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The Legality of North Korea's Threat of Use of Nuclear Weapons

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Introduction

Nuclear-armed Pyongyang is a reality. But is it a reality in law as well? North Korea's nuclear program poses an existential threat to South Korea, and it also raises a critical foreign policy challenge to the US. An important legal question raised by North Korea's nuclear weapons is the legality of the threat of use of nuclear weapons. The legality of North Korea's threat of use of nuclear weapons is important because it is one of Kim Jong Un's favorite strategies to initiate a negotiation with other states and test their resolve amid North Korea's isolation from the international community. At the same time, it poses a grave foreign policy challenge to the US and other states in Northeast Asia. Moreover, the escalation of tension in Northeast Asia is dangerous because many of the big players in the region, including the US, Russia, and China, are nuclear-armed states.

This paper addresses the lawfulness of North Korea's public statements threatening the potential use of nuclear weapons against the US and its military actions such as nuclear and missile tests that preceded and followed those threats. First, I review the exchange of threatening statements and conducts between North Korea and the US from mid 2017 to early 2018 and discuss the characteristics of North Korea's threats of use of nuclear weapons against the US. Second, I discuss whether North Korea's public statements threatening the use of nuclear weapons and its military actions that preceded and followed those statements constitute threats of force. Third, I discuss whether those public statements and military actions are lawful.

Threatening Statements from Missile-Equipped Pyongyang

Soon after Kim Il Sung's death on December 17, 2011, the Supreme People's Assembly named Kim Jong Un as the supreme leader of North Korea.¹ Becoming the head of a state in his late twenties, Kim Jong Un committed himself to a campaign to solidify his control and stabilize the grief-stricken state. A noteworthy thing about Kim Jong Un's efforts to consolidate his leadership is his obsession with missiles.

On July 28, 2017, North Korea tested an intercontinental ballistic missile (ICBM) that could theoretically have reached Chicago and even New York.² In response, the UN Security Council unanimously passed Resolution 2371 imposing additional sanctions, including a complete ban on the export of coal, iron, seafood and lead on North Korea.³ On August 8, 2017, a leaked Defense Intelligence Agency report revealed that North Korea has successfully produced miniaturized nuclear warheads for ballistic missile delivery, including ICBMs.⁴ President Donald Trump's reaction launched the battle of words between the US and North Korea where both countries publicly remarked on the potential use of force against each other.

¹ Mark Memmott, *Kim Jong Un Declared to Be 'Supreme Leader' of North Korea*, NPR (Dec. 29, 2011, 7:15 AM), <https://www.npr.org/sections/thetwo-way/2011/12/29/144420122/kim-jong-un-declared-to-be-supreme-leader-of-north-korea>.

² Anna Fifield, *North Korea Fires Another Missile, Its Latest Step toward Putting the US within Reach*, WASH. POST (June 28, 2017), https://www.washingtonpost.com/world/asia_pacific/north-korea-fires-another-missile-its-latest-step-toward-putting-the-us-within-reach/2017/07/28/7fc4437a-71fd-11e7-8c17-533c52b2f014_story.html?utm_campaign=buffer&utm_content=buffer1e87a&utm_medium=social&utm_source=twitter.com&utm_term=.fedbd62b305e.

³ Kelsey Davenport, *Chronology of U.S.-North Korean Nuclear and Missile Diplomacy*, ARMS CONTROL ASS'N, <https://www.armscontrol.org/factsheets/dprkchron> (last updated July, 2020).

⁴ Joby Warrick et al., *North Korea Now Making Missile-Ready Nuclear Weapons, U.S. Analysts Say*, WASH. POST (Aug. 8, 2017), https://www.washingtonpost.com/world/national-security/north-korea-now-making-missile-ready-nuclear-weapons-us-analysts-say/2017/08/08/e14b882a-7b6b-11e7-9d08-b79f191668ed_story.html?utm_term=.26a064dbf86e.

While on vacation at his New Jersey golf course, President Trump made the following statement:

“North Korea best not make any more threats to the United States. [Kim Jong Un] has been very threatening beyond a normal state, and as I said, they will be met with fire and fury, and frankly power the likes of which this world has never seen before.”⁵

President Trump saw North Korea’s ballistic missile test as a clear threat to US national security and threatened back by invoking the potential use of military force against North Korea.

In response to President Trump’s provocative remarks, North Korea initially fought back with a threat of creating “an enveloping fire” around Guam⁶ and further escalated the tension between the two states by threatening the US with the potential use of nuclear weapons:

“It is a daydream for the U.S. to think that its mainland is an invulnerable Heavenly kingdom...the U.S. should clearly face up to the fact that the ballistic rockets of the Strategic Force of the [Korean People’s Army] are now on constant standby, facing the Pacific Ocean and pay deep attention to their azimuth angle for launch.”⁷

Kim Jong Un warned that North Korea could strike the US mainland with ICBMs. Also, his mentioning of the “Strategic Force” of the Korean People’s Army is significant because it oversees North Korea’s nuclear and strategic missile forces.

Following the altercation with the US, North Korea did not back down. It raised the tension between the two nations even further by displaying its missile capability in a series of ballistic missile and nuclear tests. On August 25, 2017, North Korea launched three short-range

⁵ Peter Baker & Choe Sang-Hun, *Trump Threatens ‘Fire and Fury’ Against North Korea if It Endangers U.S.*, N.Y. TIMES (Aug. 8, 2017), <https://www.nytimes.com/2017/08/08/world/asia/north-korea-un-sanctions-nuclear-missile-united-nations.html?searchResultPosition=9>.

⁶ *Id.*

⁷ *Id.*

ballistic missiles from its eastern coast to the sea.⁸ Three days later, on August 28, 2017, North Korea fired a Hwasong-12 missile, an intermediate-range missile, which traveled 1,700 miles and landed in the Pacific Ocean after flying over Japan.⁹ This missile test marked only the third time a North Korean missile flew over Japan.¹⁰ Less than a week after, on September 3, 2017, North Korea conducted its sixth nuclear test, claiming that the test used a hydrogen bomb and resulted in a complete success.¹¹ The UN Security Council responded by passing Resolution 2375 imposing additional sanctions on North Korea, including a ban on textile exports and a cap on refined petroleum product imports.¹² On September 15, 2017, North Korea launched another ballistic missile over Japan, making it the fourth missile that flew over the Japanese soil.¹³

President Trump faced a challenge to his foreign policy. In his first address to the UN General Assembly, President Trump made the following statement:

“The United States has great strength and patience, but if it is forced to defend itself or its allies, we will have no choice but to totally destroy North Korea...Rocket Man is on a suicide mission for himself and for his regime.

