

# Just War Theory: North Korea and Preemptive War

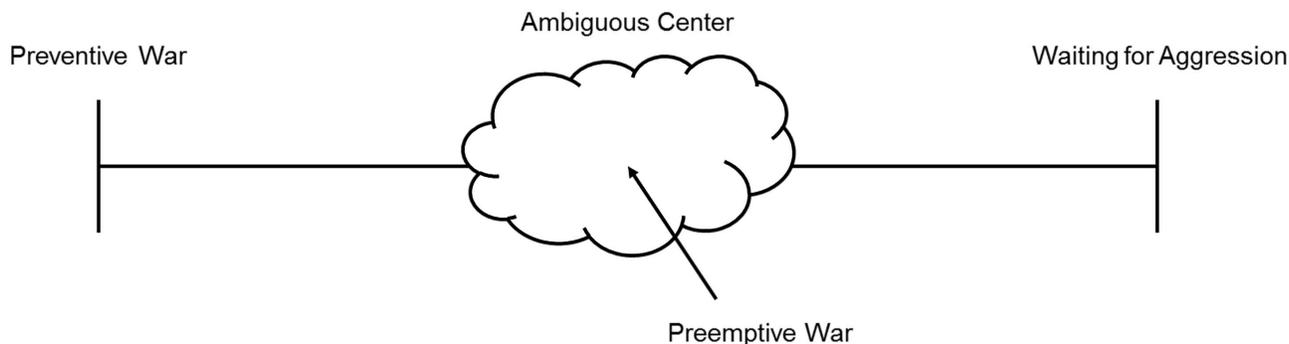
by Zachary L. Morris

In December, Secretary of Defense James Mattis said that “storm clouds are gathering” over Korea, and while he hoped for a diplomatic solution, there is “little reason for optimism.”<sup>1</sup> Senator Lindsey Graham echoed Secretary Mattis’ sentiments when he estimated that there was a 30 to 70 percent chance of war between the United States (U.S.) and North Korea, officially known as the Democratic People’s Republic of Korea (DPRK).<sup>2</sup> Reports have also suggested the U.S. is considering preemptive strikes against North Korea.<sup>3</sup> Kori Schake, from the Hoover Institution, has stated the Trump Administration “sounds eerily and increasingly like the George W. Bush administration in the run-up to the Iraq war” when discussing North Korea.<sup>4</sup> Many people fear the Trump administration is building a war cabinet with John Bolton and Mike Pompeo.<sup>5</sup> John Bolton, the new National Security Advisor, has regularly espoused extremely hawkish positions and outlined his views in a Wall Street Journal op-ed titled “The Legal Case for Striking North Korea First.”<sup>6</sup> Mike Pompeo, the serving CIA director and, pending confirmation, incoming Secretary of State, has also supported extremely hawkish views and has made several remarks apparently endorsing a first strike against the DPRK.<sup>7</sup> Contrasted with these concerns, several positive developments have occurred recently, including North Korea’s participation in the South Korean hosted Winter Olympics, discussion about a Korean War peace treaty, Kim Jong-un’s cancellation of further nuclear and missile testing, and a planned summit between President Trump and Kim Jong-un. While these are all positive signs for diplomacy, some analysts are concerned that “if negotiations fail, the administration might conclude that a military strike is the only way forward, greatly increasing the chance of war.”<sup>8</sup>

However, based on Just War Theory, a preemptive attack against North Korea is currently unjustified. Of the three required conditions for a justified preemptive attack, within the exception to just cause called “anticipation,” the North Korean case meets only one. The three conditions necessary for a preemptive attack are: 1) an adversary that displays a manifest intent to injure; 2) a degree of active preparation that makes the intent and danger actual, and; 3) a situation in which waiting is no longer an option. The paper follows in five sections. The first explains the concept of just cause within *Jus ad Bellum* and the conditions necessary for a justified preemptive war. The second section argues North Korea meets the first required condition of a manifest intent to injure. The third section explains that North Korea does not meet the condition of active preparation. Active preparation, in this context, focuses on the conditions necessary for an adversary possessing weapons of mass destruction (WMD). Those conditions are a recent history of: using WMD, committing international aggression, or deliberately targeting civilians in wartime. The fourth section argues that there is still time and other options are available for the U.S. to resolve the tension; hence, North Korea does not meet the third required condition. Finally, the paper concludes by examining a few potential conditions which could justify a preemptive attack on North Korea and argues that the U.S. should maintain strict standards for the justification of preemptive war.

