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The Unlawfulness of a “Bloody Nose Strike” on North Korea

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CONTENTS

I.	Introduction.....	2
II.	Armed Attack	3
	A. Use of Force	3
	B. Grave Use.....	8
III.	Collective Self-Defense.....	14
	A. Procedure	14
	B. Substance.....	17
IV.	Individual Self-Defense.....	20
	A. Armed Attack	20
	B. Proportionality.....	23
V.	Conclusion	25

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The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

I. INTRODUCTION

In early 2018, the media began to report that the United States was debating whether to “react to some nuclear or missile test with a targeted strike against a North Korean facility to bloody Pyongyang’s nose and illustrate the high price the regime could pay for its behavior.”¹ This article asks a simple question: would such a “bloody nose strike” (BNS) violate international law’s rules on the use of force, the *jus ad bellum*?

Unfortunately, providing a coherent answer is complicated by the lack of clarity surrounding the United States’ planning of such a strike. In particular, the government has not specified what kind of provocation it would consider sufficient to justify a BNS, has not identified precisely what a BNS would entail, and has not offered a legal theory for why a BNS would be permissible under international law. To some extent, therefore, this article is inherently speculative.

Because so much is unknown, the following legal analysis proceeds on two assumptions. The first is that the United States would attempt to justify a BNS either as the collective self-defense of Japan, its ally most directly threatened by North Korea’s nuclear and missile tests, or on the basis of its own individual right of self-defense. The second is that a BNS would be a response to one of two North Korean provocations that have taken place over the past couple of years: (1) a test of nuclear weapon on North Korean territory, or (2) the intentional launch of an unarmed ballistic missile into Japan’s territorial waters.²

The article itself is divided into four parts. Part II asks whether either North Korean provocation would qualify as an “armed attack,” the necessary precondition of individual or collective self-defense. Part III analyzes what would be required for the United States to justify a BNS as the collective self-defense of Japan. And Part IV discusses whether the United States

1. Gerald F. Seib, *Amid Signs of a Thaw in North Korea, Tensions Bubble Up*, WALL STREET JOURNAL (Jan. 9, 2018), <https://www.wsj.com/articles/amid-signs-of-a-thaw-in-north-korea-tensions-bubble-up-1515427541>.

2. See Michael Schmitt & Ryan Goodman, *Best Advice for Policymakers on “Bloody Nose” Strike against North Korea: It’s Illegal*, JUST SECURITY (Jan. 23, 2018), <https://www.justsecurity.org/51320/advice-policymakers-bloody-nose-strike-north-korea-illegal/>. North Korea has also fired multiple unarmed missiles through Japan’s airspace. Because there is no relevant difference between such launches and launching an armed missile into Japan’s territorial waters (which necessarily involves invading Japan’s airspace), I will address only the latter type of launch.

could justify a BNS as its own individual self-defense. Throughout this analysis, the article assumes that there are no relevant differences between conventional and customary international law concerning the use of force.³

II. ARMED ATTACK

In order for the United States to invoke either collective or individual self-defense, a BNS would have to be a response to an armed attack (or what is believed to be an armed attack) by North Korea. To constitute an armed attack, one of the North Korean provocations would have to qualify as (1) a use of force that is (2) particularly grave.

A. Use of Force

Article 2(4) of the U.N. Charter provides that “[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.”⁴ Because a use of force must have an interstate element,⁵ a nuclear test on North Korean territory would not represent a use of force within the meaning of Article 2(4)—and thus could not justify self-defense under Article 51.⁶

That does not mean, however, that such tests are lawful. To begin with, as I have explained elsewhere,⁷ the ratification of the Comprehensive Nuclear-Test-Ban Treaty⁸ by 168 States,⁹ including by the vast majority of States

3. See, e.g., Oliver Dörr, *Prohibition of Use of Force*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 10 (Sept. 2015), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e427> (“It is submitted . . . that the prohibition of the use of force is today both a norm of treaty law and of international customary law and that both rules are, at least in general, identical in content.”).

4. U.N. Charter art. 2, ¶ 4.

5. See Dörr, *supra* note 3, ¶ 21 (“Art. 2 (4) UN Charter prohibits the use of force solely in the international relations between States. It does not, therefore, apply to the use of military force within the territory of a State . . .”).

6. U.N. Charter art. 51.

7. Kevin Jon Heller, *Specially-Affected States and the Formation of Custom*, 112 AMERICAN JOURNAL OF INTERNATIONAL LAW 191 (2018).

8. Comprehensive Nuclear-Test-Ban Treaty, *opened for signature* Sept. 24, 1996, 35 INTERNATIONAL LEGAL MATERIALS 1439 (1996) (not yet in force).

9. *Comprehensive Nuclear-Test-Ban Treaty*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-4&chapter=26&clang=_en (last visited Feb. 6, 2020).

that can be considered specially affected with regard to nuclear weapons, means that customary international law likely prohibits all nuclear testing, regardless of location.¹⁰

It is also possible that North Korea's nuclear testing runs afoul of Article 2(4)'s prohibition on the *threat* of force. The question here, following the International Court of Justice's (ICJ) *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, is why North Korea engages in such testing:

In order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defence against any State violating their territorial integrity or political independence. Whether a signalled intention to use force if certain events occur is or is not a "threat" within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths.¹¹

North Korea clearly views its nuclear arsenal as a way of deterring States, particularly the United States, from attacking it.¹² But experts agree that North Korea also uses nuclear testing to coerce States like South Korea and Japan to adopt political and economic policies that are friendlier—or at least less hostile—to it.¹³ The latter purpose likely renders the testing an unlawful threat of force.

A strong case can be made, then, that North Korea's nuclear testing, despite taking place on its territory, is a wrongful act that gives rise to its international responsibility.¹⁴ As a result, injured States—at a minimum those

10. It is possible, of course, that North Korea should be considered a persistent objector to that prohibition. *See* Heller, *supra* note 7, at 240.

11. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 47 (July 8); *see also* *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 269 (June 27) [hereinafter *Nicaragua*] (noting that "in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception").

12. STEPHEN BLANK, *A WAY OUT OF THE NORTH KOREAN LABYRINTH* 3 (2014).

13. *Id.*

14. *See Draft Articles on Responsibility of States for Internationally Wrongful Acts*, [2001] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION pt. 2, 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

specially affected by the nuclear testing, whether because they suffer the environmental impact of the testing or are the targets of the coercion it represents¹⁵—are entitled not only to demand that North Korea cease testing,¹⁶ but also to engage in countermeasures designed to induce North Korea to comply with its international obligations.¹⁷

The right to engage in countermeasures, however, would not justify a U.S. BNS against North Korea, whether as an act of collective or individual self-defense. Article 50 of the Articles on State Responsibility make clear that “[c]ountermeasures shall not affect . . . the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations.”¹⁸ Indeed, given the analysis below,¹⁹ a BNS in response to a nuclear test on North Korean territory would *itself* qualify as an armed attack, entitling North Korea to use force against the United States in self-defense.