⁸ Choe Sang-Hun, *North Korea Fires Short-Range Missiles from Its East Coast*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/world/north-korea-fires-short-range-missiles-from-its-east-coast.html>.

⁹ Choe Sang-Hun & David E. Sanger, *North Korea Fires Missile over Japan*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/2017/08/28/world/asia/north-korea-missile.html>.

¹⁰ *Id.*

¹¹ Choe Sang-Hun & David E. Sanger, *North Korean Nuclear Test Draws U.S. Warning of ‘Massive Military Response’*, N.Y. TIMES (Sept. 2, 2017), <https://www.nytimes.com/2017/09/03/world/asia/north-korea-tremor-possible-6th-nuclear-test.html>.

¹² Davenport, *supra* note 3.

¹³ James Griffiths et al., *North Korea Launches Missile over Japan*, CNN (Sept. 15, 2017), <https://www.cnn.com/2017/09/14/asia/north-korea-missile-launch/index.html>.

The United States is ready, willing and able, but hopefully this will not be necessary.”¹⁴

President Trump sought to apply greater pressure on North Korea at the UN General Assembly. While he explained that the US had “patience” and did not want to take military actions, President Trump engaged in using combative words to warn North Korea that its threatening actions to the US and its allies would eventually lead itself to “total destruction” and “suicide,” an apocalyptic view that implied a nuclear war.

President Trump’s strong warning at the UN General Assembly failed to make Kim Jong Un concede. Kim Jong Un did not back down and released the following remarks on North Korea’s state news agency:

“Now that Trump has denied the existence of and insulted me and my country in front of the eyes of the world and made the most ferocious declaration of a war in history that he would destroy the [Democratic People’s Republic of Korea], we will consider with seriousness exercising of a corresponding, highest level of hardline countermeasure in history... whatever Trump might have expected, he will face results beyond his expectation. I will surely and definitely tame the mentally deranged U.S. dotard with fire.”¹⁵

Kim Jong Un did not specify what he meant by the “highest level of hardline countermeasure.” However, he made it clear that he would engage in a “corresponding” countermeasure to President Trump’s threatening remarks about the potential use of nuclear weapons, making the use of nuclear weapons more likely.

¹⁴ Jacob Pramuk, *Trump at UN: ‘Rocket Man’ Kim Jong Un ‘Is on a Suicide Mission’*, CNBC (Sept. 19, 2017, 3:23 PM), <https://www.cnbc.com/2017/09/19/trump-at-un-rocket-man-kim-jong-un-is-on-a-suicide-mission.html>.

¹⁵ *Full Text of Kim Jong-Un’s Response to President Trump*, N.Y. TIMES (Sept. 22, 2017), <https://www.nytimes.com/2017/09/22/world/asia/kim-jong-un-trump.html>.

The tension between the two states persisted. On September 23, 2017, US Air Force B-1B Lancer bombers flew over waters east of North Korea.¹⁶ This military operation was the farthest north of the Demilitarized Zone any US bomber aircraft have flown off North Korea's coast in the 21st century.¹⁷ On September 25, 2017, North Korea's Foreign Minister, Ri Yong-ho claimed that President's Trump's comments at the UN General Assembly constituted "a declaration of war" against North Korea and that North Korea had every right to "shoot down US strategic bombers even when they were not within North Korea's airspace border."¹⁸

In November 2017, President Trump officially re-designated North Korea as a state sponsor of terrorism.¹⁹ On November 29, 2017, North Korea launched a newly developed ICBM which flew about 600 miles and landed in the East Sea.²⁰ The UN Security Council again unanimously adopted Resolution 2397, "imposing additional sanctions on North Korea, including cutting refined petroleum imports by nearly ninety percent, limiting crude oil exports to four million barrels and mandating the expulsion of North Korean workers from other countries in two years or less."²¹

¹⁶ Statement by Dana W. White, Chief Pentagon Spokesperson, U.S. DEP'T OF DEF. (Sept. 23, 2017) (on file with the U.S. Department of Defense website), <https://www.defense.gov/News/Releases/Release/Article/1322213/us-flys-b1-b-bomber-mission-off-of-north-korean-coast/>.

¹⁷ *Id.*

¹⁸ Rick Gladston & David E. Sanger, *North Korea Says It Has the Right to Shoot Down U.S. Warplanes*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/world/asia/trump-north-korea.html>.

¹⁹ Jeff Mason & David Brunnstrom, *Trump Declares North Korea State Sponsor of Terrorism, Triggers Sanctions*, REUTERS (Nov. 20, 2017, 12:00 PM), <https://www.reuters.com/article/us-northkorea-missiles-usa/trump-declares-north-korea-state-sponsor-of-terrorism-triggers-sanctions-idUSKBN1DK223>.

²⁰ Mark Lander et al., *North Korea Fires a Ballistic Missile, in a Further Challenge to Trump*, N.Y. TIMES (Nov. 28, 2017), <https://www.nytimes.com/2017/11/28/world/asia/north-korea-missile-test.html>.

²¹ Davenport, *supra* note 3.

The two heads of the states carried over the spiral of tension to 2018. In his 2018 new year's address, Kim Jong Un announced that his country has "completed" its state nuclear force.²² He added that:

"Our country's nuclear forces are capable of thwarting and countering any nuclear threats from the U.S, and they constitute powerful deterrent that prevents it from starting an adventurous war...the whole of [the U.S.] mainland is within the range of our nuclear strike and the nuclear button is on my office desk all the time; the United States needs to be clearly aware that this is not merely a threat but a reality."²³

Kim Jong Un clarified that North Korea's nuclear weapons were intended to deter nuclear threats from the US. By declaring North Korea's nuclear capability and preparedness to strike the US mainland, Kim Jong Un signaled that the use of nuclear weapons was a serious option for him.

