

THE NORTH KOREAN NUCLEAR CRISIS: AN ASSESSMENT OF THE LEGAL JUSTIFICATION OF THE USE OF FORCE BY THE UNITED STATES

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ABSTRACT: *Since the outbreak of North Korean nuclear crisis, there have been many calls on the United States government to apply tougher measures on the DPRK to deal with its provocations and defiance on the Non-Nuclear Proliferation Regime. Tougher measures on North Korea include sanctions and the use of force. However, any eventual use of force by the United States on North Korea will be illegal if it does not meet the criteria of the Caroline Doctrine that requires that anticipatory self-defense be both necessary and proportional. Furthermore, any use of force that goes beyond the Caroline Doctrine will undermine the Articles 2 and 51 of the United Nations Charter that allows war only in self-defense. Given the fact that any use of force on North Korea will challenge the normative basis on which global society has been supported, it is imperative to solve the nuclear crisis through negotiations by continuing the Six Party Talks, with a commitment not only on the part of the DPRK to give up its nuclear program but also on the United States to sign a Non-Aggression Pact with Pyongyang that replaces the armistice of 1953, so as to assure that its survival as a State will not be at stake.*

KEYWORDS: North Korean, Nuclear Crisis, Legal, Use of Force, United States

INTRODUCTION

The North Korean nuclear crisis is an important topic in international law due to the fact that it permits us to demonstrate that pacific means to settle disputes such as negotiations and dialogue are tools that have not lost relevance in resolving conflicts or misunderstandings among states. The importance of the North Korean nuclear crisis is of great magnitude because it allows us to understand the limitations that the use of force has in international law to deal with sensitive issues such as nuclear proliferation. This article seeks to demonstrate that any use of force by the United States on North Korea that goes beyond *the Caroline Doctrine* will undermine International Law and the principles that regulate the use of force such as the prohibition of its use which is a *ius cogens* norm.

The Korean Nuclear Crisis

The North Korea nuclear program has produced a crisis with the United States and its allies since the early 1990's, but it was in the year 2002 that the nuclear tension intensified, when North Korea acknowledged that it had nuclear weapons, creating a tension on the peninsula that has acquired international dimensions. Since 1998, North Korea has taken provocative actions such as the launching of the Taepodong 1 and Taepo Dong 2 Missiles, the nuclear underground tests of 2013 and the latest nuclear tests carried out in September 2016. However, as it will be discussed in this article, any use of force on the Korean Peninsula would be a violation not only

of North Korea's integrity but also a violation of international law, especially Article 2 of the UN Charter.

The crisis affects the peace and stability of the North East Asian region, because North Korea has weapons of mass destruction and this fact creates a dangerous environment and adverse repercussions for the international security. However, North Korea's nuclear weapons, missiles programs and massive conventional deployments are aimed at deterrence and defense. Even if the North develops nuclear weapons, it will not use them because of a devastating US response. Even though, the US has embraced the possibility of changing the North Korean regime by waging a war on the peninsula, the mere prospect of doing that will produce implications for the US and its allies on the region.

Even though, there are some supporters of the use of force as a way to solve the nuclear issue, however, the North Korean nuclear crisis presents a different challenge if compared to Iraq and the United States cannot easily wage a war on the Korean Peninsula. North Korea has nuclear weapons and it has the ability to produce them, this fact constituted a deterrent for the American use of force. Furthermore, there are risks and implications that make difficult any use of force by the United States to solve the North Korean nuclear crisis.

AMERICAN INTERVENTION CONCERNING NORTH KOREA'S NUCLEAR WEAPONS: AN ISSUE OF SELF DEFENSE?