The use of force analysis is very different for the launch of an unarmed missile into Japan’s territorial waters. The critical issue here, given that such a launch necessarily affects Japan’s territorial integrity, is whether Article 2(4) implicitly contains a gravity requirement that might not be satisfied by the launch of a single unarmed missile into an area devoid of people and objects. There is some support for a gravity requirement in the legal scholarship and in the practice of international organizations. Corten, for example, has argued that “there is a threshold below which the use of force in international relations, while it may be contrary to certain rules of international law, cannot violate article 2(4).”²⁰ Similarly, the Independent International Fact-Finding Mission on the Conflict in Georgia has claimed that Article 2(4) excludes incidents such as “the targeted killing of single individuals, forcible abductions of individual persons, or the interception of a single aircraft,” because the “prohibition of the use of force covers all physical force which surpasses a minimum threshold of intensity.”²¹

15. *Id.* art. 42(b)(i).

16. *Id.* art. 30.

17. *Id.* art. 49.

18. *Id.* art. 50(1)(a).

19. *See infra* text accompanying notes 39–52.

20. OLIVIER CORTEN, *THE LAW AGAINST WAR* 55, 77 (2010); *see also* Mary Ellen O’Connell, *The Prohibition on the Use of Force*, in *RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW* 89, 102 (Nigel D. White & Christian Henderson eds., 2013) (“Article 2(4) is narrower than it might appear on its face. Minimal or *de minimis* uses of force are likely to fall below the threshold of the Article 2(4) prohibition.”).

21. 2 REPORT OF THE INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA 242, 242 n.49 (2009).

The idea that Article 2(4) implicitly contains a gravity requirement, however, is difficult to reconcile with the provision's *travaux préparatoires*, which indicate that it was intended to be “an absolute all-inclusive prohibition.”²² Moreover, as Ruys has shown, States have routinely invoked Article 2(4) in response both to limited military confrontations between States²³ and to small-scale military incursions that did not meet with armed resistance.²⁴ In the latter situation, the critical factor determining international reaction has been the presence or absence of hostile intent. States have generally refrained from invoking Article 2(4) when an incursion was either accidental, such as soldiers unknowingly crossing an international border, or intentional but not intended to harm the territorial State, such as an aircraft crossing an international border to avoid bad weather.²⁵ By contrast, they have been quick to invoke Article 2(4) whenever an incursion was deliberate and in any way threatening—even in situations involving a single aircraft or a single ship.²⁶

The best interpretation of the prohibition of the use of force is thus the one offered by Dörr:

In relation to small-scale intrusions of a military character it is decisive to determine whether they reflect a hostile intent on the part of the intruder. Other than that, no specific gravity threshold can be read into Article 2(4) UN Charter nor be shown to exist in the customary practice of States.²⁷

By this standard, North Korea firing an unarmed missile into Japan's territorial waters would qualify as a use of force as long as North Korea intended

22. 6 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 334–35 (1945).

23. See Tom Ruys, *The Meaning of “Force” and the Boundaries of the Jus Ad Bellum: Are “Minimal” Uses of Force Excluded From UN Charter Article 2(4)?*, 108 AMERICAN JOURNAL OF INTERNATIONAL LAW 159, 183–87 (2014).

24. See *id.* at 189–90.

25. See, e.g., “Force Majeure” and “Fortuitous Event” as Circumstances Precluding Wrongfulness: *Survey of State Practice, International Judicial Decisions and Doctrine – Study Prepared by the Secretariat*, [1978] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, pt. 1, 61, 99–104, U.N. Doc. A/CN.4/SER.A 1978/Add.1 (Part 1).

26. Ruys, *supra* note 23, at 189.

27. Dörr, *supra* note 3, ¶ 19; see also Ruys, *supra* note 23, at 189 (“[A]n unlawful territorial incursion, even if small in scale, that reflects a manifest hostile intent may come within the ambit of Article 2(4), irrespective of whether the territorial state chooses to respond by force.”).

the missile to breach Japan’s territorial sovereignty, as has been the case for all previous launches through Japan’s airspace.²⁸

There is, however, one lingering question: Is firing an unarmed missile into a depopulated area an act “of a military character”? Or is it closer to political or economic coercion, which both the context²⁹ and drafting history³⁰ of Article 2(4) indicate are excluded from the prohibition of the use of force?³¹ Schmitt and Goodman seem to take the latter position when they argue that an unarmed missile does not qualify as a weapon when fired into an area devoid of people or objects.³² Their argument implies that such an act would not qualify as a use of military force under Article 2(4) even if the necessary hostile intent is present.³³

I disagree, as it seems clear from State practice that “military character” refers to the nature of the actor using force, not the act itself. In other words, an act has a military character when a State’s armed forces engage in the act, regardless of the specific form the act takes. To be sure, Dörr persuasively argues that it is possible to imagine an extraterritorial act involving a State’s armed forces that would violate the principle of non-intervention but not the prohibition on the use of force, such as unarmed soldiers delivering humanitarian assistance to civilians without the territorial State’s consent.³⁴ Such acts are excluded from Article 2(4), however, not because they do not have a military character, but because they lack hostile intent. An unarmed missile deliberately fired by North Korea’s armed forces into Japan’s territorial waters would thus clearly be an act of a military character, even if the missile was unarmed and not a “weapon” as that term is usually understood.

28. North Korea has never claimed that any of the breaches of Japan’s airspace were accidental.

29. See, e.g., Dörr, *supra* note 3, ¶ 11

Paragraph 7 of the Preamble of the UN Charter identifies as one of the goals of the United Nations ‘to ensure . . . that armed force shall not be used, save in the common interest’, and Art. 44 shows that the UN Charter uses the term ‘force’ where it refers to the application of military force.

30. See, e.g., Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 885, 905 (1999) (noting that States refused to adopt proposals to include political and economic coercion within Article 2(4)).

31. See, e.g., Ruys, *supra* note 23, at 163 (“It is generally accepted that [Article 2(4)] extends to armed force only.”).

