Are We There Yet?

Applying the Legal Framework of Anticipatory Self-Defense to the Democratic People's Republic of Korea

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Anticipatory self-defense has been recognized by the international community after it was first articulated in 1837 in the *Caroline* case.

Though infrequently relied upon in modern history to justify military action, anticipatory self-defense is not a new concept.[1] The United States declared the deterrence of the Democratic People's Republic of Korea (DPRK) nuclear program a top priority in the Summary of the 2018 National Defense Strategy of The United States of America.[2] As tensions rise, fall, and potentially rise again on the Korean peninsula, anticipatory self-defense, and the defense of the homeland against the DPRK's nuclear program, will remain a crucial topic of discussion. Anticipatory self-defense has been recognized by the international community after it was first articulated in 1837 in the *Caroline* case. It is often referred to as the *Caroline* doctrine.[3] There are two types of anticipatory attacks in self-defense: pre-emptive and preventive.[4] The distinction is nuanced and often misunderstood, but is integral to the analysis of whether the U.S. is able to lawfully use military force against another nation.

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In the past few years, the DPRK has ramped up its nuclear weapons development and missile testing program by successfully launching missiles of varying sizes and testing nuclear weapons.[5] This nuclear weapons development is a threat to surrounding nations and the U.S., and causes instability in the region. The recent spate of DPRK tests culminated in the successful launch of an intercontinental ballistic missile (ICBM) on 28 November 2017.[6] Despite the recent launches, the DPRK remains a member of the U.N., but has been repeatedly subject to ongoing suffocating sanctions established by the U.N.[7] Furthermore, despite

acceding to the nuclear Non-Proliferation Treaty (NPT) in 1985, the DPRK eventually announced their intent to withdraw in 2003 and declared they are no longer subject to the NPT framework. The recent events have caused many nations, including the U.S., to discuss the use of anticipatory self-defense as justification for use of force against the DPRK. This discussion will continue, despite recent peace talks, if the DPRK fails to completely denuclearize or if negotiations fail. This article explores the historical and legal basis for anticipatory self-defense, applies it to current events on the Korean Peninsula, and offers a useful continuum framework for legal professionals advising political and military leaders.

THE *CAROLINE* DOCTRINE

In order to fully understand anticipatory self-defense, it is necessary to review the origin of the *Caroline* legal doctrine. The doctrine arose in 1837 after a tense diplomatic incident between Britain and the U.S. during the Canadian Independence Movement.[8] The *Caroline* was a U.S. flagged steamer vessel owned and operated in the U.S. which regularly entered U.S. ports for extended periods of time. The Canadian Independence Movement had been fighting the British for increased democratic processes and a reduction in corruption. Canadian troops had been using the *Caroline* to move resources and personnel. Following a battle, the Canadians used the *Caroline* to retreat to Navy Island, outside of what is now Ontario. After dropping off the Canadian forces, the *Caroline* travelled back to Schlosser Port in New York and remained there overnight. British forces identified the ship as assisting the Canadian troops and planned an attack on the night of 29 December 1837, while it was in the New York port.[9] It is unclear whether the British knew that 23 U.S. citizens had boarded the vessel to stay the night.[10] On 29 December 1837, British troops, on order by their superiors, attacked the *Caroline*, set it on fire, and sent the vessel over Niagara Falls.[11]

The U.S. immediately condemned the attack, claiming neutrality in the battle between the Canadian Independence Movement and Britain.[12] Further, the U.S. demanded prosecution of the perpetrators and reparations for the destruction of the vessel.[13] In response, Britain claimed any U.S. citizens or property used to support the Canadian Independence Movement are no longer neutral.[14] Additionally, even though the *Caroline* was on U.S. sovereign territory, Britain asserted what is now known as anticipatory self-defense.[15] The U.S. claimed that in order to be entitled to use self-defense, there must be an "instant and overwhelming" need to defend, leaving no other means to defend oneself, and no moment for deliberation.[16] Additionally the U.S. claimed the actions must be proportional and avoid unreasonable or excessive actions.[17] Britain ultimately asserted that the *Caroline* was an immediate and overwhelming threat due to its assistance to the Canadian Independence Movement and the only option was to destroy the vessel while it was in a U.S. port.[18] While the question of whether Britain truly faced an instant and overwhelming threat remained unresolved between Britain and the U.S. for many years, the *Caroline* doctrine and the rule of anticipatory self-defense became prevailing legal doctrine in the international community. Today, just as in 1837, the elements of anticipatory self-defense require an imminent threat that is instant and overwhelming, leaving no moment for deliberation, and requiring a necessary and proportional response.[19]