After the attacks of September 11 2001, the former US president George W. Bush signaled a policy change, to his view *we must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends.... Traditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents, whose so called soldiers seek martyrdom in death....the greater the threat, the greater the risk of inaction and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.* (Kegley, Preemptive War, 2003)

Some scholars support preventive wars to forestall those threats that are not imminent but could represent a danger in the future, for instance *Kaufmann argues that preventive war is not illegal because if the United Nations proves unable or unwilling to protect a country, that country retains its right to the broader use of force (Kaufman, 2005). Similarly, Bowett claims that the right of legitimate defense exists as a customary right even before 1945, and he agrees with the possibility of responding not only against armed attacks but also against imminent and to prevent future attacks (Bowett, 1958).* However, as Mullerson states:

"in our day any kind of broadening of the interpretation of the right to resort to military force is fraught with danger for the survival of human civilization. Therefore, international law must develop along the path of eliminating all loopholes in the legal regulation of the ban on the use of force, which are used by those who still do not understand the necessity of the actual

realization of the superiority of general human interests over national or class interests. Unilateral coercive military measures must disappear from international practice in the future. In this regard international law must become maximally clear and unambiguous in not permitting any broad interpretation of the right to rely on force (Mullerson, 1991)

Furthermore, The use of force has been banned as a way to resolve controversies in the international arena, for instance in 1929 it was enacted the Kellogg Briand Pact in which it was condemned the recourse to war for the solution of international controversies (Nils, 2010) and after War World II, the United Nations Charter, article 2, states that:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.

As it can be observed, from Article 2 of the UN Charter, there is a general prohibition on the use of force, this prohibition also exists in Customary Law, as the ICJ stated in the Nicaragua Case.¹

There is one exception only to the use of force which is Article 51 of the UN Charter that states that

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. (NATO, 2009)

This exception is important because *the text of article 51 constrain a states authority to use force in several discrete ways. First, self defense is only allowed if and as long as an armed attack occurs and only to end it. Under Article 51, in other words a state may use solely to repel an attack that is already in progress. Using force to prevent future attacks is categorically prohibited. Second, not every use of force amounts to an armed attack. Before self defense can be justified under Article 51, an attack from abroad must be particularly grave in its scale and effects. (Criddle, 2015).*

INTERVENTION IN NORTH KOREA: THE CAROLINE TEST

Although the North Korean nuclear crisis has been exacerbated over the past few years, *any use of force based on the presence or acquisition of nuclear weapons, is not justified as an exercise of the right of self-defense under customary law or the UN Charter. Customary international law, as expressed within the Caroline Doctrine, requires that anticipatory self-defense be both necessary and proportional. Furthermore, states must exhaust all peaceful remedies before resorting to force*" (Malone, 2003).

The Meaning of "Armed Attack" and "Self Defense"

Before assessing whether any use of force in North Korea will meet the criteria of the Caroline doctrine, it is important to know what constitutes an armed attack and what is self-defense. First of all, the International Court of Justice has stated *that: an armed attack must be understood as including not merely action by regular armed forces across an international border, but also*

¹ Nicaragua versus United States 1986

'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 (inter alia) an actual armed attack conducted by regular forces, 'or its substantial involvement therein' (ICJ, 1986). Regarding, the concept of Self Defense, the traditional definition of the right of self-defense in customary international law occurs in the Caroline case. This dispute revolved around an incident in 1837 in which British subjects seized and destroy a vessel in American port. This has taken place because the Caroline had been supplying groups of American Nationals, who had been conducting raids into Canadian territory. In the correspondence with the British authorities which followed the incident, the American secretary laid down the essentials of self-defense. There had to exist necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation. (Shaw, 2015)

Taking into consideration the concepts defined above, it is necessary to assert that one of the main risks of the use of force in North Korea regarding international law is that it fails to fully consider the application of two customary law principles necessity and proportionality, because as Gray argues *"it is problematic US assertion that North Korea represents a threat because it can handle its nuclear weapons to terrorists because in the Nicaragua case , the International Court of Justice used a definition of aggression to help interpret the meaning of armed attack in customary international law"* (Gray, 2008); it held that *"an armed attack must be understood as including 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"* (ICJ, 1986) but as Gray asserts: *the Court did not consider that the concept of armed attack stretched as far as assistance to rebels in the form of the provision of weapons or logistic or other support. The United States claimed the right to use force in many countries, however, unless these states can be shown to have been involved in terrorist attacks or in planning future, imminent terrorists attacks, this seems to be stretching preemptive self-defense to an extreme* (Gray, 2008).