32. Schmitt & Goodman, *supra* note 2.

33. *Id.*

34. Dörr, *supra* note 3, ¶ 19.

The growing acceptance of the idea that cyberattacks can violate Article 2(4) supports this conclusion. Cyberattacks involve neither “armed” force, in the literal sense of the term, nor even kinetic force, which is why both States and scholars were originally skeptical that they qualify as uses of force under Article 2(4).³⁵ The more modern position, however, is that a cyberattack “specifically intended to directly cause physical damage to tangible property or injury or death to human beings is reasonably characterized as a use of armed force and, therefore, encompassed in the prohibition.”³⁶ As with the unarmed missile, the determinative factor is hostile intent, not the extent of the tangible damage caused by the cyberattack.

B. Grave Use

The more difficult question is whether North Korea launching an unarmed missile into Japan’s territorial waters qualifies not only as a use of force, but also as an “armed attack” on Japan. Reeves and Lawless say yes;³⁷ Schmitt and Goodman say no.³⁸ Schmitt and Goodman have the stronger argument.

35. See, e.g., William C. Banks & Evan J. Criddle, *Customary Constraints on the Use of Force: Article 51 with an American Accent*, 29 LEIDEN JOURNAL OF INTERNATIONAL LAW 67, 88 (2016) (“The traditional and dominant view is that the prohibition on the use of force and right of self-defence apply to armed violence, and only to interventions that produce physical damage. Under the traditional standard, most cyber-attacks will not violate Article 2(4), and thus do not enable Article 51 self-defence.”).

36. Schmitt, *supra* note 30, at 913; see also YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 88 (5th ed. 2011) (“[T]he term ‘force’ in Article 2(4) must denote violence. It does not matter what specific means – kinetic or electronic – are used to bring it about, but the end result must be that violence occurs or is threatened.”); Dörr, *supra* note 3, ¶ 12 (“[C]omputer network attacks intended to directly cause physical damage to property or injury to human beings in another State may reasonably be considered armed force.”).

37. Shane Reeves & Robert Lawless, *Is There an International Legal Basis for the ‘Bloody Nose’ Strategy?*, LAWFARE (Jan.19, 2018), <https://www.lawfareblog.com/there-international-legal-basis-bloody-nose-strategy> (“[A]nother North Korean test in which it launches an unarmed missile into Japanese sovereign territory . . . could reasonably be interpreted as an armed attack.”).

38. Schmitt & Goodman, *supra* note 2

[I]f intentionally launched with the foreseeable result that the missile would land in a populated area and harm individuals or property with a significant scale and effect, then the operation might qualify as an armed attack regardless of whether it carried a warhead. But that is not the case here.

1. Is There a Gravity Threshold?

There are two interrelated issues here. The first is whether all uses of force qualify as armed attacks. The United States itself—to quote Harold Koh during his tenure as the Legal Advisor to the State Department—“has for a long time taken the position that the inherent right of self-defense potentially applies against *any* illegal use of force. In our view, there is no threshold for a use of deadly force to qualify as an ‘armed attack’ that may warrant a forcible response.”³⁹ Some scholars agree.⁴⁰

For multiple reasons, however, that position is difficult to defend. To begin with, as Ruys points out, “the different wording used in Article 2(4) UN Charter and Article 51 strongly suggests that ‘armed attack’ has a narrower scope than ‘use of force.’”⁴¹ That implication, in turn, is supported by U.N. General Assembly Resolution 3314, which specifically adopts a gravity-based distinction between the use of force and aggression in two contexts: Security Council determinations that aggression has not taken place⁴² and indirect aggression.⁴³ Moreover, “throughout the negotiations, numerous countries stressed that only the ‘most serious’ uses of force qualified as ‘armed attacks’” for self-defense in general.⁴⁴ Indeed, State practice generally reflects that there is a gap between “mere” uses of force and armed attacks, even if States do not want to set the armed attack threshold too high.⁴⁵

The ICJ has also consistently emphasized that not all uses of force qualify as armed attacks. In *Nicaragua*, the court famously opined that only “the most grave forms of the use of force” qualify as armed attacks.⁴⁶ The Court reaffirmed that distinction in *Oil Platforms*, holding that the Iranian incidents

39. Harold Hongju Koh, Legal Advisor, U.S. Department of State, Remarks at the USCYBERCOM Inter-Agency Legal Conference: International Law in Cyberspace (Sept. 18, 2012), <https://2009-2017.state.gov/s/1/releases/remarks/197924.htm>.

40. *See, e.g.*, ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 251 (1994).

41. TOM RUY, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 148 (2013).

42. G.A. Res. 3314, annex, art. 2, Definition of Aggression (Dec. 14, 1974).

43. *Id.* art. 3(g) (deeming an act of aggression “[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above”).

44. RUY, *supra* note 41, at 150.

45. *Id.* at 155.

46. *Nicaragua*, *supra* note 11, ¶ 191.

in question, even if viewed cumulatively, did not amount to a “most grave” use of force and thus could not be considered an armed attack.⁴⁷

2. Distinguishing “Mere” Uses of Force

The critical issue regarding the definition of an armed attack, therefore, is the nature of the distinction between “ordinary” and “most grave” uses of force, not whether such a distinction exists. The distinction cannot turn on whether the use of force in question was accompanied by hostile intent, because we have seen that the presence or absence of such intent is what determines whether a small-scale territorial incursion qualifies as a use of force in the first place. Instead, the distinction is based on the “scale and effects” of the hostile use of force, the factor the ICJ emphasized in *Nicaragua*.⁴⁸

Whereas any deliberate military incursion into another State’s territory qualifies as a use of force, even one that causes no harm, only a deliberate military incursion that is at least *capable* of causing harm to people or property qualifies as an armed attack.⁴⁹ An armed attack has thus taken place either when a hostile use of force actually causes such harm⁵⁰ or at least would have caused such harm had the attack succeeded as planned. The former situation is obvious; the latter is illustrated by two unsuccessful operations cited by

47. *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. Rep. 161, ¶ 64 (Nov. 6) [hereinafter *Oil Platforms*].

48. *Nicaragua*, *supra* note 11, ¶ 195 (distinguishing between “a mere frontier incident” and an armed attack).

49. *See, e.g.*, DINSTEIN, *supra* note 36, at 195 (defining an armed attack as “a use of force producing (or liable to produce) serious consequences, epitomized by territorial intrusions, human casualties or considerable destruction of property”); RUY, *supra* note 41, at 155 (“[C]ustomary practice suggests that, subject to the necessity and proportionality criteria, even small-scale bombings, artillery, naval or aerial attacks qualify as ‘armed attacks’ activating Article 51 UN Charter, as long as they result in, or are capable of resulting in destruction of property or loss of lives.”).