## Just War Theory: Three Conditions for Preemptive Attack

The core principles of Just War Theory aim to limit the incidence and destructiveness of war.<sup>9</sup> The principles of *Jus Ad Bellum*—just cause, right intention, public declaration of war by a proper authority, last resort, probability of success, and proportionality—recognize that while war is sometimes morally permissible,



**Figure 1. Spectrum of Anticipation.<sup>10</sup>**

the occasion for war is limited.<sup>11</sup> This analysis focuses on the exception to the principle of just cause called “anticipation.” Just cause requires that states resort to force only to defend themselves or others from aggression, and aggression is defined as the violation of a state’s right to territorial integrity and political sovereignty.<sup>12</sup> The exceptions to just cause carefully expand the moral justification for resorting to war beyond the basic limit of responding to interstate aggression.<sup>13</sup> Anticipation, or preemptive war, focuses on finding the point between legitimate and illegitimate first strikes.<sup>14</sup> The point, depicted in Figure 1 (See above.), lies in “anticipation’s” morally ambiguous spectrum between preventative war on one extreme and the unrealistic requirement of waiting for aggression on the other extreme.<sup>15</sup>

At one end of the spectrum of anticipation lies preventative war. States fight preventative wars to maintain the balance of power or to stop an unfavorable change in the potential future which could result in inferiority.<sup>16</sup> The most frequent arguments offered for preventative war are utilitarian or realist based—i.e. fight now to avoid future costs and gain future benefits.<sup>17</sup> The argument is often summarized as: the current balance of power preserves liberty, or our way of life, and is worth defending, and; fight early, before the balance tips decisively, which greatly reduces costs and risks while waiting doesn’t mean avoiding war, but only fighting on a larger and more costly scale.<sup>18</sup> Preventative war is illegal and considered unethical by Just War scholars and experts.<sup>19</sup> Preventative war is morally unjustified because the danger which states intend to limit is distant and speculative.<sup>20</sup> Given the uncertainties of power politics, there are limited practical and universal ways of deciding morally when to fight on utilitarian principles.<sup>21</sup>

Just War Theory provides some guidance and criteria to traverse the morally ambiguous spectrum of “anticipation” to find the ethically justified preemptive attacks. A preemptive attack is a military strike in which a state attacks first, not out of aims for a distant future, but for immediate aims to preempt an attack the state knows is coming in the very near future.<sup>22</sup> Just War Theory has three required conditions which help guide when a preemptive attack is justified. Only when a potential adversary meets all three conditions is a preemptive attack justified.<sup>23</sup> The three conditions are: “a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk.”<sup>24</sup> Based on these criteria, states may use military force in the face of threats of war, whenever the failure to do so would seriously risk their territorial integrity or political independence.<sup>25</sup> The Six Day War is often used as the prime example of a justified preemptive attack.<sup>26</sup> In 1967, Israel’s attack was justified because Egypt’s actions revealed a determined enemy which compelled an Israeli attack.<sup>27</sup> Egypt’s actions—including closing the Straits of Tiran, massing forces on the border, expelling the United Nations peacekeepers, and expanding military alliances—forced an attack by requiring Israeli mobilization, disrupting Israel’s economy, and creating an unsustainable security situation

for Israel. Egypt met all three conditions by demonstrating a manifest intent to injure, preparing in such a way that actively caused harm, and creating a situation in which Israel could not delay action.

However, there are many common misconceptions about what actions and threats might fulfill the conditions required to justify a preemptive attack. Because the initiation of violence and war is a significant moral event, the burden of proof falls on the initiator of violence.<sup>28</sup> Rhetoric, boastful ranting, and provocations that political leaders often use is not itself threatening.<sup>29</sup> Fear is also not a justification of, or by itself a right to, a preemptive attack.<sup>30</sup> An actual injury and harm must be caused, just not necessarily physically or by violence.<sup>31</sup> Further, the rough and tumble behavior of states in international competition does not necessarily serve as a justification for preemptive attacks. Hostile acts short of war, even those involving violence, are not automatically justification for war because they may represent restraint or an offer to quarrel within limits.<sup>32</sup> In the Six Day War example, Egypt's actions were causing actual and significant harm to Israel and its population. Egypt's actions required Israel's military to remain mobilized, actively disrupting the Israeli economy and society in harmful ways. Without Israel's preemptive attack, Israel would have either suffered severe economic damage, or demobilized and lived in a constant state of existential threat from adversaries massed on its border. Thus, detailed analysis is necessary on a case by case basis to determine if a potential adversary meets each of the required conditions necessary for a justified preemptive attack.