Necessity

Before assessing whether or not any use of force on North Korea would meet the necessity criteria, it is important to take into account that *The criterion of necessity is fundamental to the law of self-defense. Force in self-defense may be used only when it is necessary to end or avert an attack. Thus, all peaceful means of ending or averting the attack must have been exhausted or be unavailable* (Wilmshurst, 2005).

In the case of North Korea it is difficult to assert that this country constitutes an imminent threat to the United States, because as established in *the Caroline doctrine, the necessity of self-defense must be instant, overwhelming, and leaving no choice of means, and no moment for deliberations*. Although, the attempt to acquire and possess nuclear weapons is troubling, especially considering their devastating character, the International Court of Justice has recognized that these activities are not per se illegal (ICJ, 1996).

As Carpenter states, *there is little evidence that North Korea poses a threat to the United States. It is unclear whether Pyongyang's embryonic nuclear program has produced even one deployable weapon. It certainly has not produced sophisticated, compact "cutting edge"*

warheads that can be married to ICBMs (Carpenter, 2013). Moreover, even if the International Institute for strategic studies proved that North Korea has something that can hit American shores, however, it acknowledged at the same time *that any functioning nuclear tipped intercontinental ballistic missile is still several years away* (BBC, 2015)

The problem for US policymakers today is *that neither situation neither that with North Korea nor that with Iran is likely to satisfy the conditions that warrant a preemptive strike in the traditional sense. Instead available intelligence will probably be questionable, the threats uncertain and in no way clearly imminent, and the military option but one of several policies available* (Hass, 2005)

As Kondocho points out, the modern right of self-defense which is also a rule of customary international law is enshrined in Article 51 of the UN Charter *"Nothing in the Present Charter shall impair the inherent right of individual and collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures to maintain international peace and security", correspondingly neither South Korea, the United States, and Japan on the one side, nor North Korea on the other side could use force against each other in the absence of an armed attack"* (Kondocho, 2013)

Regarding the Necessity Criteria exposed by the Caroline Doctrine, *war necessarily entails killings, destruction and suffering. If therefore there is a less harmful way of achieving one's goals, we are obliged to sincerely try it first* (Janseen, 2004). Any eventual use of force in North Korea will not meet the requirement of necessity because any war on the peninsula would be costly in human lives and economic terms. In fact, military experts estimate that *a second Korean War would cost the United States roughly 80000 to 100000 casualties and 100 billion dollars. Any war would bring many casualties and the costs of reconstruction would be huge, because according with a report of the analyst Gary Luck, the costs would surpass the 100 billion dollars and the destruction and interruption of trade would cost a trillion dollars to the countries involved and their neighbors.* (Luck, 2006)

When damage to other countries is also considered, the estimated cost of war rises as high as one million casualties and \$1 trillion (Sun, 2006). Moreover, a war on the Korean Peninsula would take place in densely populated areas. It is likely that hundreds of thousands of persons US, ROK and DPRK, military and civilian would perish and millions of refugees would be created.² The expense of a regime change would be enormous. Pyongyang's conventional military power could inflict great loss of life and physical destruction on South Korea, and its nuclear weapons could obviously increase such costs dramatically. Many US military personnel (including some of the more than 30,000 currently stationed in South Korea, along with reinforcements who would be sent) would lose their lives. The United States could and would win such a war, but only at great cost to itself, the region and the rest of the world (Hass, 2005). As Lankov asserts *a US military strike on North Korea will inflict massive damage on the South Korean capital, and will drive a wedge between Seoul and Washington. Needless to say, a preemptive strike against North Korea would not be welcome in Beijing either* (Lankov, 2016) Furthermore, in order to evaluate if the requirement of necessity would be met in applying to the North Korean nuclear case it is fundamental to cite to Arman Sarvarian, who studied