50. *See, e.g.*, Karl Zemanek, *Armed Attack*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 10 (Oct. 2013), <https://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e241>

In sum, it is submitted that regardless of the dispute over degrees in the use of force, or over the quantifiability of victims and damage, or over harmful intentions, an armed attack even when it consists of a single incident, which leads to a considerable loss of life and extensive destruction of property, is of sufficient gravity to be considered an ‘armed attack’ in the sense of Art. 51 UN Charter.

RUY, *supra* note 41, at 152 (“When a State’s territory or its external manifestations abroad become the target of artillery shelling, air strikes, bombings and the like, there is in principle little doubt that such attacks reach the necessary gravity to qualify as ‘armed attacks.’”).

Ruys in which the international community nevertheless implicitly accepted that the State using force had engaged in an armed attack: Iraq’s intercepted attempt to assassinate President Bush in Kuwait in April 1993, and Yemen’s attack on Harib Fort in 1964, which killed only a few camels.⁵¹

Given this understanding of gravity, it is clear that North Korea deliberately launching an unarmed missile into Japanese territorial waters would not qualify as an armed attack against Japan. As Schmitt and Goodman note, “if intentionally launched with the foreseeable result that the missile would land in a populated area and harm individuals or property with a significant scale and effect, then the operation might qualify as an armed attack regardless of whether it carried a warhead.”⁵² Deliberately launching an unarmed missile into the sea (or through airspace), however, is not capable of causing harm to people or property. It is thus no more than a prohibited use of force.

3. Accumulation of Events

Although that conclusion is sound, it does not end the analysis of whether North Korea would commit an armed attack against Japan if it fired another unarmed missile into Japan’s territorial waters. One use of force might not be enough to qualify as an armed attack, but what about a series of them? After all, North Korea has launched multiple missiles into Japan’s territorial waters or through its airspace in the past few years alone.

This possibility implicates the so-called “accumulation of events” doctrine, one version of which⁵³ holds that “a number of incidents emanating from the same source and within a similar timeframe, which alone might not have met the threshold for an armed attack, might be considered in combination as an armed attack.”⁵⁴ The ICJ has implicitly endorsed the accumulation of events doctrine, at least in principle, in three cases: *Nicaragua*,⁵⁵ *Oil*

51. See RUYS, *supra* note 41, at 153.

52. Schmitt & Goodman, *supra* note 2.

53. A second form, relevant to the permissibility of anticipatory self-defense, is discussed below. See *infra* note 89 and accompanying text.

54. COMMITTEE ON THE USE OF FORCE, INTERNATIONAL LAW ASSOCIATION, FINAL REPORT ON AGGRESSION AND THE USE OF FORCE 7 (2018) [hereinafter FINAL REPORT ON AGGRESSION AND THE USE OF FORCE].

55. *Nicaragua*, *supra* note 11, ¶ 231 (asking whether a series of incursions into the territories of Honduras and Costa Rica could be treated “as amounting, singly or collectively, to an armed attack”).

Platforms,⁵⁶ and *Armed Activities*.⁵⁷ Moreover, States have often invoked the doctrine to justify their self-defensive acts without encountering significant resistance from the international community.⁵⁸

Although he does not explicitly invoke the accumulation of events doctrine, Dunlap suggests that it is defensible to view each of North Korea's missile launches as part of an "extended attack operation" on Japan:

To me, the context matters: a single, isolated launch of a missile that's somehow known to be unarmed is one thing, but a pattern of launches from a rogue regime issuing repeated threats about nuclear attacks is something quite different. . . . It's a fairly standard military tactic to induce complacency in your opponent by employing ruses and feints as a part of an extended attack operation. (This is especially so in Soviet military theory which still seems to dominate North Korean thinking.) Let's ask ourselves, can we really be sure that we're not witnessing something like that with the North Koreans? Are these repeated launches of "unarmed" missiles part of a sophisticated North Korean operation (already underway?) which is intended to lull the U.S. and its allies into thinking the missile launches are merely harmless "tests"?⁵⁹

By contrast, Schmitt and Goodman dismiss any attempt to rely on the accumulation of events doctrine in the North Korean context, arguing that "unless it could be reasonably concluded that subsequent missile tests would be conducted and that a forceful response would be necessary to stop them," such tests could not "be treated as one in a series of actions that constitute an on-going campaign that in its entirety constitutes an armed attack."⁶⁰

Schmitt and Goodman's position is more persuasive. Although the accumulation of events doctrine is designed to permit a defensive response to a "continuous, overall plan of attack purposely relying on numerous small

56. *Oil Platforms*, *supra* note 47, ¶ 64 (considering, but ultimately rejecting, the idea that the Iranian attack in question "either in itself or in combination with the rest of the 'series . . . of attacks' . . . can be categorized as an 'armed attack' on the United States").

57. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶ 146 (Dec. 19) [hereinafter *Armed Activities*] ("[E]ven if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.").

58. RUYSS, *supra* note 41, at 172.

59. Charlie Dunlap, *The "Bloody Nose" Strategy Debate: Why It's More Complicated than Some Think*, LAWFIRE (Jan. 24, 2018), <https://sites.duke.edu/lawfire/2018/01/24/the-bloody-nose-strategy-debate-why-its-more-complicated-than-some-think/>.

60. Schmitt & Goodman, *supra* note 2.

raids”⁶¹—generally similar to Dunlap’s characterization of the missile launches—the doctrine “does not relieve the defending State of its duty to demonstrate that it has actually been the victim of the use of armed force.”⁶² There is simply no evidence that North Korea’s unarmed missile launches have been part of an “extended attack operation” designed to make a harmful launch possible by lulling Japan and the United States into a false sense of security.

Dunlap’s interpretation might be plausible if Japan had stopped shooting down North Korean missiles once they realized they were unarmed. But Japan has never tried to intercept one of the missiles, despite having the weaponry necessary to do so,⁶³ which means that North Korea has always been free to successfully fire an armed missile at Japan. Indeed, Dunlap acknowledges that North Korea could attack Japan even without aiming directly at the Japanese mainland, because a nuclear weapon would likely cause significant damage if detonated over Japan’s territorial waters.⁶⁴ That possibility undermines any claim that the missile launches are somehow part of a “continuous, overall plan of attack” that would justify a defensive response. Instead, they are best understood as discrete uses of force that do not qualify as armed attacks either individually or collectively.

4. Knowledge

The armed attack analysis conducted above, however, assumes that Japan knows North Korea’s missiles are unarmed. An *armed* missile fired into Japan’s territorial waters would obviously qualify as an armed attack, thus en-

61. Barry Levenfeld, *Israel’s Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal Under Modern International Law*, 21 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 1, 7 n.18 (1982).