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U.N. CHARTER CODIFIES SELF-DEFENSE

Today, the U.N. forms the backbone of the international community and rule of law. The U.N. was created in 1945 following World War II by the U.S., France, U.S.S.R. (now Russian Federation), Republic of China (now the People's Republic of China), and the United Kingdom.[20] The U.N.'s mission is to safeguard global peace and prosperity, regulate conflict, and prevent future world wars.[21] The U.N. Security Council can be thought of as the U.N.'s executive branch which issues decisions and recommendations on issues brought before the Council. The Security Council can authorize international peacekeeping forces, diplomatic or economic sanctions, and even authorize military action.[22]

The five original—and only permanent—members can veto any action before the Security Council.[23] This point is important when discussing whether the Security Council would be willing to intervene in a situation related to the DPRK, given that China has a close relationship with the DPRK and Russia is generally not allied to the U.S. Often forgotten, the U.N. led a coalition of 17 nations during the Korean War against the DPRK and China, tapping the U.S. to lead the forces on behalf of the U.N.[24] This has caused the U.N. to be heavily involved in actions involving the DPRK and the Republic of Korea. Additionally, the U.S. has remained the leader of U.N. Command in charge of maintaining the armistice on the Korean Peninsula today.

United Nations Charter Article 2(4) states "[a]ll 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." This principle of non-intervention is a cornerstone of international law and stands for the proposition that States must respect each other's sovereignty.[25] While this provision places restrictions on Nations taking armed action against other Nations, Article 51 of the Charter allows for self-defense.[26]

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Article 51 states "Nothing…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." It goes on to explain that measures taken by Members in the exercise of this right to self-defense do not impact the authority and responsibility of the Security Council.[27] The U.S. believes the right to self-defense, including the right to act in anticipatory self-defense, is an inherent right of a sovereign nation and cannot be negotiated away.[28] Taking the Charter as a whole, it is clear the right to self-defense may be executed without the consent of the U.N. Security Council, so long as the threat is so imminent that there is not time to notify or consult the Council. However, at the first opportunity, the Council must be notified by the acting State of what action was taken and what justified that action.[29]

PRE-EMPTIVE ATTACK V. PREVENTIVE ATTACK

It is a well-settled principle that a necessary and proportional response is authorized in response to a hostile act or demonstration of hostile intent. However, self-defense has multiple forms, including individual, unit, and national self-defense. When analyzing the right of self-defense each form should be considered separately. In the case of anticipatory self-defense, the focus is on national self-defense in response to indicators of hostile intent. However, an adversary could potentially commit several acts demonstrating hostile intent without triggering National Authorities to declare anticipatory self-defense and attack. The key to analyzing the problem is a balance between the risk the adversary is posing against the cost (i.e. money, personnel, materiel) to take action in response to the demonstrated hostile intent.

Pre-emptive attack or preventive attack are often used interchangeably; however, the two have substantial differences that make them distinct concepts from one another.

