

NUCLEAR WEAPONS AND THE NEED FOR A NO-FIRST-USE AGREEMENT BETWEEN THE UNITED STATES AND SOUTH KOREA FOR NORTH KOREA

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I. INTRODUCTION

Nuclear weapons present a modern and complex problem in the context of international law. Numerous bilateral and multilateral treaties restrict the use of nuclear weapons, but international law falls short of establishing clear legal guidelines for situations where states may use nuclear force in self-defense. For example, Article 51 of the U.N. Charter reserves in states the inherent right of self-defense in the event of an armed attack, but states have interpreted Article 51 to also allow preemptive strikes

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in response to an imminent attack.¹ Moreover, in the International Court of Justice's ("ICJ") Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the ICJ declined to conclude on the legality of using nuclear weapons in self-defense.² Neutrality law further complicates the matter. While neutrality law holds that "[t]he territory of neutral Powers is inviolable," international law fails to determine whether the unintentional drift of radioactive fallout over neutral third-party states should be classified as collateral damage or an attack that infringes on the rights of neutrals.³ In effect, the application of international law is dangerously left open to interpretation by states, shaped by these states' personal goals and interests.

The interpretive problems of preemptive self-defense and the rights of neutrals affects the United States' options against North Korea's nuclear weapons program. Even though international law generally prohibits the use of nuclear weapons, President Trump has considered, and may again explore the idea of a preemptive nuclear strike against North Korea under a claim of self-defense, especially if North Korea continues to expand its nuclear arsenal.⁴ The United States' nuclear policy allows both the first-use and threat of first-use of nuclear weapons in a variety of circumstances.⁵ For example, the United States may preempt an enemy state's use of nuclear weapons and "threaten ... to deter, and if necessary, respond, to a variety of nonnuclear

1. Alex Potcovaru, *The International Law of Anticipatory Self-Defense and U.S. Options in North Korea*, LAWFARE (Aug. 8, 2017, 1:56 PM), <https://www.lawfareblog.com/international-law-anticipatory-self-defense-and-us-options-north-korea>.

2. The requirements of self-defense, necessity, and proportionality do not necessarily exclude the use of nuclear weapons in self-defense, but the very nature of nuclear weapons could violate humanitarian law, making them unlawful to use in self-defense. *Legality of Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. Rep. 226, ¶ 40-44 (July 8) [hereinafter *Advisory Opinion*].

3. *Convention on Rights and Duties of Neutral Powers and Persons in War on Land*, art. I, Oct. 18, 1907, 36 Stat. 2310, 1907 U.N.T.S. 540 [hereinafter *Hague Convention V*].

4. Associated Press, *North Korea Celebrates Year of 'Self-Defence' Successes, But Ties with US Lowest Since Korean War*, SOUTH CHINA MORNING POST (Jul. 20, 2018, 8:54 PM), <https://www.scmp.com/news/asia/east-asia/article/2126260/north-korea-celebrates-year-self-defence-successes-ties-us>.

5. Michael S. Gerson, *The Future of U.S. Nuclear Policy: The Case for No First Use*, HARVARD KENNEDY SCHOOL BELFER CTR FOR SCIENCE AND INT'L AFFAIRS (Feb. 2011), https://www.belfercenter.org/sites/default/files/files/publication/gerson_policy_brief_Feb_2011.pdf.

contingencies, including large-scale conventional aggression by another nuclear power... and chemical or biological weapons attacks.”⁶ President Trump only fuels the fire by calling for the expansion of more “usable” nuclear weapons, as supported and recommended by the latest U.S. Nuclear Posture Review.⁷ The combination of the United States’ rhetoric and the legal ambiguities surrounding the preemptive use of nuclear weapons have left South Korea concerned that the United States will ignore its rights as a neutral third-party.

The United States and North Korea appear willing to resolve the long-term conflict involving North Korea’s intercontinental ballistic missiles and other nuclear arms efforts in weaponry. For the first time in history, and in an effort to resolve these issues, the leaders of both nations met at the 2018 Singapore Summit, and then again at the 2019 Hanoi Summit in Vietnam.⁸ Yet, it is clear that the meetings amounted to neither true failures nor successes since the last meeting in Hanoi was cut short with the leaders unable to reach an agreement.⁹ The deadlock may be attributed to a variety of complications, including the “take all-no give” attitude that both leaders displayed, but the most glaring issue of all is that the United States appears fixated on waiting for North Korea to act first. The Trump administration must not ignore that in order “to reach a final deal on the eventual denuclearization of North Korea, the United States must give something substantial” or find alternative means to address the problem.¹⁰ Specifically, “Washington must take steps to ease North Korean fears of an American attack.”¹¹

6. *Id.*

7. U.S. DEP’T OF DEF., NUCLEAR POSTURE REPORT (2018).

8. *Singapore to Hanoi: The Winding Road Since First Trump-Kim Summit*, AL JAZEERA (Feb. 19, 2019), <https://www.aljazeera.com/news/2019/02/singapore-hanoi-winding-road-trump-kim-summit-190219093156706.html>.

9. Jung H. Pak, *The Good, the Bad, and the Ugly at the US-North Korea Summit in Hanoi*, BROOKINGS (Mar. 4, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/03/04/the-good-the-bad-and-the-ugly-at-the-us-north-korea-summit-in-hanoi>; see generally Jeremy Diamond, *Takeaways from the Trump-Kim Hanoi Summit*, CNN (Feb. 28, 2019, 6:42 AM), <https://www.cnn.com/2019/02/28/politics/trump-kim-hanoi-summit-takeaways/index.html>.

10. David C. Kang, *Why Should North Korea Give Up Its Nuclear Weapons?*, N.Y. TIMES (Aug. 22, 2018), <https://www.nytimes.com/2018/08/22/opinion/north-korea-nuclear-trump.html>.

11. *Id.*

The natural next step in thawing the relationship between the United States and North Korea would be for the United States to negotiate a no-first-use agreement with South Korea, similar in principle to the Sole Purpose Doctrine adopted by China, in which China pledged never to be the first to use nuclear weapons under any circumstance.¹² Otherwise, a preemptive nuclear strike by the United States on North Korea would violate both the law of war and the law of neutrality. Having a no-first-use policy may help defuse current tensions with North Korea and South Korea, bring the United States in line with international law, and provide diplomatic advantages for the United States-South Korean relationship.

II. PREEMPTIVE NUCLEAR STRIKE UNDER THE LAW OF WAR

The United States cannot legally engage in a preemptive nuclear strike unless North Korea strikes first.¹³ Yet, President Trump has, and may again, suggest the first-use of nuclear weapons. Some conservative scholars and commentators have made preemptive self-defense arguments for the use of nuclear weapons against North Korea that have no basis in international law. A no-first-use pronouncement by the United States would merely reassuringly state what is already required.

The United States' approach to the North Korean problem is controversial because the United States' understanding of self-defense is inconsistent with international law. Clashing interpretations regarding justified self-defense stems directly from opposing viewpoints on Article 51 of the U.N. Charter, which notes that every state has an "inherent right ... of self-defense if an armed attack occurs."¹⁴ While some scholars argue that a state may engage in self-defense only if it first suffers an armed attack,¹⁵ others recognize a broader interpretation of Article 51, which, though likely illegal, allows a state to act preemptively to

12. Marc Finaud, *China and Nuclear Weapons: Implications of a No First Use Doctrine*, ASIA DIALOGUE (Apr. 3, 2017), <https://theasiadialogue.com/2017/04/03/china-and-nuclear-weapons-implications-of-a-no-first-use-doctrine/>.

13. Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, WASH Q. (2003), at 89; see U.N. Charter art. 51.

14. U.N. Charter art. 51.

15. Arend, *supra* note 13, at 91; see generally Potcovaru, *supra* note 1.

protect its citizens if an attack is imminent.¹⁶ Under the broad approach, the United States may again claim that North Korea poses an imminent threat and authorize a preemptive nuclear strike.¹⁷

However, even if the United States justifiably engaged in self-defense, a nuclear strike, perhaps under all circumstances, is never allowed, even though the pressure to respond would be overwhelming.¹⁸ Under the law of war, or *jus ad bellum*, which concerns whether a state has engaged in war for just reasons,¹⁹ some states may rightfully use nuclear weapons in self-defense, as discussed later in this section. However, the United States, at least in the current situation, cannot engage in preemptive nuclear strikes on North Korea without violating international law for reasons of *jus ad bellum*.²⁰

An argument for a preemptive nuclear strike on North Korea also crumbles under the traditional understanding of Article 51 because it fails to meet the elements of justified self-defense, established by the *Caroline* standard in 1842.²¹ In *Caroline*, British troops in Canada travelled across the Niagara River to seize and destroy an American steamship, The S.S. *Caroline*, to prevent the ship from supporting the Canadian rebels.²² The British claimed self-defense to justify the attack, but according to Daniel Webster, the United States Secretary of State at that time, the attack was not necessary for the purpose of self-defense.²³ Thereafter, the British publicly apologized for their actions and negotiated with the United States an agreement, the *Caroline*

16. Arend, *supra* note 13, at 90; *see generally* Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.), Judgement, 1986 I.C.J. Rep. 14, ¶ 24 (June 27).