² William J. Perry, *Review of the United States Policy Towards North Korea*, (Washington, October 12 1999)

whether or not a preemptive strike on Iran will comply that requirement. This author states *that necessity entails a requirement at the strategic level to exhaust all peaceful means of averting the armed attack prior to the use of force. In the context of the putative Israeli strike upon Iranian nuclear facilities, for the operation to be necessary Israel must show that other methods of averting the putative Iranian nuclear attack had been previously exhausted. In lack of evidence concerning the existence of nuclear warheads capable of reaching Israel as well as a specific intention to deploy such warheads capable of reaching Israel as well as a specific intention to deploy such warheads and the fact that the Security Council remains seized of the matter, it is doubtful whether Israel can convincingly assert that a strike upon Iranian nuclear facilities is necessary* (Sarvarian, The Lawfulness of a Use of Force upon Nuclear Facilities in self defense, 2015). Applying the same assessment to North Korea, the United States and South Korea would have to demonstrate North Korea's intention to use its nuclear weapons, it remains doubtful whether the DPRK would use its nuclear weapons against the US and its allies, in many occasions North Korea has stated it has no intention of deploying or using its nuclear program, in fact the North Korean leader has stated that

As a responsible nuclear weapons state, our Republic will not use a nuclear weapon unless its sovereignty is encroached upon by any aggressive hostile forces with nukes (The Mirror, 2016). As the researcher of the China Institute for International Studies Yang Xiyu states, *North Korea does not really mean to start a war with the US by developing nuclear weapons. Since last year, North Korean authorities released a series of information and photos of its nuclear weapons and missile technology, all concerning national secrets which few countries would love to show to others. If North Korea really wants a war, it would never do such things* (Xiyu, 2016)

Furthermore, *the Security Council remains seized on North Korea's nuclear issue, in fact, the Security Council adopted resolution 2270 of 2016 that imposed fresh sanctions on this country for the DPRK nuclear test in violation and flagrant disregard of relevant UN resolutions*(UN, 2016). *Those sanctions imposed on March of 2016 contained the most stringent measures yet to undermine the North's ability to raise money and secure technology and other resources for its nuclear weapons program* (Times, 2016). The resolution adopted on March 2016 aims to *cripple parts of the North Korean economy that fuel its nuclear and ballistic missile programs. For example, member nations have agreed to inspect all planes and ships carrying North Korean imports and exports and stop selling aviation fuel to North Korea* (CNN, 2016).

It is important to remember as well that the United Nations Security Council agreed as well on September 2016 to begin work on a new *raft of sanctions on North Korea after its fifth nuclear test, the Council strongly condemned the test and agree to begin drafting a new resolution under article 41 of the UN Charter* (telegraph, 2016). In fact, on November 30 2016, *the UN Security Council imposed new sanctions on North Korea aimed at cutting the Asian country's annual export revenue by a quarter in response to Pyongyang's fifth and largest nuclear test in September. The 15-member council unanimously adopted a resolution to slash North Korea's biggest export, coal, by about 60 percent with an annual sales cap of \$400.9 million, or 7.5 million metric tonnes, whichever is lower. The U.S.-drafted resolution also bans North Korean copper, nickel, silver and zinc exports - and the sale of statues* (REUTERS, 2016).

The fact that the United Nations is taking measures against North Korea and applying sanctions against this country rules out a preemptive strike falling under article 51 of the UN Charter. Moreover, negotiations are still an option available to deal with the DPRK, in fact the United States representative at the United Nations stated that *multilateral pressure could be effective in bringing Pyongyang back to the table for serious and credible negotiations on denuclearization* (UN, 2016).