When considering whether or not anticipatory self-defense is lawful, the analysis starts with recognizing there are two left and right limits on the spectrum of responses a Nation can undertake: a pre-emptive attack or preventive attack. The terms are often used interchangeably; however, the two have substantial differences that make them distinct concepts from one another. Pre-emptive attacks are predicated on an immediate and known threat, leaving no time for inaction.[30] Meanwhile, preventive attacks occur without immediate threat and are illegal under international law unless the international community believes it was justi-

fied.[31] The international community will be the ultimate judge and jury of whether an attack was justified; therefore, providing justification and reasoning to the U.N. Security Council is imperative. It is important for political and military leaders at all levels to understand the differences between the two and use the terms appropriately, in order to clearly communicate State intentions.[32]

As noted, pre-emptive attacks refer to the use of force to avert an instant and imminent threat, and is a demonstration of national self-defense.[33] A pre-emptive attack is the response that occurs when National Authorities decide they are not willing to accept additional risk and therefore react to the hostile intent indicators. For example, let's assume State Alpha and State Bravo share a geographic military fortified border and have experienced periods of increased hostility throughout history. Recently, State Bravo made direct threats against State Alpha's sovereignty, including vocalizing plans to take territory from State Alpha, has started amassing significant military troops and equipment close to the border of State Alpha, and some border skirmishes have broken out, with fatalities of a few military members from each State. In this case, State Alpha could decide they are unwilling to accept the risk of State Bravo's threats and, in turn, undergo a pre-emptive attack against State Bravo.

On the other hand, a preventive attack refers to the use of force to avoid an emerging–but not instant and overwhelming–state of affairs in which a threat would be more likely or increasingly dire.[34] This form of attack usually takes place when a threat is still developing, but is not at a point where an attack is imminent.[35] One example is a non-nuclear weapons State beginning to developing nuclear weapons. During the research, development, and testing phase of any nuclear weapons program there is usually a large lead time before the State becomes nuclear weapons capable. Arguably, a State's nuclear program does not genuinely threaten any other state during the infancy of their program. Exercising national self-defense and attacking a state at the infancy of their nuclear weapons program is an example of a preventive attack. Again, such preventive attacks are generally illegal under international law, unless the international community determines the attack was justified.

ANTICIPATORY SELF-DEFENSE IN MODERN HISTORY

Historically, anticipatory self-defense was used a handful of times and met with mixed results. Two of the most renowned examples were attacks initiated by Israel called "Operation Opera" and "Operation Outside the Box."[36]

In 1981, Israel struck Iraq on their sovereign soil in Operation Opera.[37] At the time, Iraq was developing the Osirak nuclear reactor and was publicly claiming the development of nuclear capability.[38] Israel did not notify the U.N. Security Council or provide any public justification for its actions before or immediately after this attack.[39] The international community spoke out against Israel's actions because they did not provide any justification prior to the attack.[40] Ultimately, no action was taken against Israel for their actions.[41] Nonetheless, this attack is an example of a preventive attack.

Operation Outside the Box took place over twenty five years later.[42] In 2007, Syria publicly claimed they were on the precipice of developing a nuclear reactor and that the reactor was going to "go hot" very soon.[43] Appearing to learn from Operation Opera, Israel notified the U.N. Security Council of the attack. Israel claimed Syria was an imminent threat to the Israeli people.[44] Israel provided intelligence indicating the reactor was close to completion and they timed their attack to avoid causalities.[45] Due to the advance notification and credible justification, the outcry from the international community was minimal.[46] This attack was an example of a pre-emptive attack that complied with U.N. reporting requirements.

The U.S. relied on anticipatory self-defense when pre-emptively ordering troops into Iraq in 2003 as a response to intelligence indicating Iraq continued to pursue a robust weapons of mass destruction program.[47] Different than Israel's two attacks, the U.S. received U.N. Security Council support and authorization from Congress to act pre-emptively in response to the possibility that Iraq would attack the U.S. or its armed forces, or conspire with terrorists to do the same.[48]

These historic examples demonstrate the complicated determination of whether a State is justified in the actions it decides to take against another State when threatened. Ultimately, there is no clear answer on what facts must exists to ensure anticipatory self-defense is lawful. The international community will assess a State's actions after the fact and collectively decide if those actions were justified, or not. This assessment is impacted by the extent of the threats, the condition of international relations between States, and whether the State exercising anticipatory self-defense provided justification for its actions. U.N. engagement prior to the attack is integral to providing justification to the international community for the use of anticipatory self-defense.