17. Rachel Weise, *How Nuclear Weapons Change the Doctrine of Self-Defense*, 44 N.Y.U. L. J. OF INT'L L. & POL. 1331, 1334 (2012).

18. *See generally* Ira Helfand et al., *Banning Nuclear Weapons is Crucial for Global Health*, GUARDIAN (Sept. 28, 2016), <https://www.theguardian.com/commentisfree/2016/sep/28/banning-nuclear-weapons-is-crucial-for-global-health>.

19. *See generally* INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW: ANSWERS TO YOUR QUESTIONS (2015).

20. *Id.*

21. LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW 1092 (6th ed. 2014).

22. *Id.*; Samuel Moyn, *The Caroline Standard*, H2O (Aug. 1, 2016), https://h2o.law.harvard.edu/text_blocks/28886.

23. DAMROSCH & MURPHY, *supra* note 21.

standard, now regarded as a famous norm of customary international law.²⁴

The *Caroline* standard authorizes a state to act in self-defense only if the perceived threat is “instant, overwhelming, and leav[es] no choice of means, and no moment for deliberation.”²⁵ In accordance with the standard, the ICJ established the following three elements to justify self-defense: (1) imminence, (2) necessity; and (3) proportionality.²⁶ A discussion of each element in the context of a preemptive nuclear strike by the United States on North Korea reveals that such an attack would clearly violate the law of war.

A preemptive nuclear strike by the United States on North Korea would not be justified given that the United States would fail to meet the imminence standard established by the ICJ. Similar to the position taken by Daniel Webster, Rachel Weise defines “imminence” as a situation that leaves a state no time to deliberate the matter or resolve the conflict in peace.²⁷ Past negotiations between the United States and North Korea regarding the denuclearization of the Korean Peninsula show that peaceful resolutions are possible even during times of heightened tensions triggered by nuclear threats. For example, after North Korea withdrew from the Non-Proliferation Treaty in 2003, the North Korean Foreign Ministry threatened to “take a measure to open its nuclear deterrent to the public as a physical force,” and the Six-Party Talks commenced immediately.²⁸ The Six-Party Talks involved a series of multilateral discussions between Japan, China, North Korea, South Korea, Russia, and the United States, primarily to denuclearize North Korea.²⁹ Although negotiations

24. *Id.*

25. *Id.*; see Arend *supra* note 13, at 91 (“As Webster explained in a letter to Lord Ashburton, a special British representative to Washington, the state would have to demonstrate that the ‘necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment of deliberation.’”).

26. Advisory Opinion, *supra* note 2, at ¶ 41.

27. Weise, *supra* note 17.

28. Kelsey Davenport, *Chronology of U.S.-North Korea Nuclear and Missile Diplomacy*, ARMS CONTROL ASS’N (July 2019), <https://www.armscontrol.org/factsheets/dprkchron> (The Six-Party Talks commenced in the same year that North Korea withdrew from the Non-Proliferation Treaty in 2003).

29. *Id.*; see Jayshree Bajoria & Beina Xu, *The Six Party Talks on North Korea’s Nuclear Program*, COUNCIL ON FOREIGN REL. (Sept. 30, 2013), <https://www.cfr.org/background/six-party-talks-north-koreas-nuclear-program>.

fell apart in 2009, the effort reveals that peaceful negotiations are possible, even in situations where nuclear threats escalate.³⁰ The recent meetings between leaders during the 2018 Singapore Summit and 2019 Hanoi Summit would only further invalidate an argument for a preemptive nuclear strike on North Korea today because a state must have no time to resolve conflicts in peace before resorting to a preemptive strike.

Preemptive strike justifications based on imminent fear would also fail against other valid interpretations of the imminence standard. According to author, Guy B. Roberts, an imminent threat is one in which enemy troops are mobilized along the borders of a domestic territory, or more broadly, an “actually materialized” threat.³¹ Under a literal approach, a defensive strike by the United States on North Korea would not be categorized as one in response to an imminent threat of attack because North Korean troops are not currently mobilized near the United States’ borders. That is not to say that a preemptive nuclear strike is justified when North Korean troops are gathered along domestic lines, as the preemptive attack would still have to meet the elements of necessity and proportionality. Considering the imminence standard alone, it is implicit in Roberts’ rationale that a preemptive strike is reserved only as a responsive measure, when a dire situation calls for immediate emergency action, triggered by enemy conduct that translates to a legitimate threat of war.³² Thus, a preemptive strike by the United States on North Korea would violate the imminence standard under the law of war and would not be considered a preemptive measure.

Some commentators that support a preemptive nuclear strike argue that the North Korean threat has recently become imminent because North Korea’s nuclear missiles can now reach the United States.³³ In other words, they argue that the United States does not

30. Davenport, *supra* note 28.

31. Weise, *supra* note 17; 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, 505–06 (1999) (stating that the Caroline criteria remains the standard for analyzing the right of self-defense).

32. See generally 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, 517–518 (1999).

33. Matt Martino et al., *Where Can North Korea’s Missiles Reach*, AUSTL. BROADCASTING CORP. (Oct. 15, 2017), <http://www.abc.net.au/news/2017-10-16/north-korea-missile-range-map/8880894>; Gabriel Dominguez et al., *North*

have time to wait for an initial nuclear strike to occur, and that a preemptive strike is necessary, now more than ever, to neutralize the growing North Korean nuclear threat.³⁴ The United States made similar justifications under the Bush Doctrine to invade Iraq in 2003.³⁵ The Bush Doctrine, established by former President George W. Bush after the 9/11 attacks, described American policies including the right to engage in preemptive strikes on a country that poses an immediate or future threat to the nation.³⁶ Though the United States mainly justified engaging in the war by pointing to Iraq's consistent violations of the cease fire agreement, established after Iraq lost the first Gulf War,³⁷ the Bush administration also relied on a claim of self-defense, triggered by the imminent threat posed by Saddam Hussein's ability to obtain nuclear weapons.³⁸ The Bush Doctrine is just one example of how domestic policy and personal interests can help shape the definition of self-defense to justify a preemptive strike on another country, though it should be noted that most scholars would agree that the strikes on Iraq were illegal under international law even considering the justifications made by the United States under past Security Council Resolutions.³⁹

Even assuming that the Iraq invasion was legal under the Bush Doctrine, the situation in Iraq differs from the current situation in North Korea, enough so that a preemptive strike on North Korea fails under both the Bush Doctrine and international law. As noted by author, Guy B. Roberts, a strike in self-defense by the United

Korea Claims Second ICBM Test Launch Shows All of USA is Within Range, FLIEGER FAUST (July 31, 2017), <https://www.fliegerfaust.com/north-korea-claims-missile-2468256141.html>; see generally *Large Nuclear Test in North Korea on 3 September 2017*, NORSAR (Sept. 3, 2017), <https://www.norsar.no/press/latest-press-release/archive/large-nuclear-test-in-north-korea-on-3-september-2017-article1534-984.html>.

34. Martino et al., *supra* note 33.

35. *The Bush Doctrine*, CONST. RTS. FOUND., <https://www.crf-usa.org/war-in-iraq/bush-doctrine.html> (last visited Sept. 16, 2019).

36. David Sanger, *Bush's Doctrine for War*, N.Y. TIMES (Mar. 18, 2003), <https://www.nytimes.com/2003/03/18/international/middleeast/bushs-doctrine-for-war.html>.

37. *Id.*; Potcovaru, *supra* note 1.

38. Sanger, *supra* note 36; see *The Bush Doctrine*, *supra* note 35 (“During his State of the Union Address in 2002, President Bush flagged Iraq, Iran, and North Korea as an ‘axis of evil.’...He warned that disarming Iraq of its weapons of mass destruction (banned by the U.N. after the 1991 Gulf War) ‘will be enforced’ by the U.N. or, if necessary, by the United States acting unilaterally in self-defense”).