Not only The United States representatives see negotiations as valid option, Chinese representatives see the merits of this way of action, in fact, *the nuclear escalation on the Korean Peninsula prompted the People Republic of China to amplify its efforts to reboot the Six Party Talks. Chinese Foreign Ministry's Spokesperson Hong Lei pointed out that UNSC resolution cannot resolve the nuclear crisis on the Korean Peninsula and urged the parties to come back to the negotiation table. To revitalize the process and resolve the crisis on the Peninsula once and forever, China proposed to simultaneously pursue two goals of denuclearization of the Korean Peninsula and achievement of truce between the two Koreas* (Konstantin, 2016)

Negotiations are still a valid option with the DPRK, in fact Donald Trump *stated that he will be willing to negotiate with North Korean dictator Kim Jong Un in an effort to curtail the communist country's nuclear weapons program*, he said *I will speak to him, I would have no problem speaking to him. At the same time, I will put a lot of pressure on China because economically we have tremendous power over China* (FOX, 2016)

Taking into consideration those facts, the necessity criteria will not be met to invoke a preemptive strike that goes beyond article 51 of the United Nations Charter.

Proportionality

Before assessing whether or not this requirement applies in the North Korean case, it is important to give a definition of proportionality both in *jus in bello* and in *jus ad bellum*. *All are agreed that the proportionality principle plays a central role in jus in bello and jus ad bellum. In just in bello, the meaning of the principle itself is clear, it involves assessing whether the expected collateral damage to civilians and civilian objects of an attack on a legitimate target is excessive in relation to the concrete and direct military advantage anticipated* (Kretzmen, 2013). Today, *proportionality in International Humanitarian Law consists of highly developed rules prohibiting disproportionate attacks and means and methods of warfare causing superfluous injury and unnecessary suffering* (Gardam, 2004). In *just ad bellum*, proportionality has a dual role, it serves to identify the situations in which the unilateral use of force is permissible, and it serves to determine the intensity and the magnitude of military action (Cannizaro, 2006)

In relation to this principle, Brownlie asserts that *the customary right of self-defense involved the assumption that the force must be proportionate to the threat. The formula used by Webster in relation to the Caroline incident has attracted writers by virtue of his insistence that self-defense must involve nothing unreasonable or excessive, since the act, justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it* (Brownlie, International Law and the use of Force by States, 1963)

This principle requires that the probable good consequences achieved by war should outweigh the probable harmful consequences caused by it. In short, benefits should outweigh harms

(Lango, 2004). However, as Malone asserts: 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 millions casualties, including 80,000 to 100.000 Americans, if full scale war resumed on the peninsula. In the case of North Korea, proportionality becomes impossible to measure as to preemptive force, because no attack has occurred, is occurring, or is planned as to which the use of force must be proportionate. (Connell, 2002). Therefore, the proportionality requirement cannot be met on North Korea, because the harms of any use of force outweigh its benefits.

Regarding the proportionality of the response in North Korea, *certain factors may be identified as particularly relevant. These include its geographical and destructive scope, its duration, the military methods employed and collateral damage* (Sarvarian, 2015) As Dong Sung suggests *The Us forces would indeed find it difficult to penetrate the North Korean defenses. The demilitarized zone DMZ dividing the Korean Peninsula is only 250 kilometers long, and North Korea has deployed a one million man army with 6.500 armored vehicles and 10.000 artillery pieces along this narrow front. Moreover, the Korean Peninsula contains rugged terrain, including mountains, rivers and rice fields. Its northern part is particularly mountainous, and three rivers block the major approaches to Pyongyang. And since the DMZ contains only a small number of major attack corridors to both north and south, major operational surprise is unlikely* (Sun, Us Preventive War against North Korea, 2006)

Taking into consideration those hurdles, any preemptive use of force in the DPRK would be difficult to carry out, in fact as we saw it does not meet the criteria stated above imminence, necessity and proportionality. For that reason, we can conclude that any war that goes beyond the Caroline Doctrine is as Raymond states *nothing less than an amputation of the normative pillar on which global society has been based at least since 1928, when the Kellogg Briand Pact outlawed war as an instrument of foreign policy. The preventive war undercuts a key preemptory norm in international law that underpins all others, the use of force cannot be justified merely on account of an adversary's capabilities, but solely in defense against its aggressive actions. Prevention represents a frontal rejection of Articles 2 and 51 of the United Nations Charter that condones war only in self-defense. It opens the door to military first strikes against adversaries, under the claim that their motives are evil and that they are building the military capabilities to inflict mass destruction* (Raymond, 2003)