62. RUY, *supra* note 41, at 174. The ICJ emphasized the lack of evidence for the United States accumulation of events claim in the *Nicaragua* case. See *Nicaragua*, *supra* note 11, ¶ 231 (“Very little information is available to the Court as to the circumstances of these incursions or their possible motivations, which renders it difficult to decide whether they may be treated for legal purposes as amounting, singly or collectively, to an armed attack by Nicaragua on either or both States.”).

63. Alex Lockie, *Japan May Have No Choice but to Shoot Down the Next North Korean Missile Test*, BUSINESS INSIDER (Aug. 28, 2017), <https://www.businessinsider.nl/japan-us-shoot-down-next-north-korean-missile-test-2017-8?international=true&r=U.S.>

64. Dunlap, *supra* note 59 (“If even one ‘test’ missile turned out to be the real thing, how much damage could it do if it exploded not on Japan’s mainland but only over its territorial sea? Maybe a lot.”).

titling Japan to shoot down the missile in self-defense. Although the boundaries of interceptive self-defense are blurry, it is “uncontested” that, at a minimum, it permits intercepting a weapon that is not under the control of a human being, such as a missile.⁶⁵

To date, Japan has assumed that each of the missiles North Korea has launched through its airspace or into its territorial waters has been unarmed. But what if it *believed*—as opposed to *knew*—that a particular missile was armed? Would that belief entitle Japan to act in self-defense (and thus the United States to act in collective self-defense, as discussed below)?

This is a difficult question, but the better answer is that it would. As Ruys states, “[a]t the strategic level, the distinction between (admissible) interceptive and (inadmissible) pre-emptive self-defence is determined by and large by the irreversibility of the opponent’s conduct.”⁶⁶ In the context of a frontier incident, the invaded State will normally be able to delay a response until it has taken steps to determine whether the invading State is acting with hostile intent. That will not be the case, however, with a missile that has already been launched and may be armed. In that situation, not taking immediate steps to intercept the missile could have catastrophic consequences. The territorial State should thus be entitled to assume that the missile constitutes an armed attack and defend itself accordingly.

III. COLLECTIVE SELF-DEFENSE

Unless the United States acted in response to an armed attack on its interests, a BNS on North Korea would have to be justified as the collective self-defense of Japan. Such a collective self-defense claim raises two issues: (1) a procedural issue concerning whether Japan would have to specifically request the United States to defend it; and (2) a substantive issue concerning the scope of the permissible response.

A. Procedure

Any discussion of collective self-defense in the form of a BNS assumes that one of North Korea’s missile launches qualifies as an armed attack on Japan.

65. RUY, *supra* note 41, at 347.

66. *Id.* at 356.

If a State is not entitled to act in individual self-defense, collective self-defense of that State is unlawful.⁶⁷ As we have seen, although an unarmed missile fired into Japan’s territorial waters does not objectively qualify as an armed attack, Japan would be entitled to assume that it was being attacked if it believed a missile was armed. In such a situation, Japan would be fully entitled to request the United States come to its defense. Article 51 of the U.N. Charter specifically endorses collective self-defense, and there is no requirement in international law that a State engaging in collective self-defense has its own individual right of self-defense.⁶⁸

But what if, in response to an armed attack, Japan did not ask for U.S. assistance? Or what if Japan explicitly rejected it? Would the United States still be entitled to act in the “collective self-defense” of Japan?

Under customary international law, it is clear that collective self-defense is permissible only when the attacked State expressly requests assistance. The ICJ made that requirement clear in *Nicaragua*:

At all events, the Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.⁶⁹

The ICJ reaffirmed the requirement of an express request both in *Oil Platforms*⁷⁰ and (slightly more obliquely) in *Armed Activities*.⁷¹

67. See, e.g., CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 156 (4th ed. 2018).

68. See, e.g., George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 72 *INTERNATIONAL LAW STUDIES* 365, 383 (1998) (“Although it has been argued that an assisting State must have substantive rights or interests affected by an attacking State’s action, or that an assisting State must have an individual right of self-defense, neither is a prerequisite for coming to the aid of a target State.”).

69. *Nicaragua*, *supra* note 11, ¶ 199.

70. *Oil Platforms*, *supra* note 47, ¶ 51 (“Despite having referred to attacks on vessels and aircraft of other nationalities, the United States has not claimed to have been exercising collective self-defence on behalf of neutral States engaged in shipping in the Persian Gulf; this would have required the existence of a request made to the United States ‘by the state which regards itself as the victim of an armed attack.’”).

71. *Armed Activities*, *supra* note 57, ¶ 128 (“Article 51 of the Charter refers to the right of ‘individual or collective’ self-defence. The Court notes that a State may invite another State to assist it in using force in self-defence.”).

State practice also overwhelmingly supports the express-request requirement, from Jordan and Lebanon's requests for help against the United Arab Republic in 1958 to Iraq's much more recent request for help against the Islamic State. Indeed, as Gray has pointed out, "in every case where a third state has invoked collective self-defence it has based its claim on the request of the victim state, even where there was no express treaty provision requiring this."⁷²

It is also worth noting that both the United States and Japan accept the requirement of an express request. According to the U.S. Army's *Operational Law Handbook*, "[t]o constitute a legitimate act of collective self-defense, all conditions for the exercise of an individual State's right of self-defense must be met, along with the additional requirement that assistance must be requested by the victim State."⁷³ Japan has consistently taken this position.⁷⁴

A number of scholars have argued, however, that the customary express-request requirement is superseded by Article V of the 1960 Mutual Cooperation Treaty Between Japan and the United States of America, which provides that "[e]ach Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes."⁷⁵ According to Sari and Nasu, for example, Article V means that

an armed attack on Japan would not only impose an obligation on the United States to adopt appropriate measures, but it would also confer upon it a right to take forcible action without the need for a specific Japanese request to this effect, even where Japan is prevented from taking action in its individual self-defense for domestic legal or political reasons.⁷⁶

72. GRAY, *supra* note 67, at 187.

73. INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, OPERATIONAL LAW HANDBOOK 5 (18th ed. 2018) [hereinafter OPERATIONAL LAW HANDBOOK].

74. See, e.g., Masahiro Kurosaki, *The 'Bloody Nose' Strategy, Self-Defense and International Law: A View from Japan*, LAWFARE (Feb. 15, 2018), <https://www.lawfareblog.com/bloody-nose-strategy-self-defense-and-international-law-view-japan>.

75. Treaty of Mutual Cooperation and Security between the United States and Japan art. V, 11 U.S.T. 1632 (Jan. 19, 1960) [hereinafter Treaty of Mutual Cooperation and Security].