39. *The Bush Doctrine*, *supra* note 35.

State on North Korea would not be considered a preemptive measure, but a preventive one, which is generally considered illegal under international law.⁴⁰ A preventive measure is one where a state acts to destroy an enemy's nuclear capabilities prior to the threat materializing, or to halt an enemy from further producing the plutonium and uranium necessary to develop more nuclear weapons.⁴¹ Arguably, a potential strike on North Korea would be preemptive rather than preventive given that, unlike the threat in Iraq in 2003, the nuclear threat in North Korea today is already materialized.⁴²

However, such a proposition would fail under Roberts' extended definition of a preventive strike, which requires confirmation of how imminent the attack is, where the enemy's nuclear weapons lie, and how capable those systems are.⁴³ Under this approach, a strike on North Korea would clearly be classified as an illegal preventive measure because one, North Korea's nuclear program is covert in nature, hidden deep in underground facilities where they remain mostly undetected,⁴⁴ and two, the United States has been in a nuclear standoff with North Korea since North Korea obtained its first nuclear weapon.⁴⁵ Given the uncertainties regarding the locations of North Korea's nuclear facilities, their capabilities, and the imminence of an initial attack, a nuclear strike in self-defense by the United States would be an illegal preventive measure. Moreover, such an attack conflicts not only with the imminence standard, but also under the necessity and proportionality elements established by the ICJ.

Even if the United States could satisfy the imminence standard, a preemptive nuclear strike would fail to satisfy the necessity and proportionality elements for justified self-defense. Much like the imminence standard under the law of war, the necessity and proportionality standards are open to state

40. See Roberts, *supra* note 32, at 484.

41. *Id.* at 585 n.3.

42. *North Korean Strategic Nuclear Threat*, NTI (Feb. 2018), https://media.nti.org/documents/dprk_strategic_threat.pdf; see also Martino et al., *supra* note 33.

43. Roberts, *supra* note 32, at 7; see Potcovaru, *supra* note 1.

44. Christopher Woolf, *The Only Effective Arms Against North Korea's Missile Bunkers Are Nuclear Weapons, Says a Top War Planner*, PRI (Aug. 10, 2017, 6:45 PM), <https://www.pri.org/stories/2017-08-10/only-effective-arms-against-north-koreas-missile-bunkers-are-nuclear-weapons-says>.

45. Davenport, *supra* note 28.

interpretation. With respect to the necessity standard, author Francis Grimal argues that a responsive strike with nuclear weapons is valid only if the initial strike is either “launched,” or “in the air,” terms she coins respectively as “boost phase” and “free flight phase.”⁴⁶ The argument is interesting in the context of the necessity standard because it differentiates between a purely reactive strike in self-defense and a preemptive strike in self-defense.⁴⁷ To clarify, a purely reactive strike allows a state to respond with nuclear weapons only after it actually suffers an armed attack, where as a preemptive strike authorizes a state to fire nuclear weapons as soon as it detects a nuclear missile launched by the enemy. If the United States adopts Grimal’s interpretation of the necessity principle, then the United States essentially assumes a no-first-use policy.

However, a responsive or reactive strike poses numerous problems for decision makers. The United States would face potential difficulties in assessing the time of the launch as well as the type of weapon deployed by North Korea without first suffering the attack.⁴⁸ For example, in a hypothetical situation, the United States may misread a conventional strike by North Korea as one that is nuclear, thus triggering a nuclear response.⁴⁹ A misread attack and nuclear response by the United States would violate the proportionality principle under the law of war, which allows only enough force to abate and repel a threat,⁵⁰ as well as the proportionality standard under international humanitarian law, which balances military gain and unnecessary suffering during an armed conflict.⁵¹ Given the possibility of a miscalculated response, which violates both the law of war and humanitarian law, the United States should avoid such a flexible approach and strictly adhere to the core principle of the no-first-use policy, which prohibits the first-use of nuclear weapons under any circumstance.

The United States may be able to legally resort to the first-use of nuclear weapons and satisfy the proportionality standard for

46. Francis Grimal, *Jus ad Bellum: Nuclear Weapons and the Inherent Right of Self-Defence*, in 2 NUCLEAR NON-PROLIFERATION IN INTERNATIONAL LAW 337, 343 (Jonathan L. Black-Branch & Dieter Fleck eds., 2015).

47. *Id.*

48. *Id.*

49. *Id.* at 344.

50. *Id.*

51. *Id.* at 345.

justified self-defense if a conventional attack by North Korea is deemed extremely destructive.⁵² In fact, some scholars suggest that the United States would be justified in responding with a first-use of nuclear weapons if an initial conventional attack by North Korea requires nuclear force to “repel and abate” the threat adequately.⁵³ Similarly, Russia’s stance under its military doctrine in 2000 reserved the right of the first-use of nuclear weapons “in response to ... large-scale conventional aggression.”⁵⁴ The argument is based on the idea that the law of war does not require a proportional attack to be zero-sum.⁵⁵ In other words, a retaliatory nuclear strike in response to a conventional weapons attack is permitted so long as the response is used to abate a threat, even if the response does not strictly adhere to the “an eye for an eye” concept.⁵⁶ Though the “repel and abate model offers the United States flexibility in deciding whether to use nuclear weapons first, the United States should avoid adopting such an approach because it fails to determine what constitutes an adequate nuclear response, blurring the lines of when a responsive nuclear attack exceeds the scope of proportionality for self-defense.

The “repel and abate” theory is also controversial because it ignores the blind and unpredictable nature of a nuclear bomb, especially with regards to the difficulty in monitoring radioactive fallout. If the first-use of nuclear weapons in self-defense results in future confirmed casualties due to the release of uncontrollable radiation, such a defensive strike would exceed the scope of proportionality under the “repel and abate” method. As a counter-argument, some critics claim that nuclear weapons today are so modernized and developed that they can be sufficiently controlled to satisfy the proportionality element.⁵⁷ Modernized nuclear weapons allow users the ability to modify, calculate, and limit the impact of an attack to ultimately meet what is required by law.⁵⁸

52. *Id.*

53. *Id.* at 348.

54. Yuri Fedorov, *Russia’s Doctrine on the Use of Nuclear Weapons*, PUGWASH (Nov. 2002), https://pugwashconferences.files.wordpress.com/2014/05/200211_london_nws_paper_fedorov.pdf.

55. Grimal, *supra* note 46, at 340-41.

56. *Id.* at 340.

57. See Charles Dunlap, *Taming Shiva: Applying International Law to Nuclear Operations*, 42 A.F. L. REV. 157, 161-62 (1997).

58. See *Id.*

Specifically, these weapons can be programmed to reduce weapon-yield and improve accuracy.⁵⁹ Further, the weapons can be deployed in different sizes and adjusted in burst height.⁶⁰

However, as compelling as the arguments are with regards to the accuracy of modern nuclear weapons, they fails to consider radioactive drift, subject to uncontrollable factors like the weather.⁶¹ Moreover, the extent to which radiation can remain in drinking water, and thereby affect the food supply, is unaccounted for.⁶² Though the United States possesses earth-penetrating weapons (“EPW”) that can reach deep into North Korea’s underground facilities, EPWs cannot penetrate deep enough underground to contain the blast and prevent fallout.⁶³ Indeed, it is nearly impossible to accumulate data on every death directly caused by radioactive fallout, but that is no excuse for the United States to ignore the destructive after-effects of a nuclear attack, regardless of how much the initial blast can be contained.

As a practical matter, the argument for a controlled preemptive nuclear strike on North Korea ignores the likelihood of nuclear escalation. If the United States resorts to the use of nuclear weapons, North Korea may deploy nuclear weapons of its own, especially in the likely situation that the United States fails to completely disable all of North Korea’s nuclear systems, including those hidden underground. The problem becomes more challenging when targeting mobile nuclear missiles because such a circumstance necessitates the attacker to expand the initial blast of an attack, which would ultimately lead to more unintended casualties.⁶⁴ Given the unfathomable risks associated with nuclear war, prompted in large part by the difficulties in locating North Korea’s nuclear facilities, the United States should never consider the use of nuclear weapons as a defensive measure.

59. Chairman of the Joint Chiefs of Staff, Joint Publication 3-21.1, *Doctrine for Joint Theater Nuclear Operations* (Feb. 9, 1996).