Two days later, President Trump reacted to Kim Jong Un's belligerent statements with a tweet stating that:

"North Korean Leader Kim Jong Un just stated that the 'Nuclear Button is on his desk at all times.' Will someone from his depleted and food starved regime please inform him that I too have a Nuclear Button, but it is a much bigger [and] more powerful one than his, and my Button works!"²⁴

President Trump refused to back down and reacted with an even fiercer warning. While he diminished North Korea by calling the country a "depleted and food starved regime," President Trump boasted his superior nuclear weapons program, raising the prospect of using nuclear weapons against North Korea.

²² Eleanor Albert, *What to Know about Sanctions on North Korea*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/background/what-know-about-sanctions-north-korea> (last updated July 16, 2019, 8:00 AM).

²³ *Kim Jong Un's 2018 New Year's Address*, NAT'L COMMITTEE ON N. KOR. (Jan. 1, 2018), <https://www.ncnk.org/node/1427>.

²⁴ Peter Baker & Michael Tackett, *Trump Says His 'Nuclear Button' Is 'Much Bigger' Than North Korea's*, N.Y. TIMES (Jan. 2, 2018), <https://www.nytimes.com/2018/01/02/us/politics/trump-tweet-north-korea.html>.

A question may arise as to whether the heads of the two states actually meant to use nuclear weapons by engaging in a public altercation. For this paper, I do not further analyze whether these public statements made by President Trump and Kim Jong Un express their actual intention to exchange nuclear weapons. However, when viewed under the existing circumstances such as North Korea's nuclear and missile tests, the public statements from President Trump and Kim Jong Un should be seen as an expression of their actual intention to use nuclear weapons.

Characteristics of North Korea's Threat of Use of Nuclear Weapons

Some of the common themes in North Korea's public statements threatening the use of nuclear weapons are worth noting.

1. North Korea's threats of use of nuclear weapons rely on the self-defense doctrine and emphasize the retaliatory and defensive nature of its use of nuclear weapons.

In contrast to its aggressive pursuit of missile and nuclear weapons technology, North Korea's threats demonstrate North Korea's emphasis on the self-defensive use of nuclear weapons. This characteristic of North Korea's threats of use of nuclear weapons is further supported by the Supreme People's Assembly's passage of the law "On Consolidating the Position of Nuclear Weapons State for Self-Defense" (The April 1, 2013, Law on Nuclearization).²⁵ Both Article 1 and 2 of this North Korean legislation stress that North Korea's nuclear weapons are "means for defense" and serve the "purpose of deterring and repelling the aggression and attack of the enemy against [North Korea] and for dealing deadly retaliatory blows" against the enemy.²⁶ The April 1, 2013, Law on Nuclearization further clarifies in Article

²⁵ Juliana Dowling & Dae Un Hong, *The Enshrinement of Nuclear Statehood in North Korean Law: Its Implications for Future Denuclearization Talks with North Korea*, 2021 U. ILL. L. REV. 48, at 56 (2021).

²⁶ *Id.*

1 that the motivation behind North Korea's development of nuclear weapons was to deal with "hostile policy and nuclear threat of the U.S."²⁷ The Article 5 of the Law also states that North Korea shall neither use nor threaten to use nuclear weapons against non-nuclear states unless they join a hostile nuclear weapons state and attack North Korea.²⁸

2. North Korea's threats of use of nuclear weapons lack clarification as to the size, scope, and degree of force to be used.

Here, the proportionality test in *jus ad bellum* that strikes a balance between the size, scope, and degree of the responding threat to use force and the size, scope, and degree of the aggressor's threat to use force would be relevant. However, it is not clear whether North Korea has considered that its threatened use of nuclear weapons is proportional to the asserted hostile actions from the US.

3. North Korea's threats of use of nuclear weapons make no clear distinction between military and civilian targets.

There is an apparent strategic reason for not specifying the information related to the target and capability of military action in public statements. Also, North Korea's statements analyzed in this paper probably would not be subject to the law of armed conflicts because North Korea and the US are not at war. However, North Korea's lack of such distinction and non-disclosure of its capacity to discriminate between military and civilian targets raises the question of the legality of its threats during war. In Paragraph 85 of its advisory opinion on the legality of the threat or use of nuclear weapons, the International Court of Justice (ICJ) found that the principles and rules of humanitarian law applicable in armed conflicts apply to nuclear

²⁷ *Id.*

²⁸ *Id.*

weapons.²⁹ In Paragraph 78 of the advisory opinion, the ICJ further notes that the principle of discrimination establishing the distinction between combatants and civilians and the principle against unnecessary suffering to combatants are “cardinal” principles contained in humanitarian law.³⁰ Therefore, North Korea’s lack of distinction between military and civilian targets would raise a question as to the legality of its threats of use of nuclear weapons during war.

4. North Korea’s threats of use of nuclear weapons present no condition, demand, or ultimatum.

In international law literature on threat of force, many scholars have suggested definitions of threat of force that include a condition, demand, or ultimatum.³¹ However, those definitions are problematic because of the possibility that states will implicitly present or communicate their intention through an unofficial diplomatic channel. Here, North Korea did not express a specific condition, demand, or ultimatum in its threats of force. The significance of this fact is that North Korea’s public statements should not be discounted as not constituting threats of force for their lack of a specific condition, demand, or ultimatum. Instead, they should be analyzed with the help of relevant case laws defining threat of force.

5. North Korea’s threats of use of nuclear weapons are preceded or followed by military actions such as ballistic missile tests and nuclear tests.

North Korea engaged in numerous military efforts to experiment with its missile and nuclear technology while threatening the use of nuclear weapons against the US. These military

²⁹ Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶85 (July 8).

³⁰ *Id.* at 257.