NUCLEAR NON-PROLIFERATION TREATY

In 1968, the nuclear Non-Proliferation Treaty (NPT) was opened for signature and went into effect in 1970. The continuing goal of the NPT is to eliminate nuclear weapons. Currently, 191 countries have signed on to the NPT including the five permanent party members of the U.N. Security Council.[49] Four U.N. member states have failed to sign or ratify the NPT – India, Pakistan, the DPRK, and Israel. India, Pakistan, and the DPRK have all publicly announced and declared that they currently possess nuclear weapons.

The NPT includes important responsibilities and restrictions on nuclear proliferation for nuclear weapon states and non-nuclear weapon states. The nuclear weapon states include China, France, Russia, the United Kingdom and the U.S., because at the time of the treaty they had manufactured and detonated a nuclear weapon. All other states are considered non-nuclear weapons states. While the treaty allows any nation to research, produce, and use nuclear energy for peaceful purposes, it prohibits the efforts to acquire nuclear weapons.

While the DPRK is not currently a signatory to the NPT, it has come close to joining several times.[50] In 1985, the DPRK acceded to the NPT and were subject to its requirements, but did not complete the required safeguards in accordance with the NPT.[51] In 1993, the DPRK announced its intent to withdraw from the NPT.[52] The U.S. intervened and negotiated with the DPRK to remain in the NPT.[53] However, those negotiations failed in 2003 when the DPRK announced its withdrawal from the NPT and its intention to no longer subject itself to the treaty.[54]

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THE U.S.–ROK ALLIANCE

The Korean Peninsula is a unique environment, which offers unique challenges. Since 1953, the peninsula has not been in a state of peace nor in a state of war.[55] Rather, an armistice–or a cessation of hostilities–has persisted. The U.S. has led the U.N. Command attempting to maintain the armistice, document armistice violations, and deescalate hostilities. The Republic of Korea (ROK), also referred to as South Korea, is currently the only location where U.S. forces serve in support of an ongoing international armed conflict or State on State conflict, rather than a non-international armed conflict, where the U.S. fights non-state enemy actors.

For the past several decades, the mission of the U.S.–ROK alliance has been to maintain the armistice and prevent a return to the Korean War, while remaining ready to fight if necessary.[56] In 1953, immediately after the Korean War, the U.S. and ROK entered into a Mutual Defense Treaty which serves as the foundation of the close alliance that continues today.[57] Currently, the alliance includes the bilaterally-run Combined Forces Command, which reflects the mutual commitment of the ROK and the U.S. to maintain peace and security, and the willingness and capability to take that commitment into battle, if the need arises.[58] If war breaks out in Korea again, it will be led by the Commander, Combined Forces Command and U.N. Command, a joint and combined command.

A CONTINUUM

Ultimately, anticipatory self-defense resides on a continuum of actions. In the case of a non-nuclear weapons state pursuing a credible nuclear weapons program, actions on the pre-

ventive side of the continuum can include benign tasks like lawfully building nuclear power plants, educating scientists to support the nuclear power program, or purchasing stockpiles of raw materials. On the other end of the continuum are actions taken to directly threaten other nations, like launching missiles, increasing military forces, threatening other nations, and intelligence indicators signaling a direct attack is imminent. The point at which an attack would be preventive would come earlier on the continuum and would most likely not be in line with international law because the threat is not imminent. The point at which an attack would be pre-emptive would be closer to the far right of the continuum and legally justifiable under international law because there is an imminent threat and no other recourse to quell the threat is available. The decision space between the right and left limits captures the risk a State is willing to accept when hostile intent is present.

How much risk do we expect States to take when faced with a credible threat of nuclear attack?