60. *Id.*

61. Annie Bersagel, *Nuclear Weapons and Their Third Parties*, ILPL (Sept. 2014), <http://nwp.ilpi.org/?p=2621>;

see e.g. 18 ERIK V. KOPPE, *THE USE OF NUCLEAR WEAPONS AND THE PROTECTION OF THE ENVIRONMENT DURING INTERNATIONAL ARMED CONFLICT* (2008).

62. *See generally* 18 ERIK V. KOPPE, *THE USE OF NUCLEAR WEAPONS AND THE PROTECTION OF THE ENVIRONMENT DURING INTERNATIONAL ARMED CONFLICT* (2008).

63. Gerson, *supra* note 5.

64. *See Id.*

The only way the United States could legally resort to the first-use of nuclear weapons would be if other conventional weapons were unavailable upon an imminent attack. According to author, Francis Grimal, such a situation would exist only if the conventional weapons held by the United States have either been destroyed or conquered.⁶⁵ Considering the obvious strengths of the United States' military power and the various locations of its nuclear facilities, the United States is unlikely to fall into a situation where the use of conventional weapons is not an option. Implicit in Grimal's approach is that a first-use of nuclear weapons in self-defense, at least in the context of the United States and North Korea, is never justified.⁶⁶ Unfortunately, Grimal does not discuss the legality of conventional preemptive strikes.

Although several states have used conventional preemptive strikes in the past with little resistance from the international community, even a conventional preemptive strike by the United States on North Korea's nuclear facilities would violate the law of war. Some scholars point to cases such as the Al Kibar Bombing as a legal justification for the United States to use preemptive conventional strikes on North Korea.⁶⁷ The Al Kibar Bombing of 2007, also known as Operation Orchard, involved preemptive conventional strikes by Israel to destroy secret nuclear reactors in Syria.⁶⁸ Under the Begin Doctrine, Israel proclaimed the prohibition of its adversaries in the Middle East from obtaining or developing nuclear weapons.⁶⁹ Israel ultimately succeeded in destroying the Syrian reactors, and received very little criticism from the international community despite the illegality of the attack, perhaps due to the secretive nature of the strikes.⁷⁰ Since then, commentators have correctly noted that Operation Orchard failed to meet the *Caroline* standard and should have been

65. See generally Grimal, *supra* note 46, at 346 (In the event of an attack, if conventional weapons are ineffective and a State has no other military options, then using nuclear weapons would be lawful).

66. See generally Grimal, *supra* note 46.

67. Potcovaru, *supra* note 1.

68. *Id.*

69. *Id.*

70. Louis Beres, *Israel's Preemption Lesson*, U.S. NEWS (Sept. 6, 2017, 7:00 AM), <https://www.usnews.com/opinion/world-report/articles/2017-09-06/10-years-later-israels-operation-orchard-offers-lessons-on-north-korea>; see also Amos Harel & Aluf Benn, *No Longer a Secret: How Israel Destroyed Syria's Nuclear Reactor*, HAARETZ (Mar. 23, 2018), <https://www.haaretz.com/world-news/MAGAZINE-no-longer-a-secret-how-israel-destroyed-syria-s-nuclear-reactor-1.5914407>.

considered a violation of the law of war.⁷¹ It follows then that events like the Al Kibar bombings cannot be used as justification for an initial conventional strike on North Korea. The legality of a preemptive conventional strike that rests on whether an enemy state has or does not have nuclear weapons is not discussed, but it is important to note that unlike in Syria in 2007, the nuclear threat in North Korea is active and materialized. Ultimately, any preemptive strike on North Korea, whether by nuclear or conventional means, results in the same unspeakable consequences.

Even assuming that a preemptive conventional strike on North Korean nuclear facilities were legal, the United States should avoid that option for the same reasons it should avoid a controlled nuclear preemptive strike. Simply put, the risk associated with either type of strike is too high. A failed preemptive conventional strike can be measured in one of two obvious ways. First, the mission would be deemed a failure if the conventional strike does not destroy all of North Korea's nuclear launch systems and hidden bunkers.⁷² The likelihood of success is low because, as mentioned previously, the whereabouts of North Korea's nuclear infrastructure is mostly unknown, buried deep in underground tunnels over miles of terrain. Therefore, a conventional weapons attack would merely be one against military facilities "but not one that destroys" its nuclear facilities.⁷³

The second and most obvious measure of a failed conventional attack by the United States is if North Korea retaliates with nuclear force against the United States, or even South Korea, where many American troops are currently stationed. Conventional strikes in self-defense may be legal under certain circumstances, but the situation between the United States and North Korea clearly falls far outside the scope, particularly given the low likelihood of success and the risks associated with a conventional strike. Accordingly, President Trump should negotiate with South Korea a no-first-use agreement under the traditional interpretation of self-defense because even a

71. See Ashley Deeks, *Taming the Doctrine of Preemption*, in THE OXFORD HANDBOOK ON THE USE OF FORCE (Marc Weller, ed., 2015).

72. *What the U.S. Would Use to Strike North Korea*, GEOPOLINTELLIGENCE (Jan. 4, 2017), <https://www.geopolintelligence.com/u-s-use-strike-north-korea/>; Woolf, *supra* note 44.

73. Woolf, *supra* note 44.

preemptive conventional strike against North Korea poses severe legal liabilities under international law and would likely place the United States in a dangerous predicament of nuclear war.

The United States lacks legal precedent to rightfully engage in any preemptive or preventive strike in self-defense against North Korea, whether it be by conventional or nuclear weapons. The United States would violate the law of war if it used preemptive nuclear strikes against North Korea because it would fail to satisfy the self-defense elements under Article 51.⁷⁴ Moreover, a preemptive conventional strike would likely be unsuccessful in completely neutralizing the North Korean threat, and any failed attack would surely result in nuclear retaliation against the United States and its allies. Thus, the United States should negotiate a no-first-use agreement with South Korea. The agreement would leave the United States in general compliance with international law if it ever resorted to using nuclear weapons and would effectuate South Korean consent for the United States to use of nuclear weapons, but only if it is in direct response to an initial nuclear attack on domestic or allied territories.

III. SOUTH KOREA'S RIGHTS UNDER THE LAW OF NEUTRALITY

A preemptive nuclear strike by the United States on North Korea violates neutrality law with respect to South Korea. The law of neutrality governs the relationship between neutral states and belligerents at war.⁷⁵ A neutral state is one that does not “take part between two or more nations at war” and “maintains a strict indifference as between the contending parties.”⁷⁶ Accordingly, if South Korea fulfills its duty to remain impartial to the conflict, it enjoys the rights of a neutral under the law of neutrality. For the purposes of this section, it is assumed that upon a preemptive nuclear strike by the United States on North Korea, South Korea will not provide diplomatic or economic support for the United States' efforts and will refuse to participate in the hostilities in order to maintain its status as a neutral third-party.

74. Potcovaru, *supra* note 1.

75. KOPPE, *supra* note 62 at 297.

76. *Id.*

Under international law, a neutral state has the right to remain impartial from conflict and to not be harmed.⁷⁷ At a minimum, it is clear that the use of nuclear weapons by the United States on North Korea would undoubtedly cause collateral damage and injury to South Korean citizens by means of radioactive fallout. Yet, in 1993, when the World Health Organization (“WHO”) requested from the ICJ an advisory opinion on whether the use of nuclear weapons, “in view of the health and environmental effects,” would be illegal under international law, the United States, in its written response to the ICJ, claimed that the law of neutrality does not apply to the use of nuclear weapons.⁷⁸ The United States may again take the same stance if it decides to engage in a preemptive nuclear strike against North Korea. However, the claim fails under international law. Moreover, the claim will fail under the United States’ own domestic policies because under several United States documents described in the sections to follow, uncontrollable radioactive fallout resulting from the use of nuclear weapons is classified not merely as collateral damage, but as an instrumentality of war.⁷⁹ Therefore, if a preemptive nuclear strike by the United States on North Korea results in any drift of harmful radiation onto South Korean territories, then the nuclear strike would be considered an armed attack in violation of South Korea’s rights under the law of neutrality, and a violation under the United States’ own domestic policies. The point is only further emphasized by the fact that South Korea, in its written response to the ICJ, claimed that “the use of nuclear weapons by a State in a war or other armed conflict is a clear breach of its obligations under the international conventions on the protection of environment of mankind...”⁸⁰

Under a literal reading of neutrality law, South Korea faces difficulties in establishing the United States’ liability for a

77. Norman Dwight Harris, *The Duties and Obligations of Neutral Governments, Parties to the Hague Conventions, in Case of Actual or Threatened Violations by Belligerents of the Stipulations of the Said Conventions*, 9 PROC. AM. SOC’Y INT’L L. ANN. MEETING 39 (1915).