³¹ Ian Brownlie, *The Use or Threat of Force and the Concept of Armed Attack*, in INT’L L. AND THE USE OF FORCE BY STATES 364 (1963) (“[A]n express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government.”); Romana Sadurska, *Threats of Force*, 82 AM. J. OF INT’L L. 239, 241 (1988) (“A threat of force is a message, explicit or implicit, formulated by a decision maker and directed to the target audience, indicating that force will be used if a rule or demand is not complied with.”).

actions that preceded and followed North Korea's threats of use of nuclear weapons may be relevant in analyzing the legality of North Korea's threat of use of nuclear weapons because other states may perceive them as threats of force.

The Lawfulness of North Korea's Threat of Use of Nuclear Weapons

In this paper, two questions are central to analyzing the legality of North Korea's threats of use of nuclear weapons. The first question is whether North Korea's public statements threatening the use of nuclear weapons and its military actions that preceded and followed those statements constitute threats of force. The second question is whether North Korea's threats of use of nuclear weapons are lawful.

A. Do North Korea's Public Statements Threatening the Use of Nuclear Weapons and Its Military Actions That Preceded and Followed Those Statements Constitute Threats of Force?

First, it has to be determined whether North Korea's public statements threatening the use of nuclear weapons and its military actions that preceded and followed those statements constitute threats of force.

The United Nations Charter (the UN Charter) does not define what constitutes a threat of force.³² Also, the ICJ failed to provide a clear definition as to what constitutes a threat of force in its 1996 advisory opinion.³³ Rather, in Paragraph 42 of its 1996 advisory opinion, the ICJ held with vagueness that "whether a signaled intention to use force if certain events occur is or is not a threat...depends upon various factors."³⁴ Moreover, the ICJ found that the possession of

³² See Marco Roscini, *Threats of Armed Force and Contemporary International Law*, 54 NETH. INT'L L. REV. 229, at 234 (2007).

³³ Legality of Threat or Use of Nuclear Weapons, 1996 I.C.J.

³⁴ *Id.* at 245.

nuclear weapons may “justify an inference of preparedness to use them” and may constitute an unlawful threat depending on “the particular use of force envisaged.”³⁵

International law scholars have suggested different definitions of threat of force. Brownlie defines a threat of force as “an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government.”³⁶ Sadurska defines a threat of force as “a message, explicit or implicit, formulated by a decision maker and directed to the target audience, indicating that force will be used if a rule or demand is not complied with.”³⁷ Roscini defines a threat of force as “an explicit or implicit promise of a future and unlawful use of armed force against one or more states, the realization of which depends on the threatener’s will.”³⁸ These definitions have some value because they recognize the explicit and implicit nature of threats of force and the potential resort to force in the future. However, these definitions also have limitations because they are mere suggestions and lack legal bases. In addition to the limitations of these definitions, states’ intentional use of ambiguous threats as a deliberate strategy makes it even more challenging to define what constitutes a threat of force.³⁹

Despite the difficulty with defining threat of force, two ICJ cases provide helpful guidance: the *Corfu Channel* case and *Nicaragua v. US*. In this paper, the discussion of these cases is limited to the ICJ’s analysis of threat of force.

³⁵ *Id.* at 247.

³⁶ Brownlie, *supra* note 29.

³⁷ Sadurska, *supra* note 29.

³⁸ Roscini, *supra* note 30.

³⁹ Nikolas Sturchler, *The Menu of Choice: A Guide to Interpretation, in THE THREAT OF FORCE IN INT’L L.*, at 40-1, (2007).

The Corfu Channel Case (1949)

The *Corfu Channel* case arose from a military dispute between the UK and Albania.⁴⁰ On October 22, 1946, while sailing through the Corfu Channel, two British destroyers struck mines in Albanian waters and suffered damage, including loss and injury of eighty-six British officers, sailors, and others.⁴¹ In response, the British government notified the Albanian government of its intention to carry out a mine-sweeping operation in the Corfu Channel shortly.⁴² About three weeks after, the British Navy performed a mine-sweeping operation in the Albanian territorial waters within the Corfu Channel between November 12 and 13, 1946.⁴³ This conflict raised two major issues relating to threat of force. The first issue was whether the British government violated Albanian sovereignty when it sailed on Albanian waters through the Corfu Channel on October 22, 1946. The second issue was whether the British Navy's mine-sweeping operation that took place from November 12 to November 13, 1946, violated Albanian sovereignty.

The Albanian government asserted that the passage of the British warships on October 22, 1946 violated its sovereignty because the passage was not an ordinary passage in time of peace but a "political mission."⁴⁴ It argued that the British warships sailed "in diamond combat formation" with a number that "surpassed what was necessary to attain their objective" and demonstrated "an intention to intimidate" by having their weapons and soldiers at action

⁴⁰ *Corfu Channel (U.K. v. Alb.)*, Judgment, 1949 I.C.J. 4 (Apr. 9).

⁴¹ *Id.* at 14.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 30.

stations.⁴⁵ Also, the Albanian government alleged that the British government violated Albanian sovereignty during the mine-sweeping operation because it did not obtain authorization from Albania.⁴⁶

The ICJ first held that the passage of the British warships through the Corfu Channel in October 1946 did not violate Albanian sovereignty. As to the issue of the mine-sweeping operation, the Court concluded that the British Navy's operation violated Albanian sovereignty, but it did not amount to "a demonstration of force for the purpose of exercising political pressure on Albania" to violate international law.⁴⁷ Regarding the passage of the British warships, the Court reasoned that the manner adopted by the British Navy was not unreasonable when viewed in light of the fact that the British ships had been the target of warning fires by Albania on May 15, 1946 and they sailed the channel "at a time of political tension in the region".⁴⁸ As to the mine-sweeping operation, the Court based its conclusion on the facts that the British commander kept the ships at a distance from the coast, and the British warships had been the target of warning fires from the Albanian force on May 15, 1946.⁴⁹

These ICJ holdings raise two significant implications to the threat of force analysis. First, the Court's conclusion indicated that when determining whether a state's action constitutes a threat of force, it is essential to look at the facts in light of the existing circumstances and

⁴⁵ *Id.*

⁴⁶ *Id.* at 12.

⁴⁷ *Id.* at 35.

⁴⁸ *Id.* at 31.