CONCLUSION

To sum up, any use of force has to follow the Caroline's Doctrine criteria, otherwise, any attempt to apply the war on the Korean Peninsula would be illegal, because even if the UN charter allows self-defense, however, the right to self-defense is not an absolute right, there are two general restrictions on how the use of force may be applied and those restrictions are prescribed by the principles of necessity and proportionality (Nils, 2010). In the case of North Korea, any use of force by the United States will not meet those requirements to claim the right of self-defense. First of all, the proportionality requirement cannot be met because there has not been any attack executed by North Korea on the United States. Although North Korea has not met its obligations under the Non Proliferation Treaty and under the Agree Framework and has develop a nuclear program, North Korea has not planned to attack the United States and its

allies. North Korea's nuclear weapons, missiles programs and massive conventional deployments are aimed at deterrence and defense. Even if the North develops nuclear weapons, it will not use them because of a devastating US response. The North wants a guarantee of security from the US, and a policy of pressure will only make North Korea feel even more insecure. Both the weapons program and the bellicose nature of its rhetoric are an attempt to continue to deter the US from taking any preemptive moves against it"³.

Regarding the necessity criteria, in the case of North Korea it doesn't apply because as Shaw states it is essential to demonstrate that, as a reasonable conclusion on the basis of facts reasonably known at the time, the armed attack that has occurred or is reasonably believed to be imminent requires the response that is proposed (Shaw, 2015). As we saw any US response is not needed in the North Korean case simply because there has not been any attack by North Korea. Therefore, the best alternative to deal with the current crisis is not by applying the use of force but solving the nuclear crisis under the Six Party Talks.

The Six Party Talks is the best mechanism to solve the nuclear issue because it will take into consideration the interests of the countries involved in the North Korean nuclear crisis that means the stakes of North Korea, the United States, South Korea, Russia and Japan. Moreover, due to the fact that any eventual use of force on the Korean Peninsula will be viewed as illegal, it is imperative to find a permanent solution to the nuclear crisis in the DPRK that deals with the emerging threats to the Non Proliferation regimes and the danger that nuclear weapons come into the hands of terrorists.

Therefore, it is imperative to find other ways to resolve the crisis such as negotiations under the framework of the Six Party Talks. Even if there are pessimistic views about pursuing negotiations with North Korea, it is important to consider that the success of any policy of engagement with North Korea will not depend only on the disarmament of this country, but also on the compromise of developed countries to reduce its nuclear activities and its nuclear arms, because given the lack of a supreme authority in the international arena, security issues are vital for states, especially those who feel that their survival is at stake, such as North Korea. A positive step towards defusing the nuclear crisis on the Korean Peninsula would be a Non-Aggression Pact from the United States to North Korea and the United States renunciation of the US Japan Missile Accord.

The risks that entails any use of force on the Korean Peninsula rule out any war against the DPRK. However, in order to solve the nuclear crisis, it is important to strengthen international cooperation and to foster other mechanisms such as the continuation of the Six Party Talks so that North Korea give up to its nuclear weapons in the same way countries such as Libya, Argentina and Brazil did it through dialogue and engagement. Even if the path to denuclearize the Korean Peninsula is not an easy task, it is necessary to establish the basis to solve the nuclear puzzle through negotiations and appealing to mutual trust and cooperation.

As we saw in this article any use of force on North Korea, won't meet the criteria established in international law to invoke self-defense, imminence, necessity and proportionality that is why it

³ Cha, Victor & David Kang, *Nuclear North Korea*, (Columbia University Press, New York, 2003) p.43.

cannot be applied on the Korean Peninsula. Given that North Korea's attempt to develop its nuclear program as a way to ensure its survival and security, it is important that in future negotiations those concerns are addressed, otherwise it is difficult to make that the DPRK give up its nuclear deterrent, a step forward in that direction will be to address those concerns in the Six Party Talks so that North Korea has not any incentives in developing a nuclear program.

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