78. Legality of Use by a State of Nuclear Weapons in Armed Conflict, Written Statement by the United States, 1993 I.C.J. 2 (June 10, 1994) [hereinafter Written Statement to ICJ].

79. U.S. DEP’T OF ARMY, FM 27-10, THE LAW OF LAND WARFARE (1956).

80. Legality of Use by a State of Nuclear Weapons in Armed Conflict, Written Statement from the Minister of Foreign Affairs of the Democratic People’s Republic of Korea, 1993 I.C.J. 2 (Jan. 24, 1994).

preemptive nuclear strike on North Korea. In fact, any literal interpretation of neutrality law, particularly with regards to the use of nuclear weapons and its radioactive aftereffects, may render application of the law inaccurate or moot, partially because neutrality law principles were developed during a time when nuclear weapons did not exist.⁸¹ The law of neutrality is primarily governed by codification of The Hague Convention V, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, and Convention XIII, Concerning the Rights and Duties of Neutral Powers in Naval Warfare.⁸² Article 1 of the Hague Convention V, which governs warfare on land, states the “territory of neutral Powers is inviolable.”⁸³ Article 1 of the Hague Convention XIII, with respect to naval warfare, states, “Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.”⁸⁴

Other articles of the Hague Convention also reveal that the Conventions were not designed to protect neutrals from the misuse of nuclear weapons. For example, Article 2 of Convention V states that belligerents may not move troops or convoys across neutral territory.⁸⁵ In addition, Article 2 of Convention XIII states belligerents are strictly forbidden from using war ships in neutral waters to commit acts of hostility.⁸⁶ As evidenced, it appears on its face that South Korea would be unable to resort to the direct application of both Convention V and Convention XIII to claim damages for a breach of domestic territories resulting from the misuse of nuclear weapons by the United States because the Conventions were primarily designed to prevent use of neutral territories by belligerents.

81. See Hague Convention V, *supra* note 3; see also Hague Convention XIII, Convention on Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, 2415 T.S. 545.

82. Hague Convention V, *supra* note 3; Hague Convention XIII, Convention on Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, 2415 T.S. 545.

83. Hague Convention V, *supra* note 3, at art. 1.

84. Hague Convention XIII, Convention on Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, 2415 T.S. 545.

85. *Id.*

86. Hague Convention XIII, *supra* note 83, at art. 2.

However, the word “inviolable” in Article 1 of the Hague Convention V leaves room for a broad interpretation of the law. Though the negotiating history of Article 1 remains silent on the issue,⁸⁷ experts have confirmed that “there was awareness among the participants of certain broad principles underlying the texts they were drafting, notably the principle that the sovereignty of the neutral State implies that its territories may not be affected by the military operations.”⁸⁸ In the context of warfare, military operations are typically regarded as plans to resolve conflict in the state’s favor. It is unimaginable to assume that the United States’ use of nuclear weapons against North Korea would not be self-serving. Thus, under a wider approach, South Korea would have a valid claim for any resulting radioactive fallout that affects its territories.

The validity in applying a wider approach to the Hague Convention V is further supported by The Martens Clause, which operates to provide neutral states immense legal protections against harms from the radioactive byproducts of nuclear weapons. The Martens Clause, adopted as a part of the 1899 Hague Convention II with Respect to the Law and Customs of War on Land, states, “Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principle of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.”⁸⁹ It appears then that drafters of the Hague Conventions not only had in mind the possibility of further developments in warfare weaponry, but also, through the Martens Clause under the Hague Convention II, made a point to establish authority under the principles of international law over the use of excessive arms not previously covered in former conventions or treaties.

87. MICHAEL BOTHE ET AL., PROTECTION OF THE ENVIRONMENT IN TIMES OF ARMED CONFLICT 56 (1985); KOPPE, *supra* note 62, at 303.

88. MICHAEL BOTHE ET AL., PROTECTION OF THE ENVIRONMENT IN TIMES OF ARMED CONFLICT 59 (1985).

89. Hague Convention II, Laws and Customs of War on Land, art. 1, July 29, 1899, 32 Stat. 1803, T.S. 403; Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, INT’L COMM. OF THE RED CROSS (Apr. 30, 1997), <https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm>.

Conservative critics may argue that The Hague Convention II is limited to prohibit only the use of certain types of weapons known at the time to cause excessive harm, such as expanding or exploding bullets.⁹⁰ However, the argument fails where it begins. The Martens Clause does not provide a list of prohibited and non-prohibited weapons, but encapsulates all weapons deemed to be excessive arms.⁹¹ In fact, the principle was established in conjunction with the law of war to protect victims from unnecessarily suffering at the hands of excessive uses of force.⁹² Given the irreparable, widespread, and painful deaths that nuclear weapons and its byproducts may cause, it follows that the Martens Clause restricts injury to neutrals caused by nuclear weapons, and that such restrictions were certainly intended when the clause was adopted.⁹³ A strict approach to the rule contradicts negotiating history,⁹⁴ and would only require codification of the law every time a weapon is modernized or further developed. It would also render the law inapplicable in many contexts, a proposition that has already been proven through historical practice.

Based on historical applications of neutrality law, South Korea will be able to establish legal liabilities for radioactive fallout resulting from a preemptive nuclear attack by the United State on North Korea so long as it can establish the “causal relationship” between the “extremely dangerous” attack and the subsequent harm.⁹⁵ In 1978, a Soviet satellite crash-landed on Canadian soil

90. Hague Convention II, Laws and Customs of War on Land, art. 1, July 29, 1899, 32 Stat. 1803, T.S. 403; see ROBIN COUPLAND & DOMINIQUE LOYE, THE 1899 HAGUE DECLARATION CONCERNING EXPANDING BULLETS A TREATY EFFECTIVE FOR MORE THAN 100 YEARS FACES COMPLEX CONTEMPORARY ISSUES, 136-137 (Library of Congress ed., 2002).

91. Hague Convention II, Laws and Customs of War on Land, art. 1, July 29, 1899, 32 Stat. 1803, T.S. 403; see generally Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, INT’L COMM. OF THE RED CROSS (Apr. 30, 1997), <https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm>.

92. Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, INT’L COMM. OF THE RED CROSS (Apr. 30, 1997), <https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm>.

93. See *Id.*

94. KOPPE, *supra* note 62, at 302-03 (noting that scholars debate legislative history and the rights of neutral states).

95. KOPPE, *supra* note 62, at 303-04; Michael Reisman, *Compensating Collateral Damage in Elective International Conflict*, FAC. SCHOLARSHIP SERIES 8 (2013).

and injured many people.⁹⁶ As a result, the Soviets were subject to absolute liability under neutrality law, not because the satellite activity was forbidden, but because the conduct linked to the injuries was considered “extremely dangerous.”⁹⁷ The same reasoning can be applied to the United States, even in the unlikely event that a preemptive nuclear strike on North Korea is considered legal, because “[n]uclear weapons are the most dangerous weapons on earth.”⁹⁸ The same can be said for injuries caused by radioactive fallout, especially when compared to the harms resulting from the crash-landing of a satellite on neutral territories.

Though it is nearly impossible to determine the precise severity of damage that radioactive drift may cause, the extremely dangerous nature of radiation caused by nuclear weapons is well documented. In a written statement to the ICJ titled, “Memorial of the Government of the Republic of Nauru,” Nauru presented a variety of studies highlighting the grave effects of the use of a nuclear bomb, particularly in the context of neutrality law violations.⁹⁹ In the statement, Nauru expressed that the law of neutrality protects against both “trans-border incursions” as well as “trans-border damage” caused by nuclear weapons.¹⁰⁰ The choice to differentiate between the two terms further supports the validity in applying a wider approach to the law of neutrality when dealing with nuclear fallout. Nuclear radiation can travel for hundreds of miles, affecting thousands of lives by means of contaminated food, air, and water.¹⁰¹ Moreover, cesium-137, “a major source of radiation in nuclear fallout,” has a half-life of 30

96. Michael Reisman, *Compensating Collateral Damage in Elective International Conflict*, FAC. SCHOLARSHIP SERIES 8 (2013); Alexander F. Cohen, *Cosmos 954 and the International Law of Satellite Accidents*, 10 YALE J. INTL. L. 78, 79 (1984); see generally Andrew Cohen, *Canada Settles with Russia for Satellite Crash*, UPI (Apr. 2, 1981), <https://www.upi.com/Archives/1981/04/02/Canada-settles-with-Russia-for-satellite-crash/7336355035600/>.