76. Aurel Sari & Hitoshi Nasu, *Collective Self-Defense and the "Bloody Nose Strategy": Does it Take Two to Tango?*, JUST SECURITY (Jan. 26, 2018), <https://www.justsecurity.org/51435/collective-self-defense-bloody-nose-strategy-tango/>.

Reeves and Lawless agree.⁷⁷

This interpretation of the Mutual Cooperation Treaty is untenable. To begin with, it is inconsistent with Article IV of the Treaty, which provides that “[t]he Parties will consult together . . . whenever the security of Japan or international peace and security in the Far East is threatened.”⁷⁸ As Kurosaki has pointed out, the consultation requirement “remains applicable even in the case of U.S. collective self-defense” of Japan.⁷⁹ Moreover, Article VII of the Treaty explicitly states that it “does not affect and shall not be interpreted as affecting in any way the rights and obligations of the Parties under the Charter of the United Nations”⁸⁰—obligations that include the requirement of an express request for assistance.⁸¹ And finally, Kurosaki notes that “Japan’s consistent position has instead been that the treaty only authorizes the United States to use force in collective self-defense where Japan exercises its right of individual self-defense in consultation with the United States.”⁸² Indeed, Japan has taken that position specifically with regard to North Korea’s missile launches.⁸³

B. *Substance*

Even if we assume that Japan would be willing to ask the United States to help defend it against an armed North Korean missile, it is unclear whether the United States would be entitled to do so through a BNS. All States, including the United States,⁸⁴ accept that collective self-defense cannot exceed the permissible defensive response by the attacked State. What a State cannot do singly, States cannot do collectively. A BNS against North Korea would be lawful, therefore, only if Japan would be entitled to engage in the same kind of strike in response to an armed missile launch.

77. Reeves & Lawless, *supra* note 37 (arguing that “[t]his treaty may provide a basis for the United States’ to engage in a limited retaliatory strike” even in the absence of an express Japanese request for assistance).

78. Treaty of Mutual Cooperation and Security, *supra* note 75, art. IV.

79. Kurosaki, *supra* note 74.

80. Treaty of Mutual Cooperation and Security, *supra* note 75, art. IV.

81. Kurosaki, *supra* note 74.

82. *Id.*

83. *Id.*

84. OPERATIONAL LAW HANDBOOK, *supra* note 73, at 5 (“To constitute a legitimate act of collective self-defense, all conditions for the exercise of an individual State’s right of self-defense must be met.”).

Because Japan would be entitled to engage in interceptive self-defense while an armed North Korean missile (or a missile reasonably believed to be armed) was in the air, there is no reason why it could not ask the United States to shoot the missile down for it. But that is not what the United States means by a BNS, which, by all accounts, would involve destroying a target on North Korean territory. Collective self-defense would justify that kind of strike only if Japan was entitled to use force against a North Korean target.

Considering each North Korean missile launch separately, it is difficult to see how Japan could justify that kind of response. As Ruys notes,

[i]t is generally accepted in customary practice and legal doctrine . . . that measures should be geared towards the halting or repelling of an armed attack and should not exceed this goal. Otherwise, the action undertaken will involve a punitive or retaliatory character and will be qualified as a reprisal, rather than as self-defence.⁸⁵

In media res, therefore, Japan would be entitled to intercept a missile, but not to strike the military installation in North Korea from which the missile was launched. The latter response would be retaliation, not prevention, and thus an illegal reprisal.

The same limitation would not apply, however, if Japan had reason to believe that an intercepted (or completed) North Korean attack portended the imminent launch of subsequent armed attacks. In such a situation—which is not the same as “true” anticipatory self-defense, where the State ostensibly defending itself has never been the victim of an armed attack⁸⁶—Japan would not only have the right to act pre-emptively,⁸⁷ it would also be entitled to use whatever force was necessary to prevent the future attacks:

85. RUYS, *supra* note 41, at 94; *see also* GRAY, *supra* note 67, at 150 (noting that commentators widely agree “self-defence must not be retaliatory or punitive; the aim should be to halt and repel an attack”).

86. *See, e.g.*, FINAL REPORT ON AGGRESSION AND THE USE OF FORCE, *supra* note 54, at 11; JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 165 (2004) (“Many commentators would argue that, when an armed attack has occurred and there is the possibility of more such actions, anticipatory self-defence is not the issue.”).

87. *See, e.g.*, RUYS, *supra* note 41, at 106 (“In all, customary practice indicates that if a State has been subject not to an isolated attack, but to a series of armed attacks, and if there is a considerable likelihood that more attacks will imminently follow, then self-defence is not automatically excluded.”); Ashley S. Deeks, *Taming the Doctrine of Pre-Emption*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 661, 663–64 (Marc

There is . . . significant support and practical reason to accept that the UN Charter should be read as accepting that self-defence measures may take into account the need to ensure that the attacker has not simply momentarily refrained from operations while the attacks are in fact set to continue in the near future. It would appear therefore that while self-defence cannot justify “all-out” war to destroy the enemy, the forcible measures can include the need to defend the State from the continuation of attacks, and not only repel the attack of the moment.⁸⁸

Presumably, defending against “the continuation of attacks” by North Korea would require Japan to eliminate, or at least substantially degrade, North Korea’s ability to launch armed missiles at it. Japan could thus request the United States assist it in that endeavor as collective self-defense.

The problem here, of course, is a factual one. To date, North Korea has not launched an armed attack against Japan, via missile or otherwise. That does not mean Japan could not attack a military installation in North Korea that was about to launch an armed missile, but Japan’s evidentiary burden⁸⁹ to prove an armed attack was imminent would be difficult to satisfy. A State that has never been the victim of an armed attack should be held to a higher standard of proof regarding imminence than a State that has already been attacked.⁹⁰ At this point, Japan still faces the more significant evidentiary

Weller ed., 2015) (“To some extent, all uses of force in self-defence in response to a completed armed attack have an anticipatory element in them. That is, for force to be ‘necessary’, the victim state must anticipate that the attacker has the capacity and intent to strike again.”).

88. FINAL REPORT ON AGGRESSION AND THE USE OF FORCE, *supra* note 54, at 11; *see also* Roberto Ago, *Addendum to the Eighth Report on State Responsibility*, [1980] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION pt. 1, 69, U.N. Doc. A/CN/SER.A/1980

If . . . a State suffers a series of successive and different acts of armed attack from another State, the requirement of proportionality will certainly not mean that the victim State is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating succession of attacks.

GARDAM, *supra* note 86, at 161 (“[W]hen dealing with a series of attacks, the scale of the action taken to repulse such a series of attacks may differ from that which would be appropriate in response to an isolated armed attack.”).