⁴⁹ *Id.* at 35.

relevant events that lead to and follow the alleged threat of force. Second, the ICJ's conclusion reveals that some threatening state behaviors do not amount to a threat of force.

Nicaragua v. US (1986)

In *Nicaragua v. US*, the ICJ reaffirmed the significance of the existing circumstances in determining whether specific state behavior amounts to a threat of force. *Nicaragua v. US* involves the ICJ's adjudication of the US foreign policy towards Nicaragua. Nicaragua claimed that the US had used and was using force and the threat of force against Nicaragua in violation of Article 2, Paragraph 4 of the UN Charter and a customary international law obliging states to refrain from the threat or use of force.⁵⁰ More specifically, Nicaragua argued that the US-Honduran joint military maneuvers carried out near the Honduras-Nicaragua border, such as the deployment of warships on a patrol mission off the Nicaraguan coast, troop movements near the border, and paratrooper exercises that took place from 1982 to 1985 amounted to a threat of force. Nicaragua characterized these military maneuvers as “a general and sustained policy of force intended to intimidate the Government of Nicaragua into accepting the political demands of the US Government.”⁵¹

The ICJ confirmed the existence of US-Honduran joint military maneuvers near the Nicaraguan borders and held that these military maneuvers could constitute a “threat of force” prohibited by the UN Charter and customary international law.⁵² However, the Court ruled that the US military maneuvers directed against Nicaragua did not amount to “a breach...of the

⁵⁰ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶15 (June 27).

⁵¹ *Id.* at 53.

⁵² *Id.* at 118.

principle forbidding recourse to the threat or use of force” in the existing circumstances.⁵³

Notably, the Court did not justify or analyze its decision why it did not view the complained US military maneuvers as an unlawful threat of force.

These ICJ holdings in *Nicaragua v. US* also raise two significant implications to the threat of force analysis. First, military maneuvers such as the deployment of warships on a patrol mission, troop movements near the border, and paratrooper exercises may constitute a threat of force. Second, the existing circumstances are essential in determining whether specific state behavior amounts to a threat of force.

In the *Corfu Channel* case and *Nicaragua v. US*, the ICJ provides some helpful guidance on analyzing what constitutes a threat of force. First, some threatening state actions do not amount to a threat of force. Second, military maneuvers such as troop movements, deployment of warships on a patrol mission, and paratroop exercises may constitute a threat of force. Finally, and most importantly, when determining whether a state’s action constitutes a threat of force, it is essential to analyze the facts in light of the existing circumstances and relevant events that lead to or follow the alleged threat of force.

Application to North Korea’s Case

When the three significant implications raised by the *Corfu Channel* case and *Nicaragua v. US* are applied, North Korea’s public statements threatening the use of nuclear weapons and its military maneuvers constitute threats of force.

First, North Korea’s public statements threatening the use of nuclear weapons do not fall under those threatening state actions that fail to constitute threats of force when analyzed in light

⁵³ *Id.*

of the existing circumstances. North Korea's public statements threatening nuclear weapons use against the US are distinguishable from the passage of the British warships through the Corfu Channel in October 1946 and the mine-sweeping operation in November 1946. There was no armed aggression initiated by the US that directly targeted North Korea. Instead, North Korea was responsible for raising the tension between the two countries by conducting twenty-three missile tests in 2017 alone and experimenting with a hydrogen bomb.⁵⁴ Some of these missile tests conducted in between the exchange of verbal threats between Kim Jong Un and President Trump had also contributed to the speedy rise of tension.

From North Korea's perspective, both multilateral and unilateral economic sanctions imposed by the United Nations and the US before or in 2017 could be perceived as a grave threat to its national security. North Korea has argued that such economic sanctions are a part of the US' "hostile policy" against North Korea.⁵⁵ However, the wide range of economic sanctions is a form of international condemnation of North Korea's persistent and aggressive development of nuclear weapons and ballistic missile technology and other reprehensible behaviors such as cyberattacks, money laundering, and human rights violations.⁵⁶ Furthermore, North Korea did not experience any reported casualty in its armed forces as a result of exchanging public threats to use nuclear weapons against the US. This circumstantial evidence provides the ICJ with sufficient grounds to view North Korea's public statements threatening the use of nuclear weapons as unreasonable and hold them as threats of force.

⁵⁴ *North Korea Crisis*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/global-conflict-tracker/conflict/north-korea-crisis> (last visited Dec. 14, 2021).

⁵⁵ Daniel Wertz, *The U.S., North Korea, and Nuclear Diplomacy*, NAT'L COMMITTEE ON N.KOR. <https://www.ncnk.org/resources/briefing-papers/all-briefing-papers/history-u.s.-dprk-relations> (last updated Oct. 2018).

⁵⁶ Albert, *supra* note 22.

Second, North Korea's military maneuvers amount to a threat of force when analyzed in light of the existing circumstances. The ICJ's rulings in *Nicaragua v. US* are helpful to the extent that they draw an implication that the existence of military maneuvers may constitute a threat of force.⁵⁷ However, the ICJ omitted to discuss the deciding factors to conclude that the US military maneuvers near the Nicaraguan borders constituted a threat of force. Thus, factual circumstances should be addressed here. North Korea's military maneuvers mainly include nuclear weapons and ballistic missile tests. The ballistic missile tests were exceptionally provocative because they were launched over Japan, a critical US ally, toward the Pacific and tested to travel sufficient distance to reach the US mainland. The high number of missile tests conducted within a short period of time also contributed to raising concerns with the potential use of nuclear weapons. Viewed in the totality of circumstances, these military maneuvers were unequivocal threats that targeted the US and its allies.

On the other hand, while part of the US military engagements in the Korean peninsula does not amount to a threat of force because it is distinguishable from the US-Honduran joint military maneuvers against Nicaragua, other military maneuvers amount to threats of force. The military maneuvers that North Korea may allege to amount to a threat of force by the US are the installation of Terminal High Altitude Area Defense (THAAD) missile system in South Korea in May 2017 and US B1-B strategic bombers flying near North Korea's eastern coast in September 2017.⁵⁸ THAAD is a transportable missile defense system that "intercepts ballistic missiles

⁵⁷ See *Nicar. v. U.S.*, 1986 I.C.J. at 118, (the ICJ holding that Nicaragua has made some suggestion that the existence of military maneuvers constituted a threat of force).