97. Alexander F. Cohen, *Cosmos 954 and the International Law of Satellite Accidents*, 10 YALE J. INTL. L. 78, 80 (1984).

98. Nuclear Weapons, UNODA, <https://www.un.org/disarmament/wmd/nuclear/> (last visited Sept. 18, 2019).

99. Memorial of the Government of the Republic of Nauru I, Advisory Opinion, at 35 (Sept. 1994), <https://www.icj-cij.org/files/case-related/93/8792.pdf>.

100. *Id.*

101. U.S. ARMS CONTROL AND DISARMAMENT AGENCY, *WORLDWIDE EFFECT OF NUCLEAR WAR* (2007).

years.¹⁰² Though the severity of the fallout hazards of nuclear explosions depends on a variety of factors, including the design of the weapon, the force of the explosion, and the weather, the sheer time required for radiation to dissipate speaks to its prolonged and destructive effects.¹⁰³ Given the hazards associated with nuclear radiation, it follows that no court would deny the “extremely dangerous” nature of nuclear fallout that results from a strike by the United States on North Korea, and the causal relationship that would clearly exist between the act and the harm.

Despite strong evidence to the contrary, the United States has adamantly opposed the validity of neutrality law in cases that involve collateral damage resulting from military strikes taken against, but within the geographical limits of, belligerent states. In 1993, the World Health organization requested from the ICJ an advisory opinion on the following question: “In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?”¹⁰⁴ In its written response, the United States took the position that the law of neutrality did not apply to the use of nuclear weapons.¹⁰⁵ Specifically, the United States claimed that the law of neutrality protects neutral territories only from “military invasion or bombardment,” meaning that only a direct use of force by belligerent parties on neutral states violates the law of neutrality.¹⁰⁶ The term collateral damage refers to harm inflicted by belligerents on unintended targets or non-combatants during legal military operations, for which the belligerents assume liability without fault.¹⁰⁷ If the United States plans to assume no fault for unintended harms caused during warfare, then the United States must respect the legal definition of collateral damage through its’ conduct, rhetoric, and policy.

However, the United States contradicts its’ position in its written response to the ICJ through its own military policies. In the

102. *Id.*

103. Annie Bersagel, *Nuclear Weapons and Their Third Parties*, ILPL (Sept. 2014), <http://nwp.ilpi.org/?p=2621>.

104. Written Statement to ICJ, *supra* note 78.

105. U.S. DEP’T OF ARMY, *supra* note 79, at 184.

106. Written Statement to ICJ, *supra* note 78.

107. U.S. DEP’T OF AIR FORCE, AFPAM 14-210, USAF INTELLIGENCE TARGETING GUIDE (1998).

United States' Army Land Warfare Manual, the United States asserts that the law of neutrality forbids any unpermitted entry into neutral territories, whether it be through waters or airspace, by soldiers, or by "instrumentalities of war."¹⁰⁸ Furthermore, in the United States' Army's Combat-Related Special Compensation Program, war veterans are entitled to receive compensation for injuries sustained by "instrumentalities of war."¹⁰⁹ The program provides a list of situations that constitute a valid basis for compensation for injuries to veterans resulting from fumes, explosions, gases, vehicles, materials, and most importantly, exposure to radiation.¹¹⁰ Remarkably, under its own military program, the United States considers radiation an instrumentality of war, which if used to enter a neutral territory, would be considered a violation of neutrality law.¹¹¹ Radiation, no less than the blast of an explosion, is used to kill enemy troops. Just as a bomb that explodes in neutral territory violates neutrality, so does the explosive effects of a weapon. The position taken by the United States regarding neutrality law is contradictory, at best.

Interestingly enough, the United States retreated from its initial statements during oral arguments before the ICJ, concluding that the legality of the use of nuclear weapons could only be assessed on a case-by-case basis depending on the facts of the case at hand.¹¹² Indeed, the position taken by the United States leaves spectators with more questions than answers. At the same time, it appears that by assessing the legality of nuclear weapons in relation to neutrality law on a case-by-case basis, the United States implies that it *may* be liable for radioactive fallout that results from a nuclear strike on North Korea. Though the Warfare Manual and Compensation Program are not binding under international law, South Korea may utilize the document and program to support its neutrality law claims against the United States if the United States ever decides to engage in a preemptive nuclear strike on North Korea.

As a practical matter, the United States should also avoid engaging in a preemptive strike against North Korea because a

108. U.S. DEP'T OF ARMY, *supra* note 79.

109. *Id.*

110. Combat-Related Special Compensation (CRSC) 10 U.S.C. § 1413(a) (2004).

111. U.S. DEP'T OF ARMY, *supra* note 79.

112. Written Statement, *supra* note 78 at 27, 32.

military error that affects a neutral creates state responsibility in the same way that collateral damage affecting a neutral would. According to the United States' statements to the ICJ, there are no international law cases that hold a belligerent state liable to a neutral third-party for damages resulting from military strikes taken against and within belligerent territories,¹¹³ though the United States destruction of the Chinese Embassy in Serbia during the NATO bombing Belgrade certainly shines a suspicious light to the claim.¹¹⁴ In the context of using nuclear weapons, the United States is correct, simply because there are only two cases in which nuclear weapons were used during warfare—the two atomic bombs deployed by the United States on Japan during World War II.¹¹⁵

However, the United States is incorrect in the context of neutral third-party damages resulting from the use of conventional weapons, particularly with regards to the topic of collateral damage. During World War II, the United States, intending to target Germany, unintentionally bombed Switzerland, a neutral third-party.¹¹⁶ As a result of these neutrality law violations, the United States had to compensate Switzerland approximately 20 million dollars,¹¹⁷ or 62 million Swiss francs, for damages “resulting from bombing raids on German targets close to the border, or from misunderstandings regarding the geography on the part of the pilots.”¹¹⁸ In “The Diplomacy of Apology: U.S. Bombings of Switzerland During World War II,” author Jonathan E. Helmreich notes that the unintentional bombings occurred mainly due to a combination of factors including machinery malfunctions, bad weather, and the unskillfulness or overconfidence of troops.¹¹⁹ Despite the unintentional nature of the bombings, the United States still compensated Switzerland for damages.¹²⁰ Surprisingly, the compensation included damages not only for dropped bombs, fuel tanks, or crashed aircrafts, but also

113. KOPPE, *supra* note 62, at 302-303.

114. *Id.* at 263.

115. See generally Atomic Bomb History, HISTORY (May 16, 2019), <https://www.history.com/topics/world-war-ii/atomic-bomb-history>.

116. Johnathan E. Helmreich, *The Diplomacy of Apology: U.S. Bombings of Switzerland During World War II*, AIR U. REV. 20 (May-June 1977).

117. *Id.* at 22.

118. KOPPE, *supra* note 62, at 303.

119. Helmreich, *supra* note 116, at 21-22.

120. *Id.*

for damages “resulting from actions over belligerent territory but the effects of which were felt on the Swiss side of the boundary.”¹²¹ More specifically, they included damages for the “shock-waves” caused by the explosions.¹²² At a minimum, the Switzerland case reveals that belligerents may be held liable under neutrality law for failing to prevent the deaths or injuries of unintended targets, even for damages resulting from mere shock-waves. By logical extension, harmful radioactive fallout resulting from the United States’ use of nuclear weapons on North Korea will provide South Korea recourse under neutrality law, particularly when injury is unintended. The only real difference that would exist is that the collateral damage in Switzerland resulted from the unintended use of conventional weapons rather than nuclear weapons. The difference is discounted because the Switzerland case illustrates how unintended damage resulting from the miscalculated use of *any* force on a neutral state would trigger liability under the law of neutrality. Surely then, under a logical approach, if the Swiss were compensated for the “shock-waves” of an unintended conventional attack, then South Korea must be compensated for the harmful radioactive fallout that results from an unintended nuclear attack.