89. The State acting in self-defense always has the burden of proving the existence of an armed attack. *See, e.g., Oil Platforms, supra* note 47, ¶ 51. The standard of proof is unclear, but many scholars have endorsed a “clear and compelling evidence” requirement. *See, e.g., RUYTS, supra* note 41, at 509.

90. *See, e.g., FINAL REPORT ON AGGRESSION AND THE USE OF FORCE, supra* note 54, at 7 (“The accumulation of smaller attacks may, however, be relevant from the point of view

burden, and as noted earlier, there is no indication that North Korea views its missile launches as anything more than saber-rattling. Unless that changes, there is no plausible legal basis for Japan to ask the United States to help it do anything more than intercept a North Korean missile it fears might be armed.

IV. INDIVIDUAL SELF-DEFENSE

It is also possible that the United States could launch a BNS not in collective self-defense of Japan, but on the basis of its own individual right of self-defense. Dunlap has made that argument,⁹¹ as have Reeves and Lawless.⁹²

A. *Armed Attack*

The problem here is finding a North Korean armed attack—actual or potential—that would justify the United States launching a BNS in self-defense. Scholars have identified two possibilities, but neither is convincing.

The first, offered by Dunlap, is that North Korea’s missile launches into Japan’s territorial waters constitute an armed attack on the U.S. soldiers based in Japan. As he puts it, the United States “has more than 54,000 of its own reasons to unilaterally act in self-defense.”⁹³

There is no question that the use of force against the external manifestations of a State, such as soldiers and military installations, can trigger the right of self-defense. Resolution 3314, for example, deems aggression “[a]n attack by the armed forces of a State on the land, sea or air forces . . . of another State.”⁹⁴ But even if it is possible to view North Korea’s missile launches as an armed attack, that attack is directed at *Japan*, not at the *United States*, because there is no evidence that North Korea is trying to harm U.S.

of anticipatory self-defence insofar as these incidents might in some circumstances support the case for likelihood of an imminent attack.”).

91. Dunlap, *supra* note 59

In my view, if force is used against Japan that would otherwise permit an Article 51 response, it is quite likely that it’s not necessary for the U.S. to wrestle with the intricacies of the law of collective self-defense, as there are plenty of American military assets—not to mention thousands of U.S. citizens—in Japan to defend.

92. Reeves & Lawless, *supra* note 37 (“Even without another missile targeting Japan, the United States could arguably rely on its own Article 51 individual right of self-defense to justify a ‘bloody nose’ strike.”).

93. Dunlap, *supra* note 59.

94. G.A. Res. 3314, *supra* note 422, annex, art. 3(d).

soldiers or damage U.S. military installations. Unintentionally causing harm to a State’s people or property is not enough to satisfy the hostile-intent requirement; the attacking State must deliberately use force against the affected State.⁹⁵ So, although North Korea would be internationally responsible for any damage a missile attack on Japan might accidentally cause the United States’ external manifestations, a forcible U.S. response would constitute an armed attack against North Korea and trigger North Korea’s own right of self-defense.

The second possibility, defended by Reeves and Lawless, is that the totality of North Korea’s nuclear activities indicates that it intends to eventually attack the United States, thus entitling the United States to defend itself now via a BNS:

North Korea’s recent activities help support a pre-emptive self-defense argument. Despite extensive efforts by the international community, including through diplomacy, negotiations, collaboration, and sanctions, North Korea continues to defiantly test powerful nuclear weapons and launch ballistic missiles. Furthermore, it has gone to great lengths to conceal its nuclear testing program by creating underground facilities and intricate tunnel systems. This behavior, coupled with North Korea’s pattern of aggressive rhetoric and threats against the United States and other nations, makes a pre-emptive use of force seem more and more necessary.⁹⁶

This argument is neither factually nor legally convincing. To begin with, Kim Jong-un’s bluster notwithstanding, there is no evidence that North Korea would ever use a nuclear weapon against the United States. To the contrary, as noted earlier, scholars overwhelmingly agree that North Korea’s nuclear program is designed to deter attacks against it and to coerce other States, particularly North Korea’s regional neighbors, into adopting more favorable political and economic policies.⁹⁷

Even if North Korea did have offensive intentions toward the United States, that would still not justify the United States launching a BNS now. As Reeves and Lawless openly acknowledge, any such strike would be an act of pre-emptive self-defense, because a North Korean armed attack on the United States—particularly a nuclear one—cannot be said to be imminent,

95. See RUYS, *supra* note 41, at 160 (“The concept of ‘*animus aggressionis*’ is therefore best construed as requiring the deliberate use of armed force against another State or its external manifestations, or, in other words, a hostile intent.”).

96. Reeves & Lawless, *supra* note 37.

97. See *supra* notes 12–13 and accompanying text.

“leaving no choice of means, and no moment for deliberation.”⁹⁸ Moreover, given that a BNS would not be a reaction to a previous North Korean attack, the United States could not even plausibly argue that the *Caroline* standard should be somewhat relaxed to take into account a series of previous North Korean armed attacks.

Whatever uncertainty exists about the meaning of imminence, particularly in U.S. practice,⁹⁹ it is beyond doubt that “true” pre-emptive self-defense is unlawful. Although the international community is deeply divided over many important *jus ad bellum* issues, the unlawfulness of pre-emptive self-defense is not one of them. Unsurprisingly, the 125 members of the Non-Aligned Movement, those States most likely to be the targets of force, categorically reject any attempt to expand self-defense to include pre-emptive situations.¹⁰⁰ But it is not just weaker States in the Global South that reject this position: nearly all powerful States believe that pre-emptive self-defense is unlawful, including the five permanent member States of the U.N. Security Council.¹⁰¹ Even the United States rejects pre-emptive self-defense, stating categorically in the *Operational Law Handbook* that force “employed to counter non-imminent threats . . . is illegal under international law.”¹⁰² It is not surprising, therefore, that States claim a right of pre-emptive self-defense only as a last resort, preferring instead to describe their uses of force, however unpersuasively, as reactions to imminent armed attacks.¹⁰³ After all, the one unabashed invocation of pre-emptive self-defense, by Israel following

98. The *Caroline* standard, quoted in R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AMERICAN JOURNAL OF INTERNATIONAL LAW 82, 92 (1938). Although the text of Article 51 limits self-defense to armed attacks that have occurred or are ongoing, post-Charter State practice supports the idea that self-defense is permissible in response to imminent armed attacks. See, e.g., FINAL REPORT ON AGGRESSION AND THE USE OF FORCE, *supra* note 54, at 13 (“[T]here would seem to be increasing support for the view that the right to self-defence does exist in relation to manifestly imminent attacks, narrowly construed.”); Zemanek, *supra* note 50, ¶ 4 (“On balance the majority opinion accepts nevertheless that a manifestly imminent armed attack which is objectively verifiable, i.e., an attack in progress, falls within the meaning of Art. 51 UN Charter.”).