⁵⁸ Davenport, *supra* note 3.

during their final, or terminal, phase of flight.”⁵⁹ The THAAD system deployed in South Korea serves as a defensive measure solely against North Korean missiles.⁶⁰ The system’s limited scope of defensive use makes it distinguishable from the US measures taken in Nicaragua. Second, the US B1-B bombers’ mission off of North Korean coast amounts to a threat of force because the Chief Pentagon Spokesperson has clarified that the US bombers were engaged in this mission, and the mission was “a demonstration of US resolve and a clear message...to use the full range of military capabilities to defend the US homeland and [its] allies.”⁶¹ It is possible for the ICJ when analyzing whether this military maneuver amount to a threat of force to take into account the fact that this action happened only once, but it is also equally possible for the ICJ to cancel out that effect based on the conclusion that the US engaged in this military action “at a time of political tension in the region.”⁶²

Since North Korea’s public statements threatening the use of nuclear weapons and its military maneuvers constitute threats of force even when viewed separately in light of the existing circumstances, they amount to threats of force when viewed together. Based on the implications of the threat of force in the *Corfu Channel* case and *Nicaragua v. US*, North Korea’s public statements threatening the use of nuclear weapons and its military actions that preceded and followed those statements constitute threats of force.

⁵⁹ Missile Defense Project, *Terminal High Altitude Area Defense (THAAD)*, CSIS <https://missilethreat.csis.org/system/thaad/> (last updated June 30, 2021).

⁶⁰ Press Release, U.S. DEP’T OF DEF. (July 7, 2016) (on file with the U.S. Department of Defense website), <https://www.defense.gov/News/Releases/Release/Article/831178/republic-of-korea-and-the-united-states-make-alliance-decision-to-deploy-thaad/>.

⁶¹ Statement by Dana W. White, *supra* note 16.

⁶² *Corfu Channel*, 1949 I.C.J. at 31.

B. Are North Korea's Threats of Use of Nuclear Weapons Lawful?

Having established that North Korea's public statements threatening the use of nuclear weapons and its military actions constitute threats of force, the next question to address is whether North Korea's threats of use of nuclear weapons are lawful or not.

The UN Charter

The UN Charter is a good starting point. In the UN Charter, three articles are applicable when analyzing the legality of the threat of force: Article 2(4), Article 42, and Article 51. Article 2(4) gives a general prohibition of the threat of force by member states against another member state.⁶³ Article 42 and Article 51 of Chapter VII function as exceptions to Article 2(4)'s general prohibition of the threat of force. Based on this structure, a state making a threat of force against another state "starts from a position of unlawfulness and has to justify the lawfulness of its threats."⁶⁴ Article 42 permits the UN member states to resort to military measures when the Security Council authorizes those measures.⁶⁵ Article 51 protects the UN member states' inherent right of self-defense and requires the defending state to report its exercise of the self-defense

⁶³ U.N. Charter art. 2(4) ("All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.").

⁶⁴ Francis Grimal, *International Instruments Post-Charter*, in *THREATS OF FORCE: INT'L L. AND STRATEGY*, at 37 (2013).

⁶⁵ U.N. Charter art. 42 ("Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.").

right to the Security Council.⁶⁶ For this paper, Article 42 seems like an impractical justification because it is doubtful that the Security Council would ever authorize North Korea's threat or use of nuclear weapons. Therefore, the legality of North Korea's threats of use of nuclear weapons would depend on North Korea's justification of its threats based on the right of self-defense against armed aggression under Article 51.

The ICJ's Advisory Opinion (1996)

In its 1996 advisory opinion, the ICJ expressed its reading of the UN Charter Articles on the threat of force. While the ICJ confirmed the general illegality of the threat or use of force except for the situations of self-defense in Paragraph 38, it qualified the exercise of Article 51's self-defense right to conform with the customary international law principles of necessity and proportionality and international humanitarian law.⁶⁷ Article 21 of the International Law Commission (ILC) Articles on State Responsibility also recognizes this limitation to self-defense.⁶⁸ The Court further held that, for a threat of force to be lawful, the force threatened has to be lawful because the notions of threat and use of force "stand together."⁶⁹ It also established that the UN Charter does not expressly prohibit nor permit the use of any specific weapons,

⁶⁶ U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.").

⁶⁷ Legality of Threat or Use of Nuclear Weapons, 1996 I.C.J. at 244-45.

⁶⁸ James Crawford, *Circumstances Precluding Wrongfulness*, in THE INT'L L. COMMISSION'S ARTICLES ON ST. RESPONSIBILITY: INTRODUCTION, TEXT & COMMENTARIES, at 166 (2002) ("[T]he wrongfulness of an act of a state is precluded if the act constitutes a lawful measure of self-defense taken in conformity with the Charter of the United Nations.").

⁶⁹ Legality of Threat or Use of Nuclear Weapons, 1996 I.C.J. at 246.

including nuclear weapons.⁷⁰ Therefore, there are three important hurdles to overcome before a generally unlawful threat of use of nuclear weapons can become lawful. First, the threat of use of nuclear weapons must be an act of self-defense. Second, self-defensive conduct must conform to the customary international law principles of necessity and proportionality. Third, the measures taken for self-defense during armed conflicts must comply with the principles of international humanitarian law.

Here, the ICJ's holdings imply that when a state uses nuclear weapons for self-defense, and the use of nuclear weapons meets the principles of necessity and proportionality, they would be lawful. Since such use of nuclear weapons would be lawful, the threat of such use of nuclear weapons would also be lawful. On the use of nuclear weapons, however, the Court did not arrive at "a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defense, in which the very survival of a State would be at stake."⁷¹ The ICJ's indefinite conclusion implies that the legality of the threat of use nuclear weapons in an extreme circumstance of self-defense is also not definitive. This indefinite conclusion is a limitation to the threat of use of nuclear weapons for states because even though a state overcomes all the hurdles, the legality of the state's threat remains indeterminate. As it was the case in the *Corfu Channel* case and *Nicaragua v. US*, the existing circumstances and other factual considerations may play a significant role in determining the legality of the threat of use of nuclear weapons. Alternatively, as Burroughs argues, the ICJ's placement of several different burdens and arrival at the indefinite conclusion as to the legality of the threat of use of nuclear

⁷⁰ *Id.*, at 244.