Though unlikely, the United States may be able to avoid neutrality law liabilities for a preemptive nuclear strike on North Korea, but only if the effects of the strike can be controlled with enough certainty to avoid collateral damage. Specifically, the United States must design nuclear weapons that can be deployed with more control, precision, and predictability. It appears that the United States is keen on improving such functionality, at least based on its stance in the latest United States Nuclear Posture Review, which calls for more “usable” nuclear weapons.¹²³ Some scholars argue that the United States already has the technological capacity to account for collateral damage. In the article, “U.S. Air Force Uses New Tools to Minimize Civilian Casualties,” Colonel Hudson asserts that new military technologies such as the “FAST-CD” system, can dispel concerns of collateral damage and help military personnel make difficult decisions prior to and during a

121. KOPPE, *supra* note 62, at 304.

122. *Id.*

123. U.S. DEP’T OF DEF., *supra* note 7, at xv.

strike.¹²⁴ The FAST-CD system, also referred to as the “Fast Assessment Strike Tool – Collateral Damage,” identifies the weapon that will be used on a target, assesses the surrounding area, estimates the distance and angle of the attack, and calculates a “probable damage field” in the form of an image similar to that of a bug which has collided at high speed with a car windshield, hence the code name “bug splat.”¹²⁵ It appears then that if the United States can fully account for collateral damage when using nuclear weapons, the United States may avoid legal liabilities under neutrality law.

Yet some intelligence analysts have cautioned against the approach of using new nuclear weapons because the fallibility of human pilots and the likelihood of machinery malfunction dramatically increases the risks of a failed attack.¹²⁶ As Colonel Hudson noted, the technology in new weapons must provide its *users* with more control, precision, and predictability.¹²⁷ The unpredictability of weather also adds to the uncertainty of how far radiation can drift with the wind.¹²⁸ Judge Weeramantry, who issued a dissenting opinion to the International Court of Justice’s Advisory Opinion on the Threat or Use of Nuclear Weapons, argued that the most significant threat to neutral nations is radioactive fallout and that the use of nuclear weapons should be unlawful *per se* given its inherent uncontrollability.¹²⁹ To support the argument, Judge Weeramantry cited the Chernobyl disaster, which resulted in a blast of one twenty-fifth the size of the Hiroshima bomb.¹³⁰ Even scientists responsible for investigating the case failed to calculate the time that it would take for the radiation to dissipate.¹³¹ Even after all these years, an exclusion zone still exists, which highlights the grave “uncertainties

124. *U.S. Air Force Uses New Tools to Minimize Civilian Casualties*, DEFENSE AEROSPACE (Mar. 18, 2003), <http://www.defense-aerospace.com/article-view/feature/18894/usaf-plans-to-minimize-civilian-casualties.html>.

125. *Id.*

126. *Id.*

127. *Id.*

128. Bersagel, *supra* note 103.

129. Advisory Opinion, *supra* note 2, at 266.

130. *Id.* at 253.

131. *Id.* at 254.

associated with radioactive contamination.”¹³² Given the uncontrollable risks associated with nuclear fallout, it is unlikely that the United States can foresee the true extent of damage that results from the use of nuclear weapons. In effect, any preemptive nuclear strike on North Korea, especially one against protests from South Korea, would provide South Korea an opportunity for compensation because “a right without a remedy is no right at all.”¹³³

The United States must seriously consider negotiating with South Korea a no-first-use agreement with respect to North Korea. South Korea’s express abstention from the war would effectuate a claim of neutrality, thereby requiring authorization before the United States can cross into South Korean territories by land, air, sea, or instrumentality of war. Additionally, without South Korea’s consent, any drift of radioactive fallout over South Korean territories resulting from the use of nuclear weapons on North Korea would be considered an attack on neutral territories. A no-first-use policy would authorize the United States to protect South Korean territories only in response to a first-use by North Korea, and any subsequent use of nuclear weapons would not violate South Korea’s neutrality rights. Moreover, having the policy in place would allow the United States to maintain its military operations and bases in South Korea, a position that has proven to be vital, in terms of economic and military control in the East.¹³⁴ South Korea is a valuable ally to the United States. Accordingly, South Korea should continue to apply pressure on the United States to negotiate a no-first-use agreement.

IV. A NO-FIRST-USE AGREEMENT WITH SOUTH KOREA WOULD PROVIDE POLITICAL BENEFITS

A no first-use agreement between the United States and South Korea effectively eliminates any possibility of a preemptive

132. Alexis Madrigal, *Chernobyl Exclusion Zone Radioactive Longer Than Expected*, WIRED (Dec. 15, 2009, 2:32 PM), www.wired.com/wiredscience/2009/12/chernobyl-soil/.

133. Michael Reisman, *Compensating Collateral Damage in Elective International Conflict*, FAC. SCHOLARSHIP SERIES 2 (2013).

134. MARK E. MANYIN ET AL., SOUTH KOREA: BACKGROUND AND US RELATIONS (2019), <https://fas.org/sgp/crs/row/IF10165.pdf>; MARK E. MANYIN ET AL., U.S.- SOUTH KOREA RELATIONS (2017), <https://fas.org/sgp/crs/row/R41481.pdf>.

nuclear strike on North Korea, which places the United States in general compliance under the law of war and the law of neutrality. Moreover, the agreement would help ease trepidations held by enemy states regarding the chances of inadvertent or accidental first-use of nuclear weapons. Unlike China, the United States should draft its no-first-use agreement to dispel any concerns that United States' allies may have, particularly with regards to reduced protections in the East, as some allies like South Korea and Japan have historically relied on the concept of first-use implied in the Nuclear Umbrella policy.

The United States' no-first-use agreement with South Korea must differ from China's Sole Doctrine policy in order to prevent allies from producing their own nuclear weapons, in fear of weakened nuclear protections in the East under the United States' Nuclear Umbrella program. In 1964, China became the first country with nuclear weapons to adopt the Sole Purpose doctrine, a policy under which China pledged to never be the first to use nuclear weapons under any circumstance, even in response to an initial biological or chemical weapons attack on its territories.¹³⁵ As part of the policy, China promised to maintain its small nuclear arsenal solely for defensive purposes.¹³⁶ However, if the United States adopts the Sole Purpose doctrine, it effectively weakens the Nuclear Umbrella program, which implicitly authorizes the first-use of nuclear weapons as a deterrence strategy.¹³⁷ In effect, countries such as South Korea and Japan would be inclined to produce nuclear weapons of their own, just as they threatened to produce nuclear weapons in the past in response to United States' actions that weakened United States' protections in the East. For example, in the 1970s, President Park Chung Hee initiated a program to develop nuclear weapons in response to a proposal by the United States to withdraw troops from South Korea.¹³⁸ Under

135. Hui Zhang, *China's No-First-Use Policy Promotes Nuclear Disarmament*, DIPLOMAT (May 22, 2013), <https://thediplomat.com/2013/05/chinas-no-first-use-policy-promotes-nuclear-disarmament/>.

136. *Id.*

137. Eric Gomez, *Revisiting the Value of the U.S. Nuclear Umbrella in East Asia*, WAR ON THE ROCKS (Mar. 6, 2018), <https://warontherocks.com/2018/03/revisiting-value-u-s-nuclear-umbrella-east-asia/>.

138. William Burr, *Stopping Korea from Going Nuclear, Part I*, NAT'L SEC. ARCHIVES (Mar. 22, 2017), <https://nsarchive.gwu.edu/briefing-book/nuclear-vault/2017-03-22/stopping-korea-going-nuclear-part-i>.

immense pressure, the United States withdrew from the plan and thereafter, South Korea ceased to pursue its own nuclear deterrents.¹³⁹

The United States' relationship with Japan is similar. Under the Japan-United States Security Treaty established in 1967, the United States promised to maintain its Nuclear Umbrella in exchange for Japanese agreement to not possess, produce, or permit entry of nuclear weapons into its country. As noted, United States' allies in the East rely heavily on the protections that the Nuclear Umbrella provides. If the United States wishes to keep nuclear weapons out of the hands of its allies, the United States must maintain the strength of the Nuclear Umbrella program. As such, the United States should formulate a no-first-use policy that differs from the Sole Purpose Doctrine adopted by China since it needs the ability to protect its allies even though the United States itself might not have suffered the nuclear attack.

The United States would be able to maintain its alliances in the East and preserve its Nuclear Umbrella program by amending, adjusting, or qualifying its no-first-use agreement with South Korea as necessary. On its face, the Sole Purpose Doctrine adopted by China only addresses nuclear attacks directed at the policy holder's domestic territory.¹⁴⁰ To that effect, South Korea and Japan should rightfully be concerned if the United States adopts the same policy. However, the United States is not required to take the same approach as China. The United States may condition a nuclear response if North Korea attacks a particular United States ally. The condition would merely provide reassurance on a topic the United States already addressed in its' 2010 Nuclear Posture Review, in which the United States asserts that it will continue to use nuclear weapons as a deterrent against attacks on the United States and its allies.¹⁴¹ Similar positions are taken by Russia, the United Kingdom, and France, as they leave open the possibility of using nuclear weapons in response to invasion or attacks on their territories or their allies.¹⁴² Moreover, the conditions of the no-first-use agreement can be amended in the future to accommodate for new allies or to adjust to the ever-

139. *Id.*

140. U.S. DEP'T OF DEF., *supra* note 7, at vii.

141. *Id.*

142. BEATRICE HEUSER, NATO, BRITAIN, FRANCE, AND THE FRG NUCLEAR STRATEGIES AND FORCES FOR EUROPE 105 (1997).

changing geopolitical climate. Most importantly, the United States would be able to maintain its nuclear stockpile, which would not only reinforce protections provided under the Nuclear Umbrella, but also help the United States maintain relationships with its allies in the East.