99. See, e.g., Banks & Criddle, *supra* note 35, at 75 (noting that “[o]ver time, the U.S. government has endorsed an increasingly capacious definition of ‘imminence’, treating credible threats of future attacks as ‘imminent’ even if the nature and timing of the anticipated attacks are uncertain and, in significant respects, hypothetical”).

100. See GRAY, *supra* note 67, at 170 (“The Non-Aligned Movement continues to argue that Article 51 ‘is restrictive and should not be re-written or re-interpreted.’”).

101. See, e.g., Schmitt & Goodman, *supra* note 2.

102. OPERATIONAL LAW HANDBOOK, *supra* note 73, at 7.

103. See GRAY, *supra* note 67, at 170–71.

its 1981 attack on the Osirak nuclear reactor in Iraq, was unanimously condemned by the Security Council without even a single abstention.¹⁰⁴

No dispassionate observer would deny that North Korea’s nuclear program poses a serious threat to international peace and security. But that does not mean North Korea intends to attack either the U.S. homeland or the U.S.’s external manifestations, much less imminently. It is not possible to infer the intention to attack from the mere capacity to do so.¹⁰⁵ Accordingly, even in light of numerous North Korean missile launches into Japan’s territorial waters and through Japanese airspace, North Korea’s nuclear activities would not justify the United States launching a BNS against targets on North Korean territory.

B. *Proportionality*

Because there is no plausible basis for considering a North Korean missile launch into Japan’s territorial waters as an armed attack on the United States, the United States could not justify a BNS against North Korea on the basis of its individual right of self-defense. It is nevertheless worth considering what kind of BNS would be proportionate to a hypothetical North Korean armed attack against either the United States or Japan. The ICJ has repeatedly made clear that proportionality is an essential requirement of any self-defensive act, although, as Christodoulidou and Chainoglou have noted, its approach to the principle “could be described as confusing, if not phobic, due to the Court’s reluctance to define or even analyse the dimensions of proportionality in *jus ad bellum*.”¹⁰⁶

Among the scholars who have written on the legality of a BNS, only Schmitt and Goodman have specifically addressed proportionality. Their position is quite restrictive:

Proportionality would cap any defensive response at the level needed to compel North Korean [sic] to do so. The “limited” nature of the bloody nose strategy may sound positive in this regard, but if the targets of the strikes are nuclear-related facilities or other critical assets, the risk that the

104. Schmitt & Goodman, *supra* note 2.

105. *Cf. id.* (noting that “it is the armed attack against the United States that must be imminent before resorting to force anticipatorily, not the mere acquisition of the capacity to attack”).

106. Theodora Christodoulidou & Kalliopi Chainoglou, *The Principle of Proportionality from a Jus Ad Bellum Perspective*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW, *supra* note 87, at 1187, 1189.

situation would escalate, rather than diminish, would, as a matter of law, auger against acting in self-defense. Even without contemplating possible escalation, it is hard to see how a U.S. military strike on a nuclear facility would be proportionate to an unarmed projectile dropping in Japanese waters.¹⁰⁷

The analysis above supports Schmitt and Goodman's position in terms of a single missile launched into Japan's territorial waters. If the missile was unarmed, the launch would not qualify as an armed attack, making any "defensive" response an armed attack in its own right. If the missile was armed, although Japan would be entitled to defend itself and to ask the United States for assistance, the individual or collective response could not go beyond interceptive self-defense without constituting an unlawful reprisal.

The legality of a BNS changes, however, if we imagine—very counterfactually—that the first missile, whether armed or unarmed, signals the imminent launch of a second armed missile against Japan or the United States. In that case, as noted earlier, there would be nothing disproportionate about the United States (acting individually or in collective self-defense of Japan) going beyond interceptive self-defense and eliminating North Korea's ability to launch subsequent missiles. Indeed, it would not matter whether the imminent second attack would involve a nuclear or conventionally armed missile. Either way, eliminating North Korea's offensive capacity would be proportionate. As Ago wrote long ago, if a State

suffers a series of successive and different acts of armed attack from another State, the requirement of proportionality will certainly not mean that the victim State is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating succession of attacks.¹⁰⁸

That said, an imminent second attack would not give the United States *carte blanche* to engage in a BNS—not even if it limited its choice of targets to legitimate military objectives. The BNS would be lawful self-defense only if it targeted the specific installations involved in the kind of attack that North Korea was threatening to launch immediately. It could not target military objectives that had no nexus to the imminent attack:

107. Schmitt & Goodman, *supra* note 2.

108. Ago, *supra* note 88, at 69.

[T]he exercise of the right to self-defense must not be a mere motive for military sanctions, since otherwise the exercise of the right to self-defense would amount to nothing but hidden armed counter-measures, which . . . are illegal under international law. In particular, the actions allegedly taken in the exercise of the right to self-defense must, by their very nature, be able to diminish the military abilities of the aggressor and to induce the enemy not to continue its attack.¹⁰⁹

V. CONCLUSION

Although there is no question that North Korea’s nuclear testing and missile launches are deeply concerning, experts on both the left and the right agree that a BNS on North Korean territory would be both politically and militarily disastrous. That is reason enough to oppose any such strike.

This article has provided an additional reason for opposition: namely, that a BNS would categorically violate the prohibition of the use of force, one of the most fundamental norms of international law.¹¹⁰ North Korea’s nuclear testing may violate its international obligations, but it does not amount to an armed attack on Japan or the United States. And although it is possible to imagine future missile launches that would permit the United States to engage in more than interceptive self-defense on behalf of Japan, there is no evidence that North Korea has any intention of actually attacking either Japan or the United States—particularly not with a nuclear-armed missile. The sooner the United States abandons any thought of launching a BNS against North Korea, therefore, the better.

109. Andreas Zimmermann, *The Second Lebanon War: Jus ad Bellum, Jus in Bello and the Issue of Proportionality*, 11 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 99, 123 (Armin von Bogdandy et al. eds., 2007); see also RUYS, *supra* note 41, at 108 (“[I]t is not sufficient that the target is a legitimate military objective; it must also be connected with the force to be repelled.”).

110. See, e.g., *Draft Articles on the Law of Treaties with Commentaries*, [1966] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 187, 247, U.N. Doc. A/CN/SER.A/1966/add.1 (“The Commission pointed out that the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.”).