Given this, the challenge for nations reside in the middle, where States must account for technological advancements, such as nuclear-tipped missiles that are able to reach their shores in minutes or a cyber-attack that threatens critical national infrastructure. These concepts did not exist in 1837 during the time of the *Caroline* and therefore the framework was not contemplated. There is no doubt that each case must be evaluated independently and at some point on the continuum of actions the use of anticipatory self-defense is legal. However, at what point does preventive anticipatory self-defense—which requires a State to engage the U.N. Security Council—gain legitimacy? What threats could render the need for consultation no longer practicable? How much risk do we expect States to take when faced with a credible threat of nuclear attack? To put it more grimly, would the U.S. be willing to accept the loss of Los Angeles or Chicago in order to consult the U.N. Security Council? If not, how can we expect other nations to do the same?

THE DPRK ADVANCES ON THE CONTINUUM

While the DPRK nuclear weapons program dates back to at least the early 1980's, the world has recently witnessed its significant acceleration. Each weapons production milestone or threat means the DPRK moves forward on the continuum of state actions, getting closer and closer to the type of hostile intent that triggers anticipatory self-defense.

In 2003, the DPRK announced its withdrawal from the NPT, removing any treaty obligation to refrain from developing nuclear weapons. In 2005, the DPRK admitted to having nuclear weapons. In 2006, an underground nuclear explosion occurred near the village of P'unggye, DPRK. Despite the Six-Party Talks[59] to deescalate the situation, and agreements by the DPRK to stop development in the 2000s, in 2009 the DPRK launched a satellite, continued to pursue nuclear power production, and conducted another underground explosion. From 2010-2015, the DPRK continued to develop and test weapons of mass destruction and it became clear that the program was advancing successfully.

In July 2016 and in anticipation of the ongoing threat, the U.S. decided to deploy a Terminal High-Altitude Area Defense (THAAD) battery to South Korea.[60] This defensive system was set up in preparation for the need to intercept short and middle range ballistic missiles.[61] In September 2016, DPRK conducted its fifth nuclear test and conducted ICBM tests.[62] In March 2017, the THAAD system began operating in South Korea.[63] Following continued ICBM tests throughout the summer, in August 2017, the Security Council passed a resolution again expanding the sanctions against DPRK and restricted additional imports attempting to starve the DPRK of resources.[64] In September 2017, DPRK conducted its sixth nuclear test, declaring it a success.[65] Based on seismic activity during this time, it appears there was an explosion of a larger magnitude than any previous DPRK test. Immediately following the sixth nuclear test, DPRK tested an ICBM which overflew Japan. This test resulted in the U.S. imposing additional sanctions and restrictions on business dealings with DPRK. Further, the U.S. began flying B-1 Bombers off the coast of South Korea and north of the Northern Limit Line (NLL), an

unofficial boundary created in 1953 by the U.N. to reduce tensions during armistice. It was the first time the U.S. had flown above the NLL in the 21st Century.[66]

> At what point is anticipatory self-defense triggered, if at all?

In December 2017, the Security Council again imposed economic sanctions, as well as mandatory expulsion and return of DPRK citizens from other countries.[67] During this time, the U.S. announced that it would initiate a "pressure campaign" on all fronts.[68] The U.S. continued its economic chokehold on the DPRK, while also ensuring peak military readiness.[69] Finally, in 2018 the leader of the DPRK, Kim Jong Un, announced the DPRK is now prepared to thwart any threat.[70]

Given the DPRK's march towards a successful nuclear weapons program described above, at what point is anticipatory self-defense triggered, if at all? Moreover, when on the continuum of DPRK actions does a response move from preventive self-defense to pre-emptive self-defense? There is no question the DPRK's actions throughout the past five years are moving to the right of the continuum and getting closer to allowing Nations threatened to lawfully use anticipatory self-defense against the DPRK. Legal professionals at all levels must understand the concept of anticipatory self-defense and its continuum in order to properly advise.

> Anticipatory self-defense will remain a topic of discussion.