The creation of a credible no-first-use agreement with South Korea would also help alleviate international criticisms regarding the United States' massive nuclear arsenal. The United States agreed, under Article Six of the Treaty on the Non-Proliferation of Nuclear Weapons, "to negotiate in good faith to stop the nuclear arms race and to negotiate for complete elimination of nuclear weapons."¹⁴³ It is commendable that of the 70,000 warheads produced since 1945,¹⁴⁴ the United States currently only holds approximately 4,000.¹⁴⁵ However, the international community has and will demand further reductions in the stockpile so long as the United States and Russia continue to hold nearly 90 percent of the world's nuclear weapons.¹⁴⁶ Executing a credible no-first-use policy would allow the United States to demonstrate that its nuclear weapons serve as deterrents and as instruments of peace. The agreement also allows the United States to continue developing more usable and modernized nuclear weapons in accordance with its latest Nuclear Posture Review. The United States would also have a valid reason for not signing the International Atomic Energy Agency's 2005 proposal for a comprehensive ban on fissile material,¹⁴⁷ and the Treaty on the Prohibition of Nuclear Weapons.¹⁴⁸ Thus, the agreement would help the United States eliminate substantial roadblocks to more

143. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

144. *Id.*; Hans Kristensen & Robert Norris, *Global Nuclear Weapons Inventories*, BULL. ATOMIC SCIENTISTS, July-Aug. 2010, at 79.

145. Hans Kristensen & Robert S. Norris, *United States Nuclear Forces*, 74 BULL. ATOMIC SCIENTISTS, 2018, at 120.

146. Kelsey Reichmann, *Here's How Many Nuclear Warheads Exist, and Which Countries Own Them*, DEFENSE NEWS (June 16, 2018), <https://www.defensenews.com/global/2019/06/16/heres-how-many-nuclear-warheads-exist-and-which-countries-own-them/>.

147. Sharon Squassoni et al., RS22474, *Banning Fissile Material Production for Nuclear Weapons: Prospects for a Treaty (FMCT) 4* (2016), <https://fas.org/sgp/crs/nuke/RS22474.pdf>.

148. Treaty on the Prohibition of Nuclear Weapons, *opened for signature* Aug. 9, 2017, 729 U.N.T.S. 161.

support in the international community for its nuclear weapons program.

It is important to note that if it were not for the United States' own military concerns, the United States would be in a prime position to adopt China's Sole Purpose Doctrine, at least for the sake of its allies, which further supports the argument for an amendable no-first-use policy. In fact, both South Korea and Japan's recent interests mirror those of international organizations promoting nuclear disarmament.¹⁴⁹ In fact, the positions taken by Japanese leaders in the past stand in stark contrast from those held by Japanese leaders today. For example, in 1965, Prime Minister Taro Aso posited that a no-first-use policy taken by the United States would not contribute to global disarmament, implying that it would not be in Japan's best interests if the United States adopted such a policy.¹⁵⁰ In contrast, by 2009, the Democratic Party of Japan expressed desire for the United States to adopt a no first use policy.¹⁵¹ Then, in 2010, a letter issued on behalf of 204 Japanese Diet members urged President Obama to declare "sole purpose," stating that Japan likely would not pursue a nuclear weapons development program if the United States adopted a no-first-use policy.¹⁵² Based on these implications, the United States should not have reservations about executing a no-first-use policy, at least with respect to concerns that its allies will threaten future nuclear weapons development.

South Korean leaders and leaders of other nations are also likely to respond positively to a no-first-use proposal by the United States, even if it means lessened protections in the East. For example, in 1991, President George H.W. Bush unilaterally withdrew all tactical nuclear weapons globally, which included the 100 nuclear weapons stationed on South Korean territories.¹⁵³

149. Maso Takubo, *Japan's Challenges and Dilemmas Over Nuclear Disarmament*, ACRONYM (Aug. 1, 2009), <http://www.acronym.org.uk/old/dd/dd91/91mt.htm>.

150. *Id.* ("In international society, there exist large arsenals including nuclear forces... It could disturb the deterrence balance and undermine security to have a discussion separating nuclear weapons from other weapons.").

151. *Id.*

152. MIKE MOCHIZUKI, *NUCLEAR DEBATES IN ASIA* 88 (Mike Mochizuki & Deepa M. Ollapally eds., 2016).

153. Don Oberdorfer, *U.S. Decides to Withdraw A-Weapons from S. Korea*, WASH. POST (Oct. 19, 1991), <https://www.washingtonpost.com/archive/politics/1991/10/19/us-decides-to->

Thereafter, President Woo of South Korea proclaimed the Declaration on the Denuclearization of the Korean Peninsula, which prohibited South Korea from producing, possessing, or using nuclear weapons.¹⁵⁴ The United States' withdrawal of nuclear weapons in the East also prompted Soviet President Gorbachev to proclaim a reduction in his nation's nuclear capabilities.¹⁵⁵ In addition, the Declaration prompted North Korea to sign the South-North Joint Declaration on the Denuclearization of the Korean Peninsula, under which both North Korea and South Korea agreed to stop developing nuclear weapons and even nuclear enrichment facilities.¹⁵⁶ Although North Korea eventually failed to comply with its legal obligations under the Non-Proliferation Treaty, these events show that United States' actions initiated by peace will not only bring North Korea to the negotiation table, but may also prompt other nations to act similarly. A no-first-use agreement between the United States and South Korea would likely operate in similar fashion.

This research paper does not address the obligations that the United States may have to countries other than South Korea and Japan, specifically with regards to its Nuclear Umbrella policy. However, as evidenced through history, a strategic international move motivated by peace may produce positive results. In contrast, punishments imposed to weaken states into economic submission have only provoked states in the past, as evidenced by North Korea's aggressive nuclear response to United States' sanctions. Thus, the United States should strongly consider negotiating a no-first-use agreement with South Korea. If the agreement provides lasting results, it would not only be a true testament to the power of peace but would also revolutionize the international legal framework with respect to nuclear weapons defenses and help further other meaningful developments within international law generally.

[withdraw-a-weapons-from-s-korea/3759ee3f-e9bf-4944-bfdf-2f9ea727b546/?utm_term=.8349b80c3c45](https://www.dhs.gov/withdraw-a-weapons-from-s-korea/3759ee3f-e9bf-4944-bfdf-2f9ea727b546/?utm_term=.8349b80c3c45).

154. *Id.*

155. *Id.*

156. *Id.*

V. CONCLUSION

As the possibility of a preemptive strike by the United States on North Korea lingers, so does the need for the United States to adequately address the legal uncertainties surrounding the use of nuclear weapons by carefully considering all of the potential consequences involved, particularly in the context of international law. Current international law fails to provide adequate authority to restrict nation states from using nuclear weapons. Similarly, international law falls short of establishing clear legal guidelines for situations where a state may use force in self-defense. The prolonged and polarized international debate on the issue only encourages nuclear states to continue the development of nuclear weapons, which in turn, undermines aggressive efforts by world organizations to promote denuclearization and non-proliferation. The history of contradictory rhetoric by the five major nuclear powers under the Non-Proliferation Treaty only adds to the complexity of the issue. North Korea's newfound willingness to negotiate with the United States is ultimately positive. However, the parties still stand worlds apart from a realistic deal,¹⁵⁷ which reinforces the need for the United States to consider other viable strategies, such as the no-first-use agreement, in order to denuclearize North Korea. In no way does the establishment of a no-first-use agreement between the United States and South Korea render a perfect solution to the North Korean problem. However, the plan has the potential to redefine the meaning of nuclear deterrence as one driven by peace rather than by aggression and hostility.

157. Jung H. Pak, *The Good, the Bad, and the Ugly at the US-North Korea Summit in Hanoi*, BROOKINGS (Mar. 4, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/03/04/the-good-the-bad-and-the-ugly-at-the-us-north-korea-summit-in-hanoi>.