See supra* note 184 and accompanying text regarding North Korean's requests for a formal non-aggression pact from the United States; *see also* McCormack, *supra* note 153, at 17 (stating that North Korea wants an "end to the threat of nuclear annihilation under which it has lived for longer than any other nation" due to the United States' positioning nuclear weapons in South Korea until 1991 and the continuation of nuclear rehearsals with South Korea at least until 1998).

[195] McCormack, *supra* note 153, at 25 (citing Haksoon Paik, *What to Do With the Ominous Cloud Over the Korean Peace Process?*, NAPSNET, Special Report, Feb. 19, 2002).