### **Condition 1: A Manifest Intent to Injure**

The first condition for a justified preemptive attack is a manifest intent to injure by a determined enemy committed to doing severe harm to a political community.<sup>33</sup> An intent to injure is often revealed by either a bitter history of conflict between communities, or through recent and explicit threats.<sup>34</sup> These indicators must be current and specific and are often associated with concrete actions.<sup>35</sup> In 1967, Egypt and Israel were bitter and determined enemies. A recent history of conflict between Egypt and Israel existed, with wars in 1948 and 1956. Additionally, in the three weeks leading up to the June 5 attack, President Nasser took several actions to reinforce this enmity. President Nasser stated that if war occurred, Egypt's goal would be the complete destruction of Israel.<sup>36</sup> Egypt also closed the Straits of Tiran to Israeli commerce, massed forces on the border, expelled the United Nations Emergency Force from the Sinai and Gaza Strip, and expanded a military alliance with Syria to include Jordan and Iraq.<sup>37</sup> The recent history between the states, rhetoric, and physical actions, all clearly revealed that Egypt was a bitter and determined enemy intent on injuring Israel.

The DPRK has a history of animosity and tension going back decades with the U.S. and its allies South Korea and Japan. The U.S. relationship has been turbulent since the Korean War, which ended in an armistice in 1953. While there are some recent positive signs, including a possible discussion about a peace treaty with South Korea, relations remain tense.<sup>38</sup> Over the decades, the DPRK has attacked U.S. aircraft and personnel, shelled South Korea, sunk a South Korean warship, imprisoned American civilians, and abducted Japanese citizens.<sup>39</sup> In 2010, tension between South Korea and North Korea amplified, with North Korea sinking a South Korean naval vessel, which killed 46 sailors, and shelling Yeonpyeong Island—killing two South Korean civilians.<sup>40</sup> In November 2014, North Korea also conducted a sophisticated cyberattack against Sony Pictures Entertainment which disrupted the company's communication systems, released employees' information, and leaked films.<sup>41</sup> Official diplomatic relations between the U.S. and the DPRK remain extremely limited between both states.<sup>42</sup> Kim Jong-Un's use of aggressive and belligerent rhetoric also displays a deep ideological animosity for the U.S. and its allies.<sup>43</sup> The recent war of words between the Trump administration and Kim's regime has significantly heightened tension, further exacerbating the relationship.<sup>44</sup> Thus, recent history demonstrates that the DPRK remains a bitter and determined enemy of the U.S.



However, the concern related to North Korea focuses on their development of nuclear weapons. Just War scholars argue that mere possession of nuclear weapons does not count as a severely threatening military capacity and preparation. However, nuclear weapons can count as justification when coupled with a recent history of using them, committing international aggression, or having deliberately targeted civilians in wartime.<sup>53</sup> North Korea does not currently meet any of these standards regarding nuclear weapons.

North Korea has not yet used nuclear weapons, or WMD, for aggression against another state. The DPRK possesses substantial chemical, biological, and some nuclear weapons capabilities.<sup>54</sup> Current estimates of nuclear weapons generally range from between 20 and 60 warheads.<sup>55</sup> However, the current Kim regime has not used these weapons against a foreign state. The DPRK has focused on testing and development thus far, while at times using tests of both nuclear weapons and Inter-Continental Ballistic Missiles (ICBMs) to rile other states. Kim Jong-un has radically accelerated the speed and volume of testing over the previous Kim regimes, as depicted in Figure 2.<sup>56</sup> (See page 104.) While these tests and capability developments are provocative, it does not constitute use against a foreign state. Further, approximately 25-40 percent of these tests appear to fail.<sup>57</sup> The only arguable use of WMD centered on the assassination of Kim Jong-un's half-brother, Kim Jong-nam, at the Kuala Lumpur airport on 13 February 2017.<sup>58</sup> However, while this attack violated international law and was detestable, it did not constitute an attack on a foreign nation. Thus, while the DPRK clearly possesses the capability to employ various WMD, they have not yet actually used any of these systems against a foreign nation.

The current Kim regime has not committed aggression against a foreign state that constitutes an act of war. While the DPRK has conducted many belligerent acts—including cyberattacks in 2014, aggressive missile and nuclear weapons testing, assassinations, domestic purges, and virulent rhetoric—Kim Jong-un's DPRK has remained below the threshold of war and initiated less direct violence against other states than previous regimes. North Korea has not fought a war since 1953, under Kim's grandfather, Kim Il-sung. Further, Kim Jong-un has not had a violent border clash reminiscent of his father Kim Jong-il in 2010 when North Korea sank a South Korean navy corvette and shelled Yeonpyeong Island.<sup>59</sup> Thus, Kim Jong-un has skillfully remained below the threshold of war, because nonlethal cyberattacks, rhetoric, and weapons development do not constitute aggression in international law or Just War Theory.<sup>60</sup> While there is a history of animosity and tension, North Korea under Kim Jong-un has not committed recent aggression which could justify a preemptive attack due to nuclear weapons possession.