⁷¹ *Id.*, at 263, 266.

weapons by a state in an extreme circumstance of self-defense could have made it impossible for states to succeed in demonstrating the lawfulness of the threat and use of nuclear weapons.⁷²

The Self-Defense Hurdle

North Korea's threats of use of nuclear weapons fail to overcome the self-defense hurdle. In *Nicaragua v. US*, the ICJ held that an actual armed attack or act of armed force amounting to an actual armed attack is necessary for the exercise of self-defense in both cases of individual and collective self-defense.⁷³ On the other hand, when the ICJ introduced "an extreme circumstance of self-defense" in its advisory opinion, the Court did not define what constitutes an extreme circumstance of self-defense except stating that it is a situation when the very survival of a state is at stake. In the *Oil Platforms* case, a case concerning the US Navy's destruction of the Iranian oil platforms in the Persian Gulf, the ICJ reaffirmed the armed attack requirement for the exercise of self-defense.⁷⁴ This armed attack or armed force amounting to an actual armed attack requirement was affirmed again in the judgment in the *Armed Activities* case of December 19, 2005.⁷⁵ The issue then is whether North Korea has been the subject of an armed attack by the US when it made the threats of use of nuclear weapons.

⁷² John Burroughs, *Uncertainty as to an Extreme Circumstance of Self-Defense in Which the Very Survival of a State Is at Stake*, in *THE LEGALITY OF THREAT OR USE OF NUCLEAR WEAPONS*, at 47 (1997).

⁷³ *Nicar. v. U.S.*, 1986 I.C.J. at 103-4.

⁷⁴ *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, at 186-7 (Nov. 6) ("[I]n order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defense, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as 'armed attacks' within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary international law on the use of force.").

⁷⁵ *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005, I.C.J. 168, 222-3 (Dec. 19) ("[T]he Court has found...there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC.").

According to the ICJ in *Nicaragua v. US*, an armed attack includes “action by regular armed forces across an international border,” “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,” and “the sending...of armed bands [with significant scale and effects] to the territory of another State.”⁷⁶ The only action from the US that North Korea could allege to constitute an armed attack would be the US B1-B strategic bombers flying over the North Korean coast in September 2017. This military action cannot be classified as an armed attack because it did not carry out a hostile action or acts of armed force against North Korea. North Korea could argue that the US action constitutes an armed attack because the US deployed armed bands with significant scale and effects. However, this argument fails because the US bombers did not fly into the North Korean border. Rather, they flew in “international airspace over waters east of North Korea.”⁷⁷ Even assuming this military action by the US amounts to an armed attack, North Korea cannot justify its threats of use of nuclear weapons because North Korea had already engaged in the public statements and military maneuvers, including the sixth nuclear test and ballistic missile tests, that constituted threats even before the operation of the US B1-B strategic bombers. Accordingly, North Korea’s threats of use of nuclear weapons fail to overcome the self-defense hurdle.

The Necessity-Proportionality Hurdle

North Korea’s threats of use of nuclear weapons fail to pass the necessity-proportionality hurdle as well. Article 25 of the ILC Articles on State Responsibility states that a State may not

⁷⁶ *Nicar. v. U.S.*, 1986 I.C.J. at 103.

⁷⁷ Statement by Dana W. White, *supra* note 16.

invoke necessity to justify the State's action unless the act "is the only way for the State to safeguard an essential interest against a grave and imminent peril" and the act "does not seriously impair an essential interest of the [s]tate or [s]tates toward which the obligation exists, or of the international community as a whole."⁷⁸ Moreover, it prevents a state from justifying its action if "the [s]tate has contributed to the situation of necessity."⁷⁹ In the commentary section, the ILC further explains that the contribution of the situation of necessity must be "sufficiently substantial and not merely incidental or peripheral."⁸⁰ As to the rule of proportionality, the proportionality test in *jus ad bellum* that "strikes a balance between the self-defensive action and the wrong provoking it" would be relevant.⁸¹ Here, the first issue is whether North Korea's threats of use of nuclear weapons were necessary to secure its essential interest against a grave and imminent peril. The second issue is whether North Korea's threats to use nuclear weapons were commensurable to the US' wrongful action in terms of the size, scope, and degree.

North Korea did not face an "imminent" peril in the first place. The US neither declared war on North Korea nor threatened with condition or ultimatum. Instead, North Korea contributed to the tension between the two nations by engaging in a series of nuclear weapons and ballistic missile tests. The peril between North Korea and the US grew over time where both countries had sufficient time to seek a resolution. Even if a grave and imminent danger is presumed, and North Korea did not contribute to the situation of necessity, North Korea's threats

⁷⁸ James Crawford, *supra* at 178 ("Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.").

⁷⁹ *Id.*

⁸⁰ *Id.* at 185.

⁸¹ Christodoulidou & Chainoglou, *The Principle of Proportionality from a Jus Ad Bellum Perspective*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INT'L L., 1187, at 1192 (2015).

of use of nuclear weapons were not the only method to protect North Korea's national interest. Other military options, as well as nonmilitary options, would have been available. Less destructive weapons such as non-nuclear weapons could have offered a potential military alternative. Bilateral or multilateral talk with the US could have been a nonmilitary, diplomatic option. Since a less destructive weapon or diplomacy could have reasonably been expected to resolve the conflict between North Korea and the US, the rule of necessity precludes threats of use of nuclear weapons.⁸² Thus, North Korea's threats fail to overcome the necessity hurdle.

North Korea's threats of use of nuclear weapons do not overcome the proportionality hurdle as well. North Korea's threats lack clarification as to the intensity, duration, and scope of force to be used. North Korea also did not specify what kind of rule of reason analysis had it conducted before making its threats. Even if there is a proper rule of reason analysis in place, Kim Jong Un having the sole authority to order the use of nuclear weapons or raise voice against nuclearization adds more doubt to the reliability of North Korea's policy development system.⁸³ North Korea could have perceived the prolonged economic sanctions from the US and the international community as a grave peril to its national interest. However, it is convincing that a threat of use of nuclear weapons is not commensurable to economic sanctions or public condemnations.