CONCLUSION

The strategic environment in South Korea continues to change rapidly. After a volatile few years where the 2017 doomsday clock[71] ticked as close as it's ever been to midnight since its inception, the tone has recently swung back towards peace. However, this is not the first time events have trended towards a peaceful resolution. Despite recent events like the Panmunjom Declaration and a U.S.–DPRK agreement promising a "lasting peace" and "complete denuclearization," anticipatory self-defense will remain a topic of discussion for those who care about the defense of the U.S. homeland,[72] because of the potential for negotiations to spiral out of control. Until significant demonstrated steps towards denuclearization occur, the DPRK remains very close, if not already able, to strike the U.S. with a nuclear-enabled ICBM. As peace talks continue, all nations with a stake in Indo-Pacific affairs will monitor the situation closely. If past dealings with the DPRK are any indicator, the circumstances could change at any time and may warrant further legal review of anticipatory self-defense.

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EXTERNAL LINKS TO ADDITIONAL RESOURCES

- **Arms Control Association:** Chronology of U.S.-North Korean Nuclear and Missile Diplomacy (Nov, 2018), https://www.armscontrol.org/factsheets/dprkchron
- **Bulletin of the Atomic Scientists:** THE DOOMSDAY CLOCK: A Timeline of Conflict, Culture, and Change, https://thebulletin.org/doomsday-clock/past-statements/
- **History Channel:** 1837- Caroline Affair, https://www.historycentral.com/Ant/caroline.html
- **The Aviationist:** 36 Years Ago today, "Operation Opera": The Israeli Air Strike on an Iraqi Nuclear Reactor. (June 7, 2017), https://theaviationist.com/2017/06/07/36-years-ago-today-operation-opera-the-israeli-air-strike-on-an-iraqi-nuclear-reactor/
- **LAWFARE Blog:** Al-Kibar Strike: What a Difference 26 Years Make (April 2, 2018), https://www.lawfareblog.com/al-kibar-strike-what-difference-26-years-make

ENDNOTES

[1] Unless stated otherwise, the reference to self-defense in this article refers to national self-defense which would be declared by U.S. National Authorities versus individual self-defense.

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[8] Mueller et al., *supra* note 4, at 87.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Michael Byers, *Jumping the Gun*, in London Review of Books, Vol 24, No. 14, pgs. 3-5 (2002).

[17] Mueller et al., *supra* note 4, at 87.

[18] *Id.*

[19] Davies et al., *supra* note 3.

[20] United Nations, *History of the United Nations*, http://www.un.org/en/sections/history/history-united-nations/ (last visited Sept. 20, 2018).

[21] United Nations Charter, Chapter I, Art. 1, http://www.un.org/en/sections/un-charter/chapter-i/index.html (last visited Sept. 28, 2018).

[22] United Nations Charter, Chapter VII, Art. 39, http://www.un.org/en/sections/un-charter/chapter-vii/index.html (last visited Sept. 28, 2018).

[23] United Nations Charter, Chapter V, Art. 27, http://www.un.org/en/sections/un-charter/chapter-v/index.html (last visited Sept. 28, 2018).

[24] Department of State, *U.S. Relations with the Republic of Korea*, (17 July 2018), https://www.state.gov/r/pa/ei/bgn/2800.htm (last visited Aug. 7, 2018).

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[26] United Nations Charter, Chapter VII, Art. 51, http://www.un.org/en/sections/un-charter/chapter-vii/index.html (last visited Sept. 28, 2018).

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[28] Army Operational Law Handbook, *supra* note 23, at 10.

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[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] Donald Nungesser, *United States' Use of the Doctrine of Anticipatory Self-Defense in Iraqi Conflicts*, 16 Pace Int'l L. Rev. 193, 194 (2004).

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[53] *Id.*

[54] *Id.*

[55] *U.S. Relations with the Republic of Korea*, *supra* note 22.

[56] *Id.*

[57] *Id.*

[58] United States Forces Korea, *Mission of the ROK/US Combined Forces Command,* http://www.usfk.mil/About/Combined-Forces-Command/ (last visited Aug. 7, 2018).

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