Kim Jong-un's regime has not deliberately targeted foreign civilians during wartime, denying the final potential condition for justifying a preemptive attack based on nuclear weapons possession. While the Kim regime uses extreme brutality against its own domestic population—including violent purges, assassinations, and political prison camps—the DPRK has been relatively restrained in recent years regarding foreign civilians.<sup>61</sup> The last time North Korea killed foreign civilians during border conflicts was in 2010, under Kim Jong-il. However, after shelling Yeonpyeong Island and killing two South Korean marines and two civilians in November 2010, North Korea rapidly deescalated the crisis, potentially indicating a desire to limit escalation and minimize foreign civilian casualties.<sup>62</sup> Further, North Korea clearly possesses the capability to inflict significant civilian casualties should they choose to do so.<sup>63</sup> While there is widespread belief that North Korea would target civilian population centers in the event of a conflict, the regime has not done so yet.<sup>64</sup> Thus, though North Korea's domestic human rights behavior and the expectation of civilian targeting during a future war is concerning, the DPRK has not met the standard of justification for Just War Theory or a preemptive attack.

Based on this analysis, North Korea does not currently meet the second Just War Theory condition for a justified preemptive attack. The Kim regime has not taken the positive actions required to demonstrate active preparation in a conventional sense, nor has the DPRK committed actual harm recently. Further, the DPRK fails to meet any of the stringent requirements necessary to justify a preemptive attack based on

WMD possession. While there are concerns that North Korea could use its nuclear capability as a deterrent shield for international aggression, most analysts agree that North Korea is developing nuclear capabilities primarily for deterrent and political reasons.<sup>65</sup> In May 2017, Director of National Intelligence Dan Coats reaffirmed the intelligence community's assessment that "Pyongyang's nuclear capabilities are intended for deterrence, international prestige, and coercive diplomacy."<sup>66</sup> North Korea has also consistently asserted that its weapons are for deterrence, as in the 2013 Law on Consolidating Position of Nuclear Weapons State which outlined the DPRK's deterrent policy.<sup>67</sup> In September 2017, the North Korean foreign minister followed the same line at the United Nations General Assembly, stating "[North Korea's] national nuclear force is, to all intents and purposes, a war deterrent for putting an end to nuclear threat of the U.S. and for preventing its military invasion."<sup>68</sup> Thus, while WMD capabilities are concerning, North Korea's testing and development is likely focused on deterrence and does not constitute active preparation as a justification for preemptive attack.

### **Condition 3: Waiting No Longer an Option**

The third necessary condition to justify a preemptive attack based on Just War Theory is a situation in which waiting, or doing anything other than attacking, greatly magnifies the risk.<sup>69</sup> The timespan that defines the limit of waiting is certainly not hours or days, but also probably not months or years.<sup>70</sup> What this condition seeks to impose is a restriction that no other reasonable options exist to address the current threatening conditions. In the 1967 Six Day War example, most scholars focus on the three weeks leading up to the conflict.<sup>71</sup> During the weeks before the preemptive attack, Israel did attempt to address the situation using diplomacy and other means.<sup>72</sup> However, once Iraq joined the Arab alliance and the situation became dire, Israel's options disappeared, and Israel attacked the next day.<sup>73</sup> Thus, the timeframe in which states may consider a preemptive attack is ambiguous and not clearly defined, but should generally be within a few weeks or, at most, months.

North Korea currently does not meet the immediate response criteria required for a justified preemptive attack because there are still other options available for U.S. leaders to resolve the crisis.<sup>74</sup> As recent events have demonstrated, including Kim Jong-un's offer to negotiate and pause weapons testing, the U.S. and allies still possess diplomatic opportunities to deescalate the tension.<sup>75</sup> Further, some analysts question whether North Korea could even effectively attack the U.S. with nuclear weapons, and several suspect that the DPRK would require a year or more, and many tests, before having a truly threatening capability.<sup>76</sup> North Korea has thus far only conducted three tests of the Hwasong-14 and Hwasong-15 ICBMs that demonstrated a reasonable capability of reaching the continental U.S.<sup>77</sup> The DPRK still potentially faces significant technological hurdles before being capable of striking the U.S. effectively—including developing a survivable reentry vehicle, miniaturizing a warhead for intercontinental travel, achieving accuracy in targeting, defeating U.S. ballistic missile defense systems, and improving warhead power.<sup>78</sup> Thus, North Korea's capabilities to even threaten the U.S. currently are questionable and time remains for other options.