The International Humanitarian Law Hurdle

⁸² Charles J. Moxley, *The Sword in the Mirror – the Lawfulness of north Korea's Use and Threat of Use of Nuclear Weapons Based on the United States' Legitimization of Nuclear Weapons*, 27 *FORDHAM INT'L L. REV.* 1379, at 1436 (2003).

⁸³ Dowling & Hong, *supra* note 25, at 56 (“[T]he nuclear weapons of the DPRK can be used only by a final order of the Supreme Commander of the Korean People's Army (KPA) to repel invasion or attack from any hostile nuclear weapons state and make retaliatory strikes.”).

Our case related to North Korea's threats of use of nuclear weapons probably would not be subject to the law of armed conflicts because, strictly speaking, North Korea and the US did not engage in armed conflicts. For this paper, I analyze the international humanitarian law hurdle assuming North Korea's threats of use of nuclear weapons were made during armed conflict with the US.

Assuming the times of war, the international humanitarian law hurdle North Korea's threats of use of nuclear weapons fail to overcome the international humanitarian law hurdle. In Paragraph 78 of the advisory opinion, the ICJ identified two "cardinal" principles of international humanitarian law. First, the principle of discrimination precludes "weapons that are incapable of distinguishing between civilian and military targets."⁸⁴ Second, the principle against unnecessary suffering prohibits the "use of weapons causing [combatants] such harm or uselessly aggravating" suffering.⁸⁵ The question is whether North Korea's threats of use of nuclear weapons comply with the principles of discrimination and against unnecessary suffering.

North Korea's threats lack a distinction between military and civilian targets and fail to disclose its capability to discriminate. There is a strategic incentive not to specify such information in a public forum. However, the distinction between military and civilian targets and disclosure of capability to discriminate are strategically less important than information such as prioritized targets and the location of missiles. The success rate of North Korea's missile tests also adds doubt to its capability to discriminate. In the first half of 2016, North Korea was

⁸⁴ Legality of Threat or Use of Nuclear Weapons, 1996 I.C.J. at 257.

⁸⁵ *Id.*

successful with five out of ten missile tests.⁸⁶ In the first half of 2017, North Korea was successful with eight out of twelve missile tests.⁸⁷ These results undermine the reliability of North Korea's missile technology and its capability to discriminate between civilian and military targets. Therefore, North Korea's threats of use of nuclear weapons do not satisfy the principle of discrimination.

The principle against unnecessary suffering would depend more on the unique characteristics of nuclear weapons than how North Korea's threats are structured. In the advisory opinion on nuclear weapons, the ICJ recognizes the unique aspects of nuclear weapons. These characteristics include nuclear weapons' "destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come."⁸⁸ Also, in Paragraph 35 of the advisory opinion, the ICJ identified potentially catastrophic effects of nuclear weapons including heat and radiation that can pose destructive effects to "all civilization and the entire ecosystem" for an extended period. Since North Korea's threats invoke nuclear weapons use, and the ICJ perceives nuclear weapons as a potentially catastrophic weapon to human civilization and the ecosystem, North Korea's threats fail to meet the principle against unnecessary suffering.

Conclusion

This paper attempts to answer two questions. The first question is whether North Korea's public statements threatening the use of nuclear weapons and its military actions that preceded

⁸⁶ Joshua Berlinger, *North Korea's Missile Tests: What You Need to Know*, CNN (Dec. 3, 2017), <https://www.cnn.com/2017/05/29/asia/north-korea-missile-tests/index.html>.

⁸⁷ *Id.*

⁸⁸ Legality of Threat or Use of Nuclear Weapons, 1996 I.C.J. at 244.

and followed those statements constitute threats of force. The second question is whether North Korea's threats of use of nuclear weapons are lawful.

In the *Corfu Channel* case and *Nicaragua v. US*, the ICJ provides helpful guidance on analyzing what constitutes a threat of force. First, some threatening state actions do not amount to threats of force. Second, military maneuvers such as troop movements, deployment of warships on a patrol mission, and paratroop exercises may constitute a threat of force. Finally, and most importantly, when determining whether a state's action constitutes a threat of force, it is crucial to analyze the facts in light of the existing circumstances and relevant events that lead to or follow the alleged threat of force.

Applying these implications to North Korea's threats of use of nuclear weapons, this paper concludes that North Korea's public statements threatening the use of nuclear weapons and its military maneuvers constitute threats of force even when viewed separately in light of the existing circumstances. Therefore, they amount to threats of force when viewed together.

Article 2(4) of the UN Charter gives a general prohibition of the threat of force by member states against another member state. Article 51 of the UN Charter provides a self-defense exception to the general prohibition of the threat of force. While the ICJ confirmed the general illegality of the threat or use of force except for self-defense, it qualified the exercise of Article 51's self-defense right to conform with the customary international law principles of necessity and proportionality and international humanitarian law. Thus, there are three essential hurdles to overcome before a threat of use of nuclear weapons can become lawful. First, a threat of use of nuclear weapons must be an act of self-defense. Second, the self-defensive conduct must conform to the principles of necessity and proportionality. Third, the measures taken for

self-defense during armed conflicts must comply with the principles of international humanitarian law.

North Korea's threats of use of nuclear weapons are unlawful because they fail to overcome all three hurdles of self-defense, necessity-proportionality, and international humanitarian law.

This paper also suggests some solutions. The ICJ has provided strict requirements for self-defense justification for threat of force. However, North Korea continues to engage in illegal threats of force invoking the use of nuclear weapons. The ICJ should publish a new advisory opinion that defines a lawful deterrence policy and distinguishes it from unlawful threats of use of nuclear weapons from a state like North Korea. On the other hand, the US should refrain from engaging in a military action of significant scale and effect in Northeast Asia because it can amount to an armed attack and help justify North Korea's threat or use of force. When the US decides to engage in military actions, it should act with clear scope and limitations.