While North Korea possesses questionable capability to threaten the continental U.S., the DPRK clearly has the capability to threaten South Korea, Japan, and other regional U.S. interests. However, these U.S. allies, even though they face significantly higher threats than the U.S., are not yet willing to engage in a preemptive strike.<sup>79</sup> The fact that these regional partners and allies are not yet willing to engage in a preemptive attack clearly demonstrates that the U.S. should be patient and has other options available. Further, to qualify for an inability to wait longer the potential adversary would need to meet the qualification of the second Just War Theory criteria—a degree of active preparation making the intent and danger actual. Considering North Korea does not yet meet the second criteria, it is difficult to argue that North Korea could fulfill this third and more stringent criteria of Just War Theory. Thus, on balance, the DPRK does not meet either the second or third criteria for a justified preemptive attack.

## Conclusion

A preemptive attack against North Korea is currently unjustified because North Korea does not meet the necessary conditions of active preparation, or a situation in which waiting is no longer an option. While North Korea does meet the required condition of a manifest intent to injure by a determined enemy, it fails the other two necessary conditions. North Korea has not yet conducted active preparation making the intent and danger actual, either conventionally or by having a recent history of using WMD, committing international aggression, or targeting civilians in war. The DPRK does not meet the final condition because there is time and other options still available to the U.S., and North Korea likely does not even have the capability to attack the U.S. for several months or years. Further, while this paper focuses on the exceptions to just cause within *Jus ad Bellum*, further analysis would also probably find issues within the concepts of last resort, probability of success, and proportionality. Though North Korea currently fails to meet the necessary conditions for a justified preemptive attack, the DPRK may meet those conditions in the future.

Developing potential conditions required for a future justified preemptive attack on North Korea is difficult because state action, like human action, gains its significance from its context.<sup>80</sup> However, some broad contours or outlines may be discernible. First, regional allies, such as South Korea and Japan, would probably need to agree with the assessment and contribute efforts to the preemptive attack. Regional allies' participation is probably necessary because those states are currently more threatened by North Korea than the U.S., and they will likely suffer greater costs after a war starts. Further, the U.S. would likely require their support and capabilities for a successful preemptive attack and war. Second, North Korea would need to fulfill the condition depicting active preparation for war or use of WMD. One example could be atmospheric tests of nuclear weapons in the Pacific which causes international casualties or directly impacts another state's environment. Other examples might include increased tension that results in cross border fires and deliberate targeting of civilians, or conventional preparation for an attack against South Korea or other regional state. Third, and finally, the question of time and lack of other options is extremely difficult to predetermine. Few credible predictive options exist, beyond observing missiles preparing to launch with sound intelligence about their targets. However, waiting until that late a stage is probably not required by Just War Theory.

In the end, the U.S. should seek to keep the justification for a preemptive attack at a high standard for several reasons. First, war should always be the last reasonable resort for a state to address a problem.<sup>81</sup> War is a terrible and costly event, and political leaders will make mistakes.<sup>82</sup> Most populations and states care about their morality and only want to employ violence for a just purpose.<sup>83</sup> As such, preemptive attacks should be truly exceptional, and the burden of justification falls on the attacker to prove, with evidence, that the situation meets the appropriate criteria.<sup>84</sup> Only in truly exceptional circumstances can a government publicly justify a first strike and show how such an attack is consistent with protecting its people.<sup>85</sup> Otherwise the incidence of war, and its justification, could dramatically increase. The U.S. should also limit the justification for preemptive war lest other states attempt to expand the moral justification for preemptive attacks against their neighbors. Numerous contentious regions and borders exist and opening the flood gates on justified conflict could significantly destabilize the international community. Further, giving potentially expansionist states a possible justification, such as China, Russia, and Iran, could undermine U.S. interests globally. The U.S. should discourage great powers from employing preemptive attacks as a justification against significantly weaker neighbors, or risk considerable trouble in numerous geographic areas in the future. Due to the emerging environment, future scholars and military leaders should increase the study of, and refine, our nuclear weapons criteria for preemptive strikes. This appears necessary as an increasing number of countries acquire nuclear weapons and more future conflicts potentially include nuclear armed states. Refining Just War Theory in this way could limit the incidence of conflict and help control the violence or use of such weapons in a future war.

## End Notes

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10 Figure developed